



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes OPC, MNDC, (MNR), FF
 CNC, DRI, MNDC, OLC, RP, FF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent as well as to recover the filing fee for this proceeding.

The Tenant applied to cancel a Notice to End Tenancy for Cause dated November 24, 2009, to dispute a rent increase and to recover overpayments of rent as well as the filing fee for this proceeding. At the beginning of the hearing the Tenant withdrew his application for an order that the Landlord comply with the Act by making repairs to the rental property.

Issues(s) to be Decided

1. Does the Landlord have cause to end the tenancy?
2. Are there arrears of rent and if so, how much?
3. Was a valid rent increase implemented and if not, is the Tenant entitled to compensation for overpayments of rent?

Background and Evidence

This tenancy started on April 1, 2006. Rent was \$1,000.00 until November 1, 2008 when the Landlord increased it to \$1,100.00. The Landlord advised the Tenant of the rent increase in an e-mail dated August 2, 2008. The Tenant did not give his written consent to the rent increase but verbally agreed to pay it and did pay it for the period, November 1, 2008 until November 30, 2009 (for 13 months).

The Tenant claimed that the Landlord approached him in November 2009 about increasing the rent by a further \$300.00 per month. The Tenant said that when he wouldn't agree to the increase, the Landlord served him with the One Month Notice to End Tenancy for Cause dated November 24, 2009 which alleged he was repeatedly late paying rent.

Clause 3A of the Parties' tenancy agreement states,

“Rent is due and payable in advance of or on the first day of the month and shall be considered delinquent after the 5th day of the month, or the next



Dispute Resolution Services

Page: 2

Residential Tenancy Branch
Ministry of Housing and Social Development

working day thereafter in the event the due date is a Saturday, Sunday or holiday.”

The Landlord’s agent claimed that this clause meant the Tenant had a grace period of up to the 5th day of the month to pay rent, however the Landlord disagreed and said that rent was due on the 1st of the month and late fees would apply after the 5th day of the month. The Landlord said the Tenant’s practice was to e-mail him funds which the Landlord would deposit to his account the same day. Based on his bank records, the Landlord claimed the Tenant made the following late rent payments:

- May 2009 rent paid on May 5, 2009;
- July 2009 rent paid on July 8, 2009;
- August 2009 rent paid on August 6, 2009;
- September 2009 rent paid on September 4, 2009; and
- October 2009 rent paid on October 5, 2009.

The Landlord claimed that there were other late payments but he did not provide evidence of them.

The Tenant claimed that he believed Clause 3A of the tenancy agreement meant that rent was due no later than the 5th day of the month. The Tenant said he advised the Landlord in an e-mail in October 2007 that he could not pay rent on the first of the month and the Landlord agreed he could pay it later than the 1st. The Tenant disputed the dates the Landlord claimed he paid rent and relied on his bank records as follows:

- May 2009 rent paid on May 1, 2009;
- July 2009 rent paid on July 3, 2009;
- August 2009 rent paid on August 4, 2009;
- September 2009 rent paid on September 4, 2009; and
- October 2009 rent paid on October 3, 2009.

Analysis

RTB Policy Guideline #38 says that “three late payments is the minimum number sufficient to justify a notice under these provisions.”

I find that Clause 3A of the tenancy agreement is not sufficiently clear to obligate the Tenant to pay rent by the 1st of each month. In particular, I find that the statement that “rent is due on the 1st of the month but is considered delinquent after the 5th of the month” is more consistent with the Tenant’s and the Landlord’s agent’s interpretation that there was “grace period” of no later than the 5th of the month rather than the

Residential Tenancy Branch
Ministry of Housing and Social Development

Landlord's interpretation that a payment made after the 1st of the month was a late payment. I make this finding also having regard to the Parties' e-mail correspondence in October 2007 in which the Landlord agreed that the Tenant would not be obligated to pay his rent by the 1st of each month. Consequently, I find that under the tenancy agreement, rent was due no later than the 5th day of each month.

Although the Landlord claimed that the Tenant's rent payments were deposited to his bank account and recorded the same day, the Tenant's bank records contradict this assertion. In the circumstances, I find it likely that the Landlord's deposit transaction was not recorded the same day that the deposit was made and as a result, I prefer the Tenant's banking records as being more reliable evidence of the date rent was paid.

I find that the rent payments alleged by the Landlord to be late were all made by the Tenant prior to the 5th day of each month and therefore I further find that there are no grounds for the One Month Notice to End Tenancy for Cause dated November 24, 2009 and it is cancelled.

Section 34 and 35 of the Act say that a Landlord may not increase rent unless a notice of rent increase in the approved form is given to the Tenant in an amount that is no more than that allowed under the Regulations to the Act. The Landlord may increase the rent by a greater amount with the written consent of the Tenant. If the Landlord collects a rent increase that does not comply with the Act, the Tenant may recover the overpayment.

I find that the Landlord did not give the Tenant a Notice of Rent Increase in the approved form and further find that the rent increase exceeded the amount permitted under the Regulations to the Act. The Landlord argued that the Tenant verbally agreed to pay the increase and did pay the increase and therefore should not be allowed to recover the increased rent he paid.

The Act is very specific however, in requiring that the Landlord must give the Tenant a Notice of Rent Increase in the Approved form **and** that the Landlord must have the Tenant's written consent to pay an increase in rent that exceeds the amount permitted under the Regulations. In this case, the Landlord did neither of these things and as a result, I find that the Tenant is entitled to recover \$1,300.00 in rent overpayments.

For the same reasons (ie. there being no valid rent increase), I find that rent rental rate continues to be \$1,000.00 per month until a valid rent increase is implemented by the Landlord. Consequently, I also find that the Tenant does not owe \$100.00 for January 2010 rent as he has already paid \$1,000.00.



Dispute Resolution Services

Page: 4

Residential Tenancy Branch
Ministry of Housing and Social Development

As the Tenant has been successful in this matter, I also find that he is entitled to recover the \$50.00 filing fee for this proceeding. I order pursuant to s. 72 of the Act that the Tenant may deduct the amount of \$1,350.00 from his next rent payment(s) when they are due and payable to the Landlord.

Conclusion

The Landlord's application is dismissed without leave to reapply. The One Month Notice to End Tenancy for Cause dated November 24, 2009 is cancelled and the tenancy will continue. The Tenant has made out a monetary claim for **\$1,350.00** and may deduct that amount from his next rent payment(s).

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: January 06, 2010.

Dispute Resolution Officer