

DECISION

Dispute Codes CNC, FF

Introduction

This was an application by the tenant to cancel a Notice to End Tenancy for cause. The hearing was conducted by conference call. The named parties attended on behalf of the corporate tenant together with their counsel. The landlord attended with her counsel.

Issues(s) to be Decided

Should the Notice to End Tenancy be cancelled?

Background and Evidence

The tenancy began May 1, 2007 for a five year fixed term with rent in the amount of \$4,700.00 due in advance on the first day of each month. The landlord served the tenant with a one month Notice to End tenancy dated March 11, 2010. The cause alleged is that the tenant is repeatedly late paying rent. The Notice was served by posting it to the door of the rental unit on March 11, 2010. The tenant submitted its application to dispute the Notice to End Tenancy within 10 days of the deemed receipt of the Notice.

The landlord testified that the tenant has been late paying rent on four occasions in the past year. According to the landlord the rent was paid late in May, 2009, July, 2009, October, 2009 and February, 2010. Although the landlord submitted documents with respect to rent payments in 2007 and 2008, the parties confined their evidence and submissions at the hearing to the four alleged late payments mentioned.

The landlord submitted documents showing that rent for May, 2009 was deposited on May 4, 2009. July rent was deposited on July 3, 2009. October rent was deposited on October 2, 2009.

The landlord served the tenants with a 10 day Notice to End Tenancy for unpaid rent dated February 2, 2010. The Notice claimed that the tenants failed to pay rent in the amount of \$4,700.00 that was due on February 1, 2010. The tenants stated that the delay in payment of February rent was due to a discrepancy on the tenants' rent cheque between the amount written in digits and the amount written in long hand on the cheque. The tenants said that the error was corrected on February 2, 2010. The tenants applied for dispute resolution to cancel the 10 day Notice to End Tenancy. The hearing of that application was set for March 24, 2010. The landlord's 10 day Notice was withdrawn and the hearing was cancelled by agreement of the parties. The landlord's position on this application is that the February rent payment was late and constitutes another instance of late payment to be considered in making a determination as to whether or not the tenants have been repeatedly late paying rent.

The tenant's position is that the landlord's deposit records do not constitute proof that rent payments were late, but show only when the payments were processed by the landlord's bank.

It is apparent from documents submitted by the parties and testimony at the hearing that there are other landlord – tenant and familial issues that are a source of inflammation and may have prompted the landlord to give the Notice and seek an order for possession.

Analysis

The Residential Tenancy Act provides by section 47 (1) (b) that a landlord may end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent.

Residential Policy Guideline #38 states that: "Three late payments are the minimum number sufficient to justify a notice under these provisions." The policy guideline also contains the following comments:

It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late

A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent.

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision

The *Act* does not define what constitutes "repeatedly late". The policy guide says that three late payments are the minimum that would warrant the issuance of a Notice. The guideline also states that exceptional circumstances may be taken into account when determining whether a tenant has been repeatedly late paying rent. I accept the tenants' submission that the landlord's evidence as to the date of deposits to the landlord's bank does not establish that the payments in question were late. With respect to the February 2010 rent payment I accept that the payment was technically late because the improperly drafted cheque was not honoured. The tenants acted promptly to rectify the error and the rent was paid the following day. I consider that the landlord has provided insufficient evidence to establish that the tenants have been repeatedly late paying rent. The February rent payment was an anomaly and did not reflect a pattern of late payments. I therefore order that the Notice to End Tenancy dated March 11, 2010 directing the tenants to vacate by April 30, 2010 be and is hereby cancelled. The tenancy will continue. This decision does not preclude the landlord from issuing another Notice to End Tenancy if there are future late payments. The tenants

are entitled to recover the \$50.00 filing fee for this application and may deduct the said sum from a future instalment of rent.

Dated: May 3, 2010.
