

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 tenant participated in the hearing with her representative. The landlord did not attend, but she was represented at the hearing by her agent.

Issues(s) to be Decided

Should the Notice to End Tenancy issued by the landlord be cancelled?

Background and Evidence

The tenancy began in 1996. The landlord served the tenant with a one month Notice to End Tenancy dated March 8, 2010. The Notice alleged that the tenant has been repeatedly late paying rent. The Notice required the tenant to move out of the rental unit by April 30, 2010.

The landlord submitted a letter setting out a history of late rent payments. The landlord referred to a late payment in 2000, one in 2007 and one in 2008. According to the landlord the tenant was late paying rent in March, 2009, May, 2009 and August, 2009. The landlord also claimed that the tenant's February 2010 rent cheque was returned "NSF" as was her cheque for March, 2010.

The landlord submitted copies of deposit records showing the date that the landlord deposited rent cheques in her bank as evidence of late payments in 2009.

The landlord provided a copy of the March 2010 rent cheque that was returned NSF. She did not provide a copy of an NSF cheque for February, but she submitted a note from the tenant wherein the tenant apologized for having: “caused you the same problem last month.”

The tenant submitted copies of banking records to show that her rent cheque for February, 2010, was not returned “NSF”, but was negotiated by the landlord and honoured by her bank. She said that her apology to the landlord was given in error, before she was aware that her February rent cheque had not been returned NSF.

The tenant submitted that the landlord’s deposit records do not constitute proof of late payment. The tenant acknowledged that her March rent cheque was returned NSF. She said that there were sufficient funds in her account to cover the March rent cheque, but a “restraint” was placed on her account with respect to her VISA credit card and unbeknownst to her this resulted in the return of her cheque. The problem was promptly rectified by the tenant’s bank and the cheque was replaced by the tenant.

The tenant’s position is that the late payments were an anomaly in the course of an otherwise long and uneventful tenancy and the late payments will not recur. The tenant is prepared to provide the landlord with post-dated cheques for at least the next six months.

Analysis and Conclusion

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.

The landlord relied upon late payments in 2009 and NSF payments in 2010 as grounds for ending the tenancy. The landlord did not testify at the hearing and I do not have the landlord’s evidence to show when she received cheques from the tenant and when she made deposits. I find that the landlord’s evidence does not demonstrate on a balance of probabilities that the tenants rent was late on the occasions mentioned in 2009. The evidence also does not show that the tenant’s February, 2010 rent cheque was returned “NSF”. The landlord was given information about the cheque by her own bank and apparently on the strength of that advice chose not to deposit it. I find that the landlord has not shown the tenant to have been repeatedly late paying rent. I therefore order that the Notice to End Tenancy dated March 8, 2010 directing the tenant 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 tenant is entitled to recover the \$50.00 filing fee paid for her application. She may deduct the said sum from a future instalment of rent.

Dated: May 05, 2010.
