

## **DECISION**

**Dispute Codes**      CNC

### **Introduction**

This hearing was convened by way of conference call this date to deal with the tenant's application to cancel a notice to end tenancy for cause.

The parties each gave affirmed evidence, were given the opportunity to cross examine each other on their evidence, and the tenant was assisted by a third party, not related to this dispute or to this tenancy.

At the outset of the hearing, the tenant applied to amend his application for dispute resolution to include an application to allow the tenant more time to make the application to cancel the notice to end tenancy. The landlord was given the opportunity to give submissions with respect to the application to amend, and the tenant is hereby permitted to amend the application.

### **Issues(s) to be Decided**

Is the tenant entitled to an order cancelling the notice to end tenancy?

### **Background and Evidence**

This month-to-month tenancy began on August 1, 2008. Rent in the amount of \$317.00 is payable in advance on the 1<sup>st</sup> day of each month. The landlord is holding in trust for the tenant a security deposit in the amount of \$373.00.

The landlord's agent testified that he served the tenant personally on April 2, 2010 a 1 Month Notice to End Tenancy for Cause, a copy of which was provided in advance of the hearing. The notice is dated April 2, 2010 and states that the "Tenant is repeatedly late paying rent" and "Breach of a material term of the tenancy agreement that was not

corrected within a reasonable time after written notice to do so.” The landlord’s agent testified that the breach of the material term referred to in the notice is in relation to not paying rent on time. The tenant filed his application to dispute the notice on May 7, 2010.

The landlord’s agent further testified that the tenant has been late with rent payments 8 times in the last year. He further testified that 9 caution letters have been issued to the tenant about late payments of rent since the tenancy began. The tenant has never contacted the landlord’s agent to make arrangements for late payments.

The tenant paid the rent for the month of April on April 6, 2010, and testified that he believed that payment rendered the notice to end tenancy invalid. He further testified that he paid rent for the month of May on May 3, 2010 in cash and no receipt was issued by the landlord. The tenant also attempted to pay rent for June on June 1, 2010, however the landlord would not accept that payment because it was on a date that was beyond the effective date of the notice to end tenancy and he felt that accepting a rental payment at that time might jeopardize the notice to end tenancy.

The tenant also testified that he always pays his rent in cash and the landlord’s agent has never issued a receipt. The landlord’s agent has an office where the tenants normally pay their rent which is not open on weekends or statutory holidays, and the tenant did not feel comfortable leaving cash in the mail box when the agent was not there, and that is the reason that some of the payments are late. Other payments were late due to the payday of the tenant not falling close enough to the 1<sup>st</sup> day of the month when rent is due. The landlord disputes this evidence, stating that other tenants manage to pay rent on time, so having the office closed for brief periods of time on weekdays and being closed on weekends should not have prevented the tenant from paying rent on time. Further, the landlord’s agent testified that he does issue receipts and posts them to the door of the tenant’s residence. The tenant did not acknowledge ever having received a receipt.

## **Analysis**

Based on the landlord's testimony I find that the tenant was served with a notice to end tenancy for repeated late rent payments. I am also satisfied that the landlord's agent has proven that rent payments have been repeatedly late.

The *Residential Tenancy Act* states:

**26 (1)** A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

(2) A landlord must provide a tenant with a receipt for rent paid in cash.

The tenant did not have a right under the *Act* to deduct all or a portion of the rent.

I also caution the landlord's agent with respect to subsection (2) above.

I refer to the Residential Tenancy Policy Guideline #11, "Amendment and Withdrawal of Notices" which states as follows:

A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent. If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue."

In this case, the landlord could have accepted the payment of rent for the month of June, 2010 without jeopardizing the Notice to End so long as he issued a receipt that stated "For Use and Occupancy Only." By accepting rent beyond the effective date of the Notice, which I find is May 31, 2010, the tenancy would be considered reinstated by the landlord if that receipt was not issued. However, accepting a payment of rent prior to the effective date of the Notice, I find that the landlord has not reinstated the tenancy.

## **Conclusion**

Based on the above facts I find that the landlord is entitled to an order of possession and the tenant's application to cancel the Notice to End Tenancy is hereby dismissed without leave to reapply.

The tenant must be served with the order of possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

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: June 24, 2010.

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Dispute Resolution Officer