

DECISION

Dispute Codes: CNC and FF

Introduction

This application was brought by the tenant seeking to have set aside a Notice to End Tenancy for cause – repeated late payment of rent, causing extraordinary damage the rental unit and breach of a material term of the rental agreement. The tenant also sought to recover the filing fee for this proceeding from the landlord.

Issues to be Decided

This matter requires a decision on whether the Notice to End Tenancy should be set aside or upheld.

Background and Evidence

This tenancy for one-half of a side by side duplex began on May 1, 2005. Rent is \$835 per month and the landlord holds a security deposit of \$387.50 and a Pet Damage Deposit of \$150, both paid on May 6, 2005.

During the hearing, the landlord gave evidence that had served the Notice to End Tenancy had been served on August 31, 2010 when he attended the rental unit to pick up the check for September 2010 and the tenant advised him that the cheque would not be good until September 3, 2010.

He stated that the rent had been late on three previous occasions and when he learned that it would be late again, he felt it necessary to issue the Notice to End Tenancy as the late payments had serious consequences for his own business affairs. However, the tenant paid the rent for September in cash on the first.

The landlord stated that the tenant had been late with the rent paid November 4, 2005, September 4, 2009 and August 6, 2010. The landlord submitted a warning letter to the tenant dated September 8, 2009 cautioning that any further late payments of rent would result in a Notice to End Tenancy. The landlord provided copies of three NSF cheques from the tenant from August 1, 2005, September 1, 2009 and August 1, 2010.

With respect to the claim of extraordinary damage to the rental unit breach of a material term of the rental agreement, the landlord stated that the tenant's smoking in the rental unit had necessitated premature repainting and replacement of carpeted flooring. The tenant stated that she had never smoked in the rental unit but had stood in the doorway during cold weather.

She stated that she stopped doing that immediately on receiving the landlord's letter of September 8, 2009 ordering her not to smoke in the rental unit. The parties agreed that the tenant would repaint the rental unit and the landlord would pay for the paint in order to remove tobacco odours. The tenant had partially completed the undercoating when the landlord had a professional complete the work in conjunction with painting the other side of the duplex to prepare the building for sale.

Analysis

Section 47(1)(b) provides that a landlord may issue a Notice to End Tenancy for cause in circumstances in which a tenant is repeatedly late in paying the rent.

Residential Policy Guideline 38-1 sets three late payments of rent as the minimum number required to justify notice to the tenancy. The Guideline further provides that if the late payments are far apart, it can be found that they do not constitute repeated late payment.

In this matter, I must find that the instance in 2005 is too far removed from the more recent instances to be seen as part of a pattern. In addition, while the landlord noted that the rental agreement set two instances of late rent as cause for ending the tenancy, I find that the legislation and policy guidelines supersede the rental agreement.

Section 5 of the *Act* states that any attempt to contract outside of the legislation is of no effect.

As a matter of clarity, the tenant raised the issue of the landlord's acceptance of September and October 2010 rents without noting "for use an occupation only" on the receipts and thereby reinstated the tenancy. I failed to point out to the parties that the "use and occupancy only" notation on the receipt is only necessary when a tenant has received a 10-day Notice to End Tenancy for unpaid rent.

With respect to the need for repainting, I accept the evidence of the tenant that she had not smoked in the rental unit since receiving the landlord's written direction not to do so. I would also note that the parties appear to have agreed on a remedy with the joint effort to repaint. Also, given that this tenancy has been ongoing for over five years, standard depreciation tables would deem the original paint job to have been at the end of its useful life.

In the absence of more detailed evidence, photographs or third party corroboration, I cannot find sufficient evidence that the tenant has caused extraordinary damage to the rental unit to uphold the notice.

Given that the conduct of the tenant contributed in large to the issuance of the Notice to End Tenancy and the present hearing, I find that the tenant should remain responsible for her own filing fee.

Conclusion

The Notice to End Tenancy of August 31, 2010 is set aside and the tenancy continues.

The tenant's request that the filing fee be assigned to the landlord is dismissed.

The tenant is reminded that the more recent instances of late payment of rent would continue to be taken into account if there were to be a further late payment in the future.

October 18, 2010