

Decision

Dispute Codes:

CNC

Introduction

This Application for Dispute Resolution by the tenant was seeking to cancel a One-Month Notice to End Tenancy for Cause dated November 30, 2010 effective December 31, 2010. Both parties appeared and gave testimony in turn.

The One-Month Notice to Notice to End Tenancy for Cause, a copy of which was submitted into evidence, indicated that the tenant had breached a material term of the tenancy.

Issue(s) to be Decided

The tenant is disputing the basis for the notice and the issues to be determined based on the testimony and the evidence is whether the criteria to support a One-Month Notice to End Tenancy under section 47 of the *Act*, has been met, or whether the notice should be cancelled on the basis that the evidence does not support the cause shown.

The burden of proof is on the landlord to establish that the notice was justified.

Background and Evidence

In the past, the tenant and landlord entered into a previous fixed-term tenancy that provided the tenant must vacate at the end of the fixed term. However, the tenancy evidently continued beyond the expiry date of that fixed term. The landlord had previously issued a One-Month Notice to End the Tenancy for Cause, but an agreement was reached between the parties that the landlord would not proceed with the eviction and would forgo seeking an Order of Possession, provided that the tenant agreed to sign a new tenancy agreement. The landlord testified that, given the history of the tenancy, the new agreement offered was for a three-month fixed term starting on December 1, 2010 and also required that the tenant must vacate on February 28, 2010 unless a new agreement was put in place to continue the tenancy for a further term or

month-to-month at that time. A copy of the proposed tenancy agreement was in evidence before me.

The landlord testified that, although the tenant paid the rent, one of the co-tenants objected to the fixed term provision and refused to sign the agreement for December 1, 2010. The landlord stated that the fixed-term provision in the agreement was considered to be a material term and the landlord considered that the tenant's refusal to sign was a breach of a material term of the tenancy. The landlord therefore issued a One-Month Notice for Cause on November 30, 2010 based on the breach of this material term. The landlord testified that if the tenant did not accept the fixed term, then the landlord would not continue this tenancy and would be seeking to take possession of the unit.

Analysis

The basis for the one month notice is breach of a material term in the tenancy agreement. Section 47(1)(h) of the Residential Tenancy Act states:

h) the tenant

- 1) has failed to comply with a material term, and
- 2) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

To establish a breach of a material term in the tenancy exists entails satisfying the Dispute Resolution Officer that three components exist:

1. There must be a clear term contained in the tenancy agreement
2. This term must fit the definition of being "material"
3. There must be a genuine breach of the material term.

Given the above, I find it impossible to conclude that the tenant had breached a material term by refusing to sign the very contract containing the material term. In fact, a term of a contract cannot be enforced if the contract itself is not ratified by both parties confirming agreement with all of the terms. The reason is so is because technically, the contract does not exist until there is a meeting of the minds. This is the key component for an enforceable tenancy agreement to be in place.

Moreover, an "agreement to agree" does not constitute an enforceable agreement.

In any case, I find that it would be impossible for a tenant to breach a material term of a contract he had not yet agreed to. It therefore follows that the tenant cannot reject the contract at the same time as insisting that it remain in place in order that his rights and

responsibilities under that same contract, (such as the right to possession), also be protected and enforced.

I find that if this tenant does not agree with the contract as written, or this landlord does make the changes in the agreement to make them acceptable by the tenant, then there is no tenancy agreement between these two parties and the new tenancy has ended before it actually began. In short, without a compromise by one of these two parties in respect of the proposed agreement, I would be required to find that no tenancy exists and tenant must vacate the unit.

A mediated discussion ensued and the tenant indicated that both co-tenants have now decided to accept this contract and also agreed that it will be signed.

Accordingly I find that the terms of this tenancy as contained in the copy in evidence are exactly as indicated. I find that all parties have freely accepted these terms as written, including the fixed term beginning on December 1, 2010 and ending on February 28, 2011, when the tenancy will end and the tenant must vacate, unless a new fixed-term or month-to-month agreement has been signed or otherwise consented to by both parties.

Based on the preponderance of the evidence, I find that there was no breach of a material term by the tenant, but that a new fixed term tenancy is now in place beginning on December 1, 2010 and ending on February 28, 2011 at which time the tenant is required to move out.

I therefore find that the One-Month Notice to End Tenancy should be set aside and hereby order that it is of no force nor effect.

Conclusion

Based on the above, I hereby order that the One-Month Notice to End Tenancy of November 30, 2010 be permanently cancelled and of no force nor effect.

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: December 2010.

Dispute Resolution Officer