



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNR, CNC, OPR, MNR, FF

Introduction

This hearing dealt with an application by the tenant for an order setting aside 2 notices to end this tenancy and a cross-application by the landlord for an order of possession and a monetary order. Both parties participated in the conference call hearing.

Issues to be Decided

Should the notices to end tenancy be set aside?

Is the landlord entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that on November 9 the tenant was served with two notices to end tenancy. The first was a 10 day notice to end tenancy for unpaid utilities (the “Utilities Notice”) and the second was a 1 month notice to end tenancy for cause (the “Cause Notice”). The rental unit is on the lower floor of a house in which the upper floor is occupied by other tenants.

The tenancy agreement provides as follows: “gas is shared 50% with top tenants/hydro is determined by head count.” The tenant testified that the provision about the utilities was added after she signed the tenancy agreement and although she initialled the changes, she did so only because the landlord asked her to. The tenant acknowledged that she knew she was responsible for some part of the utilities but argued that it was unfair to be responsible for 50% as she did not occupy 50% of the house.

The landlord testified that early in November he asked the tenant for payment of utilities and gave her a complete copy of the hydro invoice and a copy of the amount payable for the natural gas invoice. In addition to seeking to end the tenancy for unpaid utilities, the landlord seeks a monetary order for the amount owing. The landlord also seeks to recover \$20.00 he claims to have loaned to the tenant.

The Cause Notice alleges that the tenant has repeatedly paid rent late, has significantly interfered with or unreasonably disturbed other occupants, has engaged in illegal activity that has adversely affected the quiet enjoyment, security, safety or physical well-being of another occupant and has knowingly given false information to prospective tenants or purchasers.

The landlord testified that at the time the Cause Notice was issued, the tenant had paid rent late on one occasion. The landlord claimed that the occupants of the unit on the upper floor had complained that the tenant has disturbed them by slamming doors and leaving her television on all night and that they alleged the tenant was engaged in dealing narcotics and frequently left her stove on. The landlord stated that the false information given by the tenant was her representation to the landlord at the start of the tenancy that she was employed.

An attempt was made to contact the occupants of the unit on the upper floor to obtain their testimony but they were unavailable at either of the telephone numbers provided by the landlord. The landlord requested an adjournment to give him opportunity to ensure the participation of the witnesses. I denied the request for an adjournment as the landlord was able to provide no reason why the occupants were unavailable at the time of the hearing and as there was no assurance that they would not be unavailable at a future hearing if adjourned.

The tenant denied having made excessive noise and further denied having dealt narcotics from the rental unit or having left her stove on.

Analysis

I find that the tenant is obligated to pay a portion of the utilities for the residential property. The tenant was aware that she was agreeing to be responsible for the utilities and I do not accept that she was unaware of the provision when she initialled the tenancy agreement. I find that the calculation of hydro charges on a “head count” basis is reasonable. I make no finding on the issue of the division of the natural gas charges as the landlord indicate that he was willing to discuss this with the tenant. If the parties are unable to come to an agreement as to whether the 50% division is acceptable, the tenant is free to challenge the provision as unconscionable.

Section 46(6) of the Act permits a landlord to treat unpaid utilities as unpaid rent only if the charges are unpaid 30 days after the tenant has been given a written demand. In this case, the landlord served the notice just a few days after requesting payment. I find that the Utilities Notice was served prematurely and I therefore set aside the Utilities Notice and declare it to be of no force or effect.

Residential Tenancy Policy Guideline #38 provides that in order to end a tenancy of the grounds of repeated late payment of rent, there must have been a minimum of 3 late payments. I find that one late payment cannot be characterized as repeated late payments and find that this cannot be a basis to end the tenancy.

The landlord offered hearsay testimony regarding noise and illegal activity but provided no written statements to corroborate this claim and the occupants of the upper unit did not make themselves available to testify. I must give the tenant’s direct evidence more weight than the landlord’s hearsay evidence and on that basis I find that the landlord has not proven on the balance of probabilities that the tenant has unreasonably disturbed other occupants or that she has engaged in illegal activity. I find that these allegations cannot be a basis on which to end the tenancy.

Section 47(1)(j) provides that a tenancy may be ended if the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser.

False information given to a landlord is a separate issue and is not grounds for ending the tenancy and accordingly I find that the landlord has not proven this allegation.

For the above reasons I find that the landlord has not established grounds to end the tenancy for cause. I order that the Cause Notice be set aside and of no force or effect. As a result, the tenancy will continue.

I dismiss the landlord's claim for unpaid utilities with leave to reapply after the complete bills have been presented to the tenant. I dismiss the landlord's claim to recover \$20.00 loaned to the tenant as I do not have jurisdiction over such a transaction.

As the landlord has been unsuccessful in his claim I find that he should bear the cost of the fee paid to file his application.

Conclusion

The Utilities Notice and the Cause Notice are set aside. The landlord's claim for unpaid utilities is dismissed with leave to reapply.

Dated: December 07, 2010

Dispute Resolution Officer