



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes CNR, CNL, LAT, MNDC, RR, FF
OPR, MNR, FF

Introduction

This matter dealt with an application by the Tenant to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated March 2, 2011, to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property dated February 17, 2011, for an Order authorizing the Tenant to change the locks on the rental unit, for compensation for damage or loss under the Act or tenancy agreement, for a rent reduction and to recover the filing fee for this proceeding. The Landlord applied for an Order of Possession and for a Monetary Order for unpaid rent and utilities and to recover the filing fee for this proceeding.

RTB Rule of Procedure 2.3 states that "if in the course of the dispute resolution proceeding, the Dispute Resolution Officer determines that it is appropriate to do so, the Dispute Resolution Officer may dismiss unrelated disputes contained in a single application with or without leave to reapply." To this end, I find that the Tenant's application for an Order authorizing the Tenant to change the locks on the rental unit, for compensation and for a rent reduction are unrelated to her application to cancel the 2 Notices to End Tenancy and as a result, those parts of her application are dismissed with leave to reapply.

At the beginning of the hearing, the Landlord admitted that she had not served the Tenant with a copy of her evidence package as she was under the misapprehension that the Residential Tenancy Branch would serve the Tenant with it on her behalf. In the circumstances, I find that this evidence should be excluded pursuant to RTB Rule of Procedure 11.5(b). However, the Landlord was permitted to refer to the excluded documentary evidence in her oral submissions.

Issue(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?
2. Are there rent and/or utility arrears and if so, how much?

Background and Evidence

This month to month tenancy started on November 27, 2010. Rent is \$1,450.00 per month payable in advance on the 1st day of each month. The Tenant claims that Hydro and the Shaw cable bill (which also includes internet and telephone) were included in her rent which the Landlord denies.

On October 28, 2009, an Order of Foreclosure was granted to the Mortgagee of the rental property and a further Order was made a short time thereafter that any rents from the property were to be paid to the Mortgagee. The Tenant said she was unaware of the Order requiring rent to be paid to the Mortgagee until she received a letter dated February 25, 2011 from the lawyer for the Mortgagee advising her to make her rent payments to the Mortgagee. On May 3, 2010, an Order was granted to the Mortgagee giving it conduct of sale of the rental property. The Parties agree that there is a current offer to purchase the rental property and that if it is approved by the Supreme Court, the property would be transferred to a new owner likely sometime in May 2011.

On March 2, 2011, the Landlord served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated March 2, 2011. The Notice does not include information as to how much is alleged to be owed as unpaid rent or utilities. The Landlord admitted that the Tenant is required to pay rent to the Mortgagee and that she has done so. The Landlord said however that the Hydro bill is in her name and that the Shaw cable bill was in her name until approximately the end of February 2011. The Landlord claimed that the Tenant agreed to pay for cable and Hydro but has not reimbursed her for the Shaw Cable bills for January, February and March 2011 in the total amount of \$369.65 or for the Hydro bill for January and February 2011 in the amount of \$104.00. The Landlord said the Tenant made a cable payment of \$131.00 and a hydro payment of \$70.00 for December 2010 in February 2011.

The Tenant said she advised the Landlord when they were negotiating the terms of the tenancy that she could not afford to pay the requested rental rate *and* utilities. The Tenant said she did not need the services provided by Shaw in that she had her own mobile telephone which has internet services. The Tenant said she asked the Landlord if she could just move her cable box to the rental property and put the cable bill in her own name but the Landlord refused. The Tenant said she agreed to pay \$70.00 for the hydro bill because the Landlord approached her upset saying she couldn't afford to pay it. The Tenant said she made a cable payment after receiving misleading information from a Shaw representative that if she made a payment on the arrears, she could set up her own account.

The Landlord also served the Tenant with a 2 Month Notice to End Tenancy for Landlord's Use of Property dated February 17, 2011 by posting it to the rental unit door. The Landlord said she posted this Notice on February 17, 2011 however the Tenant claimed she discovered it on her door on February 28, 2011. The Notice stated that the "Landlord, the spouse of the Landlord or a close family member of the Landlord or the

Landlord's spouse intends to occupy the rental unit." The Landlord said her primary residence was burned in a fire and another property she owned had sold and therefore she intended to move into the rental unit.

The Tenant argued that the Landlord did not intend to occupy the rental unit but rather intended to re-rent it at a higher rate of rent. The Tenant said she believes this because she spoke with the Landlord about the possibility of her vacating the rental unit from time to time during the months of July and August so that the Landlord could rent it as a short term vacation rental. The Tenant said she was willing to do this provided that the Landlord did not occupy it herself. The Tenant claimed however, that the Landlord objected to this term and shortly thereafter she received a copy of the 2 Month Notice from the Landlord. The Tenant also argued that the Landlord cannot afford to reside in the rental unit because she presently cannot afford to pay strata fees (which are paid by the Mortgagee) let alone the mortgage payments. The Tenant further argued that the prospective purchasers of the rental property have advised her that they intend to reside in the rental unit.

The Tenant said she gave a copy of the 2 Month Notice to End Tenancy and a copy of her application for Dispute Resolution to an agent for the Mortgagee. The Parties agree that the agent(s) for the Mortgagee appeared not to be concerned about the 2 Month Notice as it was their belief that the agreement for sale will be approved by the Court.

Analysis

The Landlord's Claim:

I find that the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated March 2, 2011 is not an enforceable Notice because it does not state what is alleged to be owed for rent or utilities. Consequently, the Landlord's application for an Order of Possession based on this Notice is dismissed without leave to reapply.

The Parties disagree as to whether utilities were included in the rent or not and there is no written tenancy agreement. The Landlord argued that the Tenant's payment of one cable bill and one hydro bill is evidence of an agreement that utilities were not included in the rent. The Tenant denied this and claimed that she paid those bills for other unrelated reasons. Section 13 of the Act requires a Landlord to prepare a written tenancy agreement which sets out the amount of rent and what is included in it. Consequently, the Landlord has the burden of proof on this issue and must show (on a balance of probabilities) that utilities were not included in the rent. This means that if the Landlord's evidence is contradicted by the Tenant, the Landlord will need to provide additional, corroborating evidence to satisfy the burden of proof.

Given the contradictory evidence of the Parties on this point and in the absence of any additional, corroborating evidence from the Landlord, I find that there is insufficient evidence to conclude that the Tenant was responsible for paying utilities (or that they were not included in the rent). Consequently, the Landlord's application to recover unpaid utilities is dismissed without leave to reapply.

The Tenant's Claim:

RTB Policy Guideline #2 (Ending a Tenancy Agreement: Good Faith Requirement) states at p. 2 states that,

"if the good faith intent of the landlord is called into question, the burden is on the landlord to establish that he/she truly intends to do what the landlord indicates on the Notice to End, and that he/she is not acting dishonestly or with an ulterior motive for ending the tenancy as the landlord's primary motive."

The Tenant argued that the Landlord did not intend in good faith to occupy the rental unit because she could not afford to pay the mortgage payments and strata fees and had indicated an intention to rent it out as a short term vacation rental in the summer months. The Tenant further argued that the Mortgagee likely did not want the Landlord to reside in the rental unit because they obtained a non-disposition order from the Supreme Court in 2009 after the Landlord removed some chattels or fixtures. The Landlord said it is her intention to reside in the rental unit because she does not have another residence at present. The Landlord also argued that it was irrelevant whether she could afford to make a mortgage payment or not because she was still liable to the Mortgagee for the unpaid balance of the mortgage. The Landlord further argued that an agent for the Mortgagee advised her that it took no position on whether she moved back into the rental unit or not given that there was a prospective pending sale.

I find that there is sufficient evidence to conclude that the Landlord intends in good faith to reside in the rental unit. I also find that it is irrelevant to this determination whether the Landlord can afford to make her mortgage payments to the Mortgagee or not. In particular, I find that the Mortgagee has had notice of the Landlord's intention to move into the rental unit (and of these proceedings) but has taken no position on it because they believe the rental property will likely be sold very shortly. Furthermore, I find it unlikely that the Landlord had an ulterior motive of ending the tenancy so that she could personally receive increased rent given that such rents must be paid to the Mortgagee.

Consequently, I find that there are grounds for the 2 Month Notice to End Tenancy for Landlord's Use of Property dated February 17, 2011 and the Tenant's application to cancel it is dismissed without leave to reapply. I find that the Tenant received this Notice on February 28, 2011 (at the latest) and as a result the Notice will take effect on April 30, 2011. As a further consequence, the Tenant will be entitled pursuant to s. 51

of the Act to withhold her last month's rent or if she moves out earlier, she may be entitled to compensation as provided under s. 50 of the Act. The Landlord did not request an Order of Possession with respect to this Notice at the hearing.

Conclusion

The Landlord's application is dismissed without leave to reapply. The Tenant's application to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated March 2, 2011 is granted. The Tenant's application to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property dated February 17, 2011 is dismissed without leave to reapply. The Tenant's application for an Order authorizing the Tenant to change the locks on the rental unit, for compensation and for a rent reduction is dismissed with leave to reapply.

As each of the parties had divided success and as any award of their respective filing fees would be offsetting, I order that this part of the Parties' respective applications is dismissed without leave to reapply. 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: March 30, 2011.

Residential Tenancy Branch