



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes OPR, MNR
 MT, CNR, CNC, OLC, PSF

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and a Monetary Order for unpaid rent. The Tenant applied for more time to cancel a Notice to End Tenancy, to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated March 12, 2011 and to cancel a One Month Notice to End Tenancy for Cause dated March 1, 2011.

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.” I find that the Tenant’s application for an Order that the Landlord comply with the Act by providing services and facilities is unrelated to his applications to cancel a notice to end tenancy and as a result, those parts of his application are dismissed.

At the beginning of the hearing the Tenant said he served the Landlord with his Application, Notice of Hearing and evidence package on April 1, 2011 by leaving it with another tenant at the rental property. The Landlord said he served the Tenant with his Application, Notice of Hearing and evidence package on March 22, 2011 by posting it to the rental unit door. I find that neither of the Parties served their respective applications on the other party as required by s. 89 of the Act. However, both Parties admitted that they received each other’s hearing packages and as a result, I find pursuant to s. 71(2)(c) of the Act that each of the Parties has been sufficiently served with their respective hearing packages for the purposes of the Act.

Issue(s) to be Decided

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

Background and Evidence

This tenancy started on March 1, 2005. Rent is \$1,250.00 per month payable in advance on the 1st day of each month. The Landlord purchased the rental property on March 1, 2010.

In a previous dispute resolution proceeding between these parties heard on March 25, 2011, the Dispute Resolution officer dealt with an application by the Tenant (filed on March 10, 2011) to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property dated February 28, 2011 and to cancel two 10 Day Notices to End Tenancy for Unpaid Rent or Utilities dated February 3, 2011 and March 1, 2011 respectively. The Landlord withdrew the 2 Month Notice to End Tenancy during that hearing and the two 10 Day Notices to End Tenancy for Unpaid Rent or Utilities were cancelled. The Tenant then filed his application in this matter on March 30, 2011 to cancel a One Month Notice to End Tenancy for Cause dated March 1, 2011 and to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated March 12, 2011.

The 10 Day Notice:

The Landlord said the Tenant sent him an e-mail on March 1, 2011 advising him that he would be withholding his rent for March 2011 because the Tenant believed he was entitled to withhold his rent after having received the 2 Month Notice to End Tenancy. Consequently, the Landlord said he served the Tenant on March 12, 2011 with the 10 Day Notice dated March 12, 2011 by posting it on the rental unit door.

The Tenant admitted that he received the 10 Day Notice on March 12, 2011 but claimed that he discovered that he was mistaken about being entitled to withhold his rent so he asked his accountant who prepares his company cheques to issue one for his March 2011 rent. The Tenant claimed that this cheque was sent to the Landlord with his evidence package (for the previous hearing) by registered mail on March 15, 2011 and the Landlord received it the following day. In support, the Tenant relied on a witness statement from his accountant who claimed,

“On March 15, 2011, I helped [the Tenant] mailed a cheque (####) by registered letter for [the Landlord] to [the Landlord's address for service]. I am very sure there was a cheque in the envelope I mailed.”

The Landlord denied that there was a cheque included in the evidence package he received from the Tenant and said that even though the Tenant was advised of this at the previous hearing rent for March 2011 remains unpaid. The Tenant admitted that the cheque he allegedly gave the Landlord has not been negotiated and that he has not provided the Landlord with replacement funds.

The One Month Notice:

The Landlord said on March 12, 2011, he served the Tenant with a One Month Notice to End Tenancy for Cause dated March 1, 2011 by posting it to the rental unit door. The Landlord claimed he posted this document at the same time as he posted the 10 Day Notice to End Tenancy dated March 12, 2011. The ground stated on the Notice was that "the Tenant is repeatedly late paying rent."

The Parties agree that they established a practice whereby the Tenant leaves his rent payments each month with a long-term tenant of the rental property who resides on the first floor. The Tenant pays both by cheque and cash. The Landlord relied on the following late payments:

- The Landlord said the Tenant gave him a rent cheque for May 2010 on May 5, 2010 but failed to sign it. The Tenant argued that this was an inadvertent mistake and that the delay was caused by the Landlord who deposited the cheque in error. The Landlord denied this and submitted a copy of an e-mail to the Tenant wherein he advised the Tenant about the cheque not being signed. The Landlord said the Tenant did not provide a replacement cheque until May 17, 2010.
- The Landlord said the Tenant gave him a cheque for July 2010 rent dated July 6, 2010 however it was returned for non-sufficient funds and the Tenant did not provide him with a replacement cheque until July 31, 2010. The Tenant claimed that the cheque was returned as a result of an error made by his financial institution. The Tenant said his bank refused to accept a cheque deposited to his account that was made out to a former company name in error but the bank acknowledge its error and later deposited those funds.
- The Landlord said the Tenant was late paying rent for February 2011 and as a result, on February 2, 2011 he served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. The Parties agree that the Tenant paid rent for that month in cash on February 5, 2011. The Tenant said he advised the Landlord that he would pay his rent on February 2, 2011 but he got delayed at work and by the time he got home it was too late to give his cash payment to the other tenant for the Landlord.
- The Landlord said the Tenant sent him an e-mail on March 1, 2011 advising him that he would not be paying rent for that month. The Landlord said he gave the Tenant a 10 Day Notice on March 1, 2011 and then when he realized he had served it too early, he served the Tenant with another 10 Day Notice on March 12, 2011. The Tenant said he mistakenly believed he was entitled to withhold his rent for that month as compensation because the Landlord had served him the day prior with a 2 Month Notice to End Tenancy. The Tenant said once he realized he was not entitled to withhold his rent for that month, he had his

accountant send the Landlord a cheque by registered mail on March 15, 2011. The Landlord denied that he received this cheque.

- The Landlord said the Tenant paid rent for April 2011 on April 2, 2011 which the Tenant did not deny.
- The Landlord said that the Tenant has also made late payments for each month where the 1st day lands on a weekend and in particular, he claimed the Tenant did not pay rent when it was due in August 2010 and in January 2011. The Tenant did not deny this but instead argued that because his accountant did not work on weekends, he was unable to give the Landlord a cheque when the 1st of the month fell on a weekend.

The Tenant's Application for More Time to Apply:

The Tenant argued that he paid the rent arrears for March 2011 within 5 days of receiving the 10 Day Notice to End Tenancy dated March 12, 2011 and therefore that Notice was cancelled. The Tenant admitted that he received the One Month Notice to End Tenancy on March 12, 2011 with the 10 Day Notice dated March 12, 2011. The Tenant said he filed his application to cancel the One Month Notice late because he had received so many Notices from the Landlord in a short period of time that he lost track of them all. The Tenant then changed his evidence and claimed that he was unsure when he had received the One Month Notice and then changed his evidence again and claimed he received the One Month Notice to End Tenancy on or about March 25, 2011 in an evidence package he received from the Landlord for their previous hearing held on that day.

The Tenant argued that he when he wrote on his application that he received the "notice to end tenancy" on March 12, 2011, he was only referring to the 10 Day Notice. Consequently, the Tenant argued that he did apply to dispute the One Month Notice within 10 days of receiving it.

Analysis

The 10 Day Notice:

Section 46(4) of the Act states that **within 5 days of receiving** a Notice to End Tenancy for Unpaid Rent or Utilities, a Tenant must either pay the overdue rent or apply for dispute resolution. If a Tenant fails to do either of these things, then under section 46(5) of the Act, they are conclusively presumed to have accepted that the tenancy will end on the effective date of the Notice and they must vacate the rental unit at that time.

I find that the Tenant was served with a 10 Day Notice to End Tenancy for Unpaid Rent on March 12, 2011 when it was posted on his door. Under s. 90 of the Act, the Tenant

is deemed to have received that Notice 3 days later, however, the Tenant admitted that he received the Notice on March 12, 2011 and as a result I find that he received the 10 Day Notice on March 12, 2011. Consequently, the Tenant would have had to pay the amount on the Notice or apply to dispute that amount **no later than March 17, 2011**.

The Tenant said he sent the Landlord a cheque for the overdue rent by registered mail on March 15, 2011 together with his evidence package for a previous hearing and that the Landlord received it on March 16, 2011. The Landlord admitted that he received the Tenant's evidence package on March 16, 2011 but claimed that package did not include a cheque. The Tenant relied on a witness statement from his accountant stating that she wrote out the cheque for the Tenant's rent payment and was sure the cheque was in the package she mailed to the Landlord. This witness was present at the commencement of the hearing but was advised by the Dispute Resolution Officer pursuant to RTB Rule of Procedure 11.11 she would have to leave the conference call until her evidence was needed. When this witness was later contacted by the Dispute Resolution Officer, she could not be reached and a message was left for her on her voice mail that her evidence was required. The Tenant claimed at the end of the hearing that his witness had sent him a message that she was in an accident and he wanted accommodation made to get her evidence at a later date. I denied this request as I find her evidence is unnecessary for other reasons set out below.

I find it very unusual that the Tenant would on this one occasion choose to depart from the Parties' established practice of leaving a cheque with the other tenant on the rental property. However, given the contradictory evidence of the Parties on this issue and in the absence of any corroborating evidence from the Landlord, I cannot conclude that the Tenant did not send a cheque to the Landlord on March 15, 2011 as he claimed. Consequently, I find that there is insufficient evidence to support the 10 Day Notice to End Tenancy for Unpaid Rent dated March 12, 2011 and it is cancelled. Accordingly, the Landlord's application for an Order of Possession on this ground is dismissed without leave to reapply.

However, based on the evidence of both parties, I find that that the Tenant's cheque in payment of rent for March 2011 has not been negotiated and therefore rent for that month remains unpaid. Consequently, I grant the Landlord's application for a Monetary Order for the amount of \$1,250.00. The Tenant will have to take steps to put a stop payment on the cheque he claims he issued to the Landlord on March 15, 2011.

The Tenant's Application for More Time to Apply:

Section 66(1) of the Act says that the Director may extend a time limit established by the Act but only in **exceptional circumstances**."

On his application filed March 30, 2011, the Tenant applied for more time to cancel a notice to end tenancy and also applied to cancel a 10 Day Notice dated March 12, 2011 and a One Month Notice dated March 1, 2011. The Tenant did not make any distinction

or otherwise indicate that he was seeking more time to cancel only one of the Notices in question.

At the hearing, the Tenant initially said he received the One Month Notice dated March 1, 2011 at the same time as he had received a 10 Day Notice and he believed it may have been the 10 Day Notice dated March 12, 2011. The Tenant's written submissions that he filed in support of his application, however state that he received the One Month Notice dated March 1, 2011 on March 1, 2011, the same date he received a 10 Day Notice to End Tenancy for Unpaid Rent dated March 1, 2011. The Tenant later claimed, however that he only received the One Month Notice on March 25, 2011 in the Landlord's evidence package.

I find on a balance of probabilities that the Tenant received the One Month Notice to End Tenancy for Cause dated March 1, 2011 on March 1, 2011 and therefore pursuant to s. 47(4) of the Act he had 10 days or ***no later than March 11, 2011*** to apply to cancel the One Month Notice to End Tenancy for Cause. The Tenant applied to cancel the One Month Notice on March 30, 2011. The Tenant claimed he filed late because he could not keep track of all of the Notices he had been served by the Landlord. I find, however, that this is not an "exceptional" circumstance contemplated by s. 66(1) of the Act and as described under RTB Policy Guideline #36 as set out at p. 1 of that Guideline:

"the word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling [and] a "reason" without any force of persuasion is merely an excuse. An example of what could be considered "exceptional" circumstances would be that the Party was in the hospital at all material times. An example of what *would not* be considered "exceptional" circumstances would be that the party was not paying attention to the correct procedure or did not know the applicable law or procedure."

Consequently, the Tenant's application to extend the time to apply to cancel the One Month Notice to End Tenancy for cause dated March 1, 2011 is dismissed without leave to reapply.

The One Month Notice:

Having dismissed Tenant's application pursuant to s. 66(1) of the Act for an extension of time to apply to cancel the One Month Notice to End Tenancy for Cause dated March 12, 2011, I also find that his application to cancel the One Month Notice to End Tenancy for Cause must also be dismissed without leave to reapply pursuant to s. 47(5) of the Act. Consequently, it is not necessary for me to address this part of the Tenant's application however I noted at the hearing of this matter that the Tenant appeared to misunderstand the law as it pertains to repeated late payments of rent.

RTB Policy Guideline #38 states that three late payments are the minimum necessary to justify a notice under these provisions. The Tenant argued in one instance that when

he received 10 Day Notices to End Tenancy for Unpaid Rent, he paid the overdue rent within the 5 days granted and therefore those instances did not amount to late payments. However, a 10 Day Notice does not operate to extend the time to pay rent when it is due. The Tenant admitted that rent was to be paid on the 1st of each month. Consequently, a late payment for the purposes of s. 47(1)(b) of the Act would occur whenever rent was not paid after the 1st day of each month whether the Tenant received a 10 Day Notice for that late payment or not.

Further, the Tenant admitted that he did not pay rent on the 1st of the month when that day fell on a weekend because his accountant did not work on weekends. However, that is an argument that carries no weight. It is incumbent on the Tenant to pay rent when it is due, not when it is convenient for him. If the Tenant's accountant cannot prepare a cheque on a week end day, then the Tenant must take steps to have her issue one on the preceding Friday or alternatively come up with a different payment method.

In summary, the Tenant's applications to extend the time to cancel a notice to end tenancy and to cancel the One Month Notice to End Tenancy for Cause dated March 12, 2011 are dismissed without leave to reapply. The Landlord requested and I find that he is entitled pursuant to s. 55(1) of the Act to an Order of Possession to take effect at 1:00 p.m. on April 30, 2011. I also find that the Landlord is entitled pursuant to s. 72 of the Act to recover the \$50.00 filing fee for this proceeding.

Conclusion

The Tenant's application to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated March 12, 2011 is granted. The Tenant's application for more time to cancel a Notice to End Tenancy and to cancel a One Month Notice to End Tenancy for Cause dated March 1, 2011 are dismissed without leave to reapply. As the tenancy will be ending, the Tenant's application an Order that the Landlord comply with the Act by providing services and facilities is also dismissed without leave to reapply.

An Order of Possession to take effect at 1:30 p.m. on April 30, 2011 and a Monetary Order in the amount of \$1,300.00 have been issued to the Landlord and a copy of the Orders must be served on the Tenant. The Order of Possession may be enforced in the Supreme Court of British Columbia and the Monetary Order may be enforced in the Provincial (Small Claims) Court of British Columbia. 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: April 08, 2011.

Residential Tenancy Branch