



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MT, CNC, OLC, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties.

The Landlord filed an Application on July 8, 2011, seeking to end the tenancy for cause and requesting an order of possession, and to recover the filing fee for the Application.

The Tenant applied on July 11, 2011, seeking more time to apply to cancel a Notice to End Tenancy for cause, for an order cancelling the Notice to End Tenancy for cause, and for an order for the Landlord to comply with the Act.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

The preliminary issue of the Tenant applying for more time to make her Application was dealt with at the outset of the hearing.

Both parties submitted in evidence a copy of a one month Notice to End Tenancy for cause, which was dated June 6, 2011, and shows an effective date of July 31, 2011 (the "Notice").

From the date the Tenants received the Notice, they had 10 days to dispute it by filing an Application.

There was inconsistent evidence from both parties as to the date of service of the Notice.

The Tenant wrote in her Application that the Notice was slipped under her door on July 6, 2011. She initially testified during the hearing that she received this Notice from her son on June 24, 2011, then later testified it was July 8, 2011, when she received it. The Tenant also referred to a letter from an Agent for the Landlord dated June 24, 2011, which referenced a different Notice to End Tenancy, which was apparently issued in November of 2010.

The Advocate for the Tenant testified the Tenant brought the Notice to him on July 8, 2011. He testified the Tenant had not mentioned the Notice in their previous meeting on June 27, 2011, which dealt with the letter from the Landlord dated June 24, 2011.

The Landlord had submitted in evidence a signed proof of service document for the Notice from two of its Agents.

The proof of service document is dated June 6, 2011, and one of the Agents ("Agent A") sets out he served both the Tenants with the Notice on June 6, 2011, at 7:00 p.m., by personal delivery. This is signed as being witnessed by another Agent for the Landlord ("Agent B").

During the hearing, Agent A testified that he served the Notice around 3:10 p.m. and there was no one to witness this.

Agent B testified he went to the rental unit with Agent A and saw Agent A post the Notice on the rental unit door.

The onus to prove a claim is on the party putting forward the claim. In this instance, I find there are significant inconsistencies with the Landlord's evidence as to service of the Notice being on June 6, 2011.

This led me to find that the evidence of the Advocate for the Tenant was, on a balance of probabilities, the most compelling as to the date of service. I find the Tenant was served with the Notice on July 6, 2011. Therefore, the Tenant has filed her Application on time, and it is unnecessary to grant her more time to make her Application.

I note that due to the service date being July 6, 2011, the effective date of the Notice automatically corrects under the Act to August 31, 2011.

Issue(s) to be Decided

Is the Notice to End Tenancy valid or should it be cancelled?

Background and Evidence

The tenancy began in June of 2009, with the Tenants and the Landlord agreeing to rent of \$775.00 per month, payable on the first day of the month. The rent from both Tenants is paid by a third party with cheques being sent to the Landlord.

The Landlord issued the Notice to the Tenants setting out the reasons to end the tenancy as: repeated late payment of rent; that the Tenants, or a person permitted on the property by the Tenants, has significantly interfered with or unreasonably disturbed another occupant or the Landlord; or has seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.

The Landlord alleged the Tenants are repeatedly late paying their rent. One of the Tenants pays \$400.00 per month, and the other pays \$375.00 per month. The payment of \$400.00 is normally received prior to the due date of the first of the month. The payment of \$375.00 is the one in issue. According to the Landlord it has been received late several times over the past few months.

Agent B for the Landlord testified that \$375.00 of the November 2010 rent was not received until November 7, 2010. He testified that in December \$375.00 was paid on December 11, 2010. In March of 2011, the \$375.00 was not received until March 8, 2011, according to his testimony. In April of 2011, the \$375.00 was not received until April 6, according to the testimony.

Both parties agree the Tenants have not paid any rent for August of 2011.

In reply, the Tenant testified that she withheld rent in October and November of 2010, as there had been a flood in the rental unit and she wanted to see what the Landlord or Agents would do about the flood. The Tenants had to move to another unit during this time.

The Tenant testified she did not know why the December 2010, rent was late.

The Tenant further testified that there were numerous reasons why the third party may have been late paying the Landlord on behalf of the other Tenant. She alleges it was out of the Tenants' hands as to when the third party pays the Landlord.

In reply, an Agent for the Landlord testified that it is the Tenants responsibility to pay the rent on time, on the first of the month.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

I find the Landlord has proven that the Tenants have been late paying the rent five times in the past nine months. Under the policy guideline to the Act, three instances of late payments are sufficient to end a tenancy. I also note that under section 26 of the Act the Tenants are not able to withhold rent, even if the Landlord is in breach of the Act or the tenancy agreement.

As I have found the Landlord has proven one of the reasons for issuing the Notice, that being repeated late payment of rent, I do not make any findings on the other causes alleged in this matter.

Having found the Notice is valid and should not be cancelled, I dismiss the Application of the Tenants, without leave to reapply.

I allow the Application of the Landlord and grant an order of possession, to be effective at **1:00 p.m. on August 31, 2011.**

I allow the Landlord to retain \$50.00 from the security deposit held, to recover the filing fee for the Application.

Conclusion

The Tenants were repeatedly late paying rent. An order of possession has been granted and issued, to be effective at 1:00 p.m. on August 31, 2011. The Landlord may keep \$50.00 from the security deposit to recover the filing fee for the Application.

This decision is final and binding on the parties, except as otherwise provided for under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: August 04, 2011.

Residential Tenancy Branch