DECISION

Dispute Codes DRI, CNC, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43; and.
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenant confirmed that the landlord handed him the 1 Month Notice on August 25, 2011. The landlord confirmed that she received a copy of the tenant's dispute resolution hearing package sent by registered mail on August 29, 2011. I am satisfied that the parties exchanged these documents and their written evidence in accordance with the *Act*.

At the commencement of the hearing, the tenant said that he was not disputing an additional rent increase, as he had submitted that portion of his application in error. Since he withdrew this portion of his application, I am not considering that aspect of his original application.

Issues(s) to be Decided

Should the tenant's application to cancel the 1 Month Notice be allowed? Is the tenant entitled to recover his filing fee for this application?

Background and Evidence

Although this month-to-month tenancy was not signed by both parties until July 26, 2011, the tenancy commenced on March 26, 2011. According to the terms of the tenancy agreement, monthly rent was set at $600.00, payable in advance on the first of each month. The parties agreed that electricity was not included in the monthly rent. The landlord continues to hold the tenant's $300.00 security deposit paid on March 26, 2011.

The landlord indicated in her 1 Month Notice that the tenant had breached a material tem of his tenancy agreement that was not corrected within a reasonable time after written notice to do so was given. She maintained that the tenant had failed to pay 30%

of her overall electricity bill for this property in accordance with their tenancy agreement. She entered into written evidence a copy of an August 11, 2011 utility payment notice she provided to the tenant. This notice read in part as follows;

> *I... requested 30% of electricity bill mentioned on residential tenancy agreement. You ...scratched out without my agreement or permission. There is not my initial or yours on the paper. That means you still have to pay 30% of the electricity bill. I am giving you notice to pay electricity bill.*
>
> *I copied electricity bill for you to consider to pay.*
>
> *I am only requesting*
> *$50 for April 1- May 14*
> *$60 for May 14 – July 14*

At the hearing, the tenant confirmed that the tenancy agreement did require him to pay 30% of the landlord's electricity bill for this rental property. However, he said that he refused to pay the full 30% of the bill during a period when the landlord was conducting repairs to the rental unit above him requiring extensive power usage. At the hearing, the tenant said that he would pay the amount requested by the tenant for the two periods outlined in her August 11 notice as he now understood that she had discounted the electricity bill for the period he had previously been disputing. He also agreed to pay 30% of the landlord's most recent electricity bill of $188.86 covering the period from July 15, 2011 until September 15, 2011. He said that he would pay this presently requested amount of $166.66 for his portion of the landlord's electricity bills by September 26, 2011.

Although the landlord was satisfied with the tenant's willingness to pay the outstanding amount of her electricity bill, she said that was still seeking an end to this tenancy. She testified that the tenant had altered the wording of his residential tenancy agreement by removing reference to the tenant's responsibility for 30% of the electricity bill. She maintained that the tenant's alteration of the wording of their agreement constituted a breach of a material term of their agreement that he would pay 30% of the electricity and as such an Order of Possession should be issued.

Analysis

A landlord may end a tenancy for breach of a material term but the standard of proof is high. To determine the materiality of a term, a dispute resolution officer will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach.

It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term. A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the tenancy agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. The dispute resolution officer will look at the true intention of the parties in determining whether or not the clause is material.

I find that the circumstances surrounding the signing of the residential tenancy agreement (RTA) between the parties were most unusual. The parties entered into written evidence two different versions of their RTA. Although both versions of the RTA indicated that electricity and heat were not included in the tenant's rent, there were questions marks written beside each of these boxes in the RTA. Both versions of the RTA indicated that there was "Additional Information" but on both RTAs handwritten details of this Additional Information were crossed out. Both versions failed to describe which rental unit in this building the tenancy was meant to cover.

However, there are significant differences between the two RTAs submitted by the parties. The actual forms for the RTAs are slightly different and the locations of signatures and dates are in slightly different locations. From this, I conclude that these are in fact two entirely different RTAs, both with signatures attributed to one another. According to the landlord, there is yet a third RTA that she did not choose to enter into evidence prior to this hearing.

The version submitted by the tenant had only the landlord's name entered with no tenant name. The version submitted by the tenant was signed by the tenant on July 26, 2011. The landlord signed this RTA but three separate dates are identified beside her signature. Her April and May dates are stroked through and the final date is shown as July 26, 2011. There are initials beside the crossed out April and May dates which appear to be that of the landlord and the tenant.

The landlord's version of this RTA has both landlord and tenant names, but the landlord's name is signed in a different location on the RTA form. This version had the landlord's signature dated as May 1, 2011. This version had an initial date for the tenant's signature identified as May 1, 2011 crossed out and replaced with two July 26, 2011 dates by the tenant.

When questioned as to the discrepancies between the two RTAs, the tenant admitted that he crossed out references to his responsibility to assume 30% of the electricity costs in the original RTA provided to him by the landlord. He also testified that he stroked out the April and May dates in the original RTA handed to him by the landlord in May 2011 and wrote in the new date of July 26, 2011, the date that he returned the signed RTA to the landlord. However, he testified that the landlord initialled the changed date on the RTA in which the reference to his responsibility for 30% of the electricity was also removed.

The landlord testified that the tenant must have altered the version of the RTA he submitted into written evidence by removing reference to his name and other details that were not common to the two agreements. She testified that she had another version of the RTA, which may have been the original RTA she handed to the tenant to sign in April or May 2011. However, she did not enter this other version of the RTA into written evidence. A third version of the same RTA only added to the confusion surrounding the accuracy of the RTAs, the terms of the agreements and the signatures and dates of the agreements.

In considering this matter, I conclude that neither party is blameless in what appear to be a series of different RTAs. At the commencement of this tenancy, the landlord failed to obtain a signed RTA. She apparently signed an RTA (or more likely multiple RTAs), but did not obtain the tenant's signature at that time. The parties agreed that the tenant did not sign the RTA until four months after the tenancy commenced. Despite the tenant's assertion that he obtained the landlord's initials to the changes he made to the RTA he signed, the tenant admitted to erring when he altered portions of the original RTA by removing the provision that he pay 30% of the electricity bills for the rental property. At the hearing, the tenant also confirmed that the parties agreed from the outset of the tenancy that he was responsible for 30% of the landlord's electricity bills for this property. The tenant also admitted to writing the date beside the landlord's signature on the RTA he entered into written evidence.

While both parties bear partial responsibility for errors and omissions in the process that led to the creation of different RTAs for this tenancy, the landlord bears ultimate responsibility to ensure that a properly completed RTA is in effect for a tenancy.

In this case, the landlord has maintained that the tenant's alteration of the RTA the landlord had signed on May 1, 2011 by removing reference to the tenant's responsibility for 30 % of the landlord's electricity bills constituted a breach of a material term of their agreement. As outlined above, the parties dispute whether the landlord initialled changes made to the RTA on July 26, 2011.

While I have given careful consideration to the reasons provided by the landlord for her issuance of the 1 Month Notice, the landlord has provided insufficient evidence to enable me to find that the tenant has breached a material term of their RTA. As noted above, the differences in the details of the two RTAs and the omissions and errors made by both parties with respect to these documents leads me to conclude that there is little certainty as to which RTA was allegedly breached. In addition, the landlord testified that she had yet another version of the RTA with this tenant which she had not chosen to enter into evidence, although she did enter into written evidence copies of her RTA with the upstairs tenants which had little relevance to the matters before me.

Rather than an allegation of a breach of a material term of the RTA, I find that any remedy the landlord may have had would have been directed at the tenant's failure to pay his share of the utilities. Under such circumstances, a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities would have been more in line with the evidence submitted than the landlord's alleged breach of a material term of their RTA. As outlined above, the test for determining that a material term of a tenancy agreement has been breached is high. It does not extend to the landlord's claim that the tenant was dishonest in changes he made to the RTA after she signed their original agreement. As I find that there has been no breach of a material term of this tenancy agreement, I allow the tenant's application to cancel the landlord's 1 Month Notice with the effect that this tenancy continues.

The tenant acknowledged at the hearing that he understood that he was responsible for paying 30% of the electricity costs for this property, but that his concern related to a period near the commencement of his tenancy. He testified that he accepts his responsibility to pay the landlord his portion of her electricity bill as requested and is prepared to pay his outstanding utility bill within a few days of the hearing. From this testimony, it would appear that the difference of opinion regarding the electricity bills at the early stages of this tenancy is no longer at issue.

To add further clarity and to prevent a misunderstanding of this issue due to the multiple RTAs signed by the parties, I order that the terms of the RTA between the parties include the provision that the tenant is responsible for 30% of the landlord's electricity bills for this rental property. In making this order, I note that this is the arrangement that both parties testified they understood to be in place with respect to this tenancy.

As the tenant has been successful in his application, I allow him to recover his $50.00 filing fee for this application from the landlord. I allow the tenant to reduce his next utility payment by $50.00 to enable him to recover this fee.

Conclusion

I allow the tenant's application to cancel the landlord's 1 Month Notice. The effect of this decision is that the tenancy continues.

On the basis of the evidence submitted and the testimony heard, I order that the terms of the residential tenancy agreement between the parties include the provision that the tenant is responsible for 30% of the landlord's electricity bills for this rental property.

I allow the tenant's application to recover his filing fee and order him to reduce his next utility payment by $50.00 to enable him to recover that fee from the landlord.

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*.