



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing was convened by way of conference call in response to 5 applications filed by the tenant company for an order cancelling 5 notices to end tenancy issued by the landlord. The landlord company was represented at the hearing by an agent, and the tenant company was represented by counsel. Both parties called a witness and provided evidence in advance of the hearing.

The landlord's agent opposed the late evidence of the tenant, and the tenant's counsel argued that the late evidence was in response to evidence the landlord's agent provided to the tenant's counsel. The applications before me were filed on December 8, 2011 and the notice of hearing was provided to the applicant on December 9, 2011 for service on the respondent. The respondent (landlord) submitted 131 pages of evidence to the Residential Tenancy Branch on December 15, 2011. The respondent received the applicant's 20 page evidence by email the same day at 6:44 p.m. I have copied the Rules of Procedure for the benefit of the parties below:

3.5 Evidence not filed with the Application for Dispute Resolution

- a) Copies of any documents, photographs, video or audio tape evidence that are not available to be filed with the application, but which the applicant intends to rely upon as evidence at the dispute resolution proceeding, must be received by the Residential Tenancy Branch and must be served on the respondent as soon as possible, and at least (5) days before the dispute resolution proceeding as those days are defined in the "Definitions" part of the Rules of Procedure.
- b) If the time between the filing of the application and the date of the dispute resolution proceeding does not allow the five (5) day requirement of a) to be met, then the evidence must be received by the Residential Tenancy Branch and served on the respondent at least two (2) days before the dispute resolution proceeding.
- c) If copies of the applicant's evidence are not received by the Residential Tenancy Branch or served on the respondent as required, the Dispute Resolution Officer must apply Rule 11.6 [Consideration of evidence not provided to the other party or the Residential Tenancy Branch in advance of the dispute resolution proceeding].

11.6 Evidence not received by the Dispute Resolution Officer

The Dispute Resolution Officer may adjourn a dispute resolution proceeding to receive evidence that a party states was submitted to the Residential Tenancy Branch but was not received by the Dispute Resolution Officer before the dispute resolution proceeding.

The landlord's agent did not want to adjourn the hearing, and has had the applicant's evidence for 6 days prior to the hearing, albeit not clear days. However, in the circumstances, I found that the applicant will not be prejudiced by the inclusion of the evidence. All evidence and testimony provided have been reviewed and are considered in this Decision.

Issue(s) to be Decided

Is the tenant entitled to an order cancelling any or all of the notices to end tenancy?

Background and Evidence

In this case, the applicant tenant is an employer who rents condominiums for its employees, hereafter referred to as the tenant. The respondent, hereafter referred to as the landlord, is a property management and realtor company that rented 5 units to the tenant. The tenancy began on August 1, 2008 and the 5 rental units are still rented by the tenant. Rent in the amount of \$900.00 per month per unit is payable in advance on the 1st day of each month and there are no rental arrears.

The landlord's agent testified that the intent of the tenancy agreement was to facilitate the operation of a mine. The agreement was for \$750.00 per unit per month with a review of the agreement after one year. The tenancy agreement was provided for the hearing and is dated July 28, 2008. In September, 2011 the tenant agreed that the rent would be increased to \$900.00 per month per unit.

The landlord's agent further testified that some of the units had been listed for sale by the owners. On September 15, 2011 the landlord's agent sent an email to the tenant about showing the rental units to perspective purchasers. The tenant responded by email asking the landlord to wait. The landlord's agent requested to show the units again on October 15, 2011 and the tenant requested the date be changed, but the landlord was not able to change the date and advised the tenant by email. The parties emailed back and forth and had telephone conversations but the landlord did not get the tenant's permission to show the rental units and consequently the rental units were not shown at that time. The tenant subsequently denied that the landlord was denied access to the units and denied that rent was late, and the landlord's agent testified that the landlord was not being heard by the tenant. The landlord's agent also testified that not all of the rental units have spare keys; people have borrowed them to get items left

behind and failed to return them, or locks have been changed, and not all units have duplicate keys with the property management company. Further, if the tenant did not notify employees of the landlord's intention to show the rental units, the landlord's agent would not go into the units. The people residing in the units were to be notified by the tenant company and the landlord's agent wanted to ensure that people weren't sleeping and that they were aware of the showings prior to entry.

The landlord also provided copies of cheques issued by the tenant, the first of which is dated June 28, 2011 and the landlord's agent testified that it was received on July 5 for July's rent. August's rent cheque is dated August 4, 2011 which was received on August 9, 2011. October's rent cheque is dated September 29, 2011 and was received by the landlord on October 11, 2011. November's rent cheque is dated October 27, 2011 and was received by the landlord on November 7, 2011. December's rent cheque is dated December 2, 2011 and was received by the landlord on December 5, 2011. The landlord had issued notices to end the tenancy for each of the rental units on December 2, 2011 for unpaid rent, and an employee of the tenant delivered another cheque to the landlord that day and therefore the landlord did not cash the cheque received on December 5, 2011. The landlord's agent testified to having no knowledge of the timing of rent payments prior to January, 2011, and was not made aware of late payments from January to June, 2011, but became aware in July, 2011.

On November 30, 2011 the landlord served the tenant with a 1 Month Notice to End Tenancy for Cause for each of the 5 rental units, copies of which were provided for this hearing. The notices are dated November 30, 2011 and contain an expected date of vacancy of December 31, 2011. All of the notices state that the reason for ending the tenancy is for repeated late rent payments, and 3 of them also contain the reason that the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. The landlord's agent testified that the failure of the tenant to allow access to the rental units for showings to perspective purchasers interfered with the lawful business of the landlord.

The landlord's agent spoke to the evidentiary material of the tenant stating that some of the statements are incorrect. The material includes a statement from the witness for the tenant company which states that an employee contacted the landlord's agent on November 24, 2011, however, the employee didn't call the landlord's agent but sent a text message on December 2, 2011 because the landlord had served the tenant company with 10 Day Notices to End Tenancy for Unpaid Rent or Utilities for each unit that day. A copy of the text message was provided, and it is an apology from the Chief

Financial Officer for the tenant for late rental payments and a promise to ensure that future payments are made on time.

The landlord requests an Order of Possession for each of the 5 rental units.

The witness for the tenant is the Human Resources Project Manager for the company and became involved in the housing issues after starting employment with the company in May, 2011. The witness testified that from August, 2008 to date payments for rent are made by cheque which are written prior to the end of the month and mailed to the landlord. In October, 2011 the witness had a conversation with the managing broker of the landlord company about the market rent for the rental units. No discussion was raised about late rent and the witness was unaware that rent had been late. Almost all vendors and suppliers are paid by electronic funds transfer.

The witness also testified that upon contacting the bank and receiving information about the dates that rent cheques cleared the bank, the company prepared a document showing the cheque dates and dates each item cleared, which was provided for this hearing. The clearing date for the cheque dated October 27 and clearing on the same day cannot be explained and the witness is not sure why the list shows those dates.

The witness further testified that the landlord was never denied access to any of the rental units.

Counsel for the tenant argued that under contract law, because the landlord did not mention late payments of rent prior to issuing the notices to end tenancy, there exists an implied waiver of any intent to enforce the term of the tenancy agreement respecting the date that rent is due. Further, the law states that if I accept that implied waiver and intent, the tenant ought to be put on notice that late payments are no longer acceptable.

Analysis

Firstly, dealing with the landlord's claim that the tenant denied access to the rental unit for real estate showings, and thereby interfered with the lawful right and business of the landlord, I accept that the tenant's witness was not aware that the landlord made requests to show the rental units. Under the *Residential Tenancy Act* the landlord is required to give not more than 30 days and not less than 24 hours written notice to enter a rental unit subject to a tenancy. Once that notice has been provided, the landlord need not ask permission. The landlord testified that entry without the knowledge of the employees that resided in the rental units was not a desirable way to do business and the landlord awaited responses from the tenant, which sometimes didn't happen. The landlord could have notified the tenant and also posted notices on

the doors of the rental units, and by not doing so, I find that the landlord's reason for ending the tenancy for unreasonably interfering with the landlord is weak at best.

However, the *Act* also requires a tenant to pay rent when it is due. I have reviewed the tenancy agreement which clearly states that rent is due on the 1st day of each month. The landlord testified to being the manager of the rental units since January, 2011 and became aware of late rent payments in July, 2011. The landlord also provided evidence of late payments, as did the tenant. I have compared the 2 documents, and combined they show:

Rental Month	Cheque Date	Date Rec'd by LL	Date Deposited	Date Cleared
August 2011	August 4	August 8	August 9	August 11
October 2011	September 29	October 11	October 13	October 17
November 2011	October 27	November 7	November 8	October 27

The tenant's witness testified that an error exists on the November clearing date but does not know the correct date. However, it's clear by the evidence of both parties that the landlord has not received rent by the 1st day of each month 4 times from July to November, 2011. The landlord also testified that the rent for December, 2011 was not paid until after the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on December 2, 2011, which is not disputed by the tenant.

Counsel for the tenant argued an implied waiver of any intent to enforce the term of the tenancy agreement respecting the date that rent is due, and the tenant ought to be put on notice that late payments are no longer acceptable. However, the landlord testified that the landlord attempted to deal with the tenant company about late rent and about access to the rental units but did not get responses from the tenant on several occasions until the landlord served the tenant with a notice to end the tenancy. The landlord also testified that owners expected payment by the 15th of each month and the landlord is required to hold cheques for 2 weeks to ensure they clear before passing the rent money on to the owners. As a result of the tenant's tardiness, cheques could not be issued to the owners until after the 15th of each month. Therefore I cannot accept that any implied waiver existed.

The *Residential Tenancy Act* states:

- 26** (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the

regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

I find that the onus is on the tenant to ensure that the landlord receives rent when it is due, and providing evidence that the cheques were written prior to the end of the month does not justify continuous late payments.

I find that the landlord has established repeated late rent payments for each of the 5 rental units.

I have examined the notices to end tenancy provided by the tenant and find that the notices comply with the *Residential Tenancy Act* and ought to be upheld. The landlord has asked for an Order of Possession, and the *Act* requires that I issue same if requested by the landlord and I dismiss the tenant's application to cancel the notice to end tenancy, and I so order.

Conclusion

For the reasons set out above, the tenant's application is hereby dismissed without leave to reapply.

I hereby grant an Order of Possession in favor of the landlord effective December 31, 2011. This order is final and binding on the parties and may be enforced.

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: December 23, 2011.

Residential Tenancy Branch