



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNR, MNDC, FF

Introduction

This hearing was convened by way of conference call in repose to the tenants application to cancel a Notice to End Tenancy for cause and for unpaid rent; for a Monetary Order for money owed or compensation for damage or loss under the *Residential Tenancy Act (Act)*, regulations or tenancy agreement; and to recover the filing fee from the landlords for the cost of this application. At the outset of the hearing the tenant states they did not receive a 10 Day Notice to End Tenancy for unpaid rent and therefore he withdraws their application to cancel the Notice for unpaid rent.

One of the tenants and the landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross exam each other on their evidence. The landlord and tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

Issue(s) to be Decided

- Are the tenants entitled to have the One Month Notice to End Tenancy cancelled?
- Are the tenants entitled to a Monetary Order for money owed or compensation for damage or loss?

Background and Evidence

Both parties agree that this month to month tenancy started on October 01, 2010. Rent for this unit is now \$1,330.00 per month and is due on the first day of each month in advance.

The landlord testifies that the tenants have been late paying rent on three occasions. The landlord testifies the tenants deducted \$20.00 from the rent for October, 2011. The landlord served the tenants with a 10 Day Notice to End Tenancy for unpaid rent and a breach letter concerning unpaid rent which informs the tenants that rent is due on the first day of the month. The tenants then paid the \$20.00 on October 11, 2011. The landlord testifies that the tenants did not pay rent for December until December 02, 2011 and January's rent was not paid until January 03, 2012.

The landlord testifies that the tenants have been paying rent into the landlords bank account directly as the tenants did not want to provide post-dated cheques. The landlord testifies that he served the tenants in person with a One Month Notice to End Tenancy for cause on January 03, 2012. This Notice has an effective date of February 29, 2012 and the reason to end the tenancy because the tenants are repeatedly late paying rent. The landlord testifies that the tenants could have given the landlord postdated cheques and could have dropped a cheque to the landlord for January, 2012 rent when the tenants knew the banks would not be open on January 01, 2012.

The landlord orally requests that the One Month Notice to End Tenancy is upheld and seeks an Order of Possession for February 29, 2012.

The tenant testifies that he deducted \$20.00 from their rent for October, 2011 because the landlord was responsible for damaging the tenants tire on his car when the landlord did not clear up roofing nails from the tenants driveway. The tenant testifies that he attempted to contact the landlord who would not answer his phone about the puncture so instead the tenants deducted the cost of repair from their rent. The tenant agrees he

did pay this amount on October 11, 2011 after the landlord served him with a 10 Day Notice.

The tenant agrees he did not pay his rent on December 01, 2011 and states he could not get to the bank in time to deposit the rent into the landlords account. The tenant states he did not think it would be an issue because at the start of the tenancy the landlord agreed that rent could be paid on the first or second day of each month.

The tenant testifies that as the banks were not open on January 01, 2012 he could not deposit his rent into the landlords account until the banks re-opened on January 03, 2012.

The tenant testifies that the landlord would not accept postdated cheques and wanted the tenant to pay his rent directly into the landlords account. The tenants seek to cancel the One Month Notice to End Tenancy.

The tenant testifies that it was the landlord's responsibility to ensure the tenants' driveway was clear of roofing nails after the landlord and/or his contractors did work on the roof next door.

The tenant testifies both he and his neighbor collected a dozen or more roofing nails each from the driveway after the tenants tire was damaged by a nail. The tenant testifies the cost of this tire repair was \$16.80 and the tenant seeks to recover this sum from the landlord. The tenant has provided a receipt from the tire company which states a repair was done and refers to a nail.

The landlord disputes the tenants claim and testifies that the tenant did not notify the landlord that his tire had been damaged by roofing nails until five weeks after it had happened. The landlord states he could have recovered this money from the roofing contractors at the time it occurred as the tenant could have shown that his tire had been

damaged due to their neglect. The landlord states the tenant has not provided evidence to show his tire was damaged as a result of a roofing nail.

Analysis

In this matter the tenant argues that he had a verbal agreement that rent is due on the first or second day of each month. The landlord argues that this is not the case and rent was always due on the first of each month and the landlord has followed this up with a rent increase notification which also states that rent is due on the first of each month and with a breach letter in October, 2011 which notifies the tenants that rent is due on the first day of each month.

The tenant argues that as they had an agreement with the landlord to pay rent into the landlord's bank account that he could not get to the bank on December 01, 2011 and the bank was not open until January 03, 2012, therefore making it difficult to pay rent for these months on the first day. The tenant also argues that he had cause to deduct a portion of his rent for October, 2011.

Section 26 of the Act states: 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 have considered the arguments of both parties and find that the tenants are responsible to pay rent on the first day of each month. A tenant is not entitled to deduct any amount from their rent. I further find the tenants should have been aware that the banks would not be open until January 03, 2012 as this was a Bank Holiday and should therefore have taken this into account and ensured their rent was paid either on the Friday before the Bank Holiday or by cheque to the landlord on the first day of the month. In failing to pay their rent as instructed by the landlord on the first day of each month I find the tenants have been late with their rent on three separate occasions.

Consequently the tenants' application to cancel the One Month Notice to End Tenancy is dismissed.

As the landlord has requested an Order of Possession at the hearing today I find the landlord is entitled to an Order of Possession for February 29, 2012.

With regard to the tenants claim for a Money Order for money owed or compensation for damage or loss; the onus is on the tenant to prove a 4-part test for damages:

1. That the damage or loss exists;
2. That the damage or loss exists as a result of the landlords failure to comply with the *Act* or the tenancy agreement;
3. The amount of such damage or loss; and
4. What efforts the claiming party made to mitigate, or reduce such damage or loss.

I have no evidence before me with respect to the tenants claim that his tire was damaged because of the landlords actions or neglect or what steps the tenant took to mitigate his loss by notifying the landlord that his tire had been damaged in a reasonable time frame so the landlord could have determined if the damage was caused because of the neglect of his contractors in failing to pick up any roofing nails. Therefore, I find that the tenant has failed to satisfy elements 2 and 4, and the tenants' claim for damages cannot succeed and is dismissed without leave to reapply.

As the tenants have been unsuccessful with their claim I find the tenants must bear the cost of filing their own application.

Conclusion

The tenants' application is dismissed. The One Month Notice to End Tenancy for Cause will remain in force and effect.

I HEREBY ISSUE an Order of Possession in favour of the landlord effective on **February 29, 2012** This order must be served on the tenants and may be filed in the Supreme Court and enforced as an order of that Court.

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: January 26, 2012.

Residential Tenancy Branch