Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OPC, FF

Introduction

This hearing dealt with an application by the tenants for an order setting aside a notice to end this tenancy and for an extension of time in which to make their application and a cross-application by the landlord for an order of possession. The tenants participated in the conference call hearing and the landlords did not personally appear but were represented by counsel.

Issue to be Decided

Should the notice to end tenancy be set aside?

Background and Evidence

The parties agreed that the tenants gained possession of the unit on November 25, 2011 and that the unit is one of two self-contained suites on the bottom floor of a residence in which the landlord resides on the upper floor. In their application, the landlords stated that they personally served a one month notice to end tenancy (the "Notice") on the tenants on January 28, 2012. They provided a signed statement from a witness in which the witness stated that he observed the landlords serve the notice to one of the tenants. The tenants claimed that they did not receive the Notice until February 16 when he found it under a garment rack in the entry to the rental unit. The tenants applied to dispute the Notice on February 17.

The Notice alleges that the rental unit must be vacated to comply with a government order. In support of the Notice, the landlords provided a copy of a letter dated January 25, 2012 from the City of Surrey. The letter advises that the city zoning by-laws prohibit more than one secondary suite and that because the residence had 2 secondary suites, the "additional secondary suite(s) are illegal dwelling units." The letters ordered the landlord to remove the secondary suite.

The tenants argued that because the residence has two suites on the lower floor, the landlord could have chosen to close the other rental unit but chose theirs because the

landlord and tenants had experienced some degree of conflict over another issue. The tenants provided evidence that the landlords had been advised in early November that the units were illegal. The tenants entered into evidence letters from the city in which the landlords were advised that they would receive increased utility billings and that a "secondary suite service fee" would be levied against them as it had been discovered that they had a secondary suite. The tenants claimed that the landlords knew or should have known in November that they were not in a position to offer the rental unit for rent as there was a likelihood that it would be ordered to be removed by the City. The landlords' counsel noted that the letter did not order them to close the second suite, but merely advised that properties with secondary suites were subject to additional billings and fees.

The landlord's counsel stated that the landlords had advised him that they had discussed the notice to end tenancy with the tenants, that the tenants had agreed to move out and that the security deposit had been refunded to the tenants on January 29. The landlords entered into evidence a copy of a receipt signed by one of the tenants, acknowledging receipt of the security deposit. The tenants vehemently denied having received the security deposit and testified that they had not received the landlords' evidence. The landlords' counsel stated that the landlords had advised him that they had served the evidence on the tenants.

The landlords' counsel alleged that rent had not been paid for the months of February or March. The tenants' evidence on this point was inconsistent. They first said that they had not paid rent "pending the outcome of this hearing," but later changed their testimony and stated that rent had been paid. Still later in the hearing, one tenant questioned why they should have to pay rent.

At the end of the hearing, the tenants suggested that they had not received the landlords' application for dispute resolution and invited me to look at the online Canada Post tracking system to see that no one had signed for documents. I asked the tenants whether they had received a card from Canada Post advising that registered mail was waiting for them and they insisted that they had not.

Analysis

First addressing the question of whether the tenants have been properly served with the landlords' application for dispute resolution, the landlords' provided with their evidence copies of the registered mail tracking numbers showing that they served the tenants with their application via registered mail on December 20, the same day they filed their application. Section 89 of the *Residential Tenancy Act* provides that service of an application for dispute resolution and notice of hearing via registered mail sent to the

rental unit is an acceptable form of service. During the hearing, no mention was made of registered mail by either myself or the landlords' counsel until the tenants raised the issue. If the tenants had not received the landlords' evidence, they would not have known that the application for dispute resolution and notice of hearing had been sent to them via registered mail as they claim that they did not receive a notice card from Canada Post. It is clear to me that the landlords complied with the service requirements under the Act and served their application via registered mail and it is also clear that the tenants in fact received the landlords' evidence as they would not have known that I had copies of the registered mail tracking information had they not received the evidence. The fact that the tenants chose not to pick up the registered letters does not defeat service as the tenants cannot avoid service by refusing to collect their mail. I find that both the landlords' application for dispute resolution and their evidence was received by the tenants.

The issue of when the tenants received the Notice is crucial. The tenants had 10 days in which to dispute the Notice and if they received it on January 28, they did not file their application within the statutorily prescribed timeframe and are conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice pursuant to section 47(5) of the Act. However, if they received it on February 16 as they claimed, their application was made in time. As their testimony directly conflicts with the evidence of the landlords, it is necessary to make a finding of credibility.

The evidence surrounding the service of the landlords' application for dispute resolution and evidence clearly shows that the tenants lied when they said they did not receive the documents. This together with the inconsistency of their testimonies regarding payment of rent has persuaded me that they are not credible and for this reason, where their evidence conflicts with that of the landlords, I prefer the evidence of the landlords. I find it more likely than not that the tenants received the Notice on January 28 and agreed to move out, accepting the return of their security deposit on January 29.

I find that the tenants did not file their application to dispute the Notice within 10 days. I find that they are conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice. I dismiss their claim for more time in which to file their application as section 66 of the Act only permits me to grant more time where exceptional circumstances have prevented the party from complying with the statutorily prescribed timeframe and I can see no exceptional circumstances here. The tenants' claim is dismissed.

I note that even if the tenants had not received the Notice until February 16, I would have dismissed their claim as the evidence clearly shows that the landlords were ordered by the government to remove one of the suites. Although the City's order did

not specify which suite needed to be removed, I find that the landlords were free to select a suite to close and that they were required to provide no justification as to why they selected this rental unit over the other. Accordingly, I would have upheld the Notice to end tenancy in any event.

The landlords are entitled to an order of possession and I grant an order that is effective 2 days after service. The landlords are also entitled to recover the filing fee paid to bring this application and I award them $50.00.

Conclusion

The tenants' claim is dismissed. The landlords are granted an order of possession and an order to recover the $50.00 filing fee.

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: March 09, 2012

Residential Tenancy Branch