



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, CNC

Introduction

This hearing was convened by way of conference call in response to an application made by the tenants for an order cancelling a notice to end tenancy for unpaid rent or utilities and for an order cancelling a notice to end tenancy for cause.

Both tenants and the landlord attended the conference call hearing and the landlord and one of the tenants gave affirmed testimony. The tenants also called a witness who gave affirmed testimony, and the parties were given the opportunity to cross examine each other and the witness on the testimony given.

The landlord and the tenant provided evidence in advance of the hearing, however an evidence package was provided to the Residential Tenancy Branch by the landlord, but was not provided to the tenants. All evidence, with the exception of the evidence that the tenants have not received has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling a notice to end tenancy for unpaid rent or utilities?

Are the tenants entitled to an order cancelling a notice to end tenancy for cause?

Background and Evidence

This fixed term tenancy began on April 1, 2009 and expired on April 1, 2010 and then reverted to a month-to-month tenancy. Rent in the amount of \$1,200.00 per month is payable in advance on the 1st day of each month and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenants in the amount of \$600.00 which is still held in trust by the landlord.

The landlord testified that the tenants are repeatedly late paying rent. The tenancy agreement, a copy of which was provided for this hearing states that rent is due on the 1st day of each month, but in October, 2011 the tenant paid the landlord \$1,100.00 on October 2 and another \$100.00 on October 4, 2011. For January, 2012, the tenant paid the landlord \$300.00 on January 2 and \$900.00 on January 9. February's rent was paid in 2 instalments of \$640.00 on February 1 and \$560.00 on February 2, 2012. April's rent was also paid in instalments of \$600.00 paid on the 1st of the month and the other \$600.00 on the 5th of April, 2012. The tenant paid rent for the month of May on May 8, 2012 in the full amount of \$1,200.00.

The landlord served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on May 2, 2012 by posting the notice to the door of the rental unit. A copy of the notice was provided for this hearing and it states that the tenant failed to pay rent in the amount of \$1,200.00 that was due on May 1, 2012 and contains an expected date of vacancy of May 15, 2012. The tenant paid the rent in full within 5 days, and the landlord testified that the notice is of no effect.

The landlord also served the tenant with a 1 Month Notice to End Tenancy for Cause and testified that one of the tenants was served personally with that notice on April 30, 2012. A copy of the notice was provided for this hearing and it is dated April 30, 2012 and contains an expected date of vacancy of May 31, 2012. The reasons for ending the tenancy are listed to be: The tenant is repeatedly late paying rent; The tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord; and Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. The landlord testified that the tenants smoke marihuana in the rental unit and provided a journal setting out the events from February, 2012 to May, 2012. The landlord lives in the upper unit in the building and the tenants live in the lower level. The landlord no longer has the ability to enjoy the landlord's portion of the building nor can the landlord have company due to the strong odour. With respect to the breach of a material term of the tenancy, the landlord testified that that had to do with a vehicle parked where it shouldn't have been, but the day the notice was issued, the tenants had the vehicle removed and the breach issue is no longer an issue.

The landlord also provided several notices to end tenancy for unpaid rent dated October 2, 2011, January 2, 2012, February 2, 2012, April 2, 2012, and May 2, 2012 and testified that they were provided to illustrate the continuous late payment of rent. The landlord stated that the tenant continuously told the landlord that a tenant has 5 days to pay the rent after the issuance of the notice to end tenancy.

During the course of the testimony, the landlord asked for a Writ of Possession.

The tenant testified that rent has been late in the past, but only by one day. The parties had a verbal agreement that as long as rent was paid within 5 days, that would be okay due to the tenant's receiving a disability pension. The rent for January, 2012 was late because of Christmas expenses.

The tenant also testified that the landlord was offered rent on April 30, 2012 but the landlord refused it and gave the tenant the 1 Month Notice to End Tenancy for Cause, which is disputed by the landlord. When asked why the landlord would refuse rent on April 30 but accept it on May 8, 2012, the tenant stated that the landlord accepted it on May 8, 2012 because a witness was present.

The tenants' witness testified that the landlord was served with the Tenant's Application for Dispute Resolution and was paid rent in full for the month of May, 2012 on May 8, 2012.

Analysis

The *Residential Tenancy Act* states that a tenant must pay rent when it is due under the tenancy agreement. A copy of the tenancy agreement was provided for this hearing and it states that rent is due on the 1st day of each month.

The *Act* also states that if a tenant fails to pay rent when it is due the landlord may issue a notice to end tenancy. Once served the tenant has 5 days to pay the rent in full, in which case the notice is of no effect, or dispute the notice. If the tenant does neither, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, which must be at least 10 days after the tenant is served, or deemed served with the notice. In this case, I am satisfied that the tenants paid the rent in full within 5 days of service with respect to most of the notices, and the landlord agrees. The tenants have disputed the notice to end tenancy issued on May 2, 2012, and the landlord agrees that the tenants paid the rent for that month within 5 days of service, and therefore, the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities issued on May 2, 2012 is of no effect and is hereby cancelled.

With respect to the 1 Month Notice to End Tenancy for Cause, I am not satisfied in the circumstances that the landlord has proven any breach of a material term of the tenancy or that the tenants have engaged in illegal activity that has adversely affected the quiet enjoyment, security, safety or physical well being of another occupant or the landlord. The landlord testified that the odour of marihuana prevents the landlord from having

company, but that has been disputed by the tenant who stated that neither tenant smokes inside the rental unit. However, the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent. Further, I refer to Residential Tenancy Policy Guideline #38 – Repeated Late Payment of Rent – which states that: “Three late payments are the minimum number sufficient to justify a notice under these provisions. It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late.”

In this case, the tenants did not dispute the testimony of the landlord that rent for the month of October, 2011 was not received in full until October 4, 2011; January, 2012 rent was not paid in full until January 9, 2012; February, 2012 rent was paid on February 2, 2012; and April, 2012 rent was paid in full on April 5, 2012. The tenant testified to attempting to pay May’s rent on April 30, 2012, which is disputed by the landlord, but the parties agree that 4 payments in 7 months have been late.

I have also examined the 1 Month Notice to End Tenancy for Cause, and I find that the notice is in the approved form and contains sufficient information and is lawful. Although I do not find that the landlord has established all three reasons set out in the notice, I find that the landlord has established more than 3 late rent payments in a 7 month period. With respect to the tenant’s testimony that the parties had a verbal agreement that rent could be paid by the 5th day of the month, the landlord has disputed that testimony and the onus is on the tenants to prove that agreement. I find that the tenants have failed to establish that any such agreement was made by the parties.

The *Act* also states that I must grant an Order of Possession of the rental unit to the landlord if, at the time of the hearing, the landlord makes an oral request for an Order of Possession and the landlord’s notice is upheld. The landlord requested such an order at this hearing.

Conclusion

For the reasons set out above, the tenants’ application to cancel a notice to end tenancy for unpaid rent or utilities is hereby allowed and the notice is hereby cancelled.

The tenants’ application for an order cancelling a notice to end tenancy for cause is hereby dismissed without leave to reapply.

I hereby grant an Order of Possession in favour of the landlord effective May 31, 2012.

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: May 29, 2012.

Residential Tenancy Branch