



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FF

Introduction

This hearing dealt with the tenants' application to cancel a Notice to End Tenancy for Unpaid Rent. Both parties appeared at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

The tenants had served the landlord with their Application for Dispute Resolution via registered mail sent to the landlord's service address as it appears on the Notice to End Tenancy. The landlord testified that she never received the tenants' application as the registered mail was returned before she could pick it up. The landlord acknowledged that she provided the tenants with a service address where she no longer lives.

Upon learning of the hearing the landlord submitted late evidence to the Residential Tenancy Branch but not to the tenant.

I was satisfied the tenants acted reasonably in serving their application upon the landlord using the service address she provided them and I proceeded with the hearing. I did not accept the landlord's late evidence as it was not served upon the tenants and the reason for it being late was due to circumstances within the landlord's control. The landlord was cautioned that it is her responsibility to check for mail at a service address she provides to the tenants.

On another note, I did not have a copy of the Notice to End Tenancy before me. The tenant was adamant that she provided to the Government Agent's office but acknowledged it was not served upon the landlord. The landlord did not provide a copy of the Notice either. I provided both parties the opportunity to provide and confirm the content of the Notice to End Tenancy. The content of the Notice was undisputed and I proceed to consider whether there is a basis to cancel the Notice.

Issue(s) to be Decided

Should the Notice to End Tenancy for Unpaid Rent be upheld or cancelled?

Background and Evidence

I was provided undisputed information that the tenancy commenced in 2000 and the tenants paid a \$500.00 security deposit. The tenants are required to pay rent of \$1,000.00 on the 1st day of every month. Up until earlier this year the tenants paid rent in cash and the landlord did not issue receipts. In recent months the tenant has been directly depositing payments into the landlord's bank account, including \$1,000.00 for May 2012 rent.

On May 4, 2012 the landlord personally served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent (the Notice) with an effective date of May 14, 2012. The Notice indicates that the tenants failed to pay rent of \$675.00 on May 1, 2012. The landlord also noted on the Notice that \$1,000.00 would be returned to the tenants upon vacating the rental unit.

The landlord submitted that the amount appearing on the Notice represents rental arrears from 2008, 2009 and 2010 that total \$540.00 plus six late fees of \$25.00 each, plus \$50.00 compensation for a banking error for a total amount of \$740.00. However, during a conversation with the tenant on April 22, 2012 the landlord agreed to accept \$675.00 from the tenants on May 1, 2012. The tenants failed to pay the \$675.00 as agreed and the landlord issued the Notice to End Tenancy.

The landlord acknowledged that the written tenancy agreement is the standard agreement, as provided by the Residential Tenancy Branch, without an addendum for late fees.

The tenant submitted that they have never been provided a ledger or an accounting of the arrears although in 2010 the tenants had agreed to construct a flower bed in exchange for approximately \$500.00 in arrears. The flower bed was not constructed by the tenants as the landlord's husband and son undertook the work themselves.

The tenant claimed that prior to hearing the landlord's testimony at the hearing the tenants were uncertain as to how the landlord determined the rental arrears. Nor have the tenants been provided an opportunity to verify the landlord's calculations especially considering they have not received receipts for the cash payments or a ledger.

The tenant further submitted that she had agreed to pay the landlord \$675.00 to keep the tenancy going but that she could not obtain the funds on May 1, 2012. When the tenant offered to pay the landlord the funds on May 4, 2012 the landlord told the tenant it was too late.

The landlord made submissions that she has been taken advantage of by the tenants and that she wants the tenancy to end. The landlord also indicated she wanted to sell the property and could not do so with the stress associated to this tenancy.

The tenant was of the position they have been tolerant with the landlord and have endured a lack of a shower and done caretaking of the property without compensation.

Analysis

Where a tenant fails to pay rent owed to the landlord in accordance with the terms of the tenancy agreement or Act, the landlord may issue a 10 Day Notice to End Tenancy for Unpaid Rent. Upon receipt of such a Notice the tenant has five days to pay the outstanding rent to nullify the Notice. The landlord must not refuse payment. In this case, the tenant asserted that she offered to make payment but the landlord refused. However, I reject the tenant's position since I find no compelling evidence that the tenant could not have deposited the funds into the landlord's bank account just as she had done for previous rent payments.

Alternatively, upon receipt of a 10 Day notice the tenant may dispute the Notice within five days of receiving it, which is what the tenant did in this case. Accordingly, I have considered whether the landlord has issued a valid and enforceable 10 Day Notice.

Based upon the landlord's own testimony I find the tenants do not owe the landlord \$675.00 in rent. The landlord's own submission was that the tenants owed \$540.00 in rent.

As the landlord was informed at the hearing, late fees may be collected if the tenancy agreement provides for such a provision. Since the written tenancy agreement contains no provision for payment of such fees the landlord is not entitled to collect late fees from the tenants. Nor is the landlord entitled to other compensation from the tenants related to banking errors.

While the tenant may have agreed to pay the landlord \$675.00 during a conversation on April 22, 2012 such an agreement is not enforceable under the Act. Pursuant to section 5 of the Act, parties cannot agree to contract or avoid the Act. Further, section 6

provides that any term contrary to the Act is unenforceable. Therefore, the tenant's agreement to pay fees for which the landlord is not entitled to collect is unenforceable.

For the above reasons, I find the 10 Day Notice to End Tenancy issued May 4, 2012 is invalid as it is not based upon the rent owed by the tenants. Rather, it is based upon a greater amount that is not compliant with the Act. Therefore, I cancel the Notice and the tenancy continues.

Upon hearing from both parties, I accept that the tenants likely owe and likely knew that they owed some arrears to the landlord since they had offered to construct a flower bed in 2010. However, given the lack of receipts for cash payments, the lack of a ledger or accounting of the arrears, and the amount of time that has elapsed since the arrears originated I accept that the tenants have not been provided the opportunity to verify the landlord's calculations. I accept that the landlord's actions have put the tenants at a disadvantage. Therefore, I ORDER the landlord to provide the tenants with a ledger or accounting of the rental arrears and provide them the opportunity to satisfy the arrears before issuing another 10 Day notice for such arrears.

As the tenants were successful in this application I award the filing fee to the tenants. The tenants are authorized to deduct \$50.00 from rent payable to the landlord.

Conclusion

The Notice to End Tenancy issued May 4, 2012 has been cancelled and the tenancy continues. The tenants are authorized to recover the filing fee paid for this application by deducting \$50.00 from rent payable to the landlord.

The landlord has been ORDERED to provide the tenants with a ledger or accounting of the rental arrears and provide them the opportunity to satisfy the arrears before issuing another 10 Day notice for such arrears.

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 31, 2012.

Residential Tenancy Branch