



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, O

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 cause. The tenants' application further requests an order that the landlord make repairs to the unit, site or property.

Both tenants and an agent for the landlord company attended the conference call hearing, and the tenants were represented by an advocate. The parties gave affirmed testimony and provided evidence in advance of the hearing to the Residential Tenancy Branch and to each other. A portion of the evidence provided by the tenants was not received by the landlord or by the Residential Tenancy Branch within the time provided for in the Residential Tenancy Branch Rules of Procedure, however the landlord's agent did not oppose inclusion of that evidence, so long it is limited to evidence relevant to the tenants' application for an order cancelling a notice to end tenancy for cause. The parties agreed to that, and I find that all evidence provided should be considered in this Decision.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling a notice to end tenancy for cause?
Are the tenants entitled to an order that the landlord make repairs to the unit, site or property?

Background and Evidence

This month-to-month tenancy began on July 19, 2010 and one of the tenants still resides in the rental unit. Rent in the amount of \$706.00 is currently payable each month, and the landlord collected a security deposit at the outset of the tenancy in the amount of \$342.50. The rental unit is an apartment in a complex containing 23 rental units, and the landlord's agent and spouse are resident managers of that complex.

The landlord's agent testified that the tenants have been continually late paying rent, having received 13 late rent payments since the beginning of the tenancy. As property managers, the landlord's agent and spouse have advocated for the tenants to not be evicted. A review came up and the property management company decided to issue the tenants with a notice to end tenancy for repeated late rent payments.

The landlord's agent referred to the tenancy agreement, a copy of which was provided by the tenants, which states that rent is payable on the 1st day of each month. A one-page addendum to the tenancy agreement is attached which contains additional terms marked (a) to (h). Paragraph (g) allows the landlord to charge a \$25.00 late fee for any rent payments received after the 5th day of each month. The paragraph in the addendum states as follows: "(g) Rent received after the 5th – including postdated cheques – will be considered late and are subjected to a \$25 late charge." The landlord's agent further stated that the tenant was well aware that rent was due on the 1st day of each month, and a notice is also posted in the laundry room of the complex that rent is due on or before the first day of each month, and the sign was posted there about a year ago.

The landlord's agent also testified that the tenants made late rent payments to the landlord on the following dates: January 5, 2011; February 5, 2011, March 4, 2011, April 5, 2011, May 5, 2011, June 5, 2011, July 6, 2011, September 3, 2011, October 7, 2011, November 4, 2011 and May 4, 2012.

The landlord's agent also testified that one of the tenants receives assistance from the government and that portion of the rent is paid directly to the landlord by the government. The other tenant pays the other half of the rent from the tenant's earnings. The landlord's agents tried to counsel the tenants to pay early on the payday before rent is due, but the tenant who pays rent from earnings replied that other bills needed to be paid out of that payday. The landlord's agents suggested that the tenant obtain a money order on that payday before the beginning of the month and also suggested that the tenants provide the landlord's agents with post-dated cheques, which the tenants declined to do. On May 4, 2012 the landlord's agents again advocated for the tenants but the head office of the landlord company would not allow the landlord's agents to advocate for the tenants any longer and a 1 Month Notice to End Tenancy for Cause was issued. A copy of that notice was provided by the tenants in advance of the hearing, and it is dated May 15, 2012 and contains an expected date of vacancy of June 30, 2012. The reason for issuing the notice is stated to be that the tenant is repeatedly late paying rent. The landlord's agent testified that although the notice is dated May 15, 2012, the tenants were served with the notice the day before, or May 14, 2012, by posting it to the door of the rental unit on May 14, 2012.

When asked if the landlord had ever issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, the landlord's agent replied that one was issued on January 2, 2012, but the tenant paid the rent within 5 days. It was not mentioned previously as a month that rent was late because the late rent was the portion paid by the government, not by the tenant.

When asked about paragraph (g) in the addendum to the tenancy agreement, the landlord's agent responded that all tenancy agreements have the same addendum and the landlord company has never had a dispute resolution proceeding where it was questioned, although no evidence of that has been provided, nor did the landlord's agent elaborate any further.

The tenant who is no longer resident in the rental unit testified that the other tenant had vacated the rental unit for about a week and then returned. The landlord's agent agreed to the return of the tenant, but said that the tenancy was no longer in that tenant's name.

The tenant further testified that everything that the landlord's agent testified to is a lie. The tenants were not served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities in January, 2012. The tenants usually deal with the spouse of the landlord's agent who told the tenants about a year ago that the 5 days was a grace period and after that a \$25.00 late fee would be applied. Further, the sign went up on the laundry room about 4 to 6 months ago.

The tenant further testified that the portion of rent paid by the government is always paid on time. Copies of rent receipts were also provided in advance of the hearing.

The other tenant testified that rent was late since starting a new job. June 1, 2012 was a payday and rent was paid that day. The tenant also got paid on April 20, 2012 but paid other bills.

The advocate for the tenants made submissions during the hearing, stating that paragraph (g) in the addendum to the tenancy agreement is an ambiguous statement and the tenants considered they had until the 5th of the month to pay rent. The only rent payments that were beyond the 5 day grace period were on August 11, 2010, January 20, 2011, July 6, 2011 and October 7, 2011.

The advocate also submitted that page 2 of the notice contains information for landlords which states that, "For repeated late rent payment, you can give this Notice any time after the third occurrence. However, if the occurrences were far apart, a Dispute

Resolution Officer may decide that, in the circumstances, the tenant cannot be said to be “repeatedly late.”

Analysis

Firstly, with respect to the tenancy agreement, I find that the addendum forms a part of that agreement, and paragraph (g) is an ambiguous term. Section 13 of the *Residential Tenancy Act* sets out the requirements for tenancy agreements, which includes setting out the day in the month, or in the other period on which the tenancy is based, on which the rent is due. Section 12 of the Residential Tenancy Regulations states that:

12 (1) A landlord must ensure that a tenancy agreement is

- (a) in writing,
- (b) signed and dated by both the landlord and the tenant,
- (c) in type no smaller than 8 point, and
- (d) written so as to be easily read and understood by a reasonable person.

The tenant testified that the spouse of the landlord’s agent told the tenant that a 5 day grace period is allowed. The landlord’s agent testified that the tenants were well aware that rent is due on the 1st of each month and that at least one of the tenants was counselled by the landlord’s agent to attempt to collect rent on the 1st day of each month. The onus is on the landlord to prove the claim, and where the tenant disputes the landlord’s testimony, the landlord must be able to provide evidence. The landlord’s agent did not call the spouse to rebut the testimony of the tenant that the tenants were told about the 5 day grace period.

In my opinion, the paragraph stipulates that rent is not considered late until after the 5th of the month.

The tenant admitted to paying rent on August 11, 2010, January 20, 2011, July 6, 2011 and October 7, 2011, all of which are beyond the 5th day of the month. I refer to Residential Tenancy Policy Guideline #38 which states that 3 late payments are the minimum number sufficient to justify the issuance of a notice to end tenancy for repeated late rent payments. It also states that, “... if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late.” If I were to follow that guideline, I must consider that the August 11, 2010 late payment doesn’t count, but the other 3 late payments ought to count because they were not far apart, but are all within a 10 month period. The guideline also states: “A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.” In this

case, the notice to end tenancy was served on May 15, 2012. The landlord's agent testified that the tenant was late again with the rent in May, 2012, having paid on May 5, 2012, and taking the position that rent was due on the 1st day of each month, as the landlord's agent obviously believed, I cannot find that the landlord failed to act in a timely manner after the most recent late payment.

I have also reviewed the notice to end tenancy issued by the landlord, and I find it is in the approved form, contains accurate information, and ought to be upheld. The tenants' application to cancel the notice to end tenancy is hereby dismissed.

During the course of the hearing the parties were advised that if the notice to end tenancy is upheld, the tenants' application for repairs to the unit would be dismissed, and I find it prudent to dismiss that claim.

Conclusion

For the reasons set out above, the tenants' application is hereby dismissed in its entirety without leave to reapply.

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: June 18, 2012.

Residential Tenancy Branch