



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPR, MNR, MNSD, O, FF
Tenant: CNC, FF

Introduction

This hearing dealt with the cross Applications for Dispute Resolution. The landlord sought an order of possession and a monetary order and the tenant sought to cancel a notice to end tenancy. The hearing was conducted via teleconference and was attended by the landlords; their agent; the tenant and his witness.

At the outset of the hearing the parties clarified the tenant was still in possession of the rental unit. As such, I find the portion of the landlord's Application for Dispute Resolution claiming for damage to the rental unit to be premature and dismiss that portion with leave to reapply.

As the landlord had issued two notices to end tenancy on the same date and since the tenant applied to cancel only one of the notices and the landlord had only applied to cancel the other notice I offered for both parties to amend their respective Applications to include the notice that they had not applied against.

The landlord confirmed he wished to include seeking an order of possession based on either the 1 Month Notice to End Tenancy for Cause or the 10 Day Notice to End Tenancy for Unpaid Rent. The tenant chose only to dispute the 1 Month Notice to End Tenancy for Cause.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession for unpaid rent or for cause and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 46, 47, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

It must also be decided if the tenant is entitled to cancel a 1 Month Notice to End Tenancy for Cause and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 47, 67, and 72 of the *Act*.

Background and Evidence

The parties agree the tenancy began in 2004 and is a month to month tenancy for the current monthly rent of \$950.00 due on the 7th of each month with a security deposit of \$437.50 paid. The landlord submits the tenancy began in April 2004 and the tenant submits it began in May 2004.

The landlord submitted into evidence the following documents:

- A copy of a 1 Month Notice to End Tenancy for Cause dated and signed by the landlord on July 12, 2012 with an effective date of August 15, 2012 citing the tenant is repeatedly late paying rent; the tenant has caused extraordinary damage to the unit/site or property/park; and the tenant has not done required repairs of damage to the unit/site; and
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent dated and signed by the landlord on July 12, 2012 with an effective vacancy date of July 25, 2012 citing the tenant had failed to pay rent in the amount of \$950.00 that was due on July 7, 2012.

The landlord submits that over the course of the tenancy the tenant had provided the landlord with 7 cheques that had been returned as insufficient funds for which the tenant later paid the rent in full as follows: December 2008; May 2009; February and October 2010; June and August 2011; February 2013. The landlord provided bank statements showing both the deposit of these cheques and the reversals and copies of the returned cheques into evidence.

The landlord also submits that the tenant has been late when making cash rental payments for all of the months of 2012 and that the February 2012 rent was by cheque initially; returned as insufficient funds; and subsequently paid in cash.

The parties agree the tenant provided the landlord with post dated cheques. However, the tenant submits that on some occasions, if he had not been able to get to the bank to deposit his funds in time to honour the rent cheque he would pay the landlord in cash on the day it was due and that the landlord has not returned any of his cheques to this date, other than the copies provided into evidence or provided any receipts for cash payments.

The landlord submits that the tenant would call and ask for the landlord to not cash one of his cheques and that it would likely be several days after rent was due that the tenant would provide the landlord with cash for the rent payments. The landlord submits that this is confirmed by the copies of voided cheques for the material months and that some of the voided cheques indicate the date the cash payment was made.

The landlord also submits that the bank statements submitted confirm the landlord's practice to deposit the tenant's rent payments on the date received or at least within 1 day of receiving the payment.

The landlord submits that in May 2012 the landlord had identified to the tenant that the landlord's daughter was going to be moving into the rental unit. The tenant submitted a copy of a letter from the landlord dated May 31, 2012 advising the tenant the tenancy would end on June 30, 2012.

The tenant submits also that once the landlord found out there is a requirement for a 2 month notice to end the tenancy for landlord's use and for compensation to the tenant of 1 month's rent the landlord changed the reasons for ending the tenancy.

The landlord submits that because the tenant had not allowed the landlord access to the rental unit for at least 2 years, it was not until the tenant allowed the landlord access to the rental unit for an inspection on July 10, 2012 that the landlord's daughter and her family decided they could not live in the rental unit due to its condition.

The landlord submits that the major problem is that cat urine has contaminated the carpets and walls of the unit and the odour makes the unit unsuitable for their family members to occupy. The landlord also submits the unit is unsanitary, which may be contributing to some breathing problems the landlords have been having (as they live upstairs).

The landlord provided several photographs of the rental unit showing substantial clutter. For example in one photograph of the kitchen there appears to be only the stove top and one small area of countertop left available for use and the rest of all services including cupboards; tables; chairs; even the windowsills are covered with items.

The tenant has also submitted several photographs showing the condition of the rental unit in a substantially different condition. The photographs show a rental unit that has been clean up significantly.

The tenant submitted that the reason the condition was as it was when the landlord inspected was that he did not have time to clean up and that part of that clean up included removing several boxes that he contained items of both his and his ex-girlfriend that had to be gone through before removing. The couple broke up about 4 years ago.

The tenant's witness testified to the condition of the rental unit at the time that she left the unit herself over 4 years ago and confirmed that she had no knowledge of the current condition of the unit.

The landlord submits that in September 2011 they discussed with the tenant a number of issues they wanted him to deal with such as cleaning the rental unit; cleaning and/or replacing the carpeting; and the problems with accepting rent on the 7th of each month. The landlords confirmed in their testimony that they never presented these issues in writing to the tenant after their initial discussions regarding the repairs. The tenant testified that he doesn't understand what repairs the landlord wants him to make and that the landlord refuses to specifically identify any things that need repairing.

The parties agree that on July 10, 2012 the landlord provided a typewritten document to the tenant intended to be a mutual agreement to end the tenancy. The agreement sets out that landlord will forgo the payment of rent for the month of July 2012 and the tenant will move out the rental unit no later than July 31, 2012 and if the tenant does not move out the rent will be payable immediately.

The tenant submitted that he did not sign this agreement at the time because he wanted to check with the Residential Tenancy Branch to seek advice on the agreement. The tenant indicated it took him a couple of days to get in touch with anyone at the Branch and then he was not staying in his rental unit for a few days and by the time he returned on July 15, 2012 the landlord had issued the 10 Day Notice to End Tenancy.

The landlord testified the 10 Day Notice was served to the tenant on July 12, 2012 by posting it on the rental unit door.

The parties agree the tenant paid the landlord \$700.00 in cash on July 20, 2012 and on the same date provided the landlord with a post dated cheque (August 1, 2012) for \$250.00. The tenant submits that because he thought he would be having an agreement with the landlord that he would not have to pay rent he used his rent money to move items into storage and had to arrange to get more money to pay the rent.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- a) The tenant is repeatedly late paying rent;
- b) The tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to the rental unit or residential property; or
- c) The tenant does not repair damage to the rental unit or other residential property, as required under section 32(3), within a reasonable time.

Residential Tenancy Policy Guideline 38 states that three late payments are the minimum number of late payments sufficient to justify a notice to end tenancy for this cause. The guideline goes on to say that a landlord who fails to act in a timely manner after the most recent late rent payment may be considered to have waived their reliance on this provision.

While the landlord indicates that the tenant has been late every month in 2012 for which most of those months were paid in cash the tenant has disputed the landlord's claim. I find the provision of the landlord's banking statements showing the landlord's pattern of depositing rent payments the same day or shortly after is not sufficient evidence to establish when the landlord actually received the payment.

In addition, the landlord has not issued to the tenant any receipts for rent paid by cash. Not only is the provision of receipts an obligation the landlord has under Section 26(2) of the *Act*, it would provide a record to both parties at the time of the payment confirming when that payment was received. I also find that voiding a cheque and dating it with the date of receipt but not providing any record to the tenant of the receipt is insufficient to establish any of the cash payments were late.

As to the cheques that were returned to the landlord as insufficient funds, I note that the last time that occurred was in February 2012, as such and in accordance with Guideline 38, I find the landlord failed to act on this issue in a timely manner and has therefore waived reliance on this provision.

In relation to the landlord's assertion the tenant caused extraordinary damage to the rental unit, the landlord asserts that the cat urine has caused substantial damage to the rental unit. However, from the evidence provided by the landlord, at the time of the inspection the entire rental unit was completely cluttered and I find it would be, based on the balance of probabilities, very difficult to get an accurate assessment of the extent of the damage or what the appropriate remediation would be.

Further the landlord's own submission of an email from a carpet cleaner dated August 3, 2012 suggests that the tenant needs to be vacated to assess the damage. As the tenant submits he has cleaned up the rental unit, including litter boxes, and from the tenant's photographs it appears that a more accurate assessment may now be possible but at the time of the issuance of the notice I find the landlord cannot establish sufficient damage to warrant ending the tenancy.

As to the landlord's assertion that they had requested the tenant make repairs to the unit and that he had not made these repairs in a reasonable time I find the landlord has failed to provide sufficient evidence that the tenant was informed of any required repairs in September 2011 and even if there was, there is no evidence that the landlord followed up in a timely fashion sufficiently to rely upon this cause 11 months later to end the tenancy. For these reasons, I find the landlord has failed to establish sufficient cause to end the tenancy in accordance with Section 47.

Section 46 of the *Act* allows a landlord to end a tenancy if rent is unpaid on any day after the day it is due by giving the tenant notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

Section 46(4) goes on to say that within 5 days of receiving such a notice the tenant may pay the overdue rent, in which case the notice has no effect or dispute the notice by making an application for dispute resolution.

Section 46(5) states that if a tenant who receives a notice under Section 46 does not pay the rent in full or file an application for dispute resolution within 5 days the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date.

I note the tenant filed his Application to dispute the landlord's notice for cause on July 25, 2012 and did not dispute the notice for unpaid rent. However, even if the tenant had applied to cancel the notice for unpaid rent it would have been 5 days after he would have been allowed to dispute the notice as he received it on July 15, 2012.

As such, by not filing an Application to dispute the 10 Day Notice by July 20, 2012 the tenant had until that date to pay the rent in full. I accept the parties agree the tenant paid \$700.00 in cash on July 20, 2012 and provided a cheque dated August 1, 2012. The provision of a cheque will only constitute payment received once the cheque is negotiable. As the cheque provided was dated August 1, 2012, I find the tenant failed to pay the full rent by July 20, 2012.

Therefore, I find the tenant failed to pay the landlord with the rent in full within 5 days of receiving a 10 Day Notice to End Tenancy for Unpaid Rent and in accordance with Section 46(5) the tenant is conclusively presumed to have accepted the tenancy would end.

Conclusion

I find the landlord is entitled to an order of possession effective **two days after service on the tenant**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

As both parties were successful in their Applications I dismiss both requests to recover the filing fee for their respective Applications.

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: August 23, 2012.

Residential Tenancy Branch