



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC

Introduction

This hearing was convened by way of conference call in response to an application made by the tenant for an order cancelling a notice to end tenancy for cause and for an order that the landlord comply with the *Act*, regulation or tenancy agreement.

The tenant and an agent for the landlord company attended the conference call hearing, and both parties gave affirmed testimony and provided evidentiary material in advance of the hearing to each other and to the Residential Tenancy Branch. The tenant also called a witness who gave affirmed testimony. The parties were given the opportunity to cross examine each other and the witness on the testimony and evidence provided, all of which has been reviewed and is considered in this Decision.

No issues with respect to service or delivery of documents or evidence were raised.

Issue(s) to be Decided

Is the tenant entitled to an order cancelling a notice to end tenancy for cause?
Is the tenant entitled to an order that the landlord comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

The landlord's agent testified that this month-to-month tenancy began on September 1, 1997 and the tenant still resides in the rental unit. Rent in the amount of \$815.80 per month is currently 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 tenant in the amount of \$375.00 which is still held in trust by the landlord.

The landlord further testified that an application for an Order of Possession and monetary order was made by the landlord by way of a Direct Request Proceeding. The landlord had served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and the tenant begged the landlord to withdraw the notice. The landlord told

the tenant that it would be cancelled if the tenant paid the rent in full and if the tenant paid the \$50.00 filing fee for that Direct Request Process and some other associated costs, being the cost of a registered mail package, the landlord's agent's time, gasoline and the cost of the toll bridge, bringing the request to \$90.00. The conversation was verbal only and nothing was put in writing, but the tenant paid the rent in full on September 19, 2012. The landlord did not collect the other money that the landlord had requested from the tenant, but the landlord did not pursue the application for an Order of Possession because the landlord did not issue a receipt marked "For Use and Occupancy Only," and feared the tenancy had been reinstated as a result. The Decision of the Direct Request proceeding was a dismissal of the landlord's application with leave to reapply.

The landlord's agent further testified that the tenant was late with rent for the months of July, August and September, 2012, having paid July's rent on July 9 by depositing it into the landlord's account, August's rent on September 12 by depositing it into the landlord's account, and September's rent on September 19, 2012. The landlord collected September's rent and deposited that rent money into the landlord's account.

The landlord's agent served the tenant with a 1 Month Notice to End Tenancy for Cause on October 6, 2012 by personally handing the notice to the tenant's son, who resides with the tenant and is aged 21. A copy of the notice was provided for this hearing, and it is dated October 6, 2012 and contains an expected date of vacancy of November 30, 2012. The notice states that the tenant is repeatedly late paying rent.

On the same date, October 6, 2012 the landlord's agent served the tenant with a notice of rent increase and testified that if the landlord is not successful with the notice to end tenancy, the rental increase will take effect.

The tenant testified that the tenant called the landlord's agent and advised that rent for the month of July, 2012 would be late and the landlord's agent stated that it was not a problem and that no late fees would be charged. The same situation happened in August, 2012 and September, 2012, and again the landlord's agent told the tenant that it was okay and that no late fees would be charged. The tenant paid what was owing for September on September 19, 2012 at which time the landlord's agent stated that the tenant had to pay an additional \$110.00, being costs associated with the landlord's attempt to evict the tenant, \$50.00 for the filing fee and the landlord's time and gas money.

On October 10, 2012 the landlord's agent left a voice message for the tenant which was transcribed for this hearing. The landlord has admitted to the transcript, which shows that the landlord's agent asked the tenant for more money and stated that if the tenant didn't pay it, the landlord's agent would increase the rent by 4%.

Rent for October and November, 2012 were paid on time.

The tenant feels that the landlord had stated that the late rent for those months was okay but only issued the 1 Month Notice to End Tenancy because the landlord did not recover the fees that the landlord asked the tenant for on September 19 and on the phone message on October 10, 2012.

The tenant's witness testified to hearing the voice message of the landlord's agent over and over again and testified that the tenant and the tenant's witness prepared a transcript of the message.

Prior to the end of the hearing, the landlord's agent disconnected from the conference call hearing without announcement.

Analysis

I have reviewed the evidentiary material provided by the parties, and it is clear that the landlord applied for an Order of Possession and a monetary order for unpaid rent declaring that the tenant was served with the Notice of Direct Request Proceeding on September 14, 2012 by registered mail. The Decision, a copy of which was provided by the tenant for this hearing, states that the tenant was served with a 10 Day Notice to End Tenancy for Unpaid Rent personally on September 4, 2012. The Decision is dated September 20, 2012 and dismisses the landlord's application with leave to reapply due to the amount of rent claimed by the landlord, which was determined to be inconsistent with the tenancy agreement. That application stated that the amount due for rent as of September 13, 2012 was \$515.60 instead of the monthly amount of \$750.00 because the landlord had raised the rent since the tenancy agreement was created and the tenant had paid \$326.00 on September 12 and \$200.00 on September 5, 2012.

The tenant does not dispute that rent was late for the months of July, August and September, but stated that in each case, the tenant advised the landlord's agent in advance that rent would be late and each time the landlord's agent indicated that it was not a problem and no late fees would be charged. That testimony was not disputed by the landlord's agent.

The parties also agree that the landlord's agent told the tenant on more than one occasion that the landlord's agent expected the tenant to pay fees that I find the landlord was not entitled to and the tenant did not pay. The tenant's position in this regard is that the landlord's agent issued the notice to end tenancy because the tenant failed to pay the additional fees. However, the tenant also testified that the voice message of the landlord's agent was left on October 10, 2012, which states that if the tenant doesn't pay the extra fees, the landlord would be issuing a rent increase by 4%, but that rent increase had already been issued to the tenant on October 6, 2012.

I refer to Residential Tenancy Policy Guideline 38 which deals with repeated late rent, and that guideline states that 3 late payments are the minimum number sufficient to justify a notice to end tenancy for repeated late rent. It is not conclusive that if a tenant is late with rent 3 times the landlord is automatically entitled to end a tenancy, but if the notice to end tenancy is disputed by the tenant, the onus is on the landlord to prove repeated late rent. The guideline also states that: "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," meaning it is discretionary to a dispute resolution officer. Neither of the parties gave any testimony about past rent payments, and the tenancy began in 1997. The tenant has not paid rent late for the last 2 months.

The landlord had the ability to re-apply for an Order of Possession after receiving the Decision following the Direct Request process but stated that the tenant paid the rent and the landlord's agent didn't issue a receipt that stated that the money was being received for Use and Occupancy only, and therefore, the tenancy may have been reinstated. Further, I find that the parties had an agreement about rent being late for those months because the landlord's agent told the tenant it was not a problem and the landlord did not cause the tenant to pay any late fees.

In the circumstances, I agree with the tenant; the landlord issued the notice to end tenancy for repeated late rent because the tenant didn't pay the extra fees that the landlord asked for. The landlord was not entitled to those fees from a tenant; those fees are payable to a landlord's agent by the landlord company or the owner of the rental unit. I further find that a 3 month hic-up over a 15 year tenancy does not necessarily prove repeated late rent.

Conclusion

For the reasons set out above, the notice to end tenancy is hereby cancelled and the tenancy continues.

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: November 09, 2012.

Residential Tenancy Branch