



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Landlord: OPC, MNDC, FF
Tenants: CNC, MNDC, OLC, OPT, RR, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution. The landlord sought an order of possession and a monetary order. The tenants sought to cancel a notice to end tenancy; an order of possession; and an order to allow the tenants to reduce rent.

The hearing was conducted via teleconference and was attended by the landlord and both tenants. The landlord had arranged to have witnesses available for the hearing but they were not called to provide any testimony. During the reconvened hearing we heard the testimony of one of the landlord's witnesses.

At the outset of the hearing the tenants confirmed that they were seeking an order of possession. They explained that they were living in the rental unit but that they did not want to give possession back to the landlord. I explained that as they are currently living in the rental unit they, in fact, have possession and there is no need for them to obtain an order of possession. I amend their Application to exclude this matter.

The parties agreed that when the tenants provided the landlord with their Application for Dispute Resolution in December 2012 the documents they included were the Application; the Notice of Hearing documents and factsheets they were required to serve.

The tenants' Application outlined a monetary claim for \$12,918.61 but provided no details as to what the compensation was for on the Application form, rather they noted that the details were in attached paperwork. While the tenants provided the attached paperwork to the Residential Tenancy Branch (RTB) when they applied they did not provide the attached paperwork to the landlord when they served the other documents.

The landlord was not served these details until the tenants served the landlord with their complete 227 evidence package on January 10, 2013 contrary to the requirement, under the RTB Rules of Procedure to serve the respondent with evidence at least 5 days prior to the hearing. At least 5 days, does not include weekends; the date the documents were served; or the date of the hearing.

The parties also agreed the landlord had failed to provide the tenants with a copy of his amended Application for Dispute Resolution. The landlord confirmed the amendment was an increase in the amount of his monetary claim.

For these reasons and pursuant to Rule 2.3 of the RTB Rules of Procedure I find that the monetary matters should be dismissed from both Applications for Dispute Resolution as they are sufficiently unrelated to the matter of ending of the tenancy. I dismiss both parties' monetary claims with leave to reapply under separate future applications.

The landlord confirmed that despite providing 7 additional pages of evidence to the RTB on January 14, 2013 he did not provide this additional evidence to the tenants. As a result, I informed the parties that I would not consider this additional evidence.

The parties confirmed they were prepared to address the issues of the two 1 Month Notices to End Tenancy for Cause issued by the landlord. The remainder of the hearing was spent dealing with these notices to end tenancy. As there were two notices the parties provided testimony on each notice separately.

Both parties provided substantial testimony on the 1 Month Notice to End Tenancy for Cause issued by the landlord on December 5, 2012 citing the tenants are repeatedly late paying rent. I provided 3 opportunities for the parties to confirm that they had provided their full testimony on the matters related to this Notice.

Once confirmed that the parties had provided their testimony on the issue of repeated late payment of rent the landlord presented his case in regard to the 1 Month Notice to End Tenancy for Cause issued on December 3, 2012 citing the tenants or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord; seriously jeopardized the health or safety or lawful right of another occupant or the landlord; put the landlord's property at significant risk; and the tenants have breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Due to time constraints there was not an opportunity to hear the tenants' response to the landlord's evidence and testimony regarding the December 3, 2012 Notice. I advised the parties that because we had concluded testimony on the issues related to the Notice issued December 5, 2012 (repeated late payment of rent) that I would consider writing a decision on that issue and if I determined the landlord had cause to end the tenancy based on that Notice I would write this decision and not reconvene the hearing.

I also advised that if I found the landlord had not provided sufficient evidence to establish cause to end the tenancy based on the December 5, 2012 Notice that I would reconvene the hearing to allow the tenants to provide their response to the landlord's submissions regarding the December 3, 2012 Notice.

While the landlord agreed with this position, the tenants indicated that they wanted to present testimony and evidence to establish the landlord had issued the December 5, 2012 Notice in retaliation against them. Upon review of the evidence and testimony

provided by both parties at the original hearing I found that I had some specific questions regarding the payment of rent in September 2012 and as such I reconvened the hearing. This also provided the tenants an opportunity to provide their testimony regarding retaliation and their response to the landlord's evidence and testimony regarding the 1 Month Notice issued on December 3, 2012.

Prior to closing the original hearing, the landlord noted that the he submitted a letter from the tenant's previous landlord that identified file numbers for dispute decisions between the tenant's and the former landlords. The tenants agreed to allow me to review the decisions, despite the fact that they were not submitted into evidence.

Upon deliberation, I determined that it would not be fair to the landlord to review decisions that he had not received as evidence, and as such I did not review these decisions prior to the reconvened hearing. The landlord testified in the reconvened hearing that he had been provided these documents and was prepared to speak to any issues that might arise.

Both parties had provided additional evidence between hearings. There was some confusion on the part of all parties as to instructions I had provided in regard to any additional evidence and as such, I have not considered any of the additional evidence submitted by either party.

I note that while the landlord had provided several submissions of new evidence one of his packages and the only package submitted by the tenants were related to each party's monetary claims which I had advised both parties had been dismissed with leave to reapply and were therefore not relevant to this reconvened hearing.

While both parties provided substantial testimony and evidence regarding both notices to end tenancy, this decision documents only the relevant evidence and testimony to the decision made.

Issue(s) to be Decided

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

In the alternative it must be decided if the tenants are entitled to cancel two 1 Month Notices 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 *Residential Tenancy Act (Act)*.

Background and Evidence

The parties provided a copy of a tenancy agreement signed by the parties on May 27, 2012 for a month to month tenancy beginning on June 1, 2012 for a monthly rent of \$1,650.00 due on the 1st of each month with a security deposit of \$825.00 and a pet damage deposit of \$250.00 paid.

The landlord provided the following documents as evidence:

- A copy of a 1 Month Notice to End Tenancy for Cause issued December 3, 2012 with an effective vacancy date of January 6, 2013 citing the tenants or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord; seriously jeopardized the health or safety or lawful right of another occupant or the landlord; put the landlord's property at significant risk; and the tenants have breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so; and
- A copy of a 1 Month Notice to End Tenancy for Cause issued December 5, 2012 with an effective vacancy date of January 6, 2013 citing the tenants are repeatedly late paying rent.

The parties agree that in July 2012 and December 2012 the cheques issued by the tenants for the payment of rent were returned as insufficient funds. The parties also agree that when the tenants provided the landlord with their rent payment for September 2012 the draft was in the amount of \$1,600.00 deposited into the landlord's account.

The tenants submit that they discussed this issue with the landlord on September 1, 2012 on the phone. The tenants submit that they had obtained the draft from the bank and the bank teller erred in the amount he had requested but that he did not notice until after he had left the bank.

The landlord submits that the tenants did not contact him by phone that he determined the full rent was not paid by checking his account, as he begun to do after the July 2012 NSF issue.

Both parties provided an email from the landlord to the tenants dated September 3, 2012 in which the landlord states (in part):

"Thanks for the rent. I believe that your rent is \$1650.00, but you sent me only \$1600.00. Please send me some utility bills as well. This has to be handled separately and cannot be deducted from the rent."

The tenants submit that this was a follow up email from the landlord after they discussed the issue on the phone. The tenants testified that the landlord stated in the phone call that he would pick up the balance when he was at the residential property later in the month. The replacement cheque is dated September 1, 2012 and was negotiated on September 28, 2012.

The tenant clarified in the reconvened hearing that when he paid the September 2012 rent he purchased a draft from his own bank and then went to his landlord's bank and deposited the draft that his own bank had provided him in the incorrect amount.

The tenant testified that he did not receive anything from the landlord's bank confirming how much he had deposited and that it was not until later that he discovered the error made by his own bank.

The tenants submit that they had done nothing wrong in their tenancy but that for some reason when they started submitting complaints to the landlord regarding the tenants in the basement rental unit the landlord sided with the other tenants and found all kinds of terms to say these tenants were violating in their tenancy agreement.

They submit that even when the landlord told them they were in breach of specific issues they would correct it right away or they would want to discuss it with the landlord but he refused to discuss. The tenants also testified that at one point the landlord told them to stop harassing the tenant below and then turned around and told them to work an issue out with the tenant below.

Analysis

Section 47(1)(b) of the *Act* allows a landlord to end a tenancy by giving the tenants notice to end the tenancy if the tenant is repeatedly late paying rent. A notice issued under this section must end the tenancy effective on a date that is not earlier than a month after the date the notice is received and the day before the day in the month that rent is payable under the tenancy agreement.

Residential Tenancy Policy Guideline 38 states that 3 late payments are the minimum number sufficient to justify a notice under this provision. The Guideline goes on to say that 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.

Based on the testimony of both parties, I accept that the tenants were late paying rent for the months of July and December 2012.

In regard to the payment of rent for the month of September 2012, as the landlord disputes the tenants claim that they contacted the landlord on September 1, 2012 and he told them that he would pick up the cheque later in the month, the burden rests with the tenant to provide evidence that he did contact the landlord on September 1, 2012 and that it was the landlord who indicated he would pick up the cheque later.

From the documentary evidence provided by both parties, the earliest documented evidence of the landlord's awareness of the short payment for September 2012 was in the email the landlord provided to the tenants on September 3, 2012. From the text of that email, I find this was the first contact the parties had in relation to September 2012 rent and it is the landlord who is identifying to the tenant that the rent that was due on September 1, 2012 was not totally paid.

Further, while I accept the teller in the tenant's bank **may** have made an error in providing the tenants a draft in an incorrect amount there is no evidence that the draft was issued in error or what the tenant had specifically requested; the tenants had possession of the draft before they deposited it to the landlord's account; and it was incumbent on the tenants to ensure the amount of the deposit was the correct amount of rent.

I also note that the tenants had the landlord's banking information and could have easily returned to the bank and deposited the additional \$50.00 as soon as they discovered the discrepancy, which from their testimony was on September 1, 2012. The obligation, under the tenancy agreement and Section 26 of the *Act*, is that the tenants must ensure the rent is paid on the day of the month that it was due.

I find the tenants were late paying rent for the month of September 2012 and as such, the landlord has established the tenants have failed to pay rent on the day it was due on at least 3 distinct occasions.

I find that the motivation of a landlord to enforce the terms, in a tenancy agreement, regarding the timeliness of the payment of rent in a tenancy has no bearing on the facts that the tenants have been repeatedly paying rent late.

In addition, I find the landlord issued the Notice to End Tenancy in regards to repeated late payment of rent as soon as he became aware of the third late payment and while this may have coincided with the other issues between the parties, it was the tenant's action of providing a cheque that would not clear during these disputes between the parties that led to the issuance of the Notice.

For these reasons, I find the landlord has established sufficient cause to end the tenancy and I grant the landlord an order of possession. In addition, I dismiss the tenant's Application seeking to cancel the 1 Month Notice to End Tenancy for Cause issued December 5, 2012 in its entirety.

Section 53 of the *Act* states if a landlord or tenant gives notice to end a tenancy with an effective date that does not comply with the requirements set out in the relevant section the party is seeking to end the tenancy under the effective date is deemed to be changed to the earliest date permitted under the applicable section.

As the landlord issued the Notice to End Tenancy for Cause on December 5, 2012, I find to be compliant with Section 47 the earliest effective date could have been is January 31, 2013 and as such the effective date is deemed to be January 31, 2013, pursuant to Section 53.

As I have found the 1 Month Notice to End Tenancy for Cause issued by the landlord on December 5, 2012 for repeated late payment of rent is valid and enforceable I make no rulings on the 1 Month Notice to End Tenancy for Cause issued on December 3, 2012.

Conclusion

I find the landlord is entitled to an order of possession effective **two days after service on the tenants**. This order must be served on the tenants. If the tenants fail 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.

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of \$50.00 for the fee paid by the landlord for this application. I order the landlord may deduct this amount from the security deposit held in the amount of \$825.00 in satisfaction of this claim.

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: January 31, 2013

Residential Tenancy Branch

