



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SUSSEX REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: CNR

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a Ten-Day Notice to End Tenancy for Unpaid Rent dated August 2, 2013 with effective of August 12, 2013.

The landlord and the male co-tenant attended the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

The parties testified that the female co-tenant was deceased, having recently passed away on June 18, 2013.

Issue(s) to be Decided

Should the landlord's Ten-Day Notice to End Tenancy for Unpaid Rent be cancelled?

Background and Evidence

The tenancy began on June 1, 2013 and the tenants who agreed to the tenancy consisted of a couple who rented the suite as co-tenants. The rent was set at \$675.00 and a security deposit of \$337.50 was paid.

Submitted into evidence by the applicant/tenant in support the application was, a copy of the Ten-Day Notice to End Tenancy for Unpaid Rent or Utilities issued only to the male co-tenant. The Notice was dated August 2, 2013 indicating that rental arrears of \$675.00 due on August 1, 2013 were owed.

The tenant's advocate stated that both co-tenants who rented the suite were on provincial disability, but the social benefit cheques were issued only in the female tenant's name and the rent was being paid directly to the landlord by the Ministry.

The landlord testified that the tenant had not paid rent owed for August, 2013. The landlord explained that a cheque for direct payment of the August rent was received from the Ministry near the end of July 2013. The landlord testified that she was aware that the female co-tenant had passed away on July 18, 2013.

The landlord testified that, because the rent cheque that was received by the landlord from the Ministry for August rent was still issued in the female co-tenant's name, as had been the case throughout the tenancy, the landlord felt it necessary to contact the Ministry to confirm that the Ministry was aware of the female co-tenant's death and to find out if the rent cheque still showing the female tenant's name, should be cashed.

According to the landlord, the representative from the Ministry very instructed the landlord not to cash the rent cheque and to send it back, which the landlord did.

The landlord testified that this meant that the rent for August was not paid in advance by the Ministry as it had been in the past. The landlord testified that on July 30, 2013, she spoke to the tenant about the upcoming rent that was due on August 1, 2013. The landlord testified that the tenant told her that the rent was paid directly by the Ministry. The landlord testified that she then informed the male co-tenant that the rent cheque had been returned to the Ministry and therefore his rent was not paid.

The landlord testified that they issued a 10-Day Notice to End Tenancy for Unpaid Rent on August 2, 2013 and personally served it on the male co-tenant. The landlord testified that the tenant stated that he would make arrangements to pay the rent and planned to find another co-tenant. The landlord pointed out that the tenant has not yet paid the rent for August 2013 and also failed to pay rent for the month of September 2013.

The tenant acknowledged that all of the above data provided by the landlord was true, except for the landlord's allegation that the Ministry required the landlord to return the August rent cheque.

The tenant testified that the landlord sent the cheque back of their own volition and they refused to cash it. The tenant pointed out that the landlord did not submit any documentation from the Ministry with respect to these alleged instructions to return the cheque. The tenant's position is that the cheque for August should not have been sent back and by doing so, the landlord refused payment and should not hold the tenant accountable for the unpaid rent.

The tenant testified that he only found out the funds were not paid on July 30, 2013 and was not able to make alternate arrangements prior to the due date of August 1, 2013.

The tenant testified that the landlord then took this opportunity to immediately issue a 10-Day Notice to End Tenancy for Unpaid Rent served on August 2, 2013, on the basis that the rent was not paid.

The tenant testified that they then made an application for dispute resolution on August 2, 2013 to dispute the August 2nd Notice.

The tenant testified that, by sending the funds back to the Ministry, the landlord interfered with the issuing of his disability benefits from the Ministry for the month of August 2013 and the direct payment of rent from the Ministry for August. In addition, according to the tenant, the landlord's action in sending back the August rent cheque also affected his ability to pay the rent for the month of September 2013.

The tenant disagrees with the 10-Day Notice to End Tenancy for Unpaid Rent and wants the Notice cancelled.

Analysis

Section 26 of the Act states that rent must be paid when it is due, under the tenancy agreement, whether or not the landlord complies with the Act.

Through testimony from both parties it has been established that the tenant did not pay the rent for August 2013. When a tenant fails to comply with section 26, section 46 of the Act permits the landlord to end the tenancy by issuing a Ten-Day Notice effective on a date that is not earlier than 10 days after the date the tenant receives it.

This section of the Act also provides that, within 5 days after receiving a notice under this section, a tenant may dispute the notice by making an application for dispute resolution. In this instance I find that the tenant did make an application to dispute the Notice within the five-day period. The Act also provides that, within 5 days after receiving a notice under this section, the tenant may pay the overdue rent, in which case the notice has no effect.

I find that the 10-Day Notice to End Tenancy for Unpaid Rent was issued only to the male co-tenant and neglected to include or name the estate of the female co-tenant. I find that the landlord apparently did not attempt to locate or ensure service of the 10-day Notice to the executors of the co-tenant's estate. That being said, a Notice properly served on one or both co-tenants is considered to be validly served.

I find that there is no dispute over the fact that the landlord did receive a cheque to pay the rent for the month of August 2013 on behalf of the tenant and declined to cash it.

I find that the tenant was advised by the landlord that the rent cheque had been sent back to the Ministry on Friday August 30, 2013, three days prior to the due date for August rent and that this transpired just prior to a statutory holiday.

Although the landlord gave testimony that they were verbally instructed by an unnamed third party, purportedly representing the Ministry, to return the cheque, I find that the landlord did not offer any supportive documentary evidence to verify that this occurred and relied solely on verbal testimony, which was disputed by the tenant.

I find that, when one party provides their version of the facts in one way and the other party provides an equally probable alternate version of facts, this conflicting testimony may be seen as a stalemate. However, I do not find it necessary to consider which version to favour as more viable than the other in making a determination in this case.

I find that, in the absence of additional documentary evidence adding evidentiary weight to support their stated position, then the party carrying the burden of proof is unlikely to succeed. The reason this is so is because the two parties are not on equal ground and one of the two parties carries an added burden of proving their case. In this instance, I find that the onus is solely on the landlord to adequately prove that they were justified in their decision to refuse the rent cheque and that the landlord's actions did not interfere with, nor undermine, the male co-tenant's ability to receive funds to pay the rent.

I find that the landlord has failed to sufficiently meet the burden of proof in this regard.

Accordingly I grant the tenant's application requesting that the 10-Day Notice to End Tenancy for Unpaid Rent be cancelled and I order that it is of no force nor effect.

Conclusion

The tenant is successful in the application and the Ten Day Notice to End Tenancy for Unpaid Rent is cancelled.

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: September 12, 2013

