



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 396629 BC LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FF, O

Introduction

This hearing was scheduled to deal with a tenant's request to cancel a Notice o End Tenancy for Cause, and other issues. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

The tenant identified the rental unit as Apt. 2 on his Application whereas the landlord identified the unit as "Back/Up" on the Notice to End Tenancy. I confirmed with both parties that the Upper unit at this address is also referred to as Apt. 2 by the parties in their dealings with each other. By mutual consent, I amended the Application to reflect both descriptions of the rental unit address.

After this application was filed, the landlord issued another Notice to End Tenancy to the tenant on January 6, 2013. Both parties were prepared to make submissions regarding this subsequent Notice to End Tenancy and I amended the Application to deal with it.

It was undisputed that a written tenancy agreement was not prepared for this tenancy. The tenant's lawyer questioned the applicability of the Act since there is no written agreement. As the parties were informed during the hearing, the Act applies to all residential tenancy agreements, rental units and residential properties in the Province unless specifically excluded by virtue of Section 4 of the Act. The Act defines "tenancy agreement" to include any agreement between a landlord and tenant with respect to possession of a rental unit, whether that agreement is written, oral, express or implied. I was further satisfied that this living accommodation is not listed under section 4 and that the Act applies to this tenancy. Therefore, I accepted jurisdiction to resolve the dispute.

Issue(s) to be Decided

1. Should the Notices to End Tenancy be upheld or cancelled?
2. What is the monthly rent payable by the tenant?
3. Is it necessary to issue any the orders to either party?

Background and Evidence

The tenant took possession of the subject rental unit in October 2013. A security deposit has not been by the tenant. The tenant has rented multiple units and parking space from the landlord. On October 19, 2013 the tenant provided the landlord with a cheque in the amount of \$5,775.00. This sum included payment of \$550.00 for three months (October – December 2013) for the subject rental unit. The tenant subsequently informed the landlord that he had put a stop payment on the cheque and the cheque was not deposited by the landlord. The tenant later paid the landlord \$1,500.00 for the subject rental unit, calculated as three months of rent at \$500.00 per month.

The landlord posted a 1 Month Notice to End Tenancy for Cause, in the approved form on the tenant's door no November 15, 2013 (the Notice). The Notice indicates the reasons for ending the tenancy are as follows:

- Tenant is repeatedly late paying rent with handwritten notations added: "insufficient rent/unpaid damage deposit"; and,
- Security deposit or pet damage deposit was not paid within 30 days as required by the tenancy agreement.

On January 6, 2014 the landlord issued another Notice to End Tenancy but this time is was on a form produced by the Branch in 1996 and the landlord served only two of the four pages of the Notice (herein referred to as the second Notice). The second Notice indicates the reasons for ending the tenancy are failure to pay rent for January 2014 and damage to the deck and handrail supports.

Below, I have summarized the parties' positions with respect to each of the issues raised during the hearing.

Rent

The landlord submitted that when he showed the rental unit to the tenant on or about October 1, 2013 the parties agreed the monthly rent would be \$550.00. On October 19, 2013 the parties each calculated the amount owed by the tenant for the various units he

was renting from the landlord and the parking space. I heard that the parties arrived at the same figure of \$5,775.00 and then the tenant wrote a cheque in that amount and gave it to the landlord. The landlord also pointed out that the previous tenant in the rental unit also paid \$550.00 per month as evidenced by a copy of the security deposit refund cheque issued to her in the amount of \$275.00.

The tenant's lawyer submitted, as provided in the tenant's letter to the landlord dated October 25, 2013, that the rent agreed upon by the landlord and tenant was \$500.00 per month.

The landlord denied that there was ever an agreement to rent the unit to the tenant for \$500.00 per month.

Security deposit

The landlord initially testified that on October 1, 2013 the landlord showed the unit to the tenant, explained the work that had been done to the unit and that which still needed doing, informed the tenant that the monthly rent was \$550.00 and "that's it." The landlord subsequently changed his testimony to include a statement that he informed the tenant that a security deposit of \$275.00 would have to be paid during that conversation, to which the tenant agreed he would.

The landlord acknowledged that he did not require the tenant to pay a pet damage deposit even though the landlord was aware that the tenant would have a pet reside with him at the rental unit.

The tenant's lawyer submitted that the tenant takes the position that the request to pay a security deposit was not made until after the tenancy commenced and that a requirement to pay a security deposit cannot be imposed retroactively.

Damage and locks

The landlord provided photographic evidence and testimony indicating the tenant has cut the railing off the balcony, thereby significantly damaging and putting the property and the landlord's interests in the property at significant risk. The landlord indicated this damage as a reason for ending the tenancy on the second Notice.

The tenant's lawyer submitted that the second Notice is unenforceable as it is a very old form and missing two pages.

The landlord is also concerned the tenant has changed the locks and has made other alterations to the unit, such as unauthorized painting. The landlord acknowledged that

he has not attended the property to verify his concerns as the relationship between the parts is very strained and unpleasant.

The tenant's lawyer submitted that the tenant has advised that he has not changed the locks.

Unpaid rent

The landlord stated that rent has not been received for January 2014, as indicated on the second Notice.

The tenant's lawyer did not dispute the allegation that rent is outstanding. Rather, the issue is that the second Notice is not enforceable for reasons given above.

Analysis

Under the Act, a landlord may end tenancy or cause by serving the tenant with a 1 Month Notice to End Tenancy for Cause, in the approved form. The Act provides that if a Notice deviates from the approved form, the Notice may be found enforceable so long as the deviation does not affect its substance or mislead the tenant.

Where a tenant has received a 1 Month Notice the tenant may file to dispute the Notice within 10 days of receiving it. Where a Notice to End Tenancy comes under dispute the landlord bears the burden to prove the tenancy should end for the reasons indicated on the Notice. The burden of proof is based on the balance of probabilities.

I provided the following findings and reasons with respect to the two Notices to End Tenancy issued to the tenant with respect to this rental unit.

1 Month Notice issued November 15, 2013

This notice indicates the tenant is repeatedly late paying rent; however, Residential Tenancy Policy Guidelines provide that in order to find repeated late payment of rent the tenant must have paid rent late at least three times. Since the tenancy commenced in October 2013 and the Notice was issued in November 2013 I find the tenant had not been late at least three times when this Notice was issued.

This Notice indicates, by way of the handwritten notes, that the tenant has paid insufficient rent. Where a tenant fails to pay all of rent that is due to the landlord the landlord's remedy is to serve the tenant a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities any day after the day rent is due. The landlord has not issued a 10 Day Notice to the tenant as of the date of this hearing despite the landlord's submission that

rent is outstanding. The landlord remains at liberty to issue a 10 Day Notice should rent remain outstanding.

This Notice indicates the tenant failed to pay a security deposit. The Act provides that a landlord may require the tenant to pay a security deposit when the tenancy forms or as a condition of entering into a tenancy agreement. The requirement to pay a security deposit is a term that must be included in a written tenancy agreement under the Act. The difficulty in this case is that there is no written tenancy agreement for me to refer to and I am left with disputed submissions of the parties.

I have no doubt the landlord requested the tenant to pay a security deposit at some point in time, and this is evidenced by a letter the landlord wrote to the tenant on October 27, 2013. However, in order to establish an entitlement to collect a security deposit the landlord must demonstrate that the requirement was communicated and agreed upon when the tenancy agreement formed. A tenancy forms when both parties reach an agreement with respect to the tenant's occupation of the rental unit. In other words, if the landlord neglects to discuss payment of a security deposit and get the tenant's agreement to pay that amount when the tenancy forms the landlord is not at liberty to demand it at a later time. I find the landlord meet the burden to satisfy me that an agreement for the tenant to pay a security deposit was reached when the tenancy formed considering:

- the disputed submissions of the parties,
- the absence of a written tenancy agreement that would establish the requirement; and,
- the parties met on October 19, 2013 to settle the amounts owed to the landlord at that time without payment or discussion of the security deposit.

In light of the above, I do not end the tenancy for failure to pay a security deposit.

Since the tenant was not required to pay a pet damage deposit when the tenancy formed I do not end the tenancy for failure to pay a pet damage deposit.

Based on all of the aforementioned, I cancel the 1 Month Notice to End Tenancy for Cause issued on November 15, 2013.

Notice to End Tenancy issued January 6, 2014

This Notice is not a Notice to End Tenancy in the approved form. Since the form is so out-dated the reference to certain section numbers of the Act are incorrect and the missing pages of the Notice means pertinent information was not communicated to the

tenant. Therefore, I find the Notice to End Tenancy issued on January 6, 2014 is not enforceable and I do not end the tenancy based upon this Notice.

Although I have found the Notice to End Tenancy of January 6, 2014 to be unenforceable due to the form used, it is important to note that this does not mean the landlord does not have grounds to end the tenancy. That being said, the landlord remains at liberty to issue another 1 Month Notice to End Tenancy for Cause in the approved form for damage to the property. The landlord is also at liberty to issue a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities should rent remain outstanding.

Rent

Pursuant to section 62 of the Act, I may determine “any matters related to [the] dispute that arise under this Act or a tenancy agreement” and “...make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.”

Both parties provided submission with respect the amount of monthly rent agreed upon and I find it necessary and appropriate to make a finding as to the amount of rent payable by the tenant so as to avoid future and on-going dispute with respect to this matter.

Based on the balance of probabilities, I find the monthly rent payable by the tenant for this unit is \$550.00 due on the 1st day of every month. I make this finding considering the following factors:

1. The landlord provided verbal testimony as to the amount of the monthly rent agreed upon, subject to examination by me and the tenant's lawyer; whereas, the tenant decided not to appear at the hearing and provide verbal testimony subject to examination.
2. I find the tenant's letter of October 25, 2013 is effectively countered by the landlord's letter written in response on October 27, 2013.
3. The tenant provided a cheque to the landlord that included three months of rent at the rate of \$550.00 on October 19, 2013.
4. I am satisfied the landlord was collecting monthly rent of \$550.00 for this unit from the immediately preceding tenant I was not provided any reason why the rent would be reduced for the subject tenant.

In light of the above, I set the monthly rent at \$550.00 effective October 1, 2013 and I order the tenant to pay that amount of monthly rent to the landlord as provided under

the Act. The amount of rent payable may only be changed if it is increased pursuant to the rent increase provisions of the Act or as so ordered by an Arbitrator.

Since I have set the rent at \$550.00 per month starting October 1, 2013, the landlord is at liberty to issue 10 Day Notice to End Tenancy for Unpaid Rent with respect to the \$150.00 shortfall for the months of October – December 2013. Should rent for January 2014 remain outstanding the sum of all of these amounts may be included in a single 10 Day Notice to End Tenancy.

Damage and Locks

I order the tenant to stop making any alterations or repairs to the rental unit effective immediately unless the tenant has the written consent of the landlord or an Arbitrator.

I note that in the tenant's letter of October 25, 2013 he stated he has installed "new locks". The Act prohibits the tenant from changing locks without the express consent of the landlord or an Arbitrator or doing so meets the criteria of an emergency repair. Even if a tenant has consent to change the locks, the tenant must provide a copy of the key to the landlord unless otherwise ordered by an Arbitrator. Therefore, if the tenant has changed the locks to this unit, I strongly suggest to the tenant that he immediately reinstall the locks supplied by the landlord or provide the landlord with a key for the changed lock(s).

I order the landlord to verify that the landlord's copy of the keys work on the locks of the rental unit. If not, the landlord may demand a copy of the key from the tenant, in writing, and upon receiving such a demand I order that the tenant must immediately provide the landlord with a copy of the key for the locks installed on any door. If the tenant fails to do so, the landlord is at liberty to change the locks, at the tenant's expense, and give a key to the tenant. Alternatively, the landlord may issue another 1 Month Notice to End Tenancy for Cause citing the reason "non-compliance with an order under the legislation".

I make no award for recovery of the filing fee paid by the tenant and I am satisfied that the tenant's actions necessitated the need for this hearing, at least in part.

Conclusion

The Notice to End Tenancy for Cause, issued November 15, 2013 is set aside as such a notice is not appropriate for ending a tenancy for unpaid rent, the tenant had not been repeatedly late paying rent at the time of its issuance, and I was unsatisfied the tenant is required to pay a security deposit or pet damage deposit as a term of tenancy.

The Notice to End Tenancy for Cause issued January 6, 2014 is invalid and of no effect.

As both Notices to End Tenancy are unenforceable, the tenancy continues at this time. However, the landlord remains at liberty to issue a 10 Day Notice for Unpaid Rent if any rent remains outstanding. The landlord also remains at liberty to issue another 1 Month Notice in the approved form for reasons other than failure to pay a security deposit or pet damage deposit, as applicable.

The monthly rent is set at \$550.00 effective October 1, 2013 subject only to rent increase provisions or as ordered by an Arbitrator.

The tenant is ordered to stop making any alterations to the rental unit without written consent of the landlord or an Arbitrator.

The tenant must ensure that the locks supplied by the landlord are in place or if the locks have been changed that a key is provided to the landlord immediately. If the locks have been changed by the tenant and the tenant has not provided the landlord with a copy of the key, the landlord may demand a copy of the key in writing and if the tenant fails to comply, the landlord may issue a 1 Month Notice to End Tenancy for Cause for failure to comply with an Order issued under the legislation.

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 22, 2014

Residential Tenancy Branch