



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant's Application: CNC, OLC, ERP, RP, RR, FF
Landlord's Application: OPC, FF

Introduction

This hearing dealt with cross applications. The tenants applied to cancel a 1 Month notice to End tenancy for Cause; for authorization to reduce rent payable; and for orders for: compliance, emergency repairs, and repairs. The landlords applied for an Order of Possession for cause. 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.

Rule 2.3 of the Rules of Procedure authorizes me to dismiss unrelated disputes contained in a single application. The tenants indicated several matters of dispute on their Application for Dispute Resolution, the most urgent of which is the request to cancel the Notice to End Tenancy. I find that not all the issues identified on the tenants' Application for Dispute Resolution are sufficiently related to be determined during this proceeding. Therefore, I have only considered the tenants' request to cancel the Notices to End Tenancy and I dismiss the balance of tenants' Application with leave to reapply.

Issue(s) to be Decided

Should the 1 Month Notice to End Tenancy for Cause be upheld or cancelled?

Background and Evidence

The tenants filed to dispute a 1 Month Notice to end Tenancy for Cause dated April 14, 2014 with a stated effective date of May 31, 2014. The reason for ending the tenancy is because the tenants have been "repeatedly late paying rent."

A tenancy agreement was executed by the tenants and the landlord for a fixed term tenancy set to commence September 1, 2012 and expire August 31, 2014. The

tenancy agreement provides that the monthly rent was \$2,600.00 due on the 1st day of every month; however, all parties confirmed that the tenants requested and the landlords agreed from the outset of the tenancy that the tenants may pay rent on the 3rd day of every month. The tenants then provided the landlords with post-dated cheques dated the 3rd day of every month.

The tenancy agreement also provided for a security deposit of \$2,600.00 and a non-compliant late fee clause in the addendum. The tenants had attempted to pay the \$2,600.00 security deposit by way of three cheques but the cheques were dishonoured and further attempts to collect two of the dishonoured cheques for amount in excess of \$1,300.00 ceased, leaving only \$1,300.00 actually collected by the landlords.

The landlords put forth that the tenants have provided seven cheques that have been late or dishonoured. The tenants pointed out that three of those seven cheques pertained to the illegal security deposit. As such, I limited the landlords' submissions to those pertaining to the remaining four payments for rent that were either received late or dishonoured.

The landlords submitted that the rent for the months of August 2013, September 2013, October 2013 and April 2014 were late. The tenants acknowledged that payment of rent for August 2013 and April 2014 was late. Therefore, the remainder of the testimony focused on whether rent for September and October 2013 was late.

I heard that in July 2013 the tenants received a Notice of Rent Increase to increase the rent to \$2,695.00 starting October 2013. The landlord also communicated to the tenants via email on July 8, 2013 that the rent increase comes into effect October 1, 2013 and that the last cheque in the landlord's possession was for the month of September 2013. The parties also had a verbal discussion and as a result the tenant understood that the landlord needed another cheque for September 2013. The tenants sent the landlords another rent cheque for September 2013 and dated the cheque for September 5, 2013; however, the landlord's agent was still in possession of the original cheque dated September 3, 2013. During discussions between the parties about the receipt of another cheque for September 2013, the landlord agreed with hold off on cashing the September 2013 rent cheque until September 5, 2013; however, the landlord's agent went ahead and deposited the September 3, 2013 cheque on September 4, 2013. The rent cheque deposited on September 4, 2013 was returned for insufficient funds. The rent was eventually received by the landlord on September 11, 2013.

The tenants also sent the landlord new cheques for the increased rent of \$2,695.00 starting in October 2013 but the cheques for the 5th day of the month. The landlord responded by informing the tenants that paying rent on the 5th was not acceptable. In response, the tenants provided the landlord with more post-dated cheques for the increased rent amount and dated the cheques for the 3rd day of the month. The rent cheque for October 2013 was dated October 3, 2013 and was deposited on October 4, 2013. The cheque was dishonoured for the reason "funds not cleared" as opposed to "insufficient funds".

The tenants were of the position that they believed the landlord had permitted them to change the payment date to the 5th day of the month. The landlord confirmed that the tenants had made such a request but that the landlord's response was merely that they could discuss it further in the summer. There were no further communications whereby the landlord agreed to accept rent on the 5th day of the month until such time the landlord received the cheques dated for the 5th. Upon receipt of the cheques dated for the 5th the landlord communicated to the tenants that paying rent on the 5th was unacceptable.

The tenants were of the position that despite the confusion about paying rent on the 5th day of the month, the landlord had agreed to wait until September 5, 2013 to cash September's rent cheque in particular. In support of this, the tenants pointed out that the landlord did not charge them a late or NSF fee when the cheque was dishonoured.

The tenants submitted that their bank erred in dishonouring the cheque for October 2013 and that the funds were available. As evidence of this the tenants pointed to their bank statement where the bank uses the term "correction" for a transaction dated October 4, 2013.

The tenant also suggested that the landlords have ulterior motives to end this tenancy. I did not hear from the tenants further on this point as the landlord need not have a "good faith intention" where a 1 Month Notice comes under dispute.

It was undisputed that the tenants paid the landlord \$1,695.00 for June 2014 and this represents the monthly rent less \$1,000.00 as compensation for flooring the landlord agreed to pay to the tenants. I heard that the landlords agreed to compensate the tenants \$1,000.00 for flooring and sent the tenants a cheque for \$1,000.00 but when that cheque was not received the landlord's cancelled the cheque and did not replace it with another. The tenants withheld the \$1,000.00 from funds paid for June 2014 which the landlord accepted for use and occupancy only.

Analysis

Under the Act, a tenant must pay rent when due in accordance with their tenancy agreement. Where a tenant is repeatedly late paying rent, the landlord may end the tenancy for repeated late payment of rent under section 47 of the Act. Residential Tenancy Policy Guidelines provide that there must be at least three late payments of rent to conclude the tenant has been repeatedly late paying rent. I accept the undisputed submissions that the landlord had agreed to accept rent on the 3rd day of the month and would not consider it late if paid on that date. Therefore, I have not considered rent payments made on the 3rd of the month to be late.

Since there was no dispute that rent was paid late for the months of August 2013 and April 2014 in order to conclude the tenants have been repeatedly late paying rent and uphold the 1 Month Notice I need only be satisfied that rent was paid late for either the month of September 2013 or October 2013.

With respect to September 2013 I find the rent was paid late. The tenants argued that they thought rent could be paid on the 5th day of the month based upon communications earlier that year; however, I have read all of the emails provided to me and I find the landlord did not agree to accept rent payments on the 5th day of the month. Rather, the landlord merely indicates that further discussion may be had but clearly stated that until then rent would remain payable on the 3rd day of the month. Upon receipt of cheques dated for the 5th of the month, on August 31, 2013 the landlord communicated to the tenants that the cheques dated for the 5th of the month were unacceptable and should be dated for the 3rd of the month. The fact that the landlord agreed to hold off on depositing the September 2013 rent cheque until September 5, 2013 does not mean the tenants were not late. Agreeing to hold off on cashing a cheque so that a cheque is not dishonoured is not equivalent to paying rent on time. Therefore, I find the landlord was entitled to collect rent on September 3, 2013 and was not provided rent on that date, resulting in a late payment of rent.

In light of the above, I am satisfied the tenants have paid rent late on at least three occasions and it is not necessary to further analyze whether rent was paid late for October 2013.

Having been satisfied the tenants have been repeatedly late paying rent I uphold the 1 Month Notice and dismiss the tenants' request to cancel it. Therefore, I find this tenancy legally ended on May 31, 2014.

With respect to possession of the rental unit, I provide the landlords with an Order of Possession effective June 30, 2014. I find the tenants sufficiently compensated the landlords for use and occupancy up until June 30, 2014 and in making this determination I also find that the tenants have been compensated \$1,000.00 for the flooring.

I make no award for recovery of filing fees as the tenants' request to cancel the 1 Month Notice was unsuccessful and because it is not necessary for a landlord to file an Application to obtain an Order of Possession were the tenant has requested cancellation of the Notice. An Order of Possession may be requested by a landlord orally at a hearing scheduled to hear a tenant's Application to cancel a Notice to End Tenancy.

Although I was provided evidence with respect to a non-compliant late payment and NSF cheque clause the parties are at liberty to resolve the matter of overpayment of non-compliant fees among themselves and if they are unable to resolve that issue, the overpayments to the landlords may be the subject of another proceeding.

Conclusion

The 1 Month Notice to End tenancy has been upheld and the landlord has been provided an Order of Possession effective June 30, 2014. I have found that the tenants have paid for use and occupancy for the month of June 2014 and the tenants have been compensated \$1,000.00 for flooring the landlord agreed to pay to the tenants.

The balance of the tenants' Application has been dismissed with leave to reapply.

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: June 17, 2014

Residential Tenancy Branch

