



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

The tenant applied for an order pursuant to section 47(4) of the Residential Tenancy Act to set aside a Notice to End a Tenancy dated June 2, 2014 for cause. The tenant and landlord JS attended the teleconference hearing.

Issue(s) to be Decided

Is there jurisdiction under the Act for this application?

Is the tenant entitled to an Order cancelling the Notice to End or is the landlord entitled to an Order for Possession?

Preliminary matter

I have excluded all of the landlords' written evidence but for the Notice as JS failed to deliver any of it to the tenant.

Background and Evidence

Service of the application was admitted. Based upon the evidence of the landlord JS I find that the Notice to End the Tenancy were served on June 7, 2014 by posting it on the door on June 4, 2014. JS testified that although the tenants have exclusive possession of the unit, the landlords reserved the right to enter the unit to make repairs when convenient, use the common areas and the kitchen when they were at the unit for extended periods of time. JS admitted that he and his wife the other landlord have separated and he does not know where they are. JS testified that the tenant shared the house with three other occupants and that most of them complained about her lack of cleanliness: not washing dishes, not cleaning counters, leaving hair in the bathroom shower, and underwear in the sink. JS testified that his wife CS advised him that LC screamed at CS and accused her of taking LC's computer.

JS testified that rent was due on the first of every month and the tenant has been repeatedly late in paying her rent on every month since the inception of the tenancy always issuing cheques dated the 3rd of every month. JS did not know when the tenancy began as his wife CS entered into that agreement.

The tenant LC testified that at the beginning of the tenancy the landlord CS agreed that the rent would be payable on the 3rd of every month, as LC's money was not available until after the 2nd of every month. LC testified that she consistently paid her rent on that day without complaint. LC testified that the landlords come and went whenever they felt like it. She often found them in the living room watching TV, in the bathroom or having family dinners. LC testified that the landlords ate in the unit at least once a week and that the landlord CS has been living in the unit full time for the last week. LC testified that it is a shared house and often other people do not clean up or leave hair in the shower. LC testified that on one occasion she protested that the landlord CS was operating her portable PC without her permission but did not yell at her.

Analysis

Section 4 (c) of the Act states as follows:

What this Act does not apply to

4 This Act does not apply to

(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

In this case by the landlords reserving the right to access the kitchen and bathroom whenever he or she pleases and by the landlord CS moving into the unit I find that the Residential Tenancy Act likely does not have any application to this living situation. The landlords need to decide what this arrangement is. If it is a tenancy then they need to abide by the Act. However, on the evidence before me I find that I do not have jurisdiction over this application.

In the alternative in the interests of the parties I will make a determination of this application on its merits. The Notices to End a Residential Tenancy rely on sections 47(1)(b), (d)(i) of the Residential Tenancy Act. Those sections provide as follows:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(b) the tenant is **repeatedly late paying rent**;

(d) the tenant or a person permitted on the residential property by the tenant has:

(i) **significantly interfered with or unreasonably disturbed** another occupant or the landlord of the residential property,

The landlord relies upon the ground that the tenants were repeatedly late paying the rent which is a breach of sections 47(1)(b) and (h) of the Act. The *Residential Tenancy Act* provides by section 47 (1) (b) that a landlord may end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent. The Residential Policy Guideline #38 states that: "Three late payments are the minimum number sufficient to justify a notice under these provisions." The policy guideline also contains the following comments:

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. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late

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.

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent.

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision

The *Act* does not define what constitutes "repeatedly late". The policy guide says that three late payments are the minimum that would warrant the issuance of a Notice. I find that the landlords did not act in a timely manner to enforce the payment of the rent on time as they waited eight months before issuing a Notice to End the Tenancy. In the alternative I accept the evidence of the tenant that the landlord CS waived the requirement that the rent be paid on the first day, acquiescing to the payment being made on the 3rd orally and by conduct. I am not satisfied on the balance of probabilities that the landlords have established that tenant did in pay the rent late repeatedly.

The landlords have also relied upon section 47(1)(d)(i) that the tenant has **significantly interfered with or unreasonably disturbed** another occupant or the landlord of the residential property. The landlord JS gave hearsay evidence of the conduct that he alleged disturbed his wife and the other occupants.

In this matter I have not given much weight to the evidence of the landlord as it is mostly hearsay as his wife and the other occupants did not attend the hearing to give testimony or be cross examined. The tenant has a right to hear and confront the evidence against her first hand. It is the landlords who have the burden of proof on the balance of probabilities to establish cause. This onus must be satisfied strictly where the landlords seek to end a tenancy.

In this matter the landlords failed provide evidence of such a degree that establishes that the tenant's conduct significantly interfered with or disturbed the landlords or the other tenants.

I find that the tenant's testimony was given in a straightforward manner and I accept it. The tenant has rebutted every allegation made against her by way of her testimony. I therefore find that the landlords have failed to prove cause as alleged in the Notice on the balance of probabilities. The tenant's application is successful. I therefore order that the Notice to End Tenancy dated June 2, 2014 directing the tenant to vacate be and are hereby cancelled.

Conclusion

I find that I do not have jurisdiction over this matter pursuant to section 4(c) of the Act. Alternatively, I have cancelled the Notice to End a Residential Tenancy dated June 2, 2014. I Order that the tenancy is confirmed and shall continue. I have declined to make any Order for the recovery of the filing fee.

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: August 05, 2014

Residential Tenancy Branch

