



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing was convened by way of conference call concerning an application made by the tenant for an order cancelling a notice to end tenancy for cause.

The landlord and the tenant both attended, each gave affirmed testimony, and provided evidentiary material in advance of the hearing to the Residential Tenancy Branch and to each other. The parties were given the opportunity to cross examine each other on the evidence and testimony provided, all of which has been reviewed and is considered in this decision.

No issues with respect to service or delivery of documents or evidence were raised.

Issue(s) to be Decided

Should the notice to end tenancy be cancelled?

Background and Evidence

The landlord testified that this month-to-month tenancy began on May 1, 2014 and the tenant still resides in the rental unit. Prior to that the landlord had a tenancy with the tenant's partner and the tenancy agreement was in the partner's name. The partner moved out and a new tenancy agreement was signed by the parties dated May 2, 2014 and a copy has been provided. Rent in the amount of \$1,100.00 per month is payable on the last day of each month for the following month, and there are no rental arrears. The landlord has collected a security deposit from the tenant in the amount of \$575.00 as well as a pet damage deposit in the amount of \$200.00, both of which are still held in trust by the landlord.

The landlord further testified that the tenant was personally served with a 1 Month Notice to End Tenancy for Cause on September 4, 2014. A copy of the notice has been

provided and it is dated September 4, 2014 and contains an expected date of vacancy of October 4, 2014. The reason for issuing the notice is: Tenant is repeatedly late paying rent. The effective date of vacancy was incorrect, and the tenant brought it to the landlord's attention and through emails, the parties agreed that the tenancy would end on October 31, 2014.

The landlord further testified that the rent was usually paid by way of an interac email transaction. Once the landlord receives an email, the landlord can go into the website and deposit the funds to the landlord's account as long as the tenant doesn't cancel the payment. On August 9, 2014 the tenant paid \$800.00 for the rent and on August 19, 2014 the tenant paid the remaining \$300.00. The tenant was also late with the rent for June, July, August and September, 2014. The tenant has consistently made partial payments, not having paid the full amount on time, and the landlord has provided all email transfers to corroborate that testimony. The landlord further testified that on September 5, 2014 the tenant sent the landlord an email saying that she wasn't shocked about receiving the notice.

The tenant testified that she thought the landlord was working with her. The tenant tried to get assistance for rent through BC Housing Rental Assistance Program to off-set the cost of rent, but the application process is very slow. The tenant started the process in April.

The tenant further testified that on January 10, 2010 the tenant and boyfriend moved in and rent was paid to the end of September, 2014. Rent for October and November, 2014 were paid on time. The landlord was aware of the tenant going through the housing program and gave the tenant no indication that it wasn't acceptable or that the landlord would issue a notice to end the tenancy. Further, the landlord never issued any 10 Day Notices to End Tenancy for Unpaid Rent or Utilities and has never asked for rent on the last day of the month or gave the tenant any message about late rent. If the landlord had, the tenant testified that she would have moved heaven and earth to ensure the rent was paid on time. As soon as it was brought to the tenant's attention, all rent was paid on time. The tenant works seasonally and has always communicated with the landlord, and there was no indication that the landlord had a problem with it.

Analysis

The *Residential Tenancy Act* states that if a tenant is repeatedly late paying rent, the landlord may issue a notice to end tenancy for cause. Generally, 3 late payments is the minimum number that a landlord is required to prove. In this case, the tenant doesn't deny that rent has been late on at least 3 occasions.

I refer to Residential Tenancy Policy Guideline #11 – Amendment and Withdrawal of Notices, which states, in part:

... A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

The question of waiver usually arises when the landlord has accepted rent or payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

In other words, the landlord collected rent money on October 1, 2014 after the issuance of the notice on September 4, 2014, and again on November 1, 2014 after the effective date of the notice, which is October 4, 2014, although the landlord testified that the parties agree that it should read October 31, 2014. The landlord has accepted that rent money without giving the tenant any indication that it was being received for the use of and occupancy of the rental unit only because the landlord is entitled to that money, and not because the landlord is satisfied that the tenancy should be reinstated. I also find that prior to issuing the notice the landlord has accepted rent late on many occasions without giving the tenant any indication that it wasn't acceptable to pay rent late. It might be different if the tenancy had only begun recently, but the tenant has resided in the rental unit for 4 years, the tenant testified that she thought the landlord was working

with her, and the landlord does not dispute the tenant's testimony that no previous notices were issued or that the parties had an open line of communication and the landlord never told the tenant that it wasn't acceptable. I accept the testimony of the landlord that the tenancy agreement was previously in the name of the tenant's boyfriend and that a new tenancy was created with this tenant, but the landlord has not disputed the tenant's testimony that it was never an issue, and I take that to mean before and after the new tenancy agreement was created.

A tenant is required to pay rent on time, but in the circumstances, I am not satisfied that the landlord has established that the tenant was aware that failing to pay the rent on time was a material term of the tenancy by virtue of the fact that the landlord did nothing to enforce it over the length of the tenancy. I further find that the landlord did not give the tenant any indication that rent paid on October 1, 2014 and November 1, 2014 were being accepted for use and occupancy only, and the landlord has effectively reinstated the tenancy.

The notice to end tenancy is cancelled and the tenancy continues.

I hereby order the tenant to pay rent on time and in accordance with the tenancy agreement.

Conclusion

For the reasons set out above, the 1 Month Notice to End Tenancy for Cause dated September 4, 2014 is hereby cancelled and the tenancy continues.

I hereby order the tenant to comply with the *Residential Tenancy Act* and the tenancy agreement by paying rent when it is due.

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: November 13, 2014

Residential Tenancy Branch

