



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, O

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("the *Act*") for cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent ("the 10 Day Notice") pursuant to section 46 and decision with respect to a rent increase by her landlord.

The landlord did not attend this hearing, although I waited until 9:49 a.m. in order to enable the landlord to connect with this teleconference hearing scheduled for 9:30 a.m. The tenant attended the hearing and was given a full opportunity to be heard, to present evidence, and to make submissions with respect to her application. Her sister attended the hearing to provide assistance to the tenant.

The tenant confirmed that she received the 10 Day Notice that was placed under her door at her rental unit. For the information of the parties, I note that pursuant to section 88 of the *Act*, a notice to end tenancy must be served in one of the following ways:

88 All documents, ... that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

- (a) by leaving a copy with the person;
- (b) [*relating to service to a landlord*]
- (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, ...
- (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
- (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;

(f) by leaving a copy in a mail box or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

(g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;

(h) by transmitting a copy to a fax number provided as an address for service by the person to be served;

(i) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];

(j) by any other means of service prescribed in the regulations.

When a notice to end tenancy is placed under a door, that document may be misplaced or lost. There is no certainty that it will be received. It is not considered a conspicuous place under the *Act* and therefore can raise issues of service of the materials. However, the tenant testified that she received the notice to end tenancy and acted on it, by filing her own application. In accordance with section 88 of the *Act*, I accept the tenant was served with the 10 Day Notice to End Tenancy.

The tenant provided sworn, undisputed testimony that she personally served the landlord with her dispute resolution hearing package on January 20 or 21, 2015 by handing it to the building manager. She testified that this package included the Application for Dispute Resolution, the Notice of Hearing and the tenant's documentary evidence. In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenant's notice and written evidence, as declared by the tenant. The tenant also filed further materials on January 29, 2015 however she testified that she did not provide the landlord with those documents. I will not consider the tenant's materials filed on January 29, 2015 in this matter.

Issues to be Decided

Should the Notice to End Tenancy be cancelled?

Should the tenant be subject to a retroactive rent increase?

Background and Evidence

This month to month tenancy began in 2011 with a rental amount of \$885.00 payable on the first of each month. The tenant testified that she was told the rent had been increased to \$915.00 in 2013 however she also testified that she had never received notice of this increase. She continued to pay \$885.00 per month over the course of 2013 and 2014. The tenant testified that she paid a security deposit in the amount of \$425.00 in 2011. She is unsure what month she paid the deposit.

The tenant testified that she received the Notice to End Tenancy under the door of her rental unit on January 11 or 12, 2015. The tenant testified that on receiving the 10 Day Notice, she spoke to the building manager and arranged for a payment plan with respect to any outstanding rent. However, the tenant claims that the majority of the "outstanding amount" demanded by the landlord is based on a rental increase that the landlord claims took effect in 2013. She disputes that increase, testifying she did not receive notification of the increase.

The tenant testified that she did not pay rent on January 1, 2015 as alleged in the 10 Day Notice. She testified that she told the landlords that she was unable to pay and she paid \$685.00 on January 21, 2015. She testified that she told the landlords she would pay the remainder of January rent before the end of January however she actually paid the final amount of \$200.00 on February 4, 2015. The tenant testified there are no further outstanding rental arrears from January 2015 or prior to that date.

The tenant testified that she did not pay rent on February 1, 2015. She testified that she paid \$235.00 towards February 2015 rent on February 4, 2015 and has not yet paid the rest of February rent. The tenant testified that the only outstanding amount owing to the landlord is the remainder of February rent, an amount of \$650.00.

Analysis

The tenant made an application pursuant to section 46(4) of the *Act* within five days of receiving the 10 Day Notice from the landlord. That 10 Day Notice, with an effective date of January 22, 2015 indicated an outstanding amount of \$3010.00. The tenant testified that a portion of the outstanding amount reflects the difference between the rental amount she paid (\$885.00) and the increased rental amount claimed by the landlord (\$915.00). The tenant provided sworn, undisputed testimony that she was not aware of any rent increase in 2013. She provided undisputed testimony that she did not receive a notice with respect to an increase in her rent.

When a tenant applies to cancel a notice to end tenancy, the burden shifts to the landlord to justify that the notice to end tenancy is valid. The landlord did not attend this

hearing to justify the 10 Day Notice. Further, the tenant raised legitimate issues with respect to the amount identified as outstanding on the 10 Day Notice to End Tenancy.

The tenant testified that she has paid the amount to the landlord that is outstanding in rent. If a landlord accepts full payment of the rent owing after the effective date noted on a notice to end tenancy, that landlord must communicate their intentions to end that tenancy clearly, despite any payment. While a notice to end tenancy itself provides a timeline for the tenant to pay rental arrears, it is also within the discretion of the landlord to reinstate or agree to reinstate the tenancy any time after the issuance of a notice to end tenancy.

The Residential Tenancy Branch materials suggest that a landlord place the words, "use and occupancy only" on a receipt issued for funds accepted from the tenant after the effective date of a notice to end tenancy. The *Act* creates a variety of provisions for reinstatement of tenancy at the agreement of the affected parties.

Under the *Act*, if a tenant does not pay rental arrears or apply for dispute resolution within 5 days of a 10 Day Notice being issued, the tenancy is presumed to have ended. However, that presumption can be rebutted. In certain circumstances, a tenant might assume that, since a notice to end tenancy was issued citing outstanding rent as the basis for that notice, the payment of that outstanding rent would reinstate the tenancy. Again, a landlord may continue to accept payment for outstanding rent but it is incumbent on the landlord to be clear if they still intend to end the tenancy.

The tenant testified that, over the course of 2013 and 2014, the tenant continued to reside in the rental unit and pay her rental amount of \$885.00. She testified that she was not approached by the landlord with respect to her failure to pay this alleged rent increase during those two years. She testified that it was only on receipt of the 10 Day Notice in January 2015 that she was told there was an outstanding balance because of the rent increase amounts over the course of two years. She disputes the rental increase and testified that she paid the correct outstanding rental amount after the effective date identified in the 10 Day Notice. There is no contradictory evidence provided at this hearing.

Based on the evidence provided for this hearing and the tenant's sworn and undisputed testimony, I find that the acceptance of the rental arrears by the landlord for January rent reinstated this tenancy.

With respect to the tenant's application disputing the landlord's rental increase, Residential Tenancy Policy Guideline No. 37 provides the circumstances under which a

landlord can increase rent. "The landlord may impose an Annual Rent Increase up to, but not greater than, the percentage amount calculated as follows: inflation rate + 2%." The tenant's rent can only be increased once every 12 months. The Guideline also states that a tenant's rent cannot be increased unless the tenant has been given proper notice in the approved form at least 3 months before the increase is to take effect. A rent increase that falls within the limit permitted by the applicable Regulation cannot be disputed at a dispute resolution proceeding. However, it is not strictly the increase that the tenant disputes. The tenant provided sworn undisputed testimony that she had no notice of this increase and, further, that the landlord seeks to claim the difference between the tenant's rent paid and the rental increase amount from 2013 to the present date.

The Residential Tenancy Regulations provide that where a landlord has not fully applied an approved rent increase within 12 months of the date the increase comes into effect, the unused portion cannot be carried forward or added to another rent increase, unless an arbitrator orders otherwise. It seems unfair to suggest that, in the circumstances as provided by the tenant at this hearing, the tenant should be responsible for this level of debt. The landlord has not appeared at this hearing. Therefore, I have no evidence before me to support any landlord claim as to whether notice of a rent increase was provided and in what form that notice was given. I also do not have any testimony from the landlord to explain why the landlord would have chosen not to collect the rent increase from the tenant since 2013 but only provide a 10 Day Notice for Unpaid Rent in 2015. It seems unfathomable that the landlord continued to accept the tenant's rent at \$885.00 when the rent had allegedly increased to \$915.00 over the course of more than two years.

I grant the tenant's application, listed as "other" with respect to her landlord's requirement to pay outstanding rental arrears based on an unpaid rental increase. I find that the correct monthly rent remains \$885.00, the amount identified in the tenancy agreement. If the landlord wishes to increase the rent at the premises, the landlord must take the appropriate steps under the *Act* to do so.

Based on the tenant's testimony that she has paid January rent in full and based on the lack of attendance of the landlord at this hearing, I accept that the tenancy is reinstated and I grant the application to cancel the 10 Day Notice to End Tenancy. The landlord is within his purview to take action with respect to any unpaid rent owing from February 2015.

Conclusion

I grant the tenant's application to cancel the notice to end tenancy. The notice to end tenancy is cancelled. The tenancy will continue.

I grant the tenant's application to determine the legitimacy of the rental increase claim: I order that the rental increase will not be of force and effect. I order that the correct monthly rent for this tenancy remains \$885.00, until such time as the rent is varied in accordance with the *Act*.

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: February 24, 2015

Residential Tenancy Branch