Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, RP, FF

Introduction
This hearing dealt with an application by the tenant for orders setting aside a 1 Month Notice to End Tenancy for Cause; compelling the landlord to comply with the Act, regulation or tenancy agreement; and compelling the landlord to make certain repairs. Both parties appeared and had an opportunity to be heard.

Issue(s) to be Decided
- Is the 1 Month Notice to End Tenancy for Cause dated January 27, 2014 valid?
- Should a repair order be made and, if so, on what terms?
- Should any other order be made against the landlord?

Background and Evidence
The tenancy commenced June 1, 2013. The parties signed a written tenancy agreement. The agreement provided for a one year fixed term tenancy ending May 31, 2014 and continuing thereafter as a month-to-month tenancy. The agreement also states that the monthly rent is $700.00 and is due on the first day of the month.

There are two rental units in this building, which is located in a small community. On the upper level is a small restaurant that is open seasonally. When operating the restaurant is open 5 ½ days a week.

The tenant's unit is a two bedroom, 1200 square foot suite on the lower level. The landlord testified that in 2005 the unit was extensively renovated, including upgrades to the electrical system.

At the start of the tenancy the landlord explained to the tenant that the electric hot water tank for both levels is attached to the downstairs meter. The agreement was that the tenant would be compensated in the amount of $60.00 per month for this usage every month that the restaurant is open.

The building is heated by an electrically powered boiler. The boiler is connected to the upstairs meter. The hydro bill is in the name of the upstairs tenant and the tenant is supposed to pay the landlord for his usage in the downstairs unit. During the prime heating season the upstairs unit is vacant with only a small refrigerator and a small heater left operating.

In the spring of 2014 there was an interruption in electrical service to the tenant for two days as a result of an error made by B C Hydro when installing the new Smart meter. The repair bill, which was paid by the landlord, was $742.45. As compensation for the interruption the landlord agreed to pay the tenant's share of the hydro bill from October 2013 to the spring of 2014, in the amount of $650.00.

In February 2014 the landlord sent the tenant a very detailed accounting the hydro usage, the hydro bill and a request for payment of $762.23, being the hydro charges for the previous three months. The tenant testified that he did not understand the information provided by the landlord. Both parties agreed that the tenant did eventually pay the amount requested in full.

The tenant had claimed that that a number of repairs were required to the rental unit. The landlord testified that he had recently spent a week in this community and had repaired a number of items.

The tenant acknowledged that the landlord had made the repairs as stated. He also acknowledged that many of the problems had been caused by "absentmindedness" on his part.

The tenant continued to complain about the fact that the rental unit has single pane windows, no vent over the kitchen stove, and no fan in the bathroom. The landlord pointed out that the building is over forty years old; these were the conditions when the tenant rented the unit; and that both the kitchen and bathroom have windows that open. He also filed invoices showing that regular and significant repairs had been made to this property over the course of the tenancy.

The tenant's history of rent payment is as follows.

The August 2013 rent was not paid until August 24, 2013. The October and December 2013 cheques of $700.00 each were returned to the landlord marked NSF. The tenant replaced each of these cheques with a cheque in the amount of $600.00. On each occasion the landlord's bank charged the landlord a $45.00 NSF fee. The tenant has never reimbursed the landlord for these costs.

The landlord testified that in January 2014 the tenant was not working and was finding it impossible to pay the rent and the hydro bill. To help out the tenant he agreed to reduce the rent to $600.00 per month. His intention was that the reduction would be temporary.

In May 2014 the tenant paid $500.00 towards the rent.

On June 10, 2014 the landlord served the tenant with a 1 Month Notice to End Tenancy for Cause. The tenant disputed the notice and was successful on his application. In a decision dated July 23, 2014, the notice to end tenancy was set aside and the tenancy continued.

After the hearing the landlord presented the tenant with a document that re-affirmed that the monthly rent was $700.00. The tenant never signed the document. The tenant testified that after the last hearing he told the landlord he wanted to keep the rent at $600.00 because “of what I am putting up with”.

The landlord testified that he never served the tenant with a 10 Day Notice to End Tenancy for Non-Payment of rent but he spoke to the tenant many times about the fact that they were back to the original tenancy agreement and the rent was $700.00. The tenant testified that “I kept insisting I want compensation”.

The tenant has tendered $600.00 every month and the landlord has accepted it.

In the fall of 2014 the tenant told the landlord his elderly mother had moved in and it was his intention to move to a new place that would be more suitable for both their needs.

The tenant gave the landlord posted dated cheques, each in the amount of $600.00 for the January, February and March 2015 rents.

The January cheque was returned to the landlord marked NSF. This was the last straw for the landlord. On January 27, 2015 he signed a 1 Month Notice to End Tenancy for Cause. The sole reason stated on the notice was that the “tenant is repeatedly late paying rent.”

The notice was posted at the rental unit and was also sent to the tenant by registered mail. The evidence was not clear as to when the notice was actually posted or mailed.

The tenant testified that he found the notice on January 30 and he received a second copy by registered mail on February 2.

The tenant testified about his mental health difficulties and the disruptions he has had to his disability allowance.

The tenant did not provide a replacement cheque for the January cheque until February 10, 2015. The landlord testified that he had cashed the February cheque but as of the date of the hearing he still had the March cheque. The tenant said the cheque had gone through his bank account but did not provide any proof of that.

Analysis

Section 47(1)(b) of the *Residential Tenancy Act* allows a landlord to end a tenancy where a tenant is repeatedly late paying rent. The relevant law is summarized in *Residential Tenancy Policy Guideline 38: Repeated Late Payment of Rent*.

The *Guideline* states that three late payments are the minimum number to justify a notice under these circumstances. 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.

The late rent payments in August, October and December of 2013 would have been sufficient grounds for ending this tenancy if a 1 Month Notice to End Tenancy had been served on the tenant at that time. However, those late payments are so far in the past they may not be considered on this application.

Instead of ending the tenancy at that time the landlord made a new arrangement with the tenant reducing the rent to $600.00 per month. I accept the landlord’s testimony that he only intended this rent reduction to be temporary.

I find that once the last arbitrator continued this tenancy the landlord made it clear to the tenant that he expected him to comply with the terms of the original tenancy agreement. This was confirmed by the tenant’s testimony.

One of the issues that arises in this case is whether the landlord, by continuing to accept rent in the amount of $600.00 and not taking the enforcements procedures available to landlords under the legislation (i.e. serving the tenant with a 10 Day Notice

to End Tenancy for Non-Payment of Rent) sooner may be taken to have waived any right to collect $700.00 per month for rent.

The law on this topic is summarized in *Residential Tenancy Policy Guideline 11: Amendment and Withdrawal of Notices.* The Guideline explains that 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 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 amounting to estoppel.

The landlord's behaviour over the six months following the last arbitration hearing does not amount to a clear, unequivocal and decisive act of a party intending to waive his right to collect the full rent. Although he was very lenient with the tenant, both parties testified that the landlord continued to ask for $700.00 per month.

The tenant testified that he resisted the landlord's efforts to collect $700.00 because he wanted compensation from the landlord for certain aspects of this tenancy. However, section 26(1) specifically provides that a tenant must pay rent when it is due, whether or not the landlord complies with the legislation or tenancy agreement, unless the tenant has an order from an arbitrator allowing him or her to withhold rent. The tenant did not have such an order.

The landlord argues that he should not be penalized because he continued to talk to the tenant instead of taking legal action immediately. I think that in this situation that is a fair statement.

I find that the landlord's delay in taking immediate legal action was motivated by two factors in particular:

- The tenant's statement that he was going to move out soon, and the landlord's hope that the situation would resolve itself peacefully.
- The landlord's habit of trying to help the tenant, who faces many difficulties.

I find that the tenant has been consistently late with the rent in that he has not paid the full amount of the rent due since August 1, 2014. The landlord has established that the notice to end tenancy is valid and the tenant's application to set it aside is dismissed.

Section 55(1) of the *Residential Tenancy Act* provides that if a tenant makes an application to set aside a landlord's notice to end a tenancy and the application is dismissed, the dispute resolution officer must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing, the landlord makes an oral request for an order of possession.

The landlord did make an oral request for an order of possession. The landlord is entitled to an order of possession effective two days after service on the tenant. If necessary, this order may be filed in the Supreme Court and enforced as an order of that Court.

The tenant's evidence did not establish, on a balance of probabilities, that the landlord had failed to maintain the rental unit to the standard required by the legislation or that he had failed to comply with the Act, regulation or tenancy agreement. Accordingly, both those applications are dismissed.

Conclusion

The tenant's application is dismissed in full and an order of possession has been granted to the landlord.

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: March 16, 2015

Residential Tenancy Branch