



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

This hearing dealt with a tenants' application to cancel a 1 Month Notice to End Tenancy 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.

Issue(s) to be Decided

Should the Notice to End Tenancy be upheld or cancelled?

Background and Evidence

The parties executed a written tenancy agreement on September 22, 2013 for a one year fixed term tenancy set to commence November 1, 2013 and continued on a month to month basis after the expiry date of October 31, 2014. The tenancy agreement provides that the tenants are required to pay the monthly rent of \$1,500.00 on the 1st day of every month.

On July 20, 2015 the landlord personally served the female tenant with a 1 Month Notice to End Tenancy for Cause with a stated effective date of August 31, 2015 that indicates the reason for ending the tenancy was that the tenants were repeatedly late paying rent (the Notice). The tenants filed to dispute the Notice within the time limit for doing so.

In support of ending the tenancy the landlord testified that in the 24 months since this tenancy commenced the tenants had been late paying the rent 20 times. As documentary evidence the landlord provided copies of her bank statements for the months of January 2015 through August 2015 inclusive. The bank statements show transfers from the tenants' credit union account to the landlord's credit union account on

the following dates: January 5, 2015; February 3, 2015; March 4, 2015; April 2, 2015; May 4, 2015; June 3, 2015; July 2, 2015 and August 3, 2015.

The landlord had also provided a two page typewritten submission detailing events that transpired from the start of the tenancy to the issuance of the 1 Month Notice. The submission largely describes the landlord's assessment of the condition of the property and provides no submissions with respect to repeated late payment of rent.

The tenant acknowledged that rent has been paid in the first few days of every month since the start of the tenancy and did not dispute the landlord's evidence as to the dates rent was paid. The tenant's position was that they had provided post-dated cheques to the landlord at the start of the tenancy but that the landlord did not want to go to the bank to deposit cheques and requested direct deposits to her bank account. The tenant explained that she and the co-tenant have bank accounts with two of the charter banks where their pay cheques are deposited whereas the landlord's account is with a credit union on the gulf island where they reside. As a result, the tenants had to open an account with the credit union to facilitate transfers to the landlord's account. This system necessitates moving funds from the charter banks to their credit union account and includes a 3 day hold on deposits and then another transfer is made to the landlord's credit union account. The tenant submitted that prior to receiving the 1 Month Notice on July 20, 2015 the landlord had not put them on notice that this arrangement would be grounds for evicting them.

The landlord responded by stating the tenants offered post-dated cheques at the start of the tenancy but that the tenants did not actually provide her post-dated cheques. The landlord did acknowledge that she had communicated to them that her preferred method of payment was direct deposit. The landlord maintained that rent is due on the 1st day of the month and that her other tenants are able to accomplish this by way of direct deposit. The landlord claims that she spoke with the male co-tenant about the late payment of rent on two or three occasions and that he also pointed to the multiple bank accounts as the reason rent was received by the landlord after the 1st day of the month. In questioning the landlord further about these discussions with the male tenant, the landlord admitted that she could not recall how the discussions concluded.

Analysis

Under section 47 the Act, a landlord may end a tenancy where the tenant has repeatedly paid rent late by way of a 1 Month Notice to End Tenancy for Cause. Residential Tenancy Policy Guideline 38 provides policy statements with respect to ending a tenancy for repeated late payment of rent. The policy guideline provides that

three late payments of rent are sufficient for the tenant to be considered repeatedly late paying rent. However, the policy guideline also provides that there are circumstances when an Arbitrator may find the landlord waived reliance on this provision.

In this case, it is undisputed that throughout most of this two year tenancy the rent had been received by the landlord after the first day of every month but within the few days that follow. It was also undisputed that the landlord had not put the tenant's on notice, in writing, that this practice would no longer be tolerated after it occurred multiple times. While putting the tenants on written notice prior to issuing a Notice to End Tenancy for repeated late payment of rent is not a specific requirement under the Act, where a party tolerates certain conduct for a significant period of time the question of waiver arises. It would appear that the tenants are of the position that the landlord waiver expectation of receiving rent on the 1st of the month as seen in the details of their application which include: "Rent was not repeatedly late. We were never given notice of late payments."

Waiver may be given express or implied. Implied means something is suggested but not directly expressed. Residential Tenancy Policy Guideline 11 provides policy statements with respect to waiver, including implied waiver. It provides, in part:

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.

The landlord asserted during the hearing that she was not accepting of the tenants paying rent late and in effort to demonstrate this she claimed to have spoken to the male co-tenant about the issue on two to three occasions. However, I note that despite the tenants' statement on their application that "we were never given notice of late payments" the landlord made no mention of conversations with the male tenant about repeated late payment of rent in the very detailed timeline she provided in response to the tenants' application. I am troubled by the landlord's failure to mention any such conversations in her written submission and to only raise it during the hearing when the male tenant was not present to respond to her assertions. Of further consideration is that when I asked the landlord to provide further particulars as to how those conversations with the male tenant concluded she stated she could not recall.

Therefore, I am unsatisfied the landlord verbally notified the male tenant that payments received after the first month were unacceptable and would no longer be tolerated.

What is clear to me is that rent payments had been made in the first few days of nearly every month for nearly two years and the landlord did not establish that she acted to cease this practice and only after she became dissatisfied with the condition of the property did she issue an eviction notice for repeated late payment of rent. Therefore, I find there is sufficient evidence for me to conclude that the landlord had implicitly waived reliance on the provision of the Act that permits a landlord to end a tenancy for repeated late payment of rent.

In light of the above, I find it appropriate to cancel the Notice to End Tenancy that was served upon the tenants on July 20, 2015 and the tenancy continues at this time. However, the tenants are now considered to be put on notice that the landlord will no longer tolerate receiving rent after the 1st day of the month and paying rent after the 1st from now on shall be considered late payment and paying rent late three times shall be grounds for eviction without fore warning.

To pay rent on time the tenants may continue to use direct deposit but must ensure the transfer to the landlord's credit union account is accomplished on or before the 1st of every month which and any necessary reconfiguring of banking methods would be the tenants' burden to accomplish. Alternatively, the tenants are at liberty to provide rent cheques to the landlord so long as they are dated for the 1st day of the month and in the landlord's possession on or before the 1st day of the month.

Considering the landlord's written submissions point to other issues she has with respect to this tenancy, the landlord remains at liberty to pursue appropriate lawful action concerning those other issues, including issuing a Notice to End Tenancy as applicable.

I order both parties to share in the cost of this proceeding. Since the tenants paid the \$50.00 filing fee I authorize them to withhold \$25.00 from a future month's rent to recover one-half of the fee.

Conclusion

The 1 Month Notice to End Tenancy for Cause issued on July 20, 2015 has been cancelled and the tenancy continues at this time. The tenants are now considered to be on notice that rent must be paid on or before the 1st day of every month from now on and payments received by the landlord after the 1st day will be considered late.

The tenants are authorized to deduct \$25.00 from a future month's rent to recover one-half of the filing fee paid for this application.

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: October 09, 2015

Residential Tenancy Branch

