



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LINDA E. ROSS PROP. MGT. INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR

Introduction

The tenant applies to cancel a ten day Notice to End Tenancy for unpaid rent dated March 21, 2016 but received by her on March 10. The Notice gives an effective date of March 9, 2016 for the tenant to vacate.

Both parties attended the hearing, the landlord by its representative, and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

An exception was made concerning the tenancy agreement. Neither party filed a copy of the written tenancy agreement but the tenant's representative read in portions from a purported copy that he had.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that the tenant has failed to pay rent? Has the tenancy ended as a result of the ten day Notice?

Background and Evidence

The rental unit is a two bedroom apartment. The tenancy started in May 2010 and is presently a month to month tenancy. The current rent is \$596.00, due on the first of each month. The landlord holds a \$275.00 security deposit.

There is no dispute but that the tenant failed to pay the rent due March 1, 2016. The landlord's representative Ms. C.H.'s undisputed evidence is that the tenant's rent cheque for March was sent back from a financial institution on March 9, either dishonoured or cancelled, it was not clear which.

The tenant testifies that on February 17, 2016 her apartment suffered a significant ingress of water from the floor above her.

It would appear that the landlord took timely steps to remedy the leak and remediate the tenant's apartment. However, throughout the month the apartment was exposed to open fibreglass insulation and damp and what the tenant considered to be mould growth.

She was of the view that the insulation and/or the mould was making her ill. As a result, she took up temporary residence at a motel. She did not conduct any emergency repairs herself and claims no expenses incurred for emergency repairs.

Because she had to pay for the motel, she did not have the funds necessary to pay rent when it came due March 1st.

Mr. A. for the tenant recited from what he understood to be the tenancy agreement. He testified that he had a copy of a tenancy agreement contained a term or terms stating:

- Termination by DNFC [*the original landlord*] may occur if the tenant fails to pay rent or observed the terms of the tenancy agreement or on her death.
- In the event of any breach the landlord will give the tenant three warning letters then an eviction notice.
- In the event of rent arrears the tenant will receive a "due notice" which will be sent on the fifth of the month.
- If rent arrears are not received by month's end then there will be a meeting and a payment agreement will be negotiated, specific to the tenant's financial situation.

Mr. A. notes that the landlord did not sign the copy of the tenancy agreement he has.

The tenant stated that the agreement she signed was different but the one Mr. A. read from was provided to her from a tenant's advocacy organization, who, she says, had requested it from the landlord at some time prior to 2016.

She says that on March 16 she and the landlord tried but failed to work out a repayment agreement.

In response, Ms. C.H. for the landlord says the ten day Notice at issue here should be the "due notice" referred to in the agreement read in by Mr. A.

Analysis

The tenant did not pay the March rent.

Section 26(1) of the *Residential Tenancy Act* (the “*RTA*”) states:

(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Even assuming that the perceived unhealthy state of the tenant’s apartment was due to the landlord’s failure to comply with the *RTA*, the regulations or the tenancy agreement, it did not give the tenant grounds to forego payment of rent for March.

Turning to the passages read in by Mr. A., they could have a serious effect on the validity of the Notice at issue here, but for two obstacles.

First, the agreement read in does not bear the signature of the landlord or its lawful representative. A signature on a contract is a fundamental precondition to its enforceability. While in some cases, other, circumstantial evidence may be admitted to prove an unsigned agreement is an enforceable agreement, there is no convincing evidence of that here.

Secondly, s.5 of the *RTA* prohibits contracting out of the terms of the legislation. It states:

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

The terms read in by Mr. A. vary the law set by s. 46 of the *RTA*, which provides that a landlord may end a tenancy on any day after the day unpaid rent is due by giving a ten day Notice and that if the tenant fails to pay the amount claimed or fails to make application to cancel the Notice within five days, the tenancy ends ten days after the Notice was received.

The terms read in by Mr. A. appear to favour the tenant; to give her a longer opportunity to pay rent and to interject negotiation and a payment plan fitting to her circumstances.

While it might be expected that landlords, who usually hold the upper hand in tenancy negotiations, would be most prone to attempts to avoid the *RTA*, s. 5 specifically

includes attempts by tenants to do so. No matter whom a particular term favours or whether both parties are eager to adopt it, if it avoids the provisions of the *RTA* it is “of no effect.”

For this reason, the terms read in by Mr. A. cannot help the tenant. They avoid the mandatory provisions of the *RTA* and are of no effect.

No issue was raised about the dates contained in the Notice or that they were somehow confusing or misleading. I therefore make no finding in that regard.

Conclusion

The ten day Notice to End Tenancy is a valid Notice. By operation of s.46 of the *RTA* it has resulted in the ending of this tenancy on March 21, 2016. The landlord will have an order of possession.

It should be said that there is no indication that the tenant was acting in bad faith in not paying rent for March. She may simply have misunderstood her rights and obligations. While it has resulted in the ending of this tenancy by law, I would commend to the landlord to continue its relationship with this tenant of some six years, if agreeable payment arrangements can be agreed to.

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: May 01, 2016

Residential Tenancy Branch