



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPR, MND, MNR, MNDC, FF
Tenant: CNR, CNC, OLC

Introduction

This hearing dealt with cross Applications for Dispute Resolution. The landlord sought an order of possession based on a 10 Day Notice to End Tenancy for Unpaid Rent and a monetary order. The tenants sought to cancel two notices to end tenancy (10 Day Notice and a 1 Month Notice to End Tenancy for Cause).

The hearing was conducted via teleconference and was attended by the landlord and both tenants.

On May 24, 2016 the tenants submitted an Amendment to an Application for Dispute Resolution seeking full access to laundry facilities and compensation for loss of service.

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claims relate to the 1 Month Notice to End Tenancy for Cause, the 10 Day Notice to End Tenancy for Unpaid Rent and the continuation of this tenancy is not sufficiently related to the tenants' claim to reinstate services or facilities or monetary compensation. The parties were given a priority hearing date in order to address the question of the validity of the Notice to End Tenancy.

The tenants' other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the 1 Month or 10 Day Notices. I exercise my discretion decline to accept the tenants' request for amending their claim to include reinstating a facility and compensation. I note the tenants are at liberty to file a separate claim.

At the outset of the hearing, the landlord clarified that part of her Application for Dispute Resolution was to seek compensation for damage to the rental unit for some plumbing repairs. As per Rule of Procedure 2.3 I also find that this damage is not related to

whether or not the tenancy will continue and as such, I amend the landlord's Application for Dispute Resolution to exclude the matter of compensation for damage to the rental unit with leave for the landlord reapply at a future date.

I note, in relation to the tenants' Application seeking to cancel the 1 Month Notice and in light of the fact that the landlord did not apply for an order of possession on her Application based on the 1 Month Notice, that Section 55 of the *Residential Tenancy Act (Act)* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession for unpaid rent; to a monetary order for unpaid rent; and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 46, 55, 67, and 72 of the *Act*.

It must also be decided if the tenants are entitled to cancel a 10 Day Notice to End Tenancy for Unpaid Rent; to cancel a 1 Month Notice to End Tenancy for Cause and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 46, 47, 67, and 72 of the *Act*.

Should the tenant be unsuccessful in seeking to cancel the 1 Month Notice to End Tenancy for Cause it must also be decided if the landlord is entitled to an order of possession pursuant to Section 55(1) of the *Act*.

Background and Evidence

While the parties confirmed that no written tenancy agreement was signed they agreed the tenancy began sometime in October 2015 for a monthly rent of \$650.00 with a security deposit of \$325.00.

The landlord stated that the tenancy began on a "conditional" basis. That is that the tenants were allowed to move in and based on whether or not they were a good fit for the residential property the landlord would allow them stay or not. However, I note that the *Act* does not allow for this type of "conditional" tenancy, as such, I have noted that the agreement was on a month to month basis.

The parties could not agree, in the hearing, as to what was the agreed upon date, each month, that rent was due. The landlord testified that rent was due on the last day of the month preceding the first day of rental period. The tenants submitted that they understood rent was due on the 1st of each month.

The tenant's submitted into evidence a copy of a 1 Month Notice to End Tenancy for Cause issued on May 4, 2016 with an effective vacancy date of May 31, 2016 citing the tenants are repeatedly late paying rent; the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property, seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or put the landlord's property at significant risk; and the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that has caused or is likely to cause damage to the landlord's property, has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord.

The landlord submitted that the tenants were repeatedly late paying rent for most of the duration of the tenancy. The landlord testified that they would often pay it on the 1st of the month but they have also paid it on the 5th, 7th, and as with May 2016 on the 31st.

The tenants submitted that they have paid rent on the 1st of each month with the exception of May 2016 when they paid it on May 31, 2016.

The parties confirmed that with the exception of the payment of rent on May 31, 2016 the landlord had never before issued any form of rent receipt to the tenants.

The landlord also submitted that the tenants have been cooking at all hours of the night and have been using an open flame that has caused smoke in the rental unit that is disturbing others and is a potential risk for the residential property. The landlord also submit that the tenants have left the shared bathroom unclean and as a potential hazard to other occupants in the residential property.

The tenants testified that it was another occupant who had been using the tenants' pots to cook rice that was burned and ruined their pot who had been causing the flames and smoke in the residential property. They also stated that they did not understand the landlord's complaints about the bathroom – they stated that the only possible problem may have been some hair that they had failed to clean up.

In reference to the illegal activity the landlord clarified that she did not mean to indicate an illegal activity but provided further details of the cause on the Notice which state: "not moving out, continue to cause serious problems, not paying rent at time since Nov/15" [reproduced as written].

The landlord and tenants both submitted into evidence a copy of a 10 Day Notice to End Tenancy for Unpaid Rent issued by the landlord on May 4, 2016 with an effective vacancy date of May 14, 2016 due to \$1,300.00 due on April 30, 2016.

The landlord submitted that the tenants did not pay rent on the last day of March 2016 which would have been for the month of April and on the last day of April 2016 which would have been for the month of May 2016.

The tenants testified that they did pay rent for the month of April 2016 but the landlord did not issue a receipt, as were her practice as noted above. The tenants also testified that they attempted to pay rent on May 1, 2016 but that the landlord refused to accept it.

The tenants have submitted into evidence a handwritten letter from the landlord dated April 1, 2016. The letter states:

“To all tenants of the basement suit Be advice that the last day of your tenancy in the suit is the last day of the month of April 30th, 2016 Complete renovation of rooms will start on May 1st, 2016.

On the April 30th, 2016 at 10 am you need to empty your rooms and move out all your stuff.

As I told you last 3 month and gave you already that information during this 3 month. It's a final note” [reproduced as written]

The tenants submit that when they went to pay the rent on May 1, 2016 they advised the landlord that the above noted letter was not a legal notice to end the tenancy; that she got upset and would not take any rent monies from them.

The landlord submitted that the tenants were always aggressive towards her and that they did come to her door on May 1, 2016 but it was not to pay rent it was to argue about the letter and to inform the landlord they were not moving out.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- a) The tenant is repeatedly late paying rent;
- b) The tenant or a person permitted on the residential property by the tenant has
 - i. Significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
 - ii. Seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
 - iii. Put the landlord's property at significant risk;
- c) The tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
 - i. Has caused or is likely to cause damage to the landlord's property,

- ii. Has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or
- iii. Has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord.

As per the landlord's own testimony, I find the landlord has failed to establish any illegal activity occurred and as such, cannot rely on that provision under Section 47 to end the tenancy.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

In the case before me the tenant's submit that with the exception of the May 2016 rent payment they have paid rent on the 1st of each month. The tenants also assert that rent is due on the 1st of each month. While the landlord asserts that rent is owed on the last day of the month preceding the rental period she has provided absolutely no evidence to confirm this, such as a tenancy agreement.

Section 13(1) of the *Act* requires a landlord to prepare in writing every tenancy agreement entered into. If the landlord had complied with this requirement she could have provided some evidence of when rent was due in the month.

However, in the absence of any such evidence I find there is no evidence to confirm that any payments made by the tenants on the 1st of any month are late payments. Furthermore, the landlord has provided no evidence of any rental payments made on the 5th or 7th of any month and the tenants dispute this claim.

For these reasons, I find the landlord cannot establish repeated late payment of rent as a ground for ending the tenancy.

In regard to the landlord's assertion that the late night cooking; cooking with an open flame; bathroom issues or any other disturbances, I find the tenants have provided plausible explanations and the landlord has no additional evidence to corroborate any of these accusations or that it was the tenants that caused any disturbances or potential for damage to the property.

As a result, I find the landlord has failed to establish this as a ground to end the tenancy. As such, I order the 1 Month Notice to End Tenancy for Cause issued on May 4, 2016 is cancelled.

Section 46 of the *Act* states a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy on a date that is not earlier

than 10 days after the date the tenant receives the notice. A notice under this section must comply with Section 52 of the *Act*.

Section 46(4) allows the tenant to either pay the rent or file an Application for Dispute Resolution to dispute the notice within 5 days of receipt of the notice.

There is a general legal principle that places the burden of proving a loss on the person who is claiming compensation for the loss and on a landlord for ending a tenancy based on unpaid rent. In regard to the landlord's claim that rent in the amount of \$1,300.00 was unpaid on May 4, 2016 and considering the tenants' testimony that they had paid the landlord full rent for the month of April 2016 in cash, the burden of proving that rent for April 2016 was not paid in cash, as claimed by the tenants, rests with the landlord.

Section 26(2) of the *Act* stipulates that a landlord must provide a receipt when rent is paid by cash. Cash receipts can help to establish when a rent payment has *not* been made.

When a landlord regularly provides receipts for cash payments there is an expectation that a tenant will be able to produce a receipt for every cash payment that has allegedly been made. When a tenant is unable to provide a receipt for an alleged payment, it lends credibility to a landlord's claim that a cash payment has not been made. When a tenant has previously made cash payments and has never been provided with a receipt, there is no expectation that the tenant can provide a receipt for such a payment.

In these circumstances the landlord's failure to provide receipts for cash payments made during this tenancy can significantly impair her ability to prove that the tenants did not pay the rent. The landlord did not submit any other evidence, such as a copy of a payment ledger, to corroborate her claim that the tenants did not pay \$650.00 in cash on or before May 4, 2016 for the month of April 2016.

In regard to whether or not any rent was owed on May 4, 2016, when the landlord issued the 10 Day Notice to End Tenancy for Unpaid Rent, for the month of May 2016 I accept the tenants version of events.

From the landlord's description of events from her perspective throughout the tenancy it is clear the landlord is not happy with these tenants. Furthermore, she attempted to end the tenancy effective April 30, 2016 by providing the tenant with a letter advising them that their tenancy would end on that date because she wanted to complete renovations.

Section 49 of the *Act* does allow the landlord for such a purpose but it requires the landlord give the tenants a 2 Month Notice to End Tenancy for Landlord's Use of the Property and compensation in an amount equivalent to 1 month's rent. This form and content requirements for this Notice are set out in Section 52 of the *Act* and the form itself is available on the Residential Tenancy Branch website.

I find, on a balance of probabilities, the landlord refused to accept rent because she had believed that the tenancy was not going to continue and she wanted the tenants out of the rental unit.

As such, although rent was owed to the landlord at the time she issued the 10 Day Notice to End Tenancy for Unpaid Rent, I find that it was owed only as a result of the landlord's refusal to accept it and the landlord therefore, cannot use this as grounds to end the tenancy. As a result, I order the 10 Day Notice to End Tenancy for Unpaid Rent issued on May 4, 2016 is cancelled.

In addition and for the reasons noted above, I find there is no rent owed for the month of April 2016 and as rent is now paid for the month of May 2016 I find the landlord is not entitled to a monetary order for unpaid rent at this time. Therefore, I dismiss the landlord's Application for Dispute Resolution in its entirety and without leave to reapply.

I do note, however, that during the hearing the tenant's had acknowledged that they had not paid rent for the month of June 2016. I advised the parties during the hearing that since the tenants were living in the rental unit on the day that rent was due (whether that is the last day of the month or the 1st) then they must pay the landlord rent.

I caution the tenants that failure to pay rent for the month of June 2016 will allow the landlord to issue a new 10 Day Notice to End Tenancy for Unpaid Rent. I also caution the tenants that this will now be the 2nd time they have paid rent late and Residential Tenancy Policy Guideline #38 specifies that if a tenant pays rent late on at least 3 occasions the landlord may be successful in ending the tenancy for repeated late payment of rent.

Conclusion

Based on the above, I order the tenancy remains in full force and effect.

As the landlord was unsuccessful in her Application for Dispute Resolution I dismiss her request to recover the filing fee.

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: June 08, 2016

Residential Tenancy Branch