



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OPC, LRE, OLC, FF

Introduction

Original applications

This hearing was convened to deal with cross-applications by the landlord and the tenant pursuant to the *Residential Tenancy Act* (the “Act”). An advocate for the tenant attended the hearing on the tenant’s behalf. The landlord also attended the hearing. Both the landlord and the advocate on behalf of the tenant had full opportunity to be heard, to present affirmed testimony, to make submissions and to present documentary evidence.

The landlord’s application, dated December 28, 2016, is for an order of possession and authorization to recover the filing fee for this application. The relief sought by the landlord is based on a 1 Month Notice to End Tenancy for Cause dated November 29, 2016 (the “1 Month Notice”).

The tenant’s application, dated December 8, 2016, seeks an order cancelling the 1 Month Notice and orders requiring the landlord to comply with s. 28 of the Act and suspending or setting conditions on the landlord’s right to enter the rental unit.

Amended applications

On January 2, 2017 the landlord issued a 10 Day Notice for Unpaid Rent or Utilities, and on January 17, 2017 she filed an amendment to her original application, seeking unpaid rent for January and February and unpaid utilities. Her amended application does not indicate that she seeks an order of possession based on the 10 Day Notice.

The tenant’s advocate confirmed that the tenant received both the 1 Month Notice and the 10 Day Notice but the advocate did not understand that the tenant received the landlord’s application seeking an order of possession based on the 1 Month Notice or the landlord’s amendment seeking a monetary order. The advocate understood that the hearing that had been scheduled was only with respect to the tenant’s application to cancel the 1 Month Notice. The landlord testified that she served her amended application by registered mail on January 17, 2017 to the rental address but did not submit the registered mail receipt in evidence.

The tenant had also amended his application. On January 3, 2017, the tenant amended his application to seek an order cancelling the 10 Day Notice and alleging that the landlord had failed to comply with sections 27 and 28 of the Act.

The landlord testified that she had not received the tenant's amendment. The advocate stated that it had been sent by registered mail. Again, there was no proof of service.

Very little documentary evidence was submitted by either party. Neither party submitted the tenancy agreement.

Matters before me

As the tenant did not attend with his advocate and neither party was able to satisfy me that their respective amendments had been received by the other party, I advised at the outset that I would consider only the tenant's original application to cancel the 1 Month Notice.

I further advised the landlord that she was at liberty to apply for an order of possession and a monetary order based on the 10 Day Notice she had already served on the tenant, and that if she chose to do so, she should be careful to submit evidence in support of her claim for unpaid rent and to confirm service of the application, notice of hearing, and supporting evidence on the tenant. The tenant is advised that if he wishes to dispute the landlord's application, or bring another application of his own, he must do the same.

At the outset of the hearing the advocate asked for an adjournment as the tenant was not present and the advocate was unable to reach him and did not know why he was absent. I refused an adjournment after considering the criteria set out in Rule 7.9 of the Rules of Procedure:

Without restricting the authority of the arbitrator to consider the other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment: and
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

As only the tenant's application was before me, and as the landlord had not submitted any evidence in support of the alleged cause, I considered that the matter could be resolved without the participation of the tenant, and that considering it would not prejudice him. I further considered that the presence of his advocate would suffice to provide him an opportunity to be heard.

Issue(s) to be Decided

Is the tenant entitled to an order cancelling the 1 Month Notice?

Is the tenant entitled to an order requiring the landlord to comply with the Act and/or setting limits on her entry of the rental unit?

Background and Evidence

It was agreed that the landlord took over from her now-deceased father. The landlord testified that she cannot locate a copy of the tenancy agreement in her father's files. The landlord testified that the tenancy began in June of 2016. The advocate asserted that the tenancy began years before. It was agreed that monthly rent of \$525.00 is due on the first of the month and that this is a month to month tenancy. The landlord understands that a security deposit of \$200.00 was paid at the beginning of the tenancy and that it is still held by the landlord.

The advocate submitted that the current landlord and the tenant are having difficulty cooperating. The landlord occupies another portion of the residence, and access to laundry and the provision of cable have become issues. It is therefore not clear whether utilities or laundry are included in the tenancy. The advocate says that cable and laundry have historically been available to the tenant and that the landlord is now unfairly denying these services to the tenant.

The landlord says the tenant did not historically have access to cable or laundry. She says there is shared laundry but it is meant for her and tenants other than this tenant. The landlord further says that she and the tenant agreed between themselves orally outside of the tenancy agreement that they would share cable services and the cost for same and that the tenant has not paid what he owes for this.

The advocate on behalf of the tenant says that the landlord has been entering the shared laundry without notice and through an entrance that intrudes tenant's private space. He says there is another entrance that she could use that would not be intrusive.

The 1 Month Notice indicates that the tenant has "significantly interfered with or unreasonably disturbed another occupant or the landlord." In the "details" section the landlord has indicated that there have been repeated noise complaints from the other tenants and the landlord, and "unpaid utilities past 10 days."

The landlord did not submit any documentary or audio evidence around the noise concern. She recognized she could have submitted evidence from the other tenants but had not done so. She did not describe any noise of any significance in her testimony.

The landlord submitted copies of rent receipts for October and November, both recording \$30.00 owing for October cable. The November receipt also indicates that there is \$200.00

owing for movie rentals. The landlord argued that the receipts established that the tenant had outstanding utilities. In the landlord's submission this also amounts to cause to terminate the tenancy.

Analysis

Section 47(1)(d)(i) of the Act allows a landlord to end a tenancy for cause where the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. Unless the tenant agrees that the tenancy will end, the tenant must dispute a notice under this section by filing an application within 10 days of receipt. In this case, the tenant received the 1 Month Notice on November 29, and applied to dispute it on December 8. The tenant is therefore within the timeline.

Once a tenant disputes a notice, the burden of proof is on the landlord on a balance of probabilities to establish the cause alleged. Here, the landlord has not submitted any documentary or audio evidence in support of her claim, and her testimony was not sufficient to convince me that the tenant has made noise that has been significantly or unreasonably disruptive.

The landlord's claim for outstanding utilities is properly brought as part of an application for unpaid rent. Section 46(6) allows unpaid utilities to be treated as unpaid rent in certain circumstances, which, if applicable, may allow a landlord to end a tenancy. However, unpaid utilities are not identified under s. 47 as "cause" for ending a tenancy.

The landlord was cautioned at the hearing that based on the evidence of an oral agreement between herself and the tenant with respect to cable, the unpaid cable and/or movie rental amounts may not qualify as utilities under the Act.

In summary, the landlord has not established on a balance of probabilities that there is cause to end the tenancy under s. 47 of the Act. Accordingly, I cancel the landlord's 1 Month Notice.

Although I will make no findings on whether the landlord has breach sections 27 or 28 of the Act without the benefit of the tenant's testimony, below I have reproduced those sections for the benefit of both parties.

As per s. 27 of the Act, a landlord can only terminate or restrict a service if it is not essential and not a material term of the tenancy. If a landlord does restrict a service that is non-essential and non-material, the landlord must first give 30 days' written notice and reduce the rent accordingly:

27(1) A landlord must not terminate or restrict a service or facility if

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and

(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Section 28 protects the tenant's privacy and quiet enjoyment of the rental unit. In most circumstances a landlord may not enter a rental unit without 24 hours written notice (see section 29 of the Act) and a tenant is entitled to use of the common areas for reasonable and lawful purposes:

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;

(b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

These are the landlord's obligations and exist regardless of whether I order the landlord to comply with the Act.

Conclusion

The tenant's application to cancel the 1 Month Notice is allowed. The landlord's 1 Month Notice dated November 29, 2016 is cancelled. The tenancy will continue until ended in accordance with the Act.

The tenant's amended application seeking to cancel the 10 Day Notice and seeking orders requiring the landlord to comply with sections 27 and 28 of the Act is dismissed with leave to reapply.

The landlord's amended application for a monetary order is dismissed with leave to reapply.

I order the tenant to provide the landlord with a copy of the tenancy agreement, if he has one, no later than February 10, 2017.

As set out above, the landlord has issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. This decision does not affect the landlord's ability to apply based on that notice for an order of possession and/or a monetary order.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act. Pursuant to s. 77 of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: February 03, 2017

Residential Tenancy Branch