



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT, LRE, OLC

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants on May 23, 2018 (the "Application"). The Tenants applied to dispute a One Month Notice to End Tenancy for Cause dated May 14, 2018 (the "Notice"). The Tenants also applied for an order suspending or setting conditions on the Landlord's right to enter the rental unit and an order that the Landlord comply with the *Residential Tenancy Act* (the "Act"), the *Residential Tenancy Regulation* (the "Regulations") or the tenancy agreement. The Tenants requested reimbursement for the filing fee.

Tenant G.H. (the "Tenant") appeared at the hearing and appeared for Tenant N.H. The Landlord appeared at the hearing. K.S., the nephew of the Landlord, appeared at the hearing as he dealt with the Tenants and the rental. I explained the hearing process to the parties who did not have questions about the process when asked. The parties provided affirmed testimony.

Rule 2.3 of the Rules of Procedure (the "Rules") requires claims in an application for dispute resolution to be related to each other and allows arbitrators to dismiss "unrelated claims with or without leave to reapply".

I advised the Tenant at the outset that I would not consider the request for an order suspending or setting conditions on the Landlord's right to enter the rental unit as it was unrelated to the main issue being the dispute of the Notice.

I asked the Tenant what the request for an order that the Landlord comply with the *Act*, *Regulations* or the tenancy agreement related to as it was unclear from the Application. The Tenant said the Tenants want to stay in the rental unit for another year. The Tenant did not provide any further clarification. I explained to the Tenant what I would be determining in relation to the dispute of the Notice and asked if this request was simply the same as the dispute of the Notice. The Tenant confirmed it was the same. I told both parties I would only consider the dispute of the Notice.

Both parties had submitted evidence prior to the hearing. K.S. confirmed the Landlord received the hearing package and Tenants' evidence and raised no issues in this regard. The Tenant said he did not receive any evidence from the Landlord. K.S. confirmed the Landlord did not serve her evidence on the Tenants.

I explained to the parties that the Rules require a respondent to serve their evidence on an applicant. I asked for the Tenant's position on admitting the evidence. He disputed the admission of the evidence because he did not receive it. I asked for his position on admission of the text messages between the Landlord or K.S. and Tenant N.H. The Tenant agreed to the admission of the text messages and confirmed he was aware of them. The remainder of the evidence relates to vehicles at the rental unit and is irrelevant to the issue before me. I told K.S. and the Landlord that I would only consider the text messages as the Tenant agreed to the admission of these.

Rule 3.15 of the Rules requires respondents to serve their evidence on applicants at least seven days before the hearing. Rule 3.17 of the Rules allows me to admit evidence not served in accordance with the *Act* or Rules if doing so "does not unreasonably prejudice one party or result in a breach of the principles of natural justice".

I admit the text messages between the Landlord or K.S. and Tenant N.H. as the Tenant did not take issue with admission of these. The Tenant did not request an adjournment to review these. I understood the Tenant to agree to admission of the text messages because he was already aware of them. I exclude all remaining documentary evidence of the Landlord as it was not served on the Tenant. Admission of this evidence would have prejudiced the Tenant as he did not receive a copy of it and it is not evidence he has confirmed he was previously aware of.

I dismiss the aspect of the Application requesting an order suspending or setting conditions on the Landlord's right to enter the rental unit with leave to re-apply.

I dismiss the aspect of the Application requesting an order that the Landlord comply with the *Act*, *Regulations* or tenancy agreement without leave to re-apply as this raises the same issue that will be determined in this decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. If the Tenants are not successful in cancelling the Notice, is the Landlord entitled to an Order of Possession?
3. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence. The Landlord and Tenant agreed on the following. The tenancy between the Landlord and Tenants regarding the rental unit started October 1, 2015. It was for a fixed term ending October 1, 2016. Rent is \$1,500.00 per month. The tenancy agreement states that rent is due on the first day of each month. The agreement is signed by the Landlord and Tenants.

The Notice is addressed to the Tenants although the first name used for Tenant G.H. is not his full legal name. Tenant G.H. confirmed he understood the Notice was intended for the Tenants. The reason for the Notice is that the Tenants are repeatedly late paying rent. The Notice outlines the months the Tenants were late paying rent.

K.S. testified that he served the Notice on the Tenant personally May 14, 2018. The Tenant confirmed he received the Notice May 14, 2018 from K.S.

The Tenant confirmed the Tenants filed the Application May 23, 2018. The Landlord did not take issue with this.

K.S. testified that the Tenants paid rent late in December of 2017 and January to May of 2018. He confirmed that the Tenants paid rent for these months on December 5th, January 4th, February 4th, March 3rd and April 5th. Further, he said the Tenants had rent ready for May on May 5th but this was originally refused by the Landlord. The Tenant agreed with K.S. on these points.

The Tenant did not submit that the Tenants had a right to withhold rent under the *Act*. Tenant G.H. said Tenant N.H. apologized to the Landlord in 2017 when they paid rent late and the Landlord said it was fine as long as they paid rent every month by the 15th. The Tenant said the Tenants pay rent on the second, third or fourth of the month and that if this was a problem the Landlord should have given them notice of this. The Tenant did not submit any evidence to support his position that the Landlord said it was fine if the Tenants paid rent before the 15th of each month.

The Landlord testified that she said it was okay for the Tenants to pay rent late one time but that she did not say they could pay rent late every month.

K.S. testified that he never told the Tenants verbally or in writing that the late rent payments were unacceptable prior to issuing the Notice. K.S. said he sent the Tenants text messages asking if rent was ready on the first of the month. He submitted this was sufficient to indicate to the Tenants that rent should be paid by the first of the month. K.S. said he had not submitted these text messages.

K.S. raised the issue of why the Tenants would pay rent early if it was agreed they only had to pay by the 15th of each month. The Tenant did not have a response to this.

I have reviewed the text messages submitted between the Landlord or K.S. and Tenant N.H. I note one text from August 1, 2017 where the Landlord or K.S. asks if rent is ready to be picked up. The remainder show Tenant N.H. saying rent is ready to be picked up.

Analysis

Section 47(1)(b) of the *Act* allows a landlord to end a tenancy if tenants repeatedly pay rent late. A tenant may dispute a notice to end tenancy issued under section 47 of the *Act* within 10 days of receiving the notice.

There is no issue that the Tenants received the Notice May 14, 2018. I accept the testimony of the Tenant that the Application was filed May 23, 2018 as this is what our records show. I find the Tenants disputed the Notice within the time limit set out in section 47(4) of the *Act*.

Based on the testimony of both parties, I accept that the Tenants paid rent later than the first of the month in December of 2017 and January to May of 2018.

I do not accept the testimony of the Tenant that the Landlord agreed the Tenants could pay rent any time before the 15th each month. The Landlord disputed this. The Tenants did not provide any evidence to support their position. The tenancy agreement states rent is due on the first of each month. I find rent is due on the first of each month.

However, I find that the legal doctrine of estoppel applies here. This doctrine holds that a party may be prevented from strictly enforcing a legal right to the detriment of another party if the first party has established a pattern of failing to enforce their right and the second party has relied on this conduct and acted accordingly. To return to a strict enforcement of their right, the first party must give the second party written notice that they are changing their conduct and are going to strictly enforce the right previously waived or not enforced.

I find the Landlord failed to enforce her right to receive rent on the first of each month by not taking active steps to enforce this right for at least five months. Even if I accepted that K.S. asked the Tenants via text message if rent was ready on the first of each month, this is not sufficient in my view. The Landlord should have put the Tenants on notice that the late payment of rent was unacceptable. There is no evidence before me that the Landlord did so. By letting the Tenants pay rent late for at least five months prior to issuing the Notice, the Landlord established a pattern of failing to enforce her right to receive rent on time and is precluded from ending the tenancy on the basis that the Tenants repeatedly paid rent late. Therefore, the Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

I acknowledge that term 38 in the tenancy agreement speaks to the issue of estoppel; however, the Landlord is not permitted to contract outside of the *Act* or law and therefore this term does not change my decision.

The Tenants are now on notice that the Landlord is enforcing her right to receive rent by the first of each month. Any late rent payment from this point forward may result in a notice to end tenancy being issued under section 46 of the *Act*. Further, repeated late rent payments may result in a notice to end tenancy being issued under section 47 of the *Act*.

Given the Tenants were successful in this application, I award them reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, I authorize the Tenants to deduct \$100.00 from one future rent payment. The Landlord cannot treat this amount as unpaid rent.

Conclusion

The Application is granted in part. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

The Tenants are awarded reimbursement for the \$100.00 filing fee. I authorize the Tenants to deduct \$100.00 from one future rent payment.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: July 19, 2018

Residential Tenancy Branch