Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, PSF, FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47;
- an Order for the landlord to provide services or facilities required by the tenancy agreement or law, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Tenant R.N. (the "tenant") and the landlord attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that the landlord was served the notice of dispute resolution and evidence packages (the "packages") by registered mail on December 27, 2018. The tenant testified that he sent the packages to the address for service the landlord provided on the One Month Notice to End Tenancy for Cause (the "One Month Notice"), that he is applying to cancel. The tenant entered the tracking number for the packages into evidence. I looked up the tracking number on the Canada Post website and the package was signed for on December 31, 2018.

The landlord testified that she did not receive the packages because she does not live at the address she put on the One Month Notice as her service address. The landlord testified that someone else told her that the tenant was disputing her notice and so she called into the Residential Tenancy Branch and received the necessary information to join today's hearing.

I find that the tenants are permitted to rely on the address for service the landlord put on the One Month Notice and the deeming provisions of section 90 of the *Act*. Section 90 of the *Act* states that a document given or served in accordance with section 88 *[how to give or serve documents generally]* or 89 *[special rules for certain documents]*, unless earlier received, is deemed to be received if given or served by mail, on the 5th day after it is mailed. I find that the tenant's application for dispute resolution and evidence package were deemed served on the landlord on January 2, 2019.

I note that section 55 of the *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*.

Preliminary Issue- Landlord's Evidence

The landlord testified that she did not serve her evidence package on the tenants.

Section 3.15 of the *Rules* states that the Respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. I find that since the landlord's evidence was not served on the tenants, the landlord's evidence is excluded from this proceeding.

Issue(s) to be Decided

1. Are the tenants entitled to cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47 of the *Act*?
2. Are the tenants entitled to an Order for the landlord to provide services or facilities required by the tenancy agreement or law, pursuant to section 62 of the *Act*?
3. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
4. If the tenants' application is dismissed and the landlord's Notice to End Tenancy is upheld, is the landlord entitled to an Order of Possession, pursuant to section 55 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on April 8, 2018 and is currently ongoing. Monthly rent in the amount of $1,200.00 is payable on the first day of each month. A security deposit of $600.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application. The subject rental property is a house with an upper and lower suite. The tenants live in the upper suite and other tenants live in the lower suite.

The landlord testified that on December 10, 2018 she posted a One Month Notice with an effective date of January 31, 2018, on the tenants' door. The landlord testified that the date was an error and that she meant to write January 31, 2019. The tenant confirmed receipt of the One Month Notice on December 11, 2018.

The One Month Notice stated the following reasons for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has:
    - significantly interfered with or unreasonably disturbed another occupant or the landlord.
- Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to:
    - damage the landlord's property;
    - adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant;
- Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.

The landlord testified that she has received numerous noise complaints against the tenants from the tenants who live in the lower suite. The landlord testified that on several occasions the tenants have done laundry, which is shared between the two suites, in the middle of the night. The landlord testified that the tenants in the lower suite have reported that the tenants jump on the floor causing a large amount of noise. The landlord testified that she gave the tenants verbal warnings regarding the noise complaints but never provided them with a written warning.

The tenant denied ever doing laundry in the middle of the night and denied jumping on the floor.

The landlord testified that the tenants in the lower suite told her that the tenants stop their laundry mid cycle and tamper with the wiring and water. The landlord testified that since the tenants moved in she has had to replace the laundry machines three times and that she believes this is due to the tenants purposefully damaging the machines. The tenant denied tamping with the lower tenants' laundry and the laundry machines. The tenants testified that the machines keep breaking down because the landlord buys cheap used machines.

The landlord testified that water leaked through the ceiling of the lower suite and that she hired a plumber who told her that there was no burst pipe. The landlord testified that it was her belief that the tenants were purposely dumping water on the floor to cause flooding below. The landlord testified that she had to cut into the drywall in the ceiling and wall to repair the lower suite and had to replace some of the flooring as well.

The tenant testified that they did not poor water on the floor and that after the landlord made that accusation he hired a plumber to investigate. The tenant entered into evidence notes from a plumber which stated that he was unable to find a cause of the leak emanating from the upper suite.

The landlord testified that the tenants do not provide her with her mail that is sent to their address and that the tenants are aggressive and rude. The tenant denied these allegations.

The landlord testified that she doesn't know of any illegal activities of the tenants and checked the boxes on the One Month Notice regarding illegal activities in error.

Both parties agreed that the subject rental property is heated by gas and that there is only one control for the temperature for the entire house, for both upper and lower suites. The lower suite controls the temperature of the entire house, the tenants in the upper suite have no control over the temperature in the subject rental property. Only one gas bill is issued and the cost is split between the upper and lower suites.

The tenant testified that the tenants in the lower suite have been turning the heat up very high in the day and very low at night making their property uncomfortable to live in. The landlord testified that she did not think this would be true because the tenants in the lower unit would have the same temperature in their unit as in the tenants' upper unit.

The landlord testified that she did not believe that the downstairs tenants would chose to live at an uncomfortable temperature just to spite the upstairs tenants.

The tenant testified that he has spoken with the lower tenants about the heat and that the heat has been at a good level for the last week.

Analysis

Residential Tenancy Policy Guideline 11 states that an arbitrator is permitted to amend a Notice to End Tenancy where the person receiving the notice knew, or should have known, the information that was omitted from the notice, and it is reasonable in the circumstances. In determining if a person "should have known" particular facts, an arbitrator will consider whether a reasonable person would have known these facts in the same circumstances. In determining whether it is "reasonable in the circumstances" an arbitrator will look at all of the facts and consider, in particular, if one party would be unfairly prejudiced by amending the notice.

I find that the tenants knew or ought to have known that the effective date on the One Month Notice was not supposed to be a date in the past and that the landlord mistakenly but the year 2018 instead of 2019. I find that the tenants are not unfairly prejudiced by amending the notice. Pursuant to section 68 of the *Act*, I amend the One Month Notice to state an effective date of January 31, 2019. I find that service of the One Month Notice was effected on the tenants on December 11, 2018, in accordance with section 88 of the *Act*.

Where a tenant disputes a one month notice to end a tenancy for cause given by a landlord, the onus is on the landlord to prove that the tenant has breached section 47 of the *Act.* When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

Section 47(1)(d)(i) states that a landlord may end a tenancy by giving notice to end the tenancy if 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.
The testimony of the parties is conflicting. I find that both parties have put forward a different version of events and that the landlord has not substantiated her claim with any

admissible physical evidence. I therefore find that the landlord has not met the required burden of proof that the tenant breached section 47(1)(d)(i) and so her claim fails.

Section 47(1)(f) states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property.

I find that the landlord has failed to prove that the water damage to the lower unit was caused by the tenants. I therefore find that the landlord's claim that the tenant breached section 47(1)(f) fails.

Section 47(1)(e)(i) and (ii) state that a landlord may end a tenancy by giving notice to end the tenancy if 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

As the landlord testified that she was not aware of any illegal activity conducted by the tenants and checked the boxes pertaining to illegal activity on the One Month Notice in error, I find that the landlord's claim that the tenant's breached sections 47(e)(i) and (ii) fails.

As the landlord has failed to prove, on a balance of probabilities, any of the reasons to end tenancy stated on the One Month Notice, I find that the One Month Notice is cancelled and of no force or effect.

Section 62(3) of the Act states that the director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

I Order the landlord to inform the tenants of the lower suite that they are not to change the current temperature settings at the subject rental property without discussion with the tenants in the upper suite.

As the tenants were successful in their application, I find that they are entitled to recover the $100.00 filing fee from the landlord.

Section 72(2) states that if the director orders a landlord to make a payment to the tenant, the amount may be deducted from any rent due to the landlord. I find that the tenants are entitled to deduct $100.00, on one occasion, from rent due to the landlord.

Conclusion

The One Month Notice is cancelled and of no force or effect.

Pursuant to section 72(2), I find that the tenants are entitled to deduct $100.00, on one occasion, from rent due to the landlord.

I Order the landlord to inform the tenants of the lower suite that they are not to change the current temperature settings at the subject rental property without discussion with the tenants in the upper suite.

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: February 05, 2019

Residential Tenancy Branch