



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MT

Introduction

This hearing was convened in response to an application for dispute resolution made April 17, 2019 by the Tenant pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. An Order cancelling a notice to end tenancy - Section 47; and
2. An Order allowing more time to dispute the notice to end tenancy - Section 66.

The Landlord and Tenant were each given full opportunity under oath to be heard, to present evidence and to make submissions.

Preliminary Matter

The Landlord states that it did not receive a copy of the Tenant’s bank statements showing rental payments as evidence for this hearing. The Tenant states that it provided a copy of these statements to the Residential Tenancy Branch (the “RTB”) but not to the Landlord as the Tenant did not realize that this evidence would be any different from the Landlord’s banking evidence as the Tenant was under the belief that bank records of payments made would be the same as bank records of payments received. The Landlord states that it is satisfied to continue with this evidence being considered given that this evidence was provided to the RTB. Given the Landlord’s agreement I will consider the Tenant’s banking evidence.

Issue(s) to be Decided

Is the Tenant entitled to more time to dispute the notice to end tenancy?

Is the Tenant entitled to a cancellation of the notice to end tenancy?

Background and Evidence

The following are agreed facts: The tenancy under written agreement started on March 1, 2017. At the outset of the tenancy the Landlord collected \$1,075.00 as a security deposit and the tenancy agreement provides that rent of \$2,150.00 is payable on the first day of each month. Rent does not include hydro.

The Landlord states that the current rent is \$2,291.00 as of March 1, 2019. The Landlord states that it is believed that the Tenant was served with the notice of rent increase for this date in early November 2018 by the building manager who posted it on the door. The Landlord does not have witness evidence for this service. The Landlord states that the rent was previously increased for an effective date of March 1, 2018 but that the Landlord has not supporting evidence of this service. The Landlord states that it took over as the landlord for the tenancy on January 15, 2018. The Tenant states that no rent increase notice has ever been received by the Tenant but that the Tenant has been paying rent of \$2,200.00 since nearly the onset of the tenancy as the Tenant felt this was the right amount to be paying.

The Landlord states that the Tenant has been repeatedly late paying rent and breached a material term of the tenancy by failing to have the hydro on its own name. The Landlord states that on March 20, 2019 the Landlord served the Tenant with a one month notice to end tenancy for cause (the "Notice") with these reasons states on the Notice by sending the Notice both regular and registered mail. The Landlord states that the registered mail was returned unclaimed on April 12, 2019 and that on April 16, 2019 the Landlord sent the Notice by email to the Tenant. The Landlord states that the regular mail was not returned to the Landlord.

The Tenant states that it did not receive the Notice until it came by email and that the Tenant disputed it the next day. The Tenant states that the Landlord was informed over a year ago, March 20, 2018 that the mailbox was damaged and not secure and has never repaired the mailbox. The Tenant asks for more time to dispute the Notice. The Tenant states that it is satisfied with having received the Notice by the email. The Landlord states that the mailbox was repaired by the building manager at the end of March 2018 and that the Tenant has never reported any further problems with the mailbox since. The Landlord states that the mailbox was inspected a week prior to the hearing and that it was not damaged.

The Landlord states that the Tenant has been repeatedly late on the basis of never paying any rent increases. The Landlord states that the Tenant has also been late paying rent and received rent payments on July 3, 2018, September 5, 2018, December 4, 2018 and February 4, 2019. The Landlord states that the Tenant paid rents by bank transfer and that the Landlord receives the monies paid in this method anywhere from 3 to 5 days after the Tenant makes the payment. The Landlord states that the Tenant can pay rent in a variety of methods and argues that the rent must be received by the Landlord on the first day of each month regardless of the method of payment. The Landlord states that the Tenant would have been informed by the Landlord's clerk that bank transfers take a few days to be processed and that the Tenant should make the transfers ensuring receipt by the Landlord on the first day of each month. The Landlord confirms that the tenancy agreement does not make any provision setting out latest dates for rent payments through bank transfers.

The Tenant states that with the exception of the September 2018 and February 2019 the rent payments were made by bank transfer a day prior to first of the month. The Tenant states that in the last six months prior to receipt of the Notice the Tenant was only late for February 2019.

The Landlord states that the Tenant breached a material term of the tenancy agreement by failing to open an account for its hydro utility. The Landlord states that the rent does not include the provision of hydro. The Landlord states that in July 2018 it was discovered that the Tenant had not opened an account for the hydro and that prior to this date the Landlord had paid a utility cost of \$278.07. The Landlord states that the Tenant was notified by letter on July 12 and November 13, 2018 of the issue but that no mention was made of any breach of a material term or any date for rectifying the breach in the contents of the letter. The Parties agree that the Tenant has since complied with the hydro matter. The Tenant states that it opened its hydro account about two months previous and that a year's worth of arrears owed to the hydro company has been paid. The Landlord confirms that the Landlord has not paid any hydro bills on behalf of the Tenant since July 2018.

Analysis

Section 47(4) of the Act provides that a tenant may dispute a notice to end tenancy for cause by making an application for dispute resolution within 10 days after the date the tenant receives the notice. Section 88 of the Act allows a notice to end tenancy to be sent by both regular and registered mail. Section 72(2)(c) of the Act provides that a document not served in accordance with section 88 or 89 may be found sufficiently given or served for purposes of this Act. Section 66(1) of the Act provides that a time limit may be extended only in exceptional circumstances.

Although the Landlord gives evidence that the Notice was sent by registered mail on March 20, 2019 the Landlord also gives evidence that the registered mail was returned. The Tenant gives evidence that no Notice was received until the email from the Landlord on April 16, 2019. While I consider the Tenant's evidence of having security issues with the mailbox to be weak, I also consider that the Landlord did not provide any documentary evidence of either method of service to support its oral evidence. For these reasons I find that the Landlord has not substantiated on a balance of probabilities that the Tenant receives the Notice through the mail. However as the

Parties have provided evidence of email communications during the tenancy and given the Tenant's agreement that the Notice was received by email, I find that the Notice was sufficiently given by email on April 16, 2019. As the Tenant applied to dispute the Notice on April 17, 2019 I find that the Tenant made its application within the time allowed. The Tenant therefore does not require an extension of the time limit and I dismiss that claim.

Section 47(1)(b) of the Act provides that a landlord may end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent. Policy Guideline #38 provides that "Three late payments are the minimum number sufficient to justify a notice under these provisions. It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late. A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision."

As the Landlord has provided no direct evidence of service of any rent increase notices and no supporting evidence of such service, such as witness evidence or affidavits of service, and considering the Tenant's evidence of not having received any notices of rental increase, I find on a balance of probabilities that the Landlord has not substantiated that the Tenant received any notices of rent increase. I find on a balance of probabilities therefore that the Landlord has not substantiated that the Tenant has been late on rent based on a rental shortfall from rent increase notices. Further since the Landlord has not acted for over a year in relation to the rent I consider the Landlord waived its reliance on repeated late rent as a basis to end the tenancy due to the non-payment of a rental increase.

Section 26(1) of the Act provides that a tenant must pay rent when it is due under the tenancy agreement. I note that the Act does not state that a landlord must receive rent

in its bank account when it is due. There are no provisions in the tenancy agreement for the latest dates to make rent payments by bank transfer. The Landlord's evidence is that rents may be paid by bank transfer and that the Landlord is aware that payments made by a bank transfer will result in the receipt of that payment by the Landlord anywhere from three to five days after the payments. For these reasons I consider that the tenancy agreement and the Act allow the Tenant to pay rent by bank transfer any time before the first day of the month for that month's rent. Given the Tenant's supported evidence that, with the exception of September 2018 and February 2019, the rent payments by bank transfer were made by the Tenant prior to the first day of each month, I find that the Landlord has not substantiated that the Tenant repeatedly paid the rent late.

Section 47(1)(h) of the Act provides that a landlord may end a tenancy by giving notice to end the tenancy if the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gives written notice to do so. Policy Guideline #8 provides as follows in relation to written notice:

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Based on the undisputed evidence that the Landlord did not include any mention of a breach of a material term or any deadline for the Tenant to open its hydro account in the letters of July and November 2018, I find that the Landlord did not meet the requirements of the Act for ending a tenancy for a breach of a material term. I find therefore that the Notice is not valid for this stated reason.

As neither of the reasons stated on the Notice have been found to be valid I find that the Tenant is entitled to its cancellation. The tenancy continues.

Conclusion

The Notice is not valid and is cancelled.

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

Dated: June 03, 2019

Residential Tenancy Branch