



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed the tenant served the landlords with the notice of hearing package and all of the submitted documentary evidence. Both parties also confirmed the landlords served the tenant with their submitted documentary evidence in person on August 3, 2020. Neither party raised any service issues. I accept the undisputed affirmed evidence of both parties and find that both parties have been properly served as per sections 88 and 89 of the Act.

The hearing was adjourned due to a lack of time. Both parties were cautioned that no new evidence was to be submitted nor would it be accepted. Both parties were notified that a notice of an adjournment would be attached to the interim decision detailing the new date and time for the adjournment.

The hearing was reconvened on September 17, 2020 via conference call and resumed with both parties present.

Issue(s) to be Decided

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

Is the tenant entitled to recovery of the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on August 1, 2010 on a fixed term tenancy ending on July 31, 2011 and then thereafter on a month-to-month or another fixed term as per the submitted copy of the signed tenancy agreement dated July 11, 2010. The monthly rent began at \$900.00 payable on the 1st day of each month. A security deposit of \$400.00 was paid.

The tenant confirmed that on July 24, 2020, the landlord served the tenant with the 1 Month Notice dated July 24, 2020 in person. The 1 Month Notice sets out an effective end of tenancy date of August 31, 2020 and that it was being given as:

- the tenant is repeatedly late paying rent;
- the tenant or person permitted on the property by the tenant has:
 - seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
 - put the landlord's property at significant risk.

The details of cause provided state:

Mr. P. repeatedly paid rent and utilities late during his entire tenancy. In 2011, tenant went on WCB and was under financial difficulty, we allowed him to pay rent twice a month, on the 11th and 25th of each month. Even with this flexible payment schedule his payments are often late. From Aug/18 to March/20, there're total of 20 late rent payments (not including late utility almost every month). Multiple email reminders needed before overdue payments are made and he doesn't reply to those emails or provide reasons for late payments. After his financial situation improves, he still refuses to pay rent on 1st of each month as per lease agreement. This tenant also has an ongoing issue with dog feces left and not cleaned up in back yard. Many complaints with pictures received from other tenants and landlords have sent him multiples warnings about such issues and still fails to clean up after his dog. Dog feces buildup in back yard is unsanitary and can cause health issues, it also destroys lawn and attracts rats and has caused rodent infestation of property. Landlords have to cover pest control expenses due to his negligence on this matter.

[reproduced as written]

The landlord claims that the tenant has been repeatedly late paying rent. Both parties agreed that rental payments were allowed to be made twice a month on the 11th and the 25th day of each month since September 2011.

The landlord provided both direct testimony and written details which claim that the tenant has been late paying rent on the following dates:

August 2018	Paid August 27, 2018
September 2018	Paid September 7, 2018
September 2018	Paid September 21, 2018
October 2018	Paid October 12, 2018
November 2018	Paid November 30, 2018
December 2018	Paid December 13, 2018
December 2018	Paid December 25, 2018
December 2018	Paid December 26, 2018
January 2019	Paid January 17, 2019
February 2019	Paid February 14, 2019
February 2019	Paid February 28, 2019
March 2019	Paid March 14, 2019
June 2019	Paid June 25, 2019
June 2019	Paid June 27, 2019
September 2019	Paid September 11, 2019
September 2019	Paid September 13, 2019
January 2020	Paid January 12, 2020
February 2020	Paid February 13, 2020
February 2020	Paid February 27, 2020
March 2020	Paid March 12, 2020

The tenant stated that he is not denying that rent payments are made late, but that the landlord has never made it an issue before as he has been paying rent late for several years. The tenant stated that he has never paid a late rent fee; never been issued a 10 Day Notice for Unpaid Rent; and never given a warning letter for late payment of rent.

The landlord argued that the tenant is always late paying rent and a notice to end tenancy for unpaid rent was issued on January 11, 2020 and again on March 1, 2020. The landlord clarified that no actual notice to end tenancy was issued, but email exchanges. The landlord stated that in February 2020 an email reminder February 12, 2020 to the tenant was sent regarding late rent which states in part, "If I don't receive

rent payment by noon today, Feb 12, penalty will apply. Thx for the cooperation.” It also states, “The first portion of Feb rent is overdue now. Please make payment ASAP before late penalty applies. Also I have not received Utility Payment due last month. We must inform you that repeated late rent and utility payment is not acceptable.” The landlord further argues that the tenant has never properly responded to the landlord’s communications.

The landlord also argued that the tenant has seriously jeopardized the health, safety or lawful right of the landlord and put the landlord’s property at risk due to an ongoing “dog feces” issue for the last 10 years. The landlord claims that the tenant never cleaned up after his dog causing complaints from another tenant. The landlord confirmed that no actions were taken previously as it was not considered an issue, but that the “dog feces” issue poses a health and safety risk to the occupants of the rental premises.

The tenant disputes these claims arguing that his dog had passed away recently and that there were never any issues about his dog in the past. The tenant argues that the complaints filed were retaliation from the other tenant over an unrelated disagreement. The tenant argues that he has always cleaned up after his dog within 1 – 24 hours.

Analysis

In an application to cancel a 1 Month Notice, the landlord has the onus of proving on a balance of probabilities that at least one of the reasons set out in the notice is met.

In this case, I accept the undisputed affirmed evidence of both parties that the landlord served the tenant with the notice to end tenancy for cause dated July 24, 2020 in person on July 24, 2020. Both parties confirmed the content of the notice and the reasons for cause as the tenant repeatedly late paying rent and the tenant has seriously jeopardized the health or safety, or lawful right of an occupant or the landlord and put the landlord’s property at significant risk regarding the “dog feces”.

Both parties have provided undisputed affirmed evidence that the tenant has been repeatedly late paying rent. However, the tenant has argued that the landlord has never notified that tenant that this is unacceptable behaviour by the tenant to pay rent late and that it would impact the tenancy by the landlord issuing a notice to end tenancy. The tenant has stated that the landlord has accepted a practice of late rent payments; has never been issued a 10 Day Notice for Unpaid Rent; never paid a late rent fee; and has never received a warning letter for late payment of rent that could end his tenancy. The landlord has disputed this arguing that a notice to end tenancy was issued, but has

referenced an email dated February 12, 2020 titled, "Overdue Rent 2nd Notice" as the landlord's notice of unacceptable behaviour. It states in part,

If I don't receive rent payment by noon today, Feb 12, penalty will apply. Thx for the cooperation.

The first portion of Feb rent is overdue now. Please make payment ASAP before late penalty applies. Also I have no received Utility Payment due last month. We must inform you that repeated late rent and utility payment is not acceptable

In reviewing this email, I find that it is clear that the email is regarding a rent payment and that if the tenant does not pay it that a penalty would be applied. It further states that the 1st portion of the rent is overdue and to pay it as soon as possible or a late penalty could apply. The remaining exchange references an unpaid utility bill. In this case, I find that this is not fair notice by the landlord that the tenant's tenancy is in jeopardy if the rent is not paid on time and could result in the end of the tenancy. I also find that based upon the landlord's undisputed evidence that the tenant and landlord has established a form of accepted late rent payment history. However, the last line of communication does state that "repeated late rent and utility payment is not acceptable" is clear, but no notice of the possible consequences to end the tenancy. I find that in conjunction with the tenant's undisputed evidence that no notice(s) to end tenancy for unpaid rent and no late rent fee(s) have been imposed that these were never an issue for the landlord to act.

Residential Tenancy Branch Policy Guideline #38, Repeated Late Payment of Rent states in part,

The Residential Tenancy Act¹ and the Manufactured Home Park Tenancy Act² both provide that a landlord may end a tenancy where the tenant is repeatedly late paying rent.

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.

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent.

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision.

In this circumstance, I find on a balance of probabilities that the landlord has failed to establish a claim for ending the tenancy for repeatedly late rent payments. Although the landlord has shown that the tenant has been repeatedly late paying rent, the landlord has also shown that this behaviour has been accepted and condoned by the landlord since 2018. Despite the landlord's email dated February 12, 2020 stating "...*We must inform you that repeated late rent and utility payment is not acceptable*", the landlord has at no time given notice to the tenant that his tenancy was in jeopardy. The landlords must be clear in their notice to the tenant that failure to pay rent on time could result in the end of tenancy for repeatedly late rent payments, not a late rent penalty as described in the email. On this basis, this reason for cause provided by the landlord has failed and is dismissed.

On the landlord's 2nd and 3rd reasons for cause regarding "dog feces", I find that the landlord has failed to establish a claim. The landlord had stated that previous complaints concerning the "dog feces" were not an issue, but that now were. Both parties have confirmed that the tenant's dog has now "passed away" and is no longer an issue for "dog feces" in the future. The tenant has argued that the landlord's complaint from a previous upstairs tenant was disputed as it was in retaliation over an unrelated issue. In this case, I accept the evidence of both parties and find on a balance of probabilities that the landlord has failed to provide sufficient evidence to satisfy me that the "dog feces" was a health and safety issue as the landlord has not provided any supporting evidence of such. I also find that the landlord has failed to provide sufficient evidence that the "dog feces" also put the landlord's property at significant risk. On this basis, the landlords 2nd and 3rd reasons for cause are dismissed.

The landlord has failed to provide sufficient evidence to satisfy me of the reasons for cause as listed on the notice to end tenancy. As such, the tenant's application to cancel the 1 month notice dated July 24, 2020 is granted. The tenancy shall continue.

The tenant having been successful is also entitled to recovery of the \$100.00 filing fee. As the tenancy continues, I authorize the tenant to withhold one-time \$100.00 from the next monthly rent upon receipt of this decision.

Conclusion

The tenant's application to cancel the 1 month notice is granted. The tenancy shall continue.

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: September 23, 2020

Residential Tenancy Branch