Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlords: OPC and FF
Tenants: CNC and FF

Introduction

These applications were brought by both the landlord and the tenant.

By application of November 16, 2011, the landlords seeks an Order of Possession pursuant to a Notice to End Tenancy for cause, repeated late payment of rent, sent by registered mail on October 25, 2011. The landlords also seek to recover the filing fee for this proceeding from the tenants.

By application of November 18, 2011, the tenants seek to have the Notice to End Tenancy set aside and to recover their filing fee for this proceeding.

The landlord's application was originally set for hearing on December 1, 2011, but was adjourned to the present hearing on the tenants' request to have the application heard together with their own and to permit them additional time to prepare a response to a substantial amount of evidence. The Dispute Resolution Officer (DRO) found that the minimal five-day delay would be potentially less harmful to the landlords than failure to consider their application would to the tenants.

In granting the adjournment, the Dispute Resolution Officer (DRO) noted that the landlords objected on the grounds, among others, that the tenants' application was out of time. However, the DRO noted that presumed service is rebuttable and the tenants were entitled to be heard on the matter of time.

Therefore, the present hearing must first deal with the question of whether the tenants' application is out of time. Section 90(1) of the *Act* states that documents served by mail are deemed to have been received five days later which was October 30, 2011.

Section 47(4) and (5) of the *Act* provide that, if tenants do not apply within 10 days of receipt of the notice they are conclusively presumed to have accepted that the tenancy ended on the effective date of the notice which was November 30, 2011.

However, the Supreme Court of British Columbia has found that "conclusive presumption" is rebuttable and has granted the benefit of the doubt in favour of the right to be heard. In the present matter, I note that the tenants responded to the notice with such fervour that it is difficult to imagine that they would have hesitated to contest it, particularly in view of the landlords' emails to them with an alert that a notice was on its way.

Accordingly, I accept the evidence of the tenants that for various reasons they did not receive the notice of registered mail until November 10, 2011 as verified by the Canada Post tracking record and that their November 18, 2011 application was made within 10 days of receipt of the notice. Therefore, the tenants' application was accepted and the hearing proceeded on the merits of both applications.

A second preliminary matter arose when the male tenant proclaimed that he was not, in fact, a tenant. He pointed to the rental agreement signed on November 11, 2003 which names as tenants the female tenant and an unincorporated company, although the male tenant is a signatory to the agreement. As the outcome sought by the landlord is an Order of Possession, it is of no consequence whether the male tenant is a tenant or an occupant because in either case, he would be captured by the order. Therefore, I make no determination on the question for the present.

Issue(s) to be Decided

This matter requires a decision on whether the Notice to End Tenancy for repeated late payment of rent is lawful, valid and proven and whether the landlords have met the burden of proof to warrant an Order of Possession.

Background and Evidence

This tenancy began in December of 2003 and rent is currently $1,125 per month.

To all appearances, the tenancy seems to have run smoothly for over seven of its eight years until the parties filed applications against one another on other matters earlier this

year. This is pertinent to the extent that the parties spent an inordinate amount of time in the present hearing accusing one another of duplicity, often in matters unrelated to the present dispute. In addition to the acrimony displayed on both sides of this dispute throughout the 100 minute hearing, identifying salient evidence was made more difficult by the fact that the tenants, in particular, had filed multiple copies of the same evidence.

On the subject in dispute, the landlords submitted into evidence a copy of their bank account statement for a little over the past year showing that rent payments had been posted into their bank account between one and five days late on nine separate occasions.

The landlords also submitted a copy of a letter to the tenants dated September 21, 2011 stating that the September rent had not been paid unit September 6, 2011 and issuing a final warning that, in future, late payments would result in a Notice to End Tenancy.

The tenants responded by reference to numerous copies of cheques for a number of the same months in which the cheques are dated for the first day of the month, some showing initials adjacent to the date box, but not bearing a bank stamp.

The tenants also submitted a copy of an undated letter bearing no letterhead and addressed to “whom it may concern” advising that since late 2010, the bank no longer back dates posting dates to the date of the cheque.

In addition, the tenants have submitted thumbnail photos said to show them depositing the November 2011 payment at the bank but little information is discernible

There was an exchange of emails between the parties in early October including unsuccessful attempts to find a more satisfactory way of making payments, but it did not appear to resolve matters.

Perhaps the failure is understandable considering the tenants suggestion that they would provide post-dated cheques if the landlord would prepay the $12.50 cost of cancelling cheques in case it became necessary to do, and they would mail cheques if the landlord paid the cost of registering the mail. There is no provision in the *Act* that would support such demands.

Analysis

Section 26 of the Act provides that tenants must pay rent when it is due.

Section 47(1)(b) of the *Act* empowers a landlord to issue a Notice to End Tenancy when tenants are repeatedly late paying rent, the standard of which is three late payments within 12 months by Residential Tenancy Policy Guidelines.

The present claims are complicated by the established routine of the tenants depositing the rent payments at the landlords' chosen bank, ING Direct. The banks head office in Toronto advises that their Vancouver office is not a bank branch, but a "cafe" that can accept cheques; however, they are not posted until they arrive in Toronto a day or so later. The Vancouver "cafe" advises that they do not stamp photocopies of the cheques which are provided as receipts.

Given that departure from common bank practices, I must find the landlords' bank statement is inconclusive as evidence of late payments and that the tenants evidence is inconclusive of timely payments. The "bank" is the landlords' chosen agent and the law of agency generally finds that a payment is made when it is submitted to the payee's agent. At the burden of proof lies with the landlords, I must give the benefit of doubt to the tenants.

Given the apparent lag between deposit in Vancouver and posting in Toronto, I can't be certain enough that the deposits were late to uphold the Notice to End Tenancy with an Order of Possession.

In so finding, I would caution the tenants that their response to the search for a mutually workable way to pay the rent in suggesting the landlord pay their registered mail and possible cancellation fees does not reflect favourably on their ability and/or willingness to cooperate.

That and the extraneous email and other exchanges in which the evidence was wrapped indicates that it would be in the best interest of all parties if this tenancy were to end. However, I cannot find cause to do so in the present application.

While the tenants have succeeded in having the Notice to End Tenancy set aside, I decline to award their filing fees as I find that their conduct has largely contributed to this dispute.

Conclusion

The tenants' application was accepted on the possibility that they had not received the registered mail notice of the Notice to End Tenancy in the five days deemed service.

The Notice to End Tenancy of October 25, 2011 is set aside and the tenancy continues.

I make to awards with respect to filing fees.

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: December 07, 2011.

Residential Tenancy Branch