



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the “Application”) made by the Tenant on May 9, 2016 to cancel a 1 Month Notice to End Tenancy for Cause (the “Notice”), and to recover their filing fee from the Landlord.

Both Tenants and the Landlord appeared for the hearing. However, only the female Tenant and the Landlord provided affirmed testimony. The Tenants served their Application to the Landlord on May 16, 2016 by registered mail. The Landlord confirmed receipt of their Application in early June 2016 as he was away for a period of time.

The Landlord testified that there was a delay in submitting his evidence because he was trying to get evidence from his bank with regards to the Tenants’ returned rent payments. The Tenants submitted documentary and digital evidence in response to the Landlord’s evidence. The parties’ documentary evidence was provided to me by the Residential Tenancy Branch by email as it had been submitted late. However, the Tenants’ digital evidence could not be provided before me. Due to the Landlord’s request to end the tenancy, I proceeded to consider the Landlord’s evidence first before I made findings on whether I would consider adjourning the proceedings to allow for the Tenants’ digital evidence to be before me and the Landlord.

The hearing process was explained to the parties and they had no questions about the proceedings. Both parties were given a full opportunity to present their evidence, make submissions to me, and cross examine the other party on the evidence provided.

Issue(s) to be Decided

- Have the Tenants established that the Notice ought to be cancelled?
- Is the Landlord entitled to an Order of Possession?

Background and Evidence

Both parties agreed that this oral tenancy for the upper portion of a residential home started on November 1, 2014. No written tenancy agreement was completed or signed by the parties. Rent under the tenancy was established at \$800.00 on the first day of each month at the start of the tenancy which then increased in March 2016 to \$825.00 by mutual agreement. The Tenants paid the Landlord a security deposit of \$400.00 at the start of the tenancy.

The Landlord testified that the parties had an agreement at the start of the tenancy that they would pay a 50% of the hydro with the downstairs renters and that the Landlord would provide the Tenants with the utility bill each month for them to make the payment. No written agreement was recorded to this effect. The Tenant disputed this and stated that the verbal agreement was that they would pay \$100.00 each month for hydro as this amount was reflective of the monthly bill for hydro. However, in November 2015 the cost of hydro being provided to the residential property increased and the Landlord is now seeking to increase the amount the Tenants should also have to pay. The parties confirmed that the Tenants have always paid a fixed amount of hydro for this tenancy in the amount of \$100.00.

The Landlord testified that on May 1, 2016 he served the Tenants personally with the Notice. In addition, the Landlord had provided the Tenants with six weeks prior verbal notice that the tenancy was going to end. The Notice was provided into evidence and shows a vacancy date of June 16, 2016. The reasons on the Notice for ending the tenancy were because the Tenants have:

- Repeatedly paid rent late;
- Significantly interfered with or unreasonably disturbed another occupant or the Landlord; and
- Engaged in an illegal activity that has adversely affected the quiet enjoyment, security, safety or physical wellbeing of another occupant or the Landlord.

The Landlord testified that the Tenants were late in paying their rent three times in the last 18 months. The Landlord testified that on three occasions, namely April, June, and October 2015, the Tenants rent cheque was returned as having insufficient funds.

In relation to the remaining two reasons on the Notice, the Landlord referred to a letter written by the downstairs renters. The Landlord read the entire letter during the hearing which he had provided into evidence. The letter explains in part that the Tenants have created a noise disturbance by having late night dinner parties with noisy guests as well

as a their noisy toddler who runs above their bedroom in the early hours of the morning causing them to wake up.

The renters write in the letter that the Tenants have been knocking on their door and writing letters about noise coming from their shower when they are entitled to use their shower whenever they want. The renters write that their experience of living at the residential home has been horrible as they have had to put up with excessive noise coming from the Tenants while at the same time putting up with their constant verbal and written requests regarding the renters' noise. The renters also write about a dispute regarding the payment of utilities by the Tenants citing the fact that the Landlord has to pay the increased portion of the Tenants' utilities which are supposed to be shared between the renters and Tenants.

The Landlord passionately explained that the Tenants were causing harassment to him and the renters. The Landlord explained that the Tenants had threatened him with a restraining order and that the Tenants should be grateful that they have been staying in a nice rental unit, paying low rent and utilities, and have upgrades such a wood burning stove to save them money.

The Tenant confirmed personal receipt of the Notice on May 2, 2016. The Tenant also confirmed the dates that the Landlord testified to that the rent was paid late. The Tenant explained that sound easily travels through the lower and upper portions of the house. The Tenant acknowledged that there must be noise coming from their rental unit going into the renter's lower portion of the house but they could easily hear noise coming from their unit too. The Tenant testified that they do have dinner parties but because they have children, these do not go on into the middle of the night as it had been suggested by the Landlord.

The Tenant stated that she had brought the issue of the downstairs renters' shower fan noise and loud music underneath the Tenants' bedroom and the Landlord directed that the Tenants should try and work this out directly with the renters. The Tenant explained that they have had only three interactions with the renters and this was done in an effort to resolve the noise issues, including a written note that was given to them.

The Tenant denied that these interactions were confrontational or harassing in nature. The Tenant submitted that they were attempting to amicably resolve the issue between them as demonstrated by the note they posted to the downstairs renters in the Landlord's evidence. The Tenant testified that she had brought the issue of noise travelling through the residential property to the Landlord but the Landlord failed to provide any remedy to mitigate the noise.

The Tenant testified that when the Landlord comes to their rental unit to collect rent he becomes confrontational about the noise issues between the Tenants and the renters, and as a result the Landlord makes threats that he will have people come to their unit to physically evict them. The Tenant stated that in response to this, she informed the Landlord that she would be seeking advice from the police about getting an injunction which she is in the process of doing.

The Landlord testified that he had spent \$2,000.00 in insulation and installing heavy base doors to mitigate the noise between the rental units before the Tenants and renters moved in. The Landlord stated that the Tenants' threat of an injunction against him was more reason to end this tenancy.

Analysis

In relation to the form and content of the Notice served to the Tenants, I find the Notice complied with the requirements of Section 52 of the Act and that it was served to the Tenants pursuant to Section 88(a) of the Act. The Tenant confirmed receipt of the Notice on May 2, 2016 and applied to dispute the Notice on May 9, 2016. Therefore, I find that the Tenants made the Application to dispute the Notice within the 10 day time limit stipulated by Section 47(4) of the Act.

When a landlord issues a tenant with a Notice, the landlord bears the burden of proving the reasons on the balance of probabilities if they are disputed by the tenant. Therefore, I must determine if the Landlord has met the burden by providing sufficient evidence to prove the reasons elected on the Notice. I first turn my mind to the reason to end the tenancy on the basis that the Tenants have been repeatedly late paying rent. In making findings on this matter, I refer to Policy Guideline 38 to the Act titled "Repeatedly Late Payment of Rent" which states:

"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."

[Reproduced as written]

Based on the foregoing, I find that the three late payments of rent the Landlord seeks to rely on all occurred in the middle of 2015. There is no evidence before me that after the last late rent payment of October 2015, the Tenants have continued to pay late rent since that time. Furthermore, I find that the Landlord failed to deal with the issue of late payment of rent in a timely and diligent fashion and allowed the tenancy to continue thereafter. As a result, I am only able to conclude that the Landlord failed to act in a timely manner and therefore waived his reliance on the repeatedly late payment of rent provision to end the tenancy after a significant amount of time had passed since the last late rent payment. As a result, this reason on the Notice is dismissed. However, the Tenants are cautioned regarding their obligation to pay rent on time pursuant to Section 26(1) of the Act.

In relation to the remaining two reasons on the Notice, I find the Landlord has also failed to meet the burden to prove these reasons. This is because the Landlord relies heavily on one single letter in which the renters write of a noise dispute they are having with the Tenants and that this has now escalated into alleged harassment. I find that the Landlord's oral testimony and a letter written by the renters is not sufficient for me to conclude that the tenancy should end. This is because, the Landlord failed to provide corroborative evidence, such as audio recordings indicating that the level of noise being created by the Tenants went beyond a reasonable level that would justify ending the tenancy. Even though the Landlord delivered his testimony with conviction and stated that the Tenants were lucky to be living in the rental unit, this is not a basis on which to end a tenancy.

I find that such an allegation needs to be supported by more corroborative and supporting evidence. This would have included making the downstairs renters available to deliver their witness evidence through testimony and be subject to cross examination on it. The Tenant disputed the reasons on the Notice and acknowledged that there was an issue of noise travelling easily through the two portions of the residential property. In this respect, I acknowledged that there is clearly an issue of noise passing in between the units. However, I find that the evidence presented by the Landlord is not compelling enough for me to determine that the Tenants are making more noise than that of the downstairs renters.

I also find that informing the Landlord that the Tenants were seeking an injunction against him is also not sufficient reason for me to end the tenancy. In this respect, I find that any party, including the Landlord, has the right to seek any legal remedy in any forum to deal with a dispute between them. Therefore, it would not be considered to be harassment if the Landlord simply informed the Tenants that he would be seeking to evict them as this remedy is available to a landlord under the Act.

The parties also disclosed a dispute during the hearing regarding the amount of utilities that are payable by the Tenants in this tenancy. In this respect, I refer the parties to Section 13 of the Act which requires a landlord to prepare a tenancy agreement **in writing**, and Section 14 which requires that an agreement may not be unilaterally changed. As the Landlord failed to prepare and complete a tenancy agreement or addendum that would verify his assertion that the Tenants were required to pay 50% of the hydro utilities, I am only able to turn to other evidence to make a finding in this matter.

The parties acknowledged that the Tenants started this tenancy by paying a fixed amount of \$100.00 for hydro each month. There is no evidence before me that this amount varied during the tenancy agreement which would have suggested that the Tenants were being provided with the hydro bill and were then paying 50% of that particular bill which would have likely varied each month. Neither has the Landlord provided any evidence that he made a written demand to the Tenants to pay 50% of the utilities after the tenancy has started as per the alleged verbal agreement. Therefore, in the absence of such evidence, I am only able to find that the Tenants are to pay \$100.00 for hydro per month until such time this is changed pursuant to the Act.

Conclusion

I find the Landlord has not proved the Notice as the Landlord's evidence is no more compelling than the Tenants' evidence. Therefore, the Tenants' Application to cancel the Notice is granted. The tenancy will continue until it is ended in accordance with the Act. As the Tenants have been successful in cancelling the Notice, the Tenants may recover their \$100.00 filing fee. Pursuant to Section 72(2) (a) of the Act, the Tenants may achieve this relief by deducting \$100.00 from their next installment of rent. The Tenants may want to attach a copy of this decision when making the reduced rent payment to the Landlord.

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: June 17, 2016

Residential Tenancy Branch