



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, CNC

Introduction

This was a cross-application hearing for Dispute Resolution. The matter was set for a conference call hearing.

On June 13, 2017, the Landlord applied requesting an order of possession for the rental unit based on a breach of the tenancy agreement and the issuance of a 1 Month Notice To End Tenancy For Cause dated May 15, 2017.

On June 6, 2017, the Tenant applied to cancel a 1 Month Notice To End Tenancy For Cause dated May 15, 2017.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to present affirmed oral testimony and to make submissions during the hearing. The parties confirmed that they exchanged the evidence before me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

This hearing is a re-hearing of a matter heard on August 2, 2017. On August 2, 2017, a hearing was held to deal with the applications of the Landlord and Tenant. The Tenant failed to appear and the Landlord was granted an Order of Possession for the rental unit.

The Tenant submitted a Review Consideration Application on the ground that she was unable to attend the hearing due to circumstances not anticipated and beyond her control.

On August 18, 2017, an Arbitrator granted the application for a review hearing and suspended the Decision and Order of Possession issued on August 2, 2017, pending the outcome of this hearing.

The Landlord issued a 1 Month Notice To End Tenancy For Cause ("the 1 Month notice") dated May 15, 2017, to the Tenant. The reasons for ending the tenancy within the 1 Month Notice are as follows:

Tenant is repeatedly late paying rent

Tenant or a person permitted on the property by the Tenant has:

- *Significantly interfered with or unreasonably disturbed another occupant or the Landlord.*
- *Seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.*

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 or the Landlord.*

Tenant has not done required repairs of damage to the unit/site.

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written Notice to do so.

Non-compliance with an order under the legislation within 30 days after the Tenant received the order or the date in the order.

The Tenant testified some of the same issues were considered at a previous hearing and a Decision was made. The Tenant submitted that the following reasons to end the tenancy were previously considered:

- *Late payment of rent*
- *Seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.*
- *Tenant has engaged in illegal activity that has, or is likely to damage the Landlord's property.*
- *Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written Notice to do so.*

My review of the case management system shows that the parties attended a hearing on October 26, 2016. The Tenant was disputing a 1 Month Notice To End Tenancy For Cause dated August 29, 2016.

The reasons for ending the tenancy within the 1 Month Notice dated August 29, 2016 are as follows:

Tenant or a person permitted on the property by the Tenant has:

- *Seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.*

Tenant has engaged in illegal activity that has, or is likely to:

- *Damage the Landlord's property.*

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written Notice to do so.

I find that the Landlord's allegation of repeated late payment of rent was not an issue that was previously considered in the hearing that took place on October 26, 2016.

The Landlord's testimony indicated that some of his reasons to end the tenancy within the 1 Month Notice dated May 15, 2017, are based on the same evidence and facts that were previously considered in the October 26, 2016, hearing.

I cannot re-hear and change or vary a matter already heard and decided upon as I am bound by an earlier decision, under the legal principle of Res Judicata. Res judicata is a rule in law that a final decision, determined by an officer with proper jurisdiction and made on the merits of the claim, is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent Application

involving the same claim. I find that the following reasons to end the tenancy were considered by the Arbitrator at a previous hearing and they are dismissed:

Tenant or a person permitted on the property by the Tenant has:

- *Seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.*

Tenant has engaged in illegal activity that has, or is likely to:

- *Damage the Landlord's property.*

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written Notice to do so. [pets]

Issue to be Decided

- Does the Landlord have cause to end the tenancy?

Background and Evidence

The parties testified that the tenancy commenced on February 1, 2016 as a 1 year fixed term tenancy to continue thereafter as a month to month tenancy. The tenancy agreement requires that rent in the amount of \$1,700.00 is to be paid to the Landlord by the first day of each month. The Tenant paid a security deposit of \$850.00 to the Landlord.

The Landlord provided a copy of the tenancy agreement. The tenancy agreement indicates that electricity is not included in the rent and the Tenant must pay for hydro every two months. The tenancy agreement states that the Tenant must pay the rent on time.

The Landlord issued a 1 Month Notice To End Tenancy For Cause ("the 1 Month Notice") dated May 15, 2017, to the Tenant.

The following reasons within the 1 Month Notice to end the tenancy have not previously been considered:

Tenant is repeatedly late paying rent

Tenant or a person permitted on the property by the Tenant has:

- *Significantly interfered with or unreasonably disturbed another occupant or the Landlord*

Tenant has engaged in illegal activity that has, or is likely to:

- *Adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the Landlord.*

Tenant has not done required repairs of damage to the unit/site.

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written Notice to do so. [smoking]

Non-compliance with an order under the legislation within 30 days after the Tenant received the order or the date in the order.

The 1 Month Notice provides information for Tenants who receive the Notice. The Notice states that a Tenant has the right to dispute the Notice within 10 days after receiving it by filing an Application for Dispute Resolution at the Residential Tenancy Branch. The Tenant disputed the 1 Month Notice within the required timeframe.

The Landlord provided testimony to support the reasons for ending the tenancy.

With respect to the issue of repeated late payment of rent, the Landlord testified that the Tenant moved in 19 months ago and has been late paying the rent on 12 occasions. The Landlord testified that the Tenant has also been late paying the utilities on three occasions.

The Landlord provided copies of the 10 Day Notices that he issued the Tenant when he did not receive the rent on time. The Landlord provided the following 10 Day Notices to End Tenancy for Unpaid Rent:

10 Day Notice	June 8, 2016	Unpaid Rent	\$1,000.00
10 Day Notice	July 3, 2016	Unpaid rent and utilities	\$1,700.00 & \$149.55
10 Day Notice	September 2, 2016	Unpaid rent and utilities	\$1,700.00 & \$240.12
10 Day Notice	November 29, 2016	Unpaid Utilities	\$217.67
10 Day Notice	January 11, 2017	Unpaid rent and utilities	\$200.00 & \$279.50
10 Day Notice	March 2, 2017	Unpaid Utilities	\$508.00
10 Day Notice	June 20, 2017	Unpaid Utilities	\$398.88
10 Day Notice	July 2, 2017	Unpaid rent and utilities	\$1,700.00 & \$254.86

The Landlord testified that some of the 10 Day Notices to end tenancy pertain to unpaid utilities. He testified that he issued the Notices after asking the Tenant to pay the bill, and after giving the Tenant 30 days to pay.

In addition, the Landlord testified that the rent for September 2017, was late. He testified that he received the email transfer notification on September 5, 2017.

In response, the Tenant testified that at the start of the tenancy the arrangement was for her to go to the bank and deposit the rent into the Landlord's account. She testified that paying rent that way became problematic. She testified that in December or January 2017, the parties agreed to change the payment process to an electronic email money transfer.

The Tenant testified that she does not believe that she was late paying the rent and utilities on 12 occasions.

The Tenant testified that the 10 Day Notices she received for unpaid utilities were incorrectly issued because the Landlord did not provide her 30 days to pay after providing the bill for payment. The Tenant testified that only one of the 10 Day Notices for non-payment of utilities is valid.

The Tenant testified that the last late rent payment was due to the electronic transfer system not working for a couple of days at the beginning of July 2017. The Tenant provided a text message dated June 30, 2017, indicating that Interac e-transfer service was temporarily off line to address a technical issue.

Towards the end of the hearing the Tenant acknowledged that she paid the rent late for September 2017, due to payroll issues at work.

In response, the Landlord testified that since agreeing to change the payment of rent using email transfer, the Tenant is still repeatedly late paying the rent.

With respect to the allegation that the Tenant significantly interfered with or unreasonably disturbed another occupant or the Landlord, the Landlord testified that the Tenant comes home late and vacuums and turns on her laundry which disturbs the downstairs occupant.

In response, the Tenant testified that she often works late and does not get home until 9:00 pm or 9:30 pm at night. She testified that she has children and she needs to be able to live her life. She testified that it is not unreasonable to do laundry and cleaning. She testified that there is no term in her tenancy agreement that restricts her use of her laundry.

With respect to the allegation of required repairs for damage and that Tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the Landlord, the Landlord testified that the Tenant took down an aluminium deck railing /cover.

The Tenant testified that the Landlord gave her permission to keep the railing down as long as she put it back up before she moved out. The Tenant testified that she has an email from the Landlord where he gives her permission for this.

In response, the Landlord acknowledged that he sent an email and he testified that his email to the Tenant states that she will have to put it back up before she moves out.

With respect to the allegation of a breach of a material term of the tenancy, the Landlord testified that the Tenant has been smoking inside the rental unit. The Landlord testified that he did not issue the Tenant any sort of breach letter, pointing out the breach and asking her to stop.

In response, the Tenant testified that she does not smoke in the rental unit. She testified that the lower occupant found a few cigarette butts on the property and there was no incident of her smoking inside the rental unit.

With respect to the allegation that the Tenant has not complied with an order under the legislation within 30 days after the Tenant received the order or the date in the order, the Landlord testified that the Tenant did not comply with the Arbitrators order to remove all pets from the rental property no later than November 30, 2016. The Arbitrator gave the Landlord leave to issue a further notice to end tenancy if the Tenant did not comply.

The Landlord testified that he issued a 1 Month Notice To End Tenancy For Cause to the Tenant but he chose to not enforce the Notice.

In response, the Tenant testified that she has an email from the Landlord that says she can have four cats and four ducks. The Tenant provided a copy of an email from the Landlord that states the Tenant can keep the pets.

In response, the Landlord testified that he allowed the Tenant to stay in the rental unit based on an agreement that she would remove the pets slowly.

Analysis

Residential Tenancy Policy Guideline #38 Repeated Late Payment of Rent has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. The Guideline is also intended to help the parties to an application understand issues that are likely to be relevant. The Guideline provides:

The Residential Tenancy Act and the Manufactured Home Park Tenancy Act 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.

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.

Based on the evidence and testimony of the parties before me, and on a balance of probabilities, I make the following findings:

Repeated Late Payment of Rent

I find that the tenancy agreement requires the Tenant to pay rent in the amount of \$1,700.00 on or before the first day of the month.

The Landlord has the burden to prove that there is cause to end the tenancy for repeated late payment of rent.

I accept the Landlord's testimony and evidence that the Tenant is repeatedly late paying the rent. The Landlord provided copies of 10 Day Notices to End Tenancy for Unpaid Rent or Utilities in support of his testimony.

Three of the 10 Day Notices to End tenancy were issued for non-payment of utilities. The Landlord testified that he issued the Notices after giving the Tenant 30 days to pay. The Tenant testified that only one of these 10 Day Notices was valid. The burden of proof rests with the Landlord who did not provide documentary evidence of a demand letter given to the Tenant. I find that only one of the 10 Day Notices issued for unpaid utilities can be considered to be late rent.

With respect to the 10 Day Notice dated July 2, 2017, I accept the Tenant's testimony and evidence that the Interac e-transfer service was temporarily off line for a couple of days at the end of June 2017. I find that this is an exceptional and unforeseeable circumstance. The first couple days of July were on a weekend where banks are normally closed. While I find that the rent was paid late, I do not consider it an occurrence of repeated late payment of rent.

After finding that three of the 10 Day Notices do not count towards repeated late payment of rent, there remains five 10 Day Notices to end tenancy in support of the Landlords testimony regarding late payment of rent. The Tenant did not submit any documentary evidence such as bank records to prove the rent was paid to the Landlord by the first day of the month for these Notices. I find that the Landlord has provided the stronger evidence on the issue of repeated late payment of rent.

I find that the 10 Day Notices were issued close together and are not far enough apart to find that the Tenant cannot be said to be repeatedly late.

I find that the Landlord has established that the Tenant has been repeatedly late paying the rent on more than three occasions. I find that the tenancy has ended due to repeated late payment of rent.

Since the tenancy is ending for the reason of repeated late payment of rent, there is no need to consider the other reasons within the 1 Month Notice To End Tenancy For Cause dated May 15, 2017.

The Tenant's application to cancel the 1 Month Notice To End Tenancy For Cause dated May 15, 2017, is dismissed. The Landlord is entitled to the order of possession that was suspended on August 18, 2017.

Section 82 of the Act gives me the authority to confirm, vary, or set aside the original decision or order. I set aside the original order of possession and grant a new order of possession as follows:

At the hearing, the Tenant testified that she would pay the rent due for the month of October 2017. If the Tenant has paid the rent for October 2017, I order that the tenancy ends at 1:00 pm on October 31, 2017. If the Tenant has not paid the rent for October 2017, the order of possession is effective two (2) days after service on the Tenant.

Conclusion

The tenancy is ending due to the Tenant's repeated late payment of rent.

The Landlord is granted an order of possession effective two (2) days after service on the Tenant. The Landlord will not enforce the order of possession until October 31, 2017, if the Tenant has paid the rent due for October 2017.

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: October 4, 2017

Residential Tenancy Branch