



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: CNC

Introduction

This hearing dealt with an application by the tenant to dispute a one month notice to end tenancy for repeated late payment of rent. Both parties participated in the conference call hearing and had opportunity to be heard. The hearing was held over two days, giving the landlord an opportunity to re-submit evidence which had been misplaced by the Residential Tenancy Branch.

Issue(s) to be Decided

Does the landlord have cause to end the tenancy?

Is the landlord entitled to an order of possession?

Background and Evidence

The landlord issued a one-month notice to end tenancy dated November 24, 2008, to be effective December 31, 2008 by posting the notice on the tenant's door. The tenant testified that he received the notice on November 26 and filed his dispute application on December 4. The notice alleges that the tenant has been repeatedly late paying his rent.

A copy of the written residential tenancy agreement was submitted into evidence. The agreement indicates that the tenancy began on June 1, 2002 and provides that rent is payable on the first of each month.

The landlord's representative, S.A., began managing the building in February 2008. S.A. gave evidence that the tenant paid his rent by putting a cheque in the office mail slot. S.A. testified that the tenant would date each cheque for the first of the month, but usually would not submit the cheque until approximately the tenth day of each month. S.A. testified that several other tenants paid their rent by using the same mail slot, but

that the other cheques were received on the first day of the month.

S.A. testified that in the months of February, March, May, June, August, September, October, November and December the tenant did not pay his rent on the first day of the month and S.A. issued a 10-day notice to end tenancy in each of those months by posting the notices on the tenant's door. The tenant denied having received any of the 10-day notices. The tenant indicated that he was aware that notices posted on a door are deemed received on the third day after posting and asserted that he would have had until the 10th day of each month to pay his rent if the landlord had served notices on the 2nd day of the month. The tenant specifically denied having paid rent late in any month and testified that his observations regarding the time frames in which he could have paid his rent if notices had been served were purely academic.

S.A. provided evidence showing that in the months prior to the time he assumed managerial responsibility for the residential premises, the previous property manager had served on the tenant several notices to end tenancy for non-payment of rent and for repeated late payment of rent. The parties agreed that in October 2008 the landlord served the tenant with a one-month notice to end tenancy for repeated late payment of rent. The tenant testified that he received that notice, which was posted on his door, and disputed it by making an application for dispute resolution. The landlord did not appear at the hearing set down to deal with the October notice and the notice was set aside. S.A. denied having received notice of that hearing.

The landlord submitted copies of bank deposit statements, previous eviction notices, and two notes (purporting to be from the tenant and allegedly received in the month of May) indicating rent would be late. The notes are hand printed and state as follows:

“Simon. I can't get ya the rent till the 10th. 201.”

and

“#201. Ins since May 24/08. Also can't pay rent till 10th.”

The tenant denied having written the notes, although he testified that at one juncture the landlord had been concerned that his vehicle was uninsured and the tenant had provided to the landlord proof that he had current insurance.

The tenant submitted into evidence receipts he received from the S.A. for the months of February – September inclusive, which were dated for the first of each month. The tenant offered the receipts as proof that he has always paid his rent on time. S.A. testified that although rent was received late in most of those months, he was in the practice of writing receipts at the end of each month for all monies received during the course of the month and always dated receipts for the first of the month regardless of when monies had been received.

Analysis

In an application of this nature, the landlord bears the burden of proving that the rent was paid rent late. Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.) as follows at pages 357-358:

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an **examination of its consistency with the probabilities that surround the currently existing conditions**. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...”

In subjecting the testimony of the tenant to an examination of its consistency with the events as described by both parties, I have found it to be inconsistent.

The landlord's bank statements show the date on which the tenant's cheques were deposited each month. While I accept that a bank statement shows when the deposits were made rather than when cheques were received, in the month of April the deposit slip shows that the tenant's cheque was deposited on the second day of the month. 13 other cheques were deposited on that date, each for a large amount, suggesting that these are rent cheques. April is one of the months in which the tenant is not accused of paying his rent late. In most other months, the tenant's cheque was deposited alone or with other small amounts, usually on or after the 10th day of the month, lending

credence to the landlord's testimony that the rent was received late in those months.

Although the tenant denied having paid rent late in the month of May and further denied having written the notes submitted by the landlord, a comparison of the printing on the notes with evidence submitted by the tenant and containing his printing shows the printing to be remarkably similar. This combined with the tenant's testimony that an issue with respect to the insurance on his car arose sometime after S.A. began managing the building and the statement in one of the notes regarding "ins. Since May 24/08" leads me to believe that the tenant was indeed the author of both notes.

The tenant denied having received any of the 10-day notices to end tenancy, but acknowledged having received the one-month notices to end tenancy served in October and November 2008. The tenant clearly understood the law regarding 10-day notices and the dates on which notices which are posted are deemed received. He was well aware that the notices were void if payment was received within 5 days of the date on which the notices were deemed to have been received. I find that it is well beyond the realm of coincidence that the tenant is alleged to have consistently paid rent on the 5th day after having been deemed to have received the notices. The one-month notices were served in the same manner as the 10-day notices and could not be voided by payment of rent, but had to be disputed in this forum. I find that the tenant knew that he had no choice but dispute those notices thereby acknowledging receipt in order to avoid being presumed to have accepted that the tenancy ended on the effective dates of those notices in accordance with section 47(5) of the Act. I find it inconceivable that the tenant would not have received the six 10-day notices served by S.A. when they were served in the same manner as the one-month notices.

S.A.'s demeanour during the hearing has further convinced me of his credibility. S.A. bore no animosity toward the tenant and he confirmed that he would be willing to continue the tenancy if the tenant would only pay rent on time. Even when S.A.'s frustration grew when he heard the tenant testify that he regularly paid rent on time, S.A. expressed no ill will toward the tenant, nor did he in any way appear to be seeking vengeance. While S.A. has clearly adopted a poor business practice of dating receipts for the first of each month regardless of when payment was received, I find his testimony credible and accept that the dates on the receipts do not accurately reflect the

date on which payment was received. I find no reason to accept the tenant's suggestion that the landlord manufactured evidence to show that his rent was paid late.

I find that the tenant's evidence is not credible. S.A.'s testimony, combined with the documentary evidence, has persuaded me on the balance of probabilities that the tenant has, in fact, paid his rent late in 6 of the 8 months preceding the issuance of the notice to end tenancy. I find that the landlord has met the burden of proving that the tenant has repeatedly paid rent late and I decline to set aside the notice.

During the hearing the landlord made a request under section 55 of the legislation for an order of possession. Under the provisions of section 55, upon the request of a landlord, I must issue an order of possession when I have upheld a notice to end tenancy. Accordingly, I so order. The tenant must be served with the order of possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

Conclusion

The tenant's application is dismissed and the landlord is granted an order of possession effective January 31, 2009.

Dated December 31, 2008.