



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes CNR, CNC

Introduction

This hearing dealt with applications by the tenant for orders setting aside notices to end this tenancy. Both parties participated in the hearing and had opportunity to be heard.

These applications have a long and involved history. On February 18, 2009 the tenant made her original application to dispute two notices to end tenancy. A hearing was held via telephone conference call on April 8, 2009 at which time the tenants' application was dismissed and the landlord was granted an order of possession. The tenant applied for judicial review and in a decision dated June 15, 2009, the Supreme Court set aside the April 8, 2009 decision and remitted the matter back to the Residential Tenancy Branch.

The tenant was served with another notice to end tenancy in August 2009 and filed an application to dispute that notice. The Residential Tenancy Branch scheduled this application to be heard with the original application.

A new hearing was held on November 18, 2009 and in a decision dated December 30, 2009, Dispute Resolution Officer XXXX allowed the tenant's claim and set aside the notices to end tenancy. The landlord applied for judicial review and in oral reasons for judgment delivered on July 9, 2010, the Supreme Court of British Columbia set aside the decision of XXXXX and remitted the matter back to the Residential Tenancy Branch for a new hearing. This hearing is the result of the BC Supreme Court order.

Issue to be Decided

Should the notices to end tenancy be set aside?

Background and Evidence

The parties agreed that on February 6, 2009 the tenant received the 10 day notice to end tenancy for unpaid rent (the "10 Day Notice"), that on February 10, 2009 she received a one month notice to end tenancy for cause (the "First Cause Notice") and

that on August 26, 2009 she received a second one month notice to end tenancy for cause (the "Second Cause Notice"). Both the First Cause Notice and the Second Cause Notice allege that the tenant has been repeatedly late paying her rent. The parties further agreed that by February 18, 2009 the tenant had satisfied the arrears of rent which were the subject of the 10 Day Notice.

The tenant testified that she received the First Cause Notice just 4 days after having been served with the 10 Day Notice and that it caused her confusion as the deadline for disputing the notices was different. The tenant spent some time explaining why her rent was not paid on time in the month of February, attributing it to a government error. The landlord argued that the 10 Day Notice should not be set aside because the tenant applied to dispute that notice after the effective date of the notice.

The landlord testified that the tenant has been chronically late paying her rent and that in the year 2008, she was late paying her rent on 7 occasions. The tenant denied having been late on so many occasions in 2008 but argued that even if she had been, late payments from such a long time ago should not be taken into account. The tenant asserted that she does not wish to pay her rent late, but sometimes must due to her financial circumstances. The tenant acknowledged that she was late paying rent in January and February in 2009.

The landlord provided evidence showing that in January 2008, she wrote a letter to the tenant in which she withdrew a notice to end tenancy for unpaid rent, confirmed that the tenant had agreed to pay rent on the first day of each month and advising the tenant that future failure to pay her rent on time could result in the issuance of a notice to end tenancy. The tenant testified that she recalled that she had explained to the landlord why her rent was late and that the landlord understood her situation. The landlord testified that although the tenant has often telephoned to advise that her rent would be paid late, the landlord has not ceased to rely on the term of the tenancy agreement which requires the tenant to pay her rent on the first day of the month. The landlord provided evidence showing that she has on several occasions sent the tenant letters advising that while she appreciated the tenant advising her that rent would be paid late, she did not approve the late payments.

The landlord testified that after the First Cause Notice was served, the tenant paid rent late in March, May and August of 2009, which led to the issuance of the Second Cause Notice. The tenant acknowledged having paid rent late in March, but denied having made a late payment in May and testified that the rent was paid late in the month of August because of a banking error.

The tenant argued that by accepting late rental payments throughout the tenancy, the landlord had waived its right to rely on the term requiring payment in full on the first day of the month. The landlord argued that there had been no express waiver and that the landlord's conduct did not lead one to believe that waiver had been implied. The landlord further argued that in any event, in order to establish implied waiver the tenant must have acted upon the landlord's waiver to her detriment, which she did not do.

At the hearing the landlord orally requested an order of possession in the event that I upheld one or more of the notices to end tenancy.

Analysis

Turning to the 10 Day Notice, I find that the 10 Day Notice was effective on February 16, 2009 after having been automatically corrected by section 53 of the Act. I find that the tenant did not make her application to dispute that notice until February 18, 2009. I am bound by section 66(3) of the Act which prevents me from extending the time limit to make an application for dispute resolution to dispute a notice to end tenancy beyond the effective date of the notice. I therefore decline to set aside the 10 day 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.

In the event that I am wrong and there is some means by which I can extend the time limit for the tenant to dispute the 10 Day Notice, I would not have exercised my discretion to extend the time limit. The tenant had a long history of receiving notices to end tenancy for unpaid rent and I find that she was or should have been well aware of the process for cancelling or disputing such notices. I do not accept that the issuance of the First Cause Notice caused such confusion that the tenant was unaware of her obligation to dispute or pay her arrears within a specified time frame.

Although it is unnecessary to address the two notices served for cause, in light of the history of this claim I find it prudent to do so. The tenant was unable to prove that she had not paid rent late 7 times in 2008 and twice in 2009 before the First Cause Notice was served. I find it more likely than not that the tenant had paid rent late at least 3 times in the year before the First Cause Notice was served. Residential Tenancy Policy Guideline #38 provides that 3 late payments are sufficient to establish grounds for a notice to end tenancy. I find that the landlord had grounds to end the tenancy for cause

and would have awarded the landlord an order of possession based on the First Cause Notice.

I note that I do not accept the argument that the landlord had waived its right to rely on the term of the tenancy agreement which required the tenant to pay her rent in full on the first day of each month. Even if prior to 2008 the landlord had not relied on this term, I find that in the letter of January 18, 2008 the landlord put the tenant on notice that this term would be strictly enforced in the future.

I can adopt one of two approaches to determining whether there are grounds to uphold the Second Cause Notice. One approach is to take into account the entire rental history. In adopting this approach, I would have to come to the conclusion that just as there were grounds to end the tenancy in February, those grounds remained at the time the Second Cause Notice was served. I would have upheld the Second Cause Notice on that basis and awarded the landlord an order of possession.

A second approach would have me consider only the late payments between the time the First Cause Notice was served and the time the Second Cause Notice was served. The landlord claimed that there were late payments in March, which was acknowledged by the tenant, and in May, which the tenant denied. The parties agreed that the tenant paid rent late in August but the tenant testified that she issued the landlord a cheque on the first day of the month and on the fourth day deposited sufficient monies into her account to cover that cheque. A banking error resulted in the cheque being returned for insufficient funds. The landlord argued that the tenant did have funds in her account at the time the cheque was issued, suggesting that the payment cannot be considered to have been made on time because the cheque could not have been successfully negotiated on the day the rent was due. I am not persuaded that this is the case. The landlord chose not to negotiate the cheque on the first day of the month and I find that the question of whether the cheque would have been negotiable on that date is irrelevant. I find that the question I must answer is whether the cheque was negotiable when the landlord attempted to negotiate it and I find that while it was not negotiable, this was not due to any fault of the tenant. I find that exceptional circumstances prevented the tenant from paying her rent on time in August and therefore that late payment cannot be considered part of the grounds to end the tenancy. Regardless of whether the rent in May was paid late, I find that three late payments of rent had not occurred in the time between the First Cause Notice and the Second Cause Notice and I would have set aside the Second Cause Notice on that basis.

Conclusion

The tenant's claims are dismissed and the landlord is granted an order of possession.

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: April 04, 2011

Residential Tenancy Branch