

DECISION

Dispute Codes: CNC OLC RR FF

Introduction

The tenants applied under the *Residential Tenancy Act* (the “Act”) to cancel a 1 Month Notice to End Tenancy for Cause (the “Notice”); to seek an order to have the landlord comply with the Act, regulation or tenancy agreement; to allow the tenants to reduce rent for repairs, services or utilities agreed upon but not provided; and to recover the filing fee.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony evidence and to make submissions to me. I have considered all of the evidence and testimony provided.

Preliminary Matters

The tenants indicated several matters of dispute on their application. The main issue in the application is the request to cancel the Notice. For disputes to be combined on an application, they must be related. Not all the claims on this application are sufficiently related to the main issue to be dealt with together. Therefore, I will deal with the tenant’s request to cancel the Notice and recover the filing fee and dismiss the balance of the tenant’s claim with leave to reapply.

Issue(s) to be Decided

- Should the Notice be cancelled?
- Should the applicant tenant recover the filing fee?

Background and Evidence

Both parties agreed that the tenancy began on October 1, 2011. Monthly rent in the amount of \$2,100 was due on the 1st day of every month. The tenants claimed they had

a verbal agreement with the agent for the landlord to pay the monthly rent up until the 16th of the month, if one of the tenants was travelling, however the agent for the landlord disputed this agreement. The agent for the landlord provided oral testimony that the company he represents makes their payment to the landlord on the 15th of the month, so accepting payment after that date would not be an option he could consider. There are no addendums to the rental agreement, so this arrangement could not have been made via an addendum to the written rental agreement.

The agent for the landlord provided oral testimony that the Notice was served on the tenants by posting to their door on April 27, 2012 with an effective date of May 31, 2012. Section 90 of the *Act* deems the tenant was served three days later on April 30, 2012.

The tenants disputed the service date stating it was posted to their door on May 1, 2012. The tenant stated he could get a cell phone bill and a witness, however, neither was available for the hearing.

The agent for the landlord testified that rent can be paid on time via cash; post-dated cheque delivered before the 1st and processed on the 1st; email fund transfers processed the same day; or cheques delivered in person before 3:00 p.m. on the 1st day of the month.

The agent for the landlord provided documentary evidence and oral testimony regarding repeatedly late rent payments in the form of a ledger. According to the ledger, which both parties received and was referred to during the hearing, the following payments are noted:

October 1, 2011 rent	Received via cheque October 6, 2011
November 1, 2011 rent	Received via email transfer November 17, 2011
December 1, 2011 rent	Received via email transfer December 8, 2011
January 1, 2012 rent	Received via email transfer January 16, 2012
February 1, 2012 rent	Received via cheque February 2, 2012
March 1, 2012 rent	Received via cheque March 2, 2012
April 1, 2012 rent	Received via email transfers on April 3 & 5*, 2012 (*2 half payments for a total of one full rent payment)
May 1, 2012 rent	Received via cheque on time on May 1, 2012

The tenants disputed the legitimacy of the ledger by testifying that “it is just a plain ledger”. The landlord responded by testifying that the company he represents has been in existence for over 100 years and is governed by the local Real Estate Board which requires accurate bookkeeping.

The tenant testified that although he could not recall who he spoke with, someone at the accounting department for the agent of the landlord's office stated that they could only process a certain number of email fund transfers per day. The landlord disputed this by testifying that out of the 140 properties that his office manages, only 3 tenants pay their rent via email fund transfers, with the tenant in this matter being one of them, so there is no limit on the amount of email fund transfers per day that he is aware of. When the tenant was asked specifically about a date in November 2011 as an example to determine when he emailed a fund transfer, he was unable to provide an exact date and estimated it was emailed between November 11, 2011 and November 15, 2011.

During the hearing, the tenant confirmed that multiple rent payments were not made on the 1st day of the month. The agent for the landlord testified that the landlords are tired of the continual late rent payments.

Both parties provided testimony and documentary evidence regarding the utilities as the payment of utilities was identified as a material term of the tenancy agreement by the agent for the landlord. Both parties disputed each other's evidence and testimony with respect to the payment of utilities.

Analysis

Although there was testimony received from both parties regarding the utilities as the payment of utilities was identified as a material term of the tenancy agreement by the agent for the landlord, I have not given weight to that testimony or evidence in my decision, given the testimony and documentary evidence supporting the Notice based on late rent payments alone. The tenants, by their own admission, agree that rent payments were not made by the 1st of the month and the only testimony that another arrangement allowing payment up until the 16th of the month was disputed by the agent for the landlord.

In determining whether the Notice should be cancelled, and the recovery of the filing be ordered, I have considered the testimony of the parties in an effort to establish credibility in relation to the disputed testimony. I have also considered the burden of proof, which falls to the tenants, as the applicants. The tenants did not provide sufficient evidence to prove there was an agreement beyond what was agreed to in writing in the tenancy agreement. The tenants did not provide copies of cancelled cheques or other evidence such as their own ledger.

The agent for the landlord did provide a detailed ledger indicating that seven out of the last eight rent payments were late.

In the circumstances before me, I find that the tenants have not provided sufficient evidence to prove that the rent was not repeatedly late being paid. Accordingly, I dismiss the tenant's application to cancel the Notice. With respect to the service date of the notice, I prefer the testimony of the landlord that it was served on April 27, 2012 versus May 1, 2012 as the landlord was not vague with his testimony during the hearing. One of the tenants was vague with several points during the hearing, including who he spoke to, and the date he emailed fund payments, which tends to bring his recollection of exact dates into question.

Section 55 of the *Act* states:

Order of possession for the landlord

- 55** (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,
- (a) the landlord makes an oral request for an order of possession, and
 - (b) the director dismisses the tenant's application or upholds the landlord's notice.

Given the above and taking into account the agent for the landlord's oral request for an order of possession during the hearing, I find that the landlord is entitled to an order of possession effective **two days** after service on the tenants. This order may be filed in the Supreme Court and enforced as an order of that court.

As the tenants were not successful in their application, I dismiss their request to recover the cost of the filing fee.

Conclusion

The tenants applied to cancel the Notice and to recover the cost of the filing fee. The tenants did not provide sufficient evidence that they did not repeatedly make late rent payments and, therefore, I dismiss the tenant's application to cancel the Notice and to recover the filing fee.

I grant the landlord an order of possession effective **two days** after service upon the tenants. This order must be served on the tenants and may be enforced in the Supreme Court of British Columbia.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: May 31, 2012.

Residential Tenancy Branch