



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNR, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord's agent (the agent) also attended the hearing.

The landlord's agent admitted service of the tenant's dispute resolution package. On the basis of this admission, I find that the landlord was duly served in accordance with section 89 of the Act.

The agent testified that the landlord personally served the tenant with a 10 Day Notice on 24 December 2014. This 10 Day Notice was dated 24 December 2014 and set out that the tenant had failed to pay \$1,750.00 of rent that was due 1 December 2014. The tenant did not contest this service. On the basis of this evidence, I am satisfied that the tenant was served with this 10 Day Notice pursuant to section 88 of the Act.

The agent testified that one of her colleagues personally served the tenant with a second 10 Day Notice on 30 December 2014 at 1631. This 10 Day Notice was dated 30 December 2014 and set out that the tenant had failed to pay \$1,750.00 of rent that was due 1 May 2014. The agent testified that this date was a mistake and that it should have read 1 December 2014 and not 1 May 2014. The tenant did not contest this

service. On the basis of this evidence, I am satisfied that the tenant was served with a second 10 Day Notice pursuant to section 88 of the Act.

The agent testified that the landlord personally served the tenant with a 1 Month Notice on 17 December 2014. The tenant did not contest this service. On the basis of this evidence, I am satisfied that the tenant was served with this 1 Month Notice pursuant to section 88 of the Act.

At the hearing, the landlord's agent made an oral request for an order of possession in the event I dismissed any of the tenant's applications to cancel the landlord's notices to end this tenancy.

Preliminary Issue – Request to Hear Landlord's Application

At the hearing the agent asked that the landlord's application (scheduled for early February) in respect of this tenancy be heard with this application. I declined the agent's request as it would unfairly prejudice the tenant to hear the other matter at this date without any advance notice to the tenant.

Preliminary Issue – The Notices Before Me

Three notices to end tenancy have been issued in respect of this tenancy:

- 1 Month Notice dated 17 December 2014;
- 10 Day Notice dated 24 December 2014; and
- 10 Day Notice dated 30 December 2014.

Where a party has issued multiple notices to end tenancy, there may be some confusion as to whether the issuance of a subsequent notice to end tenancy operates as waiver of the previous notice to end tenancy.

Residential Tenancy Policy Guideline, "11. Amendment and Withdrawal of Notices" provides assistance with this issue:

Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her

detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

As the 1 Month Notice and the 10 Day Notice issued 24 December 2014 relate to different legal rights, I do not consider that the issuance of the 10 Day Notice issued 24 December 2014 amounts to a waiver of the landlord's rights under the 1 Month Notice. Accordingly, the legal rights pursuant to the 1 Month Notice are not waived.

However, in this case, the 10 Day Notice issued 24 December 2014 and the 10 Day Notice issued 30 December 2014 were in respect of the same subject, that is, the notices both purported to allege that the landlord had a legal right to end the tenancy in relation to the identical rent owed. In this case, by issuing the second 10 Day Notice, the landlord has made a clear, unequivocal and decisive act that showed intent to waive the 10 Day Notice issued 24 December 2014 and replace it with the 10 Day Notice issued 30 December 2014. Accordingly, the 10 Day Notice issued 24 December 2014 is of no force and effect as the landlord is estopped from relying upon it.

Preliminary Issue – Request to Amend 10 Day Notice Dated

At the hearing the landlord asked to amend the 10 Day Notice to change the date on which the rent was due from 1 May 2014, to 1 December 2014.

Subsection 68(2) of the Act allows me to amend a notice given under the Act that does not comply with the Act. *Residential Tenancy Policy Guideline* “11. Amendment and Withdrawal of Notices” provides me with guidance in the exercise of my discretion. An amendment request may be granted where:

the person receiving the notice knew, or should have known, the information that was omitted from the notice, and it is reasonable in the circumstances.

In this case, the agent failed to provide the correct date on which rent was due. This mistake does not go to the substance of the 10 Day Notice, that is, there was alleged to be outstanding rent owed by the person to whom the notice was delivered. In particular, the tenant had notice that the landlord believed there to be \$1,750.00 in rent arrears owing as at 1 December 2014 as the landlord had delivered a previous 10 Day Notice dated 24 December 2014 that set out essentially the same information. For these

reasons, I am exercising my discretion to amend the 10 Day Notice to change the date from 1 May 2014 to 1 December 2014.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession? Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an order of possession? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim my findings around it are set out below.

There is no written tenancy agreement for this tenancy. This tenancy began 1 June 2014. The agent testified that monthly rent of \$500.00 is due on the first. The landlord testified that she no longer holds a security deposit as the security deposit was applied to September's rent arrears.

The landlord issued the second 10 Day Notice on 30 December 2014. The notice set out that it was being given for rental arrears of \$1,750.00 that were due on 1 December 2014 (as amended). The 10 Day Notice set out an effective date for the notice of 9 January 2015.

The landlord testified that the tenant owed rent for October, November and December at the time of the 10 Day Notice. As well, the landlord included the security deposit amount on the 10 Day Notice as she sought its replenishment after it had been applied to September's rent. The agent testified that the landlord has not received any payments since she issued the 10 Day Notice to the tenant.

The tenant testified under oath that he paid his rent in full, but did not keep his receipts that he received from the landlord. Later in the same hearing, the tenant testified under oath that he was never issued receipts by the landlord. The landlord testified that it is always her practice to give receipts.

The landlord issued the 1 Month Notice on 17 December 2014. The 1 Month Notice set out that it was being given as:

- the tenant or 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;
 - put the landlord's property at significant risk; or
- the 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.

The landlord testified that the tenant has threatened the landlord. The landlord specifically alleges that the tenant threatened to "whack" the landlord, to hire people to "beat" the landlord and other tenants of the residential building, and to burn the house down. The landlord testified that the tenant pushed the landlord.

The landlord elected to call one of her tenants (who resides in the upstairs portion of the residential property) as a witness (the witness). The witness testified that the tenant and the witness were involved in multiple conflicts where the tenant was intimidating and threatening toward the witness. The witness estimated that there had been five such incidents.

The witness described one such incident. The witness testified that one afternoon he was crunching cans outside the front door. The tenant told the witness that he was being too loud. The witness testified that the tenant told the witness that if he crunched one more can, the tenant would call his friend and that the two of them would strangle the witness. The witness made repeated calls to the police regarding this incident. The witness testified that when the police failed to attend after the witness's first call, he called the landlord. The landlord attended at the residential property. The witness testified that the landlord went downstairs and that the witness heard yelling, but that it was mostly the tenant who was yelling. The witness took a friend with him to go to check that the landlord was okay. The witness testified that he saw the landlord attempting to serve the tenant with a notice to end tenancy at the back door of the residential property. The witness testified that the tenant said that he was not going to move out and crumpled the paper and threw it out of the door. The witness testified that he saw the tenant push the landlord and that the landlord pushed the tenant back.

The tenant testified that he is being harassed by the upstairs tenants, and that there are bed bugs in the rental unit. The tenant described the rental unit as a "torture chamber". The tenant testified that the landlord is stalking the tenant.

The tenant provided a letter from friend that set out that there “are no grounds to evict” the tenant and that the eviction occurred after the tenant complained about loud upstairs tenants, bedbugs, and the number of tenants in the building.

Analysis

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenant has not provided evidence that he was permitted to deduct any amount from rent under the Act. None of the landlord’s alleged misconduct allows the tenant to withhold amounts from rent.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

The landlord testified that the tenant failed to pay rent for October, November and December 2014 and that the tenant had paid September’s rent by applying his security deposit against that rent. The tenant testified that he had paid the rent in full. Obviously, the testimony of the landlord and tenant directly conflicts. In this situation, I must determine which evidence I find to be more credible. I prefer the testimony of the landlord. I found the landlord to be forthright in providing her testimony and found her version of events to be more plausible. Additionally, the tenant provided inconsistent testimony. Specifically, the tenant initially testified under oath he did not retain his receipts that he received from the landlord and then later testified under oath that he never received receipts from the landlord. Accordingly, I find that the tenant did not pay rent for October, November and December and that he has not paid rent since the issuance of the 10 Day Notice.

As the tenant has failed to pay his rent in full when due, I find that the 10 Day Notice issued 30 December 2014 is valid and dismiss the tenant’s application to cancel the 10 Day Notice without leave to reapply. Where an arbitrator dismisses a tenant’s application or upholds the landlord’s notice and the landlord makes an oral request for an order of possession at the hearing, an arbitrator must grant the landlord an order for possession pursuant to section 55 of the Act. As the tenant’s application is dismissed and the landlord has made an oral request for an order of possession, I am obligated by

section 55(1) of the Act to grant the landlord an order of possession. This order of possession is effective two days after it is served upon the tenant(s).

As the tenancy ended 9 January 2014, I decline to consider the validity of the 1 Month Notice as the issue is moot.

As the tenant has not been successful in his application he is not entitled to recover his filing fee from the landlord.

Conclusion

The tenant's application is dismissed without leave to reapply.

At the hearing, the landlord requested an order of possession if the tenant's application for cancellation of the Notice to End Tenancy were dismissed.

I grant an order of possession to the landlord effective **two days after service of this order** on the tenant(s). Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: January 28, 2015

Residential Tenancy Branch

