



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, O

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause, dated October 7, 2015 ("1 Month Notice"), pursuant to section 47; and
- other unspecified remedies.

The two landlords and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

This hearing lasted approximately 92 minutes in order to allow both parties, particularly the tenant, to fully present their submissions. During the hearing, the tenant asked me to repeat a number of questions and statements and asked me to speak slowly, which I was able to accommodate. However, the tenant refused to answer various questions I asked her, she repeatedly asked the same questions and made the same comments, and interrupted myself and both landlords during the hearing. The majority of the hearing time was spent listening to the tenant's testimony and various requests. The tenant disconnected from the hearing twice and no proceedings were conducted in her absence, as she returned to the teleconference after each disconnection.

The landlords confirmed receipt of the tenant's application for dispute resolution hearing package ("Application"). The tenant confirmed receipt of the landlords' written evidence package. In accordance with sections 88, 89 and 90 of the *Act*, I find that both landlords were duly served with the tenant's Application and the tenant was duly served with the landlords' written evidence package.

The landlords confirmed that they did not receive a two-page handwritten summary statement from the tenant's written evidence package. The tenant confirmed that she

provided this statement to the landlords on October 16, 2015, by way of registered mail and she provided a Canada Post tracking number during this hearing. During the hearing, I offered the tenant the opportunity to read this statement aloud to the landlords but she declined. However, during her oral testimony at this hearing, the tenant mentioned all of the information contained in her written statement. Therefore, I find it unnecessary to make a determination regarding service of this statement to the landlords.

The landlords confirmed that they served the tenant with the 1 Month Notice on October 7, 2015, by way of posting to her rental unit door. The tenant confirmed receipt of the 1 Month Notice on October 7, 2015 but stated that she found it on the floor inside her rental unit because the landlords illegally entered her unit and placed it there. Although the tenant confirmed that she did not receive the notice in accordance with section 88 of the Act, I find that she was sufficiently served with the 1 Month Notice for the purposes of section 71(2)(c) of the Act. The tenant testified that she received the notice, was aware of its contents, and disputed the notice at this hearing.

At the outset of the hearing, the tenant confirmed that she was only seeking to cancel the landlords' 1 Month Notice at this hearing and not any other relief. She stated that she was told to apply for "other" unspecified remedies when she was completing her application at the Residential Tenancy Branch ("RTB") office. Therefore, the tenant's application for "other" unspecified remedies is dismissed.

During the hearing, the landlords made an oral request for an order of possession.

Issues to be Decided

Should the landlords' 1 Month Notice be cancelled? If not, are the landlords entitled to an Order of Possession for cause?

Background and Evidence

Both parties agreed that this month-to-month tenancy began around April 1, 2008 with the former landlord. The landlords confirmed that they took over control of this rental building on May 1, 2011. Both parties agreed that monthly rent in the current amount of \$565.00 is payable on the first day of each month. The tenant confirmed that she was issued legal notices of rent increase by her former and current landlords to raise the rent from the initial amount of \$525.00 to the current amount of \$565.00. Both parties agreed that a security deposit of \$266.00 was paid by the tenant and this amount was transferred to the current landlords when they assumed control. The tenant confirmed

that the landlords returned this deposit to her, via a cheque dated October 10, 2015, but that she has not cashed it, she does not intend to cash it and she will return it to the landlords. The tenant continues to reside in the rental unit.

The tenant seeks to cancel the landlords' 1 Month Notice. The landlords issued the 1 Month Notice, indicating that "*the tenant is repeatedly late paying rent*" and "*the tenant has allowed an unreasonable number of occupants in the unit/site.*" The landlords confirmed that they did not wish to pursue the second reason on the notice, regarding the number of occupants in the unit. The landlords indicated that they were only pursuing the issue regarding late payment of rent. The notice indicates an effective move-out date of November 31, 2015, which the landlords agreed was an error and was to read as "November 30, 2015."

Both parties agreed that the tenant paid rent late in March, July, August, September, October and November 2015. Both parties agreed that the tenant was issued multiple 10 Day Notices to End Tenancy for Unpaid Rent or Utilities ("10 Day Notices") for late payment of rent in March, July and October 2015, by the landlords. The tenant stated that the rent amounts were correct for all 10 Day Notices except for March 2015. Both parties agreed that the tenant was issued rent receipts for late payment of rent in July, August, September, October and November 2015. The landlords provided copies of the 10 Day Notices and rent receipts.

The tenant confirmed that she was only late paying rent of \$24.00 or \$26.00 each month and that she paid these amounts to the landlords soon after receiving each 10 Day Notice. The tenant stated that she is on disability and her rent payments are made by the ministry. She indicated that she advised the ministry that she received legal notices of rent increase from the landlords to raise her rent from \$541.00 to \$565.00 but they did not pay the additional \$24.00 each month because it was a small amount. She stated that she should not be evicted due to such small rent amounts owing each month, which she has ultimately paid to the landlords.

Both parties agreed that the tenant paid rent in full and on time for December 2015.

Analysis

According to subsection 47(4) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within ten days after the date the tenant receives the notice. The tenant received the 1 Month Notice on October 7, 2015 and filed her Application on October 14, 2015. Therefore, the tenant is within the ten day

time limit under the *Act*. The onus, therefore, shifts to the landlords to justify the basis of the 1 Month Notice.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement. Both parties agreed that rent is due on the first day of each month, as per the tenancy agreement.

Residential Tenancy Policy Guideline 38 states that “three late payments are the minimum number sufficient to justify a notice...” The tenant acknowledged that she paid rent late more than three times during this tenancy. Accordingly, I find that the tenant was late paying rent, despite her circumstances with disability and the amounts of rent owed, more than three times during this tenancy in March, July, August, September, October and November 2015.

Although the tenant paid rent late a number of times and the landlords accepted this rent, this does not waive the landlords’ right to issue a 1 Month Notice for repeated late payment of rent. The landlords issued the 1 Month Notice on October 7, 2015, after five late rent payments. Therefore, the landlords provided recent evidence of the tenant’s late rent payments and communicated to the tenant that this late rent was not acceptable.

Accordingly, I find that the landlords’ 1 Month Notice was issued for a valid reason. The next issue is whether the landlords waived their right to pursue the 1 Month Notice. Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 1 Month Notice:

A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.*
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*

- *the conduct of the parties.*

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. 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.

Although the landlords accepted a rent payment in December 2015 from the tenant after the corrected effective date on the 1 Month Notice of November 30, 2015, I do not find this to be a waiver of the 1 Month Notice. This is despite the fact that the landlords did not issue rent receipts indicating “use and occupancy only.” The tenant did not withdraw her Application to cancel the 1 Month Notice, at any time prior to this hearing. The landlords submitted written evidence for this hearing that supports the 1 Month Notice and the landlords’ intention to evict the tenant. The male landlord confirmed that he had verbal conversations with the tenant, advising her to vacate the rental unit, as recently as the week before this hearing. The tenant confirmed that she received a cheque from the landlords on November 10, 2015, returning her security deposit, along with a note asking when she would be vacating the rental unit. The tenant explained that this cheque was in response to her text message sent to the landlords in August 2015, advising that if she obtained the return of her security deposit, she would be willing to give written notice to vacate her rental unit. The landlords provided copies of the text message, the note and the security deposit cheque. This is recent evidence of both parties’ intention to attend this hearing to determine whether this tenancy would end, pursuant to the landlords’ 1 Month Notice. Both parties attended the hearing and made submissions regarding the 1 Month Notice.

For the above reasons, and given the conduct of the parties, I find that the landlords did not waive their rights to pursue the 1 Month Notice and did not waive the 1 Month Notice, whether expressly or impliedly. I find that the landlords did not intend to reinstate this tenancy, despite accepting rent payments after the effective date stated on the 1 Month Notice. Accordingly, the tenant’s application to cancel the landlords’ 1 Month Notice is dismissed without leave to reapply. As I have dismissed the tenant’s application, the landlords are entitled to an order of possession pursuant to section 55 of the *Act*, as they made an oral request at this hearing.

The landlords requested a 2 day order of possession. The tenant requested a 90 day order of possession if she was unsuccessful in her application. I find that the landlords are entitled to a 15 day Order of Possession. I find that because the tenant is an elderly, disabled woman, she requires additional time to vacate the rental unit. Further, the tenant paid rent for December 2015, so she is entitled to possession of the rental unit until at least December 31, 2015.

Conclusion

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

I grant an **Order of Possession to the landlords effective fifteen (15) days after service of this Order** on the tenant. Should the tenant or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I order the tenant to return the security deposit cheque of \$266.00 to the landlords within three (3) days of receiving a copy of this decision. Upon return, this security deposit must be kept in trust by the landlords and dealt with at the end of this tenancy in accordance with section 38 of the *Act*.

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: December 15, 2015

Residential Tenancy Branch

