



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNC, MNDC, LRE, AS, FF, CNL

Introduction

The tenants have applied to cancel a one month Notice to end tenancy for cause and a two month Notice ending tenancy for landlords' use of the property; compensation for damage or loss under the Act; an order to suspend or set conditions on the landlords' right to enter the rental unit; an order allowing the tenants to change the locks to the rental unit and to recover the filing fee cost from the landlord.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained 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 and to make submissions during the hearing. I have considered all of the evidence provided.

Preliminary Matters

The tenants initially applied on August 16, 2016. That initial application included the request to cancel a single 1 month Notice to end tenancy for cause issued on August 10, 2016 and the balance of the claim.

On September 15, 2016 the tenants amended the application to include a request for an order of possession for the tenants. The monetary claim was increased from \$900.00 to \$1,300.00.

On September 21, 2016 the tenants amended the application, to dispute a two month Notice to end tenancy for landlords' use of the property issued on September 7, 2016. The monetary claim was increased to \$4,000.00.

The landlord confirmed receipt of the original application and the two amendments, within the required time limit.

On October 4, 2016 the landlord served the tenants with evidence by placing that evidence on the tenants' door. That evidence was set aside as it was not given at least seven days prior to the hearing, as required by section 3.5 of the Residential Tenancy Rules of Procedure. The landlord was at liberty to make oral submissions.

Section 2.3 of the Rules of Procedure provides:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

The tenants have applied requesting compensation for the loss related to showings of the rental unit and orders related to entry by the landlord. As these matters do not directly relate to a possible end of tenancy I applied section 2.3 of the Rules and dismissed the monetary claim and the balance of the orders requested with leave to reapply.

At the start of the hearing I explained that I would take submissions on both Notices to end tenancy. If the one month Notice was found to be of force, as it has been issued first, I would not reference the testimony related to the two month Notice to end tenancy. If the one month Notice to end tenancy was set aside I would then proceed to consider the two month Notice.

The parties were informed that orders could be issued pursuant to section 62(3) of the Act, should the need become apparent.

Issue(s) to be Decided

Should the one month Notice ending tenancy for cause issued on August 10, 2016 be cancelled or must the landlord be issued an order of possession?

Should the two month Notice ending tenancy for landlords' use of the property issued on September 7, 2016 be cancelled or must the landlord be issued an order of possession?

Are the tenants entitled to an Order of possession?

Background and Evidence

The tenancy commenced August 30, 2014, rent is \$900.00 per month due on the first day of each month. The landlord is holding a security deposit in the sum of \$450.00. The tenants rent a basement suite; the landlord resides in the upper level of the home.

There was no dispute that the home has been for sale for approximately one year. The landlord said that there have been offers, with subject clauses, but that no offer has been fully executed and the home remains on the market.

The landlord and tenants agreed that a one month Notice to end tenancy for cause was served on the tenants indicating that the tenants were required to vacate the rental unit on September 30, 2016. The tenants had a copy of the Notice before them; a copy was not supplied as evidence. The landlord confirmed the details of the notice as set out by the tenants during the hearing.

The Notice provided a single reason:

"tenant is repeatedly late paying rent."

There was no dispute that rent has been paid as follows:

- August 1, 2016;
- July 4, 2016;
- June 7, 2016;
- May 1, 2016;
- April 3, 2016; and
- February 3, 2016.

These payments were all made by electronic transfer and reflect the date the tenants initiated the transfers, not the date of deposit by the landlord. Prior to this time rent had been paid by a series of post-dated cheques. The landlord said December 2015 and January 2016 rent was also paid late but the dates payment was made could not be located during the hearing.

The tenants pointed to two text messages sent by the landlord; one on June 7 and another July 3, 2016. On each occasion the landlord wrote asking the tenants for rent payments. The tenants said that they have researched the late rent payment eviction and located a previous decision where an arbitrator found that the tenancy could not end as the landlord had allowed rent to be paid late and not said anything or taken any action. The tenants said the landlord had allowed a pattern of tolerance for the late payments; therefore the landlord could no longer rely on the strict terms of the tenancy agreement.

The landlord said that the two messages sent to the tenants, requesting payment after rent had not been paid on the first of June and July 2016 indicated that the landlord was relying on the terms of the tenancy agreement.

The tenants said that in February they had misplaced their cheques. The tenants took steps to correct the problem and now use electronic transfer to pay the rent. The tenant said that payment on the first day of the month was not critical to the landlord as the payments were not quickly deposited by the landlord. The tenants said that the Notice ending tenancy was issued 40 days after the most recent late payment; which indicates the landlord was not intending to strictly rely on the rent payment term of the tenancy agreement.

The landlord stated that any delay in issuing the Notice was the result of her not being fully aware of the permissible timing of the Notice. As soon as the landlord understood she could issue the Notice at any time it was issued and given to the tenants.

Counsel submitted that the tenants raised the concept of estoppel but that the landlord had not agreed to waive her rights to rent payments on the first day of each month. If the landlord had intended to waive her rights she would not have sent the text messages requesting payment.

Analysis

Section 47(1)(b) of the Residential Tenancy Act provides that a landlord may end a tenancy where the tenant is repeatedly late paying rent. Residential Tenancy Branch policy suggests that three late payments are the minimum number sufficient to justify a notice under these provisions. It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments. If the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late.

Policy also suggests that if a landlord fails to act in a timely manner after the most recent late rent payment a landlord may be determined by an arbitrator to have waived reliance on this provision.

From the evidence before me I find that rent is due on the first day of each month. There was no dispute that rent was paid late on four of the last 8 months (February, April, June, and July, 2016); the exceptions were March, May and August 2016.

I have considered the tenants' submission that the landlord is estopped from relying upon the strict terms of the tenancy agreement requiring payment on the first day of each month. From the evidence before me I find that the landlord provided the tenants with two directions, in each June and July 2016, that rent was due and, thus, late. While rent was paid on time in August, the landlord then decided to exercise the right provided by section 47 of the Act to end the tenancy.

There was no evidence before me that supports the tenants' submission the landlord acquiesced and accepted that rent payments were not required according to the term set out in the tenancy agreement signed by the parties. In fact, I find that the reminders given in June and July 2016 demonstrated that the landlord had expected the rent payments on time and that those payments were late. If I were to accept the tenants' submission, those two reminders would have no meaning. I have rejected that suggestion. I find on the balance of probabilities, that the messages did have meaning and that the tenants' submission the landlord had waived the right to rent payments as set out in the tenancy agreement is not supported by the actions of the landlord. I cannot find any implied or explicit promise made by the landlord that rent was no longer due on the first day of each month.

I do not find that the delay in issuing the Notice, of just over one month since the most recent late payment, has any bearing on the weight of the Notice. The landlord did not allow months to pass before issuing the Notice and had already experienced four late payments in recent months, with the last late payment just the month prior to the Notice being issued. The fact that rent was paid on time in August suggests that the tenants knew rent was due on the first day of the month.

Therefore, I find that the one month Notice to end tenancy for cause issued on August 10, 2016 is of force and effect.

Therefore, pursuant to section 55(1)(b) of the Act I find that the landlord is entitled to an order of possession that is effective two days after service to the tenants. This order may be served on the tenants, filed with the Supreme Court of British Columbia and enforced as an order of the Court.

I have not considered the two month Notice ending tenancy issued on September 7, 2016 as the one month Notice was not waived by the landlord and is effective.

In relation to the issue of entry to the rental unit, the landlord is required to consider section 29 of the Act.

The tenants' request for an order of possession is dismissed.

Conclusion

The tenants' application to cancel the one month notice to end tenancy for cause is dismissed.

The tenants' application requesting an order of possession is dismissed.

The balance of the claim is dismissed with leave to reapply.

The landlord is entitled to an order of possession.

This decision is final and binding 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: October 12, 2016

Residential Tenancy Branch