



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC, FF

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by the Tenant on October 4, 2016 to: cancel a notice to end tenancy for cause; for money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement; and, to recover the filing fee from the Landlord. The Tenant amended his Application on November 8, 2016 to increase his monetary claim.

The Tenant, the Landlord (who is the owner of the rental unit), and the Co-owner of the rental unit appeared for the hearing. The Landlord called two witnesses to provide testimony during the hearing. All testimony was provided under affirmation. The hearing process was explained to the parties and they had no questions about the proceedings.

The Landlord confirmed receipt of the Tenant's Application by registered mail and personal receipt of the Tenant's amended Application and his evidence. The Tenant denied receipt of the Landlord's documentary evidence that was before me which comprised of a single page of written submissions and two witness statements. The Landlord testified that he left this evidence on the Tenant's deck. As a result, I declined to consider the Landlord's documentary evidence because there was not sufficient evidence before me that the Tenant received this evidence or that it had been served pursuant to one of the methods stipulated by Section 88 of the Act. The Landlord was informed that he was at liberty to deliver his written submissions into oral testimony and that he could have the witnesses who provided the statements deliver this evidence orally during the hearing. The Landlord raised no objections to this.

Issues(s) to be Decided

- Should the one month notice to end tenancy be cancelled?
- What is to happen with the Tenant's monetary claim?

Background and Evidence

The parties agreed that this tenancy for a five bedroom rental home started in 2006 with a number of fixed term tenancy agreements. The Tenant provided a copy of the last page of the most recent written tenancy agreement which notes that the fixed term tenancy from July 31, 2015 is extended to the end of July 2016. That last page does not document what is to happen to the tenancy after the fixed term ends but the parties confirmed that the tenancy is currently in a month to month period. The parties also confirmed that rent is currently payable by the Tenant in the amount of \$3,241.00 on the first day of each month. The Tenant paid a \$1,500.00 security deposit for the rental home which the Landlord still retains.

The Tenant confirmed receipt of a 1 Month Notice to End Tenancy for Cause (the "1 Month Notice") on September 24, 2016 which was posted to his door. The 1 Month Notice which is dated September 23, 2016 was provided into evidence and shows a vacancy date of October 23, 2016. The Landlord elected the following reasons for ending the tenancy which he detailed on page two of the 1 Month Notice:

- Tenant is repeatedly late paying rent;
- Tenant has seriously jeopardised the health, safety or lawful right of another occupant or the Landlord and put the Landlord's property at significant risk;
- Tenant caused extraordinary damage to the rental unit; and
- Tenant gave false information to a prospective tenant or purchaser.

As a result, I asked the Landlord to present evidence on each of the reasons detailed on the 1 Month Notice. With respect to the reason that the Tenant has been repeatedly late paying rent, the Landlord testified that the Tenant has been habitually late paying rent in this tenancy.

The Landlord testified that from January to July 2016 the Tenant paid his rent late every month. The Landlord was unable to provide the exact dates that the late rent payments were made but he said that he continually had to chase the Tenant for these payments. The Landlord testified that he did not address the issue with the Tenant in terms of ending the tenancy because he knew that the Tenant was having financial difficulties and that this was done out of courtesy and respect for him. However, the Landlord testified that he continually asked the Tenant to make his rental payments on time.

The Landlord testified that the Tenant was having problems paying rent because the Tenant was in dispute with the Tenant's sub-tenants who were paying rent to the Tenant for subletting the rental unit. The Landlord testified that the Tenant failed to pay any rent on August 1, 2016 and on September 1, 2016. The Landlord testified that he got sick and tired of trying to collect rent from the Tenant each month that he went to the Tenant's subtenants and collected from them their portion of the rent that was owing to him by the Tenant.

The Tenant did not dispute the Landlord's testimony in that he had not always paid his rent on time. The Tenant stated that since January 2016 he may have been late with his rent approximately on two or three occasions but he has not been keeping track of when he has been making his rent payments and could neither confirm nor deny the Landlord's testimony.

The Tenant acknowledged that the Landlord had mentioned to him verbally about late payment of rent but argued that the Landlord's lack of action gave him the understanding that this was not an issue and that the Landlord did not make mention about any requirement to pay it on the first day of each month. The Tenant testified that on some occasions, the Landlord allowed him to pay his rent late and that this was never an issue because the Landlord understood that he was having financial problems which was the reason why the Landlord did not have any issue with the Tenant subletting the rental unit.

The Tenant explained that on the occasions that he was late, it was because he used to pay the Landlord his rent by cheque. However, the Landlord changed the method of payment because he got sick and tired of having to then cash the cheques each month. As a result, the Landlord asked the Tenant to pay cash. The Tenant stated that because he received rent monies from his sub-tenants in the form of cheques he then had to cash them and then make the cash available to the Landlord to make his rent payment which is the reason why it was made late.

The Tenant disputed the Landlord's testimony in respect to payment of rent for August and September 2016. The Tenant testified that he made a payment of at least \$1,450.00 and a payment of \$91.00 at some point in the third week of September 2016. The Tenant testified that he gave the Landlord a bank draft of \$91.00 for September 2016 rent; this was his portion of the September 2016 rent as the Landlord by that time had started to collect the remainder of the rent payable from the Tenant's sub-tenants as part of an alleged illegal tenancy the Landlord had established with them.

The Tenant submitted that the Landlord's 1 Month Notice is in retaliation and bad faith to the ongoing dispute the Tenant is having with his sub-tenants which is a matter currently being arbitrated on by a different Arbitrator in a separate dispute resolution hearing.

The Landlord testified that the tenancy between him and the Tenant had ended on July 2016 as per the fixed term tenancy and because the Tenant was failing to pay his rent on time, namely on August 1, 2016, he started to collect some of the rent payable to him by the Tenant from the Tenant's subtenants. The Landlord acknowledged that the Tenant had made partial rent payment to him of \$91.00 on October 1, 2016 and November 1, 2016.

Analysis

I have examined the 1 Month Notice and I find that it was completed with the correct information on the approved form as required by Sections 47(3) and 52 of the Act. I accept that the 1 Month Notice was served to the Tenant by posting it to the Tenant's door on September 23, 2016 pursuant to Section 88(g) of the Act.

I also accept that the Tenant received the 1 Month Notice on his door on September 24, 2016. However, the vacancy date on the 1 Month Notice does not comply with Section 47(2) of the Act as it does not allow for one clear rental month before the Notice becomes effective. Therefore, I have corrected the effective vacancy date on the 1 Month Notice to October 31, 2016 pursuant to Section 53 of the Act.

When a landlord serves a tenant with a 1 Month Notice and the tenant disputes it, the burden of proof is on the landlord to prove one of the reasons the landlord relies on to end the tenancy. If the landlord proves one of the reasons to end the tenancy, the 1 Month Notice must be upheld and the tenancy must end. In relation to the Tenant's request to cancel the 1 Month Notice, I first turn my mind to the parties' evidence in relation to the allegation that the Tenant repeatedly paid rent late in this tenancy.

Section 26 of the Act requires a tenant to pay rent on the day that it is due whether or not a landlord complies with the Act. In this case, I find that the Landlord and Tenant established a tenancy which made it clear that the Tenant had an obligation to pay rent on the first day of the month.

The parties confirmed at the start of the hearing, that the tenancy between the Landlord and Tenant was currently in a month to month term. However, the Landlord argued later in the hearing that the tenancy had ended at the end of July 2016 as per the signed fixed term tenancy provided by the Tenant into evidence. In this respect, I turn to Section 44 of the Act which stipulates how a tenancy must end. In particular Section 44(3) of the Act states that if, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

The evidence before me is that the written tenancy agreement does not specify what is to happen to the tenancy after the fixed term ended on July 31, 2016. In addition, the Landlord continued to accept rent from the Tenant after July 31, 2016, even though the Tenant only made partial payments. Furthermore, the Landlord issued the Tenant with the 1 Month Notice in September 2016 which suggests that a tenancy was still in effect at that time. Therefore, based on this evidence before me, I find the Landlord and Tenant continued the tenancy after the fixed term ended on a month to month basis. Accordingly, the Tenant had a contractual and statutory obligation to pay full rent to the Landlord in this tenancy.

In making a finding on whether the Tenant has been repeatedly late paying rent, I turn to Policy Guideline 38 titled "Repeatedly Late Payment of Rent" which states:

"The Residential Tenancy Act and the Manufactured Home Park Tenancy Act both provide that a landlord may end a tenancy where the tenant is repeatedly late paying rent.

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. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late.

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

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent. Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision."

[Reproduced as written]

I have taken the above policy guideline into consideration and on the balance of probabilities I am satisfied by the evidence before me that the Tenant has repeatedly been late paying rent in this tenancy. I make this finding on the basis that the Tenant confirmed that he may have been late paying his rent two to three times from January 2016 onwards even though neither party was able to provide specific dates of when the rent payments were made. I accept that the Tenant made late payment of rent in this tenancy because he testified that he had financial problems which are the reason why he was subletting the rental unit to the sub-tenants.

I have also considered whether the Landlord's lack of action has rendered the Landlord's reliance on the repeatedly late payment provision outlined in the policy guideline. In this respect, I am satisfied that the Landlord put the Tenant on verbal notice that he was not happy with the Tenant making late payment of rent and I accept the Landlord's evidence that the reason why he held off taking any action against the Tenant was out of courtesy for the Tenant's financial situation.

I find that the burden to inform the Tenant that his rent was payable on the first day of each month did not rest with the Landlord, rather the tenancy agreement requires payment on the first day of each month. Therefore, the Tenant had a statutory obligation to fully meet this requirement each month irrespective of

whether the Landlord was complying with the Act or contracting outside of it. In addition, there is insufficient evidence before me that the Landlord gave express or implied permission that the Tenant could indefinitely pay rent outside of the required date on the tenancy agreement or that the date of payment had been changed.

The Act does not stipulate that a 1 Month Notice hinges on a good faith requirement. Therefore, I have placed little evidentiary weight on the Tenant's submission that the 1 Month Notice was served to him in bad faith and in retaliation for the dispute the Tenant is having with his sub-tenants.

Furthermore, I find that when the tenancy continued on a month to month basis after July 31, 2016, the Tenant still had a contractual obligation to continue payment of full rent to the Landlord in the amount of \$3,241.00 on the first day of each month. I make no legal findings on the validity of any tenancy agreement the Landlord made with the sub-tenants as this issue was not before me. However, I find that the Act states that a tenant must pay rent to the landlord even if the landlord does not comply with the Act. Therefore, even though the Tenant alleged that the Landlord contracted outside of the Act with the Tenant's sub-tenants, the Tenant still had an obligation to pay his rent in full to the Landlord after the fixed term tenancy ended on July 31, 2016.

The evidence before me suggests that the Tenant has failed to pay full rent to the Landlord from August 2016 onwards to the date of this hearing. Therefore, I find the Tenant has failed to meet his legal obligation to pay rent. Coupled with the Tenant's acknowledgement that he may have paid rent late two or three times from January 2016 to July 31, 2016, and the Tenant's lack of full rent payments for the months after July 2016, I am only able to conclude that the Tenant has been repeatedly late paying his rent in this tenancy.

As one of the reasons on the 1 Month Notice has been proved, the 1 Month Notice must be upheld and the Tenant's Application to cancel it is dismissed. While, the parties provided evidence in relation to the remaining reasons to end the tenancy on the 1 Month Notice, I have not documented that evidence or made any legal findings on them because the tenancy is now being ended for repeatedly late payment of rent.

Section 55(1) of the Act states that if a tenant makes an Application to dispute a notice to end tenancy the Arbitrator **must** grant an Order of Possession if it complies with the Act and the tenant's application is dismissed. As I have made a finding that the 1 Month Notice complies with Section 52 of the Act and the Tenant's Application to the cancel the 1 Month Notice is dismissed, the Landlord must be granted an Order of Possession.

As the Tenant is in rental arrears and still occupies the rental unit, I find that this order is to be effective two days after service of the order on the Tenant. The Landlord may enforce the order through the Supreme Court of British Columbia if the Tenant fails to vacate the rental unit. The Tenant may also be held liable for the losses incurred by the Landlord for enforcing the order. Copies of the order are attached to the Landlord's copy of this Decision.

Rule 2.3 of the Residential Tenancy Branch Rules of Procedure states that an Arbitrator may use their discretion to dismiss unrelated claims with or without leave to re-apply. During the hearing, I determined that the Tenant's request to cancel the 1 Month Notice was due to an allegation by the Landlord that the Tenant: was repeatedly late paying rent; had harassed other occupants; and has put the Landlord's property at significant risk.

The Tenant's monetary claim seeks relief to recover rent from the Landlord who is alleged to have taken rent from the Tenant's sub-tenants as a result of establishing an illegal tenancy with them. Accordingly, I determine that the notice to end tenancy was unrelated to the Tenant's monetary claim and the hearing time scheduled did not allow sufficient time to hear the Tenant's monetary claim. Therefore, I severed the Tenant's Application and the Tenant's monetary claim is dismissed with leave to re-apply.

Conclusion

I find the Tenant has been repeatedly late paying rent. The Tenant's Application to cancel the 1 Month Notice is denied. The Landlord is issued with a two day Order of Possession to end the tenancy. The Tenant's monetary claim is dismissed with leave to re-apply as this matter was not heard in this hearing.

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

Dated: November 25, 2016

Residential Tenancy Branch