



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, DRI, OLC, O

Introduction

This hearing dealt with a tenant's application to cancel a 1 Month Notice to End Tenancy for Cause; to dispute an additional rent increase; and, for orders for compliance. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the outset of the hearing I confirmed service of hearing documents and evidence upon each other and the Residential Tenancy Branch (the Branch). As provided in the Rule 3 of the Rules of Procedure, all evidence submitted to the Residential Tenancy Branch must be served upon the other party. This Rule is in keeping with the principles of natural justice which provide that, in part, a party has a right to prepare a defence and respond to evidence that is before the decision maker. The tenant had provided to the Branch copies of three tenancy agreements and a USB stick. The landlord acknowledged the tenant provided him with copies of three tenancy agreements when the hearing package was served upon him. However, the landlord testified that he was not in receipt of a USB stick or any other type of digital device from the tenant. The tenant acknowledged that he did not serve the digital evidence to the landlord. I informed the parties that I would not consider the digital evidence since it was not served upon the landlord. The landlord testified that he had submitted documentary evidence to the Branch on October 10, 2017 via fax. I informed the landlord that I did not yet have the landlord's evidence before me and I asked the landlord to describe the nature of his evidence. The landlord described his evidence as being time stamped evidence as to when the tenant paid rent. I noted that in the details of cause provided by the tenant on his Application for Dispute Resolution, the tenant acknowledged paying rent after the first day of the month, and that there may be no dispute that the tenant paid rent after the first of the month. The landlord also acknowledged that he had not served his evidence to the tenant. Since the landlord did not serve his evidence upon the tenant I informed that landlord that I would not have considered his evidence even if it was before me since it was not served upon the tenant. I was in receipt of a copy of the Notice to End Tenancy for Cause, along with the two pages that accompanied the

Notice. I confirmed the content of the Notice to End Tenancy with the parties and I was satisfied that I was in receipt of the Notice to End Tenancy that is the subject of this dispute. I informed the parties that they may orally describe any evidence they intend to rely upon that had not been admitted into evidence so that the other party may hear the evidence and respond to it.

On another procedural matter, the tenant had named two co-tenants in filing his Application for Dispute Resolution. The landlord had also named two co-tenants on the Notice to End Tenancy that is the subject of this dispute. However, the tenancy agreement in effect at the time the Notice was issued identifies only one tenant. Nor, was the second applicant in attendance at the proceeding and I was unable to make enquires of her in order to determine her standing as a tenant. I was not satisfied that the second named applicant has standing as a tenant and I amended the tenant's Application for Dispute Resolution to name only the tenant before me and the only tenant identified on the tenancy agreement.

Issue(s) to be Decided

1. Should the 1 Month Notice to End Tenancy for Cause be upheld or cancelled?
2. Has the landlord imposed a rent increase upon the tenant that does not comply with the Act?
3. Is it necessary or appropriate to issue any orders for compliance with the Act, regulations or tenancy agreement?

Background and Evidence

The tenant has been occupying the rental unit since August 2014 under a series of tenancy agreements. The most recent tenancy agreement executed by both parties provides that the tenancy agreement commenced on August 15, 2016 for a fixed term of one year and the tenant is required to pay rent of \$2,500.00 on the first day of every month (herein referred to as "the tenancy agreement"). The tenancy agreement does not indicate the tenant paid a security deposit; however, the landlord acknowledged that a security deposit was collected under the first tenancy agreement and that it was rolled over from one tenancy agreement to the next and a security deposit continues to be held in trust for the tenant. The landlord was uncertain as to the amount collected for the security deposit.

The tenancy agreement was prepared using the standard tenancy agreement that was available from the Residential Tenancy Branch website in 2016. As to what happens at the end of the fixed term, box i) under section 2. B) of the tenancy agreement is ticked and indicates the following:

i) the tenancy may continue on a month-to-month basis or another fixed length of time.

When I attempted to confirm with the landlord that the tenancy would continue on a month to month basis or another fixed length of time upon expiry of the fixed term, the landlord initially responded by stating I was incorrect. The landlord testified that the tenancy was to come to an end at the end of the fixed term but that the tenant did not initial in the space provided on the tenancy agreement. I noted that the landlords reference to the tenancy ending at the end of the fixed term and initials of the parties corresponded to box ii) under section 2. B), not box i) that was ticked on the tenancy agreement before me. I asked the landlord to turn to the section 2. B) of the tenancy agreement that was before him. He acknowledged that box i) was ticked under section 2. B) and that he had prepared the tenancy agreement.

The landlord pointed out that the tenancy agreement he prepared and presented to the tenant for signature included a hand written notation beside box i) which read: "both parties must agree to extend lease" and that the tenant had struck out the handwritten notation. I heard consistent testimony from the parties that the parties did not execute the tenancy agreement in the presence of the other party. Rather the landlord prepared the tenancy agreement, signed it, scanned and emailed it to the tenant. Upon receipt, the tenant struck out the above described hand-written notation, signed the tenancy agreement, scanned it and sent it back to the landlord via email.

The tenant explained that he struck out the hand-written notation when he signed the tenancy agreement as he did not agree to that term based on the negotiations the parties had before the landlord presented him the tenancy agreement for signature. The landlord acknowledged that he did not notice the hand-written term had been crossed out until July 2017 when he was attempting to renegotiate a new tenancy agreement with the tenant. I suggested to the parties that it is beneficial to execute agreements in front of each other so that any changes to the written agreement do not go unnoticed. I also informed the parties that any term in a tenancy agreement that is inconsistent or conflicts with the Act is not enforceable.

It is undisputed that on or about July 3, 2017 the landlord and the tenant had a telephone conversation; however, the parties had a different recollection as to whether the parties reached a new agreement. According to the landlord the parties orally agreed that they would enter into a new tenancy agreement reflecting all of the terms the landlord provided in a written agreement he emailed to the tenant on July 11, 2017;

including: monthly rent payable in the amount of \$2,650.00 and the tenant would have to vacate at the end of the one year fixed term. According to the landlord the tenant subsequently changed his mind and declined to sign the new tenancy agreement. According to the tenant the parties had a conversation whereby the landlord described the terms he wanted the tenant to agree to in a new tenancy agreement. The tenant did not agree to the terms proposed by the landlord and he did not sign the tenancy agreement sent to him by email. This proposed new tenancy agreement was also provided as evidence.

Shortly after the tenant declined to sign the new tenancy agreement, on July 15, 2017, the landlord posted a 1 Month Notice to End Tenancy for Cause on the tenant's door. The landlord stated that he realized there was an error in this Notice so he replaced it with the 1 Month Notice to End Tenancy for Cause dated July 18, 2017 ("the Notice"). The Notice issued July 18, 2017 is the only Notice to End Tenancy before me. The tenant failed to dispute the Notice within the time limit for doing so.

The Notice has a stated effective date of August 31, 2017 and it indicates two reasons for ending the tenancy:

- Repeated late payment of rent; and,
- Breach of material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

In the "Details of Cause" space on the Notice, the landlord refers to two attached sheets. The tenant acknowledged that the Notice was accompanied by two pages. Those pages were also before me. They are type-written and I will not reproduce them here with a view to brevity; however, the key elements contained in the pages indicate the tenant has been repeatedly late paying rent for numerous consecutive months in 2016 and January 2017 through July 2017. The landlord describes the date the full rent payments were received; states that the tenant was not given permission to pay rent late; the tenant was given verbal warnings to pay rent on time; and, the tenant rejected or ignored the landlord's attempts to collect NSF fees from the tenant. Other than late payment of rent, the pages do not describe any other breach of the tenancy agreement or delivering a written notice to the tenant describing a breach of a material term.

Repeated late payment of rent

The landlord submitted that the tenant has failed to pay the full amount of rent by midnight on the first of the month for numerous consecutive months in 2016 and

January 2017 through July 2017. The landlord testified that he brought this issue to the tenant's attention on several occasions orally and via text message. At no time did the landlord give the tenant consent to pay the full amount of rent late. The landlord submitted that because the tenant has been late more than three occasions he may end the tenancy for repeated late payment of rent.

The parties provided consistent testimony that one-half of the rent is paid by the tenant's roommate and the landlord stated that the roommate's payment has been made on-time. The tenant sends the other half of the rent payment by way of two e-transfers with the second installment often taking place a few days after the first of the month.

The tenant acknowledged that the full amount of rent was not paid by the first of the month for the months the landlord described. The tenant stated that he had an e-transfer limit of \$1,000.00 and that it would take two transfers to satisfy his rent obligation. The tenant denied that the landlord ever raised this as an issue to the tenant. The tenant pointed out that the landlord described him as a "good tenant" when the parties were communicating near the end of the fixed term and that is evidence by the landlord sending him a new tenancy agreement to sign on July 11, 2017. The tenant is of the position that the landlord is retaliating because the tenant did not agree to the new terms of tenancy proposed by the landlord, including a rent increase that exceeds that annual allowable rent increase of 3.7%. The tenant also submitted that since receiving the Notice he appreciates that this is an issue for the landlord and he has ensured that his full rent payment is made on the first of the month for the months of August 2017, September 2017 and October 2017 and he intends to continue to do so. The tenant explained that he made arrangements with his bank so that his full payment may be made at one time in exchange for higher banking fees.

The landlord denied that the Notice was issued because of the failed attempt to enter into a new tenancy agreement for a greater amount of rent and claims that the Notice was issued because the landlord is exhausted with having to deal with the tenant's repeated late payment of rent and "other issues" the landlord did not specify.

As for the landlord's assertion that the tenant has rejected the landlord's request for NSF fees, I explored whether the landlord is entitled to collect late fees or NSF fees. The landlord confirmed that the tenant's payments were not declined or dishonoured by the bank. Rather, the landlord claims that he suffered NSF fees because all of the rent was not in his bank account on time. Since the tenant's payments were not dishonoured, I informed the landlord that he may not charge the tenant NSF fees.

Further, a landlord may charge a tenant a late fee under the Residential Tenancy Regulations but only if there is such a term in the tenancy agreement. The tenancy agreement before me does not include a provision for a late fee. Accordingly, I informed the landlord that under the current tenancy agreement, the landlord may not charge the tenant a late fee.

Breach of a material term

Since the Notice and its attached pages did not refer to a breach of term of the tenancy agreement other than late payment of rent, I enquired as to the nature of this stated reason. The landlord explained that he indicated this reason on the Notice because the tenant had altered the tenancy agreement when he struck out the hand-written notation concerning the term of the tenancy. The landlord acknowledged that there was no written notice given to the tenant concerning this matter. Since a landlord may not issue an eviction notice for breach of material term until after the landlord has issued a written notice of the breach to the tenant and given the tenant a reasonable time to correct the breach, I found the landlord indicated this reason prematurely, if there was a breach of a material term.

Analysis

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove, based on a balance of probabilities, that the tenancy should end for the reason(s) indicated on the Notice.

The landlord indicated two reasons for ending the tenancy on the Notice to End Tenancy that align with reasons for ending a tenancy under section 47 of the Act. Below, I analyze each reason.

Repeated late payment of rent

Under section 47(1)(b) of the Act, a landlord may end a tenancy where the tenant has been repeatedly late paying rent. Generally, three late payments are considered to be “repeatedly” late as provided in Residential Tenancy Policy Guideline 28. However, section 91 of the Act also provides that “the common law respecting landlords and tenants applies in British Columbia”.

In this case, it is undisputed that the tenant did not pay the full amount of rent by the first day of the month for numerous consecutive months but that the full rent has been paid on time since the landlord served the tenant with the Notice. However, the parties were in dispute as to whether the landlord ever raised late payment of rent as an issue with the tenant. The tenant submitted that it was not ever raised as an issue; whereas, the

landlord submitted that it was raised several times orally and via text message. I find I prefer the tenant's version of events over that of the landlord considering the following:

- The landlord claims to have sent the tenant text messages to raise the issue of late payment of rent to the tenant but the landlord did not produce the text messages as evidence even though the tenant clearly indicated in his Application for Dispute Resolution that "[name of landlord] has never said that this was a problem...[landlord] said how I was a good tenant". If the landlord had sent the tenant text messages about late payment of rent I find it reasonable to expect he would have produced those text messages as evidence to contradict the tenant's submissions made at the time of filing.
- The landlord claims to have decided to end the tenancy due to the tenant's repeated late payment of rent in 2016 and 2017 yet he was attempting to negotiate a new tenancy agreement with the tenant on July 3, 2017 and sent the tenant a new tenancy agreement to sign on July 11, 2017, which the landlord signed, and the Notice was issued after the tenant declined to enter into a new tenancy agreement with an increased rent amount and vacate clause. Accordingly, I find the landlord's statements to be inconsistent with his actions.

While the Act does not require the landlord to issue a warning notice to the tenant before issuing a Notice to End Tenancy for repeated late payment of rent, I have considered whether the landlord gave implied consent or was tacitly compliant. Where parties have engaged in a certain conduct for a long period of time that appears to be tolerated without any objection there may be an argument that a party has given implied consent or was tacitly compliant. Having accepted the tenant's version of events that the landlord tolerated the tenant providing the final installment of rent after the first day of the month for a rather long period of time, without mention of it, and it appears to me that the landlord gave the tenant implied consent that this practice of paying the final instalment of rent after the first day of the month was acceptable up until July 2017 when the Notice was served.

Given the sequence of events, namely: the landlord's prolonged tolerance of late payment of rent; the landlord's proposal for a new tenancy agreement with the tenant; followed by the tenants rejection of the new tenancy agreement; and, then issuance of the eviction Notice, I find it very clear that the landlord is attempting to end the tenancy because the tenant rejected the landlord's proposed new terms of tenancy, which is not a basis for eviction under the Act, and the landlord is now attempting to rely upon repeated late payment of rent as a basis for ending the tenancy. However, given the landlord's long-standing implied consent of the practice, I find it reasonable to expect

that the landlord would give the tenant advance notification that the continued behaviour will no longer be tolerated and consequences will be imposed if rent continues to be paid after the first day of the month. Since the tenant was not afforded any advance notification, I decline to end the tenancy for repeated late payment of rent in these circumstances. As the tenant has done already, the tenant should consider the Notice as notification that the landlord will no longer tolerate late payment of rent. For added certainty, I also order the tenant to ensure the full amount of rent payable is satisfied on or before the first day of every month from now on.

Breach of material term of the tenancy agreement

A landlord may end a tenancy where the tenant has breached a material term of the tenancy agreement, pursuant to section 47(1)(h) of the Act. In order to end the tenancy for breach of a material term, the landlord must prove both of the following:

- (i) has failed to comply with a material term, and
- (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so

Further, the Notice to End Tenancy in the approved form requires the landlord to describe the reasons for ending the tenancy.

The breach the landlord described during the hearing was not indicated in the pages that accompanied the Notice to End Tenancy. Nor, did the landlord provide the tenant with a written notice of a breach of a material term prior to issuance of the Notice.

In light of all of the above, I grant the tenant's request to cancel the 1 Month Notice with the effect that the tenancy continues at this time.

It is important to note that I have made no finding as to whether there was a breach of a material term of the tenancy agreement by the tenant as it was unnecessary to do so considering the landlord did not satisfy part ii) of the criteria set out above. However, with a view to assisting the parties avoid further dispute on this issue, the hand-written notation the landlord wrote in section 2. B) of the tenancy agreement appears to be an unenforceable term even if it had not been struck out by the tenant.

Section 13(2)(f) of the Act provides that where the parties have a fixed term tenancy agreement, the written tenancy agreement must clearly indicate the following:

(B) whether the tenancy may continue as a periodic tenancy or for another fixed term after that date or whether the tenant must vacate the rental unit on that date.

[Reproduced as written with my emphasis bold and underlined]

The use of the word “or” means the three options outlined in 13(2)(f)(B) are the only three options for what happens at the end of the fixed term. The hand-written notation by the landlord appears to be an attempt to create something other than the three circumstances described in (B) above. Section 6 of the Act provides that a term in a tenancy agreement that is inconsistent with the Act or does not clearly express the rights or obligations of the parties is not enforceable. Accordingly, I find the hand-written notation that landlord wrote was unenforceable since it was inconsistent with section 13(2)(f)(B) of the Act.

Section 45 of the Act also provides for what happens at the end of a fixed term, which I have reproduced below:

(3) 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.

In this case, the tenancy agreement did not require the tenant to vacate the rental unit at the end of the fixed term. Nor, have the parties entered into another mutually agreed upon tenancy agreement or new fixed term. Therefore, the tenancy was set to continue on a month to month basis upon the expiry date of August 15, 2017.

As for **orders for compliance**, I issue the following orders to the parties:

1. The tenant is ordered to pay the full amount of rent on or before the first day of every month.
2. The landlord is ordered to cease requests for late fees from the tenant so long as the current tenancy agreement remains in effect.
3. The landlord is ordered to cease requests for NSF fees unless the tenant's rent payment is returned or dishonoured by the tenant's financial institution.

4. Both the landlord and the tenant are ordered to amend the current tenancy agreement to reflect the amount of the security deposit that was transferred forward from the previous tenancy agreements.

As for the tenant's request to dispute an additional rent increase, I find the landlord has not imposed an unlawful rent increase upon the tenant and this part of the tenant's application is dismissed. The landlord has attempted to increase the monthly rent by proposing a new tenancy agreement to the tenant which the tenant rejected and rent remains at \$2,500.00 per month until such time the rent legally changes. It is important to recognize that parties are at liberty to renegotiate terms of tenancy; however, new or different terms must be mutually agreed upon. The tenant remains at liberty to reject any new terms or tenancy the landlord presents to him, and vice-versa.

The tenant paid a \$100.00 filing fee for this Application for Dispute Resolution; however, the tenant did not request recovery of the filing fee from the landlord and I make no such order.

Conclusion

The 1 Month Notice has been cancelled and the tenancy continues at this time under the tenancy agreement executed by the parties in July 2016.

I have issued orders for compliance to both parties with this decision.

I have found that there was no additional rent increase that has been imposed upon the tenant and the remedy sought by the tenant for this matter is dismissed.

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: October 17, 2017

Residential Tenancy Branch