



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, LRE, MNDCT, OLC, FFT

Introduction

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

- cancellation of the landlord's One Month Notice to End Tenancy for Cause (the One Month Notice) pursuant to section 47;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord, the landlord's assistant and the tenant 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.

While I have turned my mind to all the documentary evidence, including the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

The landlord acknowledged receipt of the Application for Dispute Resolution (the Application) sent by registered mail on July 24, 2018. In accordance with section 89 of the *Act*, I find the landlord was duly served with the Application.

The tenant acknowledged receiving the landlord's evidence which was personally served to him on August 29, 2018. In accordance with section 88 of the *Act*, I find that the tenant was duly served with the landlord's evidence.

The tenant acknowledged receipt of the One Month Notice, which was personally served to them on July 16, 2018. In accordance with section 88 of the Act, I find that the tenant was duly served with the One Month Notice.

Preliminary Matter

Residential Tenancy Branch Rules of Procedure, Rule 2.3 states that, if, in the course of the dispute resolution proceeding, the Arbitrator determines that it is appropriate to do so, the Arbitrator may sever or dismiss the unrelated disputes contained in a single application with or without leave to apply.

Aside from the application to cancel the Notice(s) to End Tenancy and the request to recover the filing fee, I am exercising my discretion to dismiss the remainder of the issues identified in the tenant's application with leave to reapply as these matters are not related. Leave to reapply is not an extension of any applicable time limit.

Issue(s) to be Decided

Should the landlord's One Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession based on the One Month Notice?

Is the tenant entitled to recover the filing fee for this application from the landlords?

Background and Evidence

Both parties agreed that this tenancy began sometime in 2006. The tenant stated that the current monthly rent is \$1,037.00, and that the tenant has always paid the rent in the first week of each month. The landlord stated that the monthly rent is actually \$1,071.00, due to a notice of rent increase form served to the tenant, which is due on the first day of each month. The tenant and the landlord agreed that no security deposit was paid.

A copy of the landlord's signed July 16, 2018, One Month Notice was entered into evidence. In the One Month Notice, requiring the tenant to end this tenancy by August 23, 2018, the landlord cited the following reasons for the issuance of the One Month Notice:

Tenant is repeatedly late paying rent.

Tenant has assigned or sublet the rental unit/site without the landlord's consent
The landlord submitted the following evidentiary material:

- A copy of an e-mail from the landlord to the tenant sent on November 29, 2016, which states that following the next rent payment, "...the rent must be paid and in full on or before the first day of the month whether or not it is a holiday or none banking day-the rent must be in my account by midnight the first day of the month or sooner.";
- A copy of an electronic funds transfer from the tenant to the landlord, in the amount of \$1,37.00, sent on January 03, 2018;
- A copy of an e-mail from the landlord to the tenant sent on January 03, 2018, in which the landlord confirms receiving the monthly rent and states that the tenant does not have to worry about receiving a 10 Day Notice as long as the rent is paid by the first of the month;
- A copy of an electronic funds transfer from the tenant to the landlord, in the amount of \$920.00, sent on May 01, 2018;
- A copy of an e-mail from the tenant to the landlord sent at 8:53 p.m. on May 02, 2018, apologizing for missing the bank that day and that the tenant will go 'first thing in the am';
- A copy of an electronic funds transfer from the tenant to the landlord, in the amount of \$20.00, sent on May 05, 2018, which the tenant has indicated is the remainder of the rent for May 2018;
- A copy of an electronic funds transfer from the tenant to the landlord, in the amount of \$1,034.00, sent on June 03, 2018; and
- A copy of an electronic funds transfer from the tenant to the landlord, in the amount of \$1,037.00, sent on July 06, 2018.

The landlord testified the tenant has paid the monthly rent late for May 2018, June 2018, and July 2018. The landlord submitted that the tenant has sublet part of the rental unit to a third party. The landlord stated that she had told the tenant that this sublet was not permitted but that the tenant did it anyways.

The tenant confirmed that the monthly rent was paid after the first day of the month for each of the months in question but submitted that they have always paid the rent in the first week of the month since the beginning of their tenancy over 10 years ago. The tenant stated that payment of rent in the first week of the month was never an issue before but that that landlord wants a reason to evict the tenant so that they can find new occupants at a higher monthly rent.

The tenant stated that there is no written tenancy agreement which establishes the day that the rent is due but that if the landlord wants to provide a written tenancy agreement

for the tenant to sign, they will agree to the terms as written. The tenant testified that this is the third notice to end tenancy that the landlord has given to the tenant and that in a previous hearing in October 2017, (noted above on the title page of this decision) for the same issue, the arbitrator found in favour of the tenant and set the notice to end tenancy aside. The tenant maintained that there is no evidence that the rent is due on the first day of the month.

Analysis

Section 47 of the *Act* allows a landlord to issue a One Month Notice to End Tenancy for Cause to a tenant if they are repeatedly late paying the monthly rent.

Section 47 of the *Act* provides that upon receipt of a Notice to End Tenancy for Cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files an application to dispute the notice, the landlord bears the burden to prove the grounds for the One Month Notice. As the tenant disputed this notice on July 23, 2018, and since I have found that the One Month Notice was served to the tenant on July 16, 2018, I find that the tenant has applied to dispute the One Month Notice within the time frame provided by section 47 of the *Act*.

The landlord bears the burden of demonstrating on a balance of probabilities that the tenant has been repeatedly late paying the rent and that the tenant has sublet the rental unit without the landlord's consent.

I have reviewed all documentary evidence and the affirmed testimony of both parties and I find that the landlord has demonstrated that the tenant has been repeatedly late paying the rent.

Residential Tenancy Policy Guideline #38 (PG#38) states 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."

I find that the tenant has argued that the pattern of paying the rent in the first week of the month was established since the beginning of the tenancy and that the landlord's acceptance of it for such a long period of time indicated that it was an implied acceptance of this practise.

I accept the tenant's testimony that payment of rent within the first week of the month may have been an accepted operating practise; however, I find that if the landlord was going to change their position from the previous operating practise, they were obligated to inform the tenant with clear written communication regarding their change in policy.

I find that the landlord did make their position known and provided clear communication in their e-mails sent on November 29, 2016, and January 03, 2018. I further find that the landlord gave written notice that they did not accept the practise of paying the monthly rent in the first week of the month anymore by providing a notice to end tenancy to the tenant for repeatedly late payment of rent in 2017. I find that in the decision dated October 06, 2017, the arbitrator notes that their decision to set aside the notice at that time is based on a lack of evidence from the landlord and does not make any finding as to when the monthly rent is due. I further find that it is noted in this same decision that the landlord considers the rent to be due on the first day of the month.

For the above reasons, I find that the landlord has given written notice to the tenant that payment of the rent in the first week of the month is not an accepted operating practise and that the rent is due on the first day of each month. In the absence of a written tenancy agreement, I find that there are no terms established that require changes to be agreed upon in writing.

I find that, based on a balance of probabilities, if the tenant thought that payment of rent in the first week of the month continued to be an accepted operating practise after the previous hearing and e-mailed communications from the landlord, it would not be reasonable to apologize for paying the rent after May 02, 2018. I find that the fact that the tenant paid the monthly rent for on or before the first of the day of the month for February 2018, March 2018 and April 2018 and apologized for paying the rent after May 02, 2018, demonstrates that the tenant is aware that the rent is due on or before the first day of the month.

I find that that the tenant has confirmed in their testimony, which is supported by the evidence provided by the landlord, to paying the rent late for January 2018, May 2018, June 2018 and July 2018, which is four times in the first seven months of 2018. I find that these four occurrences of late rent paid in the first seven months of 2018, preceding the One Month Notice that was served to the tenant, meets the minimum number of late payments required to end a tenancy according to PG#38.

For the above reasons, I find that the landlord has sufficient grounds to issue the One Month Notice and to end this tenancy for cause.

Therefore, the Application to set aside the One Month Notice is dismissed, without leave to reapply.

Section 55(1) of the *Residential Tenancy Act* provides that if a tenant makes an application to set aside a landlord's notice to end a tenancy and the application is dismissed, the Arbitrator must grant the landlord an order of possession if the notice complies with section 52 of the *Act*. I find that the One Month Notice complies with section 52 of the *Act*. For these reasons, I grant a two day Order of Possession to the landlord.

I note that if the tenant has paid the full monthly rent for September 2018, the landlord is at liberty to choose to enforce the Order of Possession at the end of September 2018. If the landlord chooses to enforce the order earlier they should return any portions of the rent equal to the time the tenant vacates the rental until the end of the month.

As the tenant has not been successful in their Application, I dismiss their request to recover the filing fee from the landlord, without leave to reapply.

Conclusion

I dismiss the tenant's Application in its entirety, without leave to reapply.

I grant an Order of Possession to the landlord **effective two days after service of this Order** on the tenant. Should the tenant(s) 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.

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: September 12, 2018

Residential Tenancy Branch