



Dispute Resolution Services

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Residential Tenancy Branch Office of Housing and Construction Standards

A matter regarding WELBECQUESNELLTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MT, CNC, MNDCT, OLC, FFT

Introduction

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

- more time to cancel a Notice to End Tenancy, pursuant to section 66;
- cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67;
- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that the landlord was served the notice of dispute resolution package by registered mail on or around September 20, 2018. The manager (the "landlord") confirmed receipt of the dispute resolution package on September 26, 2018. I find that the landlord was served with this package on September 26, 2018, in accordance with section 89 of the *Act*.

I note that Section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Preliminary Issue- Severance

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the One Month Notice to End Tenancy for Cause and the application for more time to cancel the One Month Notice to End Tenancy for Cause and the continuation of this tenancy are not sufficiently related to any of the tenant's other claims to warrant that they be heard together. The parties were given a priority hearing date in order to address the question of the validity of the Notice to End Tenancy.

The tenant's other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the One Month Notice to End Tenancy for Cause or facts which establish the grounds for allowing the tenant more time to cancel the One Month Notice to End Tenancy for Cause. I exercise my discretion to dismiss all of the tenant's claims with leave to reapply except cancellation of the Notice to End Tenancy, more time to cancel the Notice to End Tenancy and recovery of the filing fee for this application.

Preliminary Issue- Landlord's Evidence

The landlord testified that he posted his evidence on the tenant's door on October 2, 2018. The tenant testified that he did not receive the landlord's evidence package.

Both parties agreed that the tenant was personally served with a One Month Notice to End Tenancy with an effective date of August 31, 2018 (the "One Month Notice") on August 31, 2018.

Section 3.15 of the *Residential Tenancy Branch Rules of Procedure* (the "Rules") states that the respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

I find that since the tenant did not receive the landlord's evidence package, all evidence submitted by the landlord, except the One Month Notice, which the tenant confirmed he received, are not admitted into evidence.

Issue(s) to be Decided

1. Is the tenant entitled to more time to cancel a Notice to End Tenancy, pursuant to section 66 of the *Act*?
2. Is the tenant entitled to cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47 of the *Act*?
3. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
4. If the tenant's application to cancel the Notice to End Tenancy is dismissed and the landlord's Notice to End Tenancy is upheld, is the landlord entitled to an Order of Possession, pursuant to section 55 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began approximately eight to nine years ago and is currently ongoing. Monthly rent in the amount of \$468.00 is payable on the first day of each month. A security deposit of \$200.00 was paid by the tenant to the landlord.

The landlord testified that on August 31, 2018 the tenant was personally served with the One Month Notice. The tenant confirmed receipt of the One Month Notice on August 31, 2018.

The One Month Notice stated the following reason for ending the tenancy:

- Tenant is repeatedly late paying rent.

The tenant testified that he filed his fee waiver documents and his application to cancel the One Month Notice on September 12, 2018. When I asked him why he did not file to cancel the One Month Notice earlier he testified that he filed on time and didn't need to file earlier.

The landlord testified that the tenant was late paying rent in June, July and August of 2018. The landlord testified that rent was paid on the following dates:

- June 6, 2018;
- July 4, 2018; and
- August 10, 2018.

The tenant testified that he paid rent for June, July and August 2018 on time, either the day before rent was due or on the first of the months in question.

Both parties agreed that the landlord and the tenant had a hearing with the Residential Tenancy Branch regarding a previous One Month Notice to End Tenancy for repeated late payment of rent on August 16, 2018. In the previous decision, the arbitrator states the following:

Although the Tenant agreed that he made late rent payments in June, July, and August of 2018; at the time the One Month Notice was created and posted to the door of the Tenant's rental unit, the Tenant had only made one new and relevant late payment of rent for the month of June, 2018. Although the Tenant acknowledged paying rent late in July and August of 2018, as these months are after the date upon which the One Month Notice was created and served, they cannot be considered as justification for the issuance of the One Month Notice.

the Tenant should be aware that the Landlord is not prevented by this decision from serving a new One Month Notice for late payment of rent including but not limited to the months of June, July, and August of 2018, should they believe that they have cause to do so.

When I asked the tenant if he told the arbitrator in the previous hearing that he was late paying rent for June, July and August of 2018, he testified that he told the arbitrator that he didn't know if he was late paying rent in June, July and August 2018. I asked the tenant again if he was late paying rent in June, July and August 2018 and he changed his testimony saying that he did not know on what dates that he paid rent but that if he paid rent late, it was the landlord's fault.

The tenant testified that the landlord was supposed to come to his apartment to collect his rent cheques and that he did not do this. The landlord testified that he goes around the apartment building on the last day of each month, and on the first day of each month collecting rent cheques and that if the tenants are not home when he comes by, the tenants must bring the rent cheque to his place of business. The

landlord testified that he came to the subject rental unit on the last and first day of each month for June, July and August and that the tenant did not provide him with rent cheques at that time and did not bring them to his place of business by the first of each month.

Analysis

More Time

Based on the testimony of both parties, I find that service of the One Month Notice was effected on the tenant on August 31, 2018, in accordance with section 88 of the *Act*. I find that the One Month Notice conforms to the form and content requirements of section 52 of the *Act*.

Section 47(4) states that a tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

10 days after August 31, 2018, the date the tenant received the One Month Notice, was September 10, 2018. I find that the tenant filed to cancel the One Month Notice more than 10 days after the date the tenant received the One Month Notice.

Section 66 of the *Act* states that an arbitrator may extend a time limit established by this Act only in exceptional circumstances. Policy Guideline 36 states:

The word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse. Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.

In this case, the tenant testified that he filed his application to cancel the One Month Notice on time. Misunderstanding the application deadlines does not meet the definition of exceptional circumstances. I dismiss the tenant's application for more time to cancel the One Month Notice.

Section 47(5) states that if a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date.

I find that the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the One Month Notice, that being September 30, 2018. As the tenant did not vacate the subject rental property on September 30, 2018, I find that the landlord is entitled to receive a Two-Day Order of Possession for the subject rental property.

End of Tenancy for Repeated Late Payment of Rent

Section 47(1)(b) of the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent.

Residential Policy Guideline 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.

The landlord testified that the tenant was late paying rent in June, July and August 2018. The tenant gave conflicting evidence stating that he paid rent on time or in the alternative, if he did not pay rent on time, it was the landlord's fault.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

In this case, the landlord's testimony as to the months for which rent was paid late is in harmony with the testimony and evidence recorded by the arbitrator in the August 2018 decision. It is the testimony of the tenant which is inconsistent, the tenant provided different versions of events during this hearing. I therefore accept the landlord's testimony as to the months the tenant paid rent late, over that of the tenant.

I find that the tenant paid rent late in June, July and August 2018. I find that the landlord did not prevent the tenant from paying rent on time. I find that it is the tenant's responsibility to pay his rent on time as per the tenancy agreement. I dismiss the tenant's application without leave to reapply.

Section 55 of the *Act* states that if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if:

- the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
- the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

Since I have dismissed the tenant's application and upheld the landlord's One Month Notice, I find that the landlord is entitled to an Order of Possession, pursuant to section 55 of the *Act*.

Conclusion

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

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenant**. Should the tenant 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: October 16, 2018

Residential Tenancy Branch