Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Vancouver Management Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("*Act*") filed by the Tenants on November 16, 2018; the Tenants sought to cancel a 10 Day Notice to End Tenancy ("10 Day Notice") issued by the Landlord and dated November 6, 2018, and to recover the cost of the filing fee. On December 11, 2018, the Tenants amended their Application to also dispute a second 10 Day Notice served on them by the Landlord that was dated December 6, 2018.

The Tenants and their advocate, SW, attended the teleconference hearing on January 4, 2019. The Tenants also had a witness, BN, testify at the hearing. Representatives for the corporate Landlord, MM, JM and RH, also attended the teleconference hearing. The Parties had the hearing process explained to them and were given the opportunity to ask questions about the process.

All Parties, representatives and the witnesses identified above were provided the opportunity to present their evidence orally at the hearing and gave affirmed testimony. The Parties also had the opportunity to present evidence in written form. I reviewed all oral and written evidence before me; however, I only referred to the evidence that is relevant to the findings in this decision.

Preliminary and Procedural Matters

The Parties provided their email addresses at the outset of the hearing and confirmed their understanding that the decision would be emailed to both Parties.

The Tenant, GM (the "Tenant"), said that he was served with the Landlord's response to Notice of Dispute Resolution Proceeding by the Landlord via email; the Tenant asserted that this evidence should be excluded and not considered, because sending it

by email is inconsistent with the requirements of the *Act*. The Tenant acknowledged that he had received and had a chance to review the Landlord's evidence documents; further, he did not indicate any way that this was prejudicial to him. As a result, I found in the hearing that the Landlord's evidence would be before me.

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*.

Issue(s) to be Decided

1. Should the 10 Day Notices be cancelled, pursuant to Section 46 of the *Act*?
2. If the Tenants are unsuccessful in their application is the Landlord entitled to an Order of Possession, pursuant to Section 55 of the *Act*?
3. Are the Tenants entitled to be reimbursed for the filing fee, pursuant to Section 72 of the *Act*?

Background and Evidence

I am giving a detailed background to this matter, as it is relevant to my consideration of the Parties' credibility and intentions, as I explain below.

A residential tenancy began in this rental unit in August 1994 when the Applicants' parent signed a tenancy agreement with the previous Landlord. On January 1, 2003, the tenancy agreement was re-written with the Applicants, GM and MM, taking over as the Tenants in the rental unit. The current rent is $1,445.00 per month, plus $60.00 for parking, all due on the first of each month.

The Tenants owe the Landlord an amount of unpaid rent from a monetary award issued prior to this Application; the current amount left owing by the Tenants to the Landlord was not in the evidence before me, however, the Landlord's own documentary evidence is that the Tenant has paid over $3,000.00 toward this debt.

The Tenant explained that the Parties have had a history of disputes before the Residential Tenancy Branch ("RTB") and he noted two RTB decisions dated February 1, 2018, and May 2, 2018, in which the respective Arbitrators rejected the Landlord's efforts to evict the Tenants. The Tenant noted that in the February 1, 2018 decision, the

Arbitrator found that the Landlord had refused to accept rent from the Tenants for November and December 2017, and January and February 2018; the Arbitrator said the Landlord "believed that doing so may reinstate the tenancy even if they issued a receipt for 'use and occupancy only'." In this February Decision, the Arbitrator also found:

> …the tenant's hospitalization is an exceptional circumstance that would allow an extension of a time limit [to respond to a 10 Day Notice issued by the Landlord on November 8, 2017]. I accept that the tenant did not willfully fail to comply with the time limit but had a bona fide intention to comply by making payment of the rental arrears on that date [November 20, 2017, rather than by the deadline of November 16, 2017].

The Parties gave testimony that on November 20, 2017, the Tenant provided the Landlord with a money order in the full amount of $1,400.00 that was set out on the 10 Day Notice, as owing. The Landlord said the money order was returned to the Tenant on that date. The Arbitrator found the Landlord's conduct in returning the money order or refusing any subsequent rent payment to be unreasonable.

The May 2, 2018 decision addressed an application by the Tenants to cancel another 10 Day Notice to End Tenancy for Unpaid Rent; the Arbitrator found that this application was based on "the same unpaid rent for the same months which was argued in that [February 2018] hearing." Based on *res judicata*, the Arbitrator found that the Landlord was not entitled to issue a notice for the unpaid rent for the months in question, and therefore, the Arbitrator cancelled the latest 10 Day Notice at that time.

The May Arbitrator found that the Landlord was entitled to a monetary order of $4,115.00 and she suggested that the Parties document the rent and arrears payments and how they are to be applied. The Arbitrator said the monetary order must be served on the Tenant "and may then be filed in the Small Claims Division of the Provincial Court as an order of that court, if the Tenants fail to make payment." With that the Arbitrator cancelled the 10 Day Notice to End the Tenancy dated February 15, 2018, and dismissed the Landlord's application for an order of possession without leave to re-apply.

In the teleconference hearing in the matter before me, the Tenant said he paid the Landlord an extra $1,000.00 in each of March, April and May 2018, in addition to the rent owing in those months. He said he intended to bring the balance to $0.00 over time. The Tenant said he set out a payment plan in an email; the Landlord said he

received the email, but that he did not agree to a payment plan. I find that the Tenants have made periodic payments toward the debt they owe to the Landlord.

The matter before me involves the Tenant's Application to cancel the Landlord's 10 Day Notices sent to the Tenant by registered mail on November 6, 2018 and another served on December 6, 2018.

The evidence before me is that on November 1, 2018, the Tenant delivered a money order to the Landlord in the amount of $2,585.00, in addition to $100.00 cash. Unlike previous money orders that the Tenant delivered to the Landlord, the Tenant did not write anything indicating the intended purpose of this payment.

The evidence before me is that the Tenant has consistently paid rent for his apartment and for that of his wife, MH, who lives in a different apartment in the same building, and whose rent is $1,080.00 per month. The Landlord submitted a copy of the money order delivered to them by the Tenant for October 2018 rent, which was for $2,585.00, and on which the words: "combined rent for Apt # 324, 316" had been written.

The Landlord's evidence is that without a hand written note on the November 2018 money order, they allocated it wholly to the unpaid rent outstanding, rather than toward the rent owing in November 2018 for the two apartments. They subsequently issued the 10 Day Notices for each apartment five days later, due to unpaid rent in November.

In the hearing, the Landlord said they did not contact the Tenants to determine if this was their intention for the funds paid on November 1, 2018. The Tenants disputed the 10 Day Notice within the deadline for doing so, pursuant to section 46(4) of the *Act*, arguing that they had paid the November rent with the money order noted above.

The Tenant also gave evidence regarding his payment of rent for December 2018. He said in front of a witness, BN, who attended the hearing, the Tenant inserted a $2,625.00 money order into an envelope, sealed the envelope and then went to the caretaker's office and inserted the envelope into the mail slot on the caretaker's door.

The Tenant's witness, BN, confirmed that he had seen the Tenant do all of these things on December 1, 2018. Further, the Landlord submitted a photograph of the Tenant inserting an envelope into the caretaker's door slot on December 1, 2018. The Tenant submitted a photograph of a money order made out to the Landlord company and dated December 1, 2018 in the amount of $2,625.00.

The Agent said that the Landlord did not receive a money order from the Tenant, but that there was a sealed, empty envelope among the payments from other tenants in the building.

In the hearing, the Tenant asked why the Landlord did not contact the Tenant for rent, if they did not receive anything from him. He said the first he heard about the matter was when he was served with a 10 Day Notice, which alleged he had not paid rent in December 2018.

The Tenant further said that later in December, he was going through flyers which had been placed in his mail when he discovered the December money order inside one of the flyers. The Tenant said in the hearing that no one else besides the Canada Post delivery person and the building's caretaker, JM, has access to his mail and he implied that JM had returned his December payment in this manner.

Analysis

Section 46 of the *Act* states a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

Section 46(4) says that within 5 days after receiving a notice under this section, the tenant may either pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution.

Section 46(5) says that if a tenant who has received a notice under this section does not pay the rent or 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 to which the notice relates by that date.

When a tenant applies to dispute a 10 Day Notice, the onus is on the landlord to prove the grounds on which the 10 Day Notice is based on a balance of probabilities. The findings of the Arbitrators in the February 2018 and May 2018 decisions noted above tend to paint the landlord/tenant relationship as difficult. Both Parties have borne challenges from the other; however, in the circumstances before me in this hearing, I find the Landlord has behaved inappropriately in two ways.

First, the Landlord allocated a November 1, 2018 payment they received from the Tenants in a manner that was inconsistent with what they had done for the same amount they had received from the Tenants in previous months.

I acknowledge that the Tenants neglected to write the purpose of the November money order on this payment, as they had done in past months; however, I find that the Landlord was unreasonable in not contacting the Tenants about the purpose of the November payment, if there was any question as to its intended use.

I find that a reasonable landlord receiving a cheque in the same amount they always did for two rents and a parking spot, delivered on the first of the month when rent was due, would more likely than not realize the payment was intended for that month's rent. The additional $100.00 cash payment above the amount of the two rents was consistent with the Tenants having made piecemeal payments of their debt to the Landlord.

Based on the above, I find that the November 2018 rent was paid by the Tenants to the Landlord in this tenancy and that the November 10 Day Notice was unsubstantiated, and therefore, is hereby cancelled, pursuant to Section 46.

Second, it is inconsistent with common sense that the Tenant would go to the cost and trouble of having a money order drafted at a bank for which to pay the rent and then place an empty envelope in the mail slot on the caretaker's door. I find the Tenant's credibility in this regard is further supported by the affirmed statement of the witness, BN, about this matter.

Further, I find the Landlord's documented proclivity to not accept the Tenants' rent payments, which was found by the respective Arbitrator to be unreasonable, raises questions in my mind about the Landlord's motivations about this tenancy.

Based on the evidence before me overall, I find the Tenants to be more credible than the Landlord and their evidence more reliable than that of the Landlord. Accordingly, I believe the Tenant's evidence that he provided the Landlord with the December 2018 rent, parking and additional payment in the amount of $2,625.00 and I find it was delivered to the Landlord on time.

I find it more likely than not that the Landlord slipped the Tenants' December money order in one of the flyers and into the Tenants' mail slot. As a result, I find that the 10 Day Notice issued by the Landlord to the Tenants in December 2018 was unsubstantiated by the Landlord's oral and written submissions and is, therefore,

cancelled and of no effect, pursuant to Section 46. The Landlord must accept payments from the Tenant for December 2018.

I urge both Parties to develop a mechanism for tracking the payments made to avoid future incidents like this from happening.

I grant the filing fee to the Tenants, pursuant to section 72 of the *Act*, as they were successful in their application considered in this decision. I order that the Tenants may reduce their February 2019 rent by $100.00 in full satisfaction of the recovery of the filing fee pursuant to section 72 of the Act.

Conclusion

The Tenants' Application to set aside the 10 Day Notices was successful, as noted above. The tenancy continues until ended in accordance with the *Act*.

This decision is final and binding on the Parties, unless otherwise provided under the Act, 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: January 14, 2019

Residential Tenancy Branch