Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 0303823 BC LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR MNDCT OLC, OPRM-DR, FFL

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's for:

- an Order of Possession pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

And the tenants' for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the "**Notice**") pursuant to section 46;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67.

The landlord's application was originally adjudicated by way of a direct request, but, following a review of the adjudicator's decision, was ordered to be reconvened to a participatory hearing.

All 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 landlord was represented by an agent.

The tenants testified, and the landlord's agent confirmed, that the tenants served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord's agent testified, and the tenants confirmed, that the landlord served the

tenants with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue – Change of Landlord's Name

The landlord is a numbered company. The tenants listed the landlord's property manager as the respondent to their application for dispute resolution. The landlord listed itself as the applicant on its application. The landlord is properly the respondent to the tenant's application, as the tenancy agreement is between itself and the tenants.

As such, I order that the tenants' application be amended to substitute the landlord as the respondent in place of the landlord's property manager.

Preliminary Issue – Severing of Claim

The tenants claim involves dispute the Notice as well as seeking an order that the landlord provide them with quiet enjoyment of the rental property, and monetary compensation for the loss of quiet enjoyment they have suffered to this point.

At the hearing I ordered, pursuant to Rule of Procedure 2.3, that the tenants' claim be severed. Rule 2.3 requires that claims in an application be related to each other, and provides arbitrators with the discretion to dismiss unrelated claims. I find that the tenants' claim regarding loss of quiet enjoyment and related compensation is not sufficiently related to their claim seeking the cancellation of the Notice.

As such, I order that the tenants' claims relating to their alleged loss of quiet enjoyment and related compensation be dismissed, with leave to reapply.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling the Notice?

Is the landlord entitled to:

- an order of possession;
- a monetary order for unpaid rent; and
- recover its filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

Tenant AA and the landlord entered into a written tenancy agreement starting October 1, 2013. Monthly rent was $1,050.00 and is payable on the first of each month. The parties agree that monthly rent is currently $1,190.00. Tenant AA paid the landlord a security deposit of $525.00. The landlord still retains this deposit.

The landlord's agent testified that throughout the tenancy the tenants have been consistently late in paying their rent. She testified that the landlord had served two 10 Day Notices to End Tenancy (in July 2014 and January 2015) prior to the issuance of the Notice.

The landlord's agent testified that, on April 3, 2019, the landlord issued the Notice for non-payment of April 2019's monthly rent ($1,190.00). The Notice had an effective date of April 30, 2019.

The landlord testified that for the last 17 months, the tenants have paid the monthly rent roughly three weeks late (between the 19th and 27th day of the month). She testified that she must constant follow up with the tenants to ensure they pay monthly rent. She testified that she would often ask them for partial payment of rent at the beginning of the month. She did not provide any documentary evidence of such efforts (such as emails, text messages, or other correspondence).

The tenants denied that the landlord sought partial payment of rent at the beginning of each month, or that she constantly followed up with them seeking rent. The tenants agree that they have paid the monthly rent between the 19th and the 27th day of the month for the last 17 months. Indeed, they submitted receipts showing payments on these dates. They testified that they paid April 2019's monthly rent within this same time frame. They testified that they had yet to pay May 2019's monthly rent, but that it would be paid within a similar time frame. The tenants disputed the assertion that payment of rent between the 19th and 27th day of the month constitutes late payment, however. They testified that in the "beginning of 2017" they entered into an oral agreement with the landlord to modify the tenancy agreement to permit payment of month rent during

this time. The tenants provided no documentary evidence to corroborate the existence of such an agreement.

The landlord's agent denies that any such oral agreement exists.

The tenants testified that on April 1, 2019, they sent a letter to the landlord's agent complaining of the "unbearable living conditions" in the rental unit due to noise caused by their neighbors, and stating that they would take steps at the protect their rights as tenants with the RTB if their complaints were not addressed within 10 days. The tenants argued that, rather than addressing the issues they raised, the landlord decided to attempt to terminate the tenancy.

The landlord's agent denied this.

Analysis

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

In this case, I find that the landlord bears the onus to prove that the Notice is valid. However, as the tenants are asserting that an oral agreement exists which modifies the tenancy agreement, I find that they have the onus of proof to establish that such an agreement exists.

Based on the evidence submitted, and the testimony of the parties, I find that an oral agreement to allow the tenants to pay monthly rent between the 19th and the 27th day of the month does not exist, on a balance of probabilities.

The tenants did not provide any documentary corroboration of this agreement (emails, text messages, or other correspondence). Given the length time that the tenants claim the oral agreement has been in place (since “early 2017”) I would expect that it would be referenced, in some form, in writing. The lack of such evidence suggests that the oral agreement does not exist. This, coupled with the landlord’s agent’s denial of its existence, provides me with a sufficient basis to find that it does not exist, on a balance of probabilities.

However, this does not mean that I accept the landlord’s argument that rent is due and owing on the first of each month. While I find that the tenancy agreement requires that monthly rent is paid on the first of the month, the actions of the landlord are not consistent with this. The landlord has failed to enforce this portion of the agreement for almost a year and a half. The landlord submitted no documentary evidence that during this time the landlord made any efforts to collect the monthly rent on time. Given the landlord’s prior conduct of issuing 10 Day Notices to End the Tenancy when rent is late (in 2014 and 2015), I find is curious that the landlord failed to take such steps during the past 17 months. The landlord’s agent did not provide an explanation for this change in behavior.

The landlord’s failure to enforce its contractual rights for 17 months could give rise to its losing those rights. Policy Guideline 11 states considers this principle (called “waiver”). It states:

> There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

Based on this Guideline, I find that an express waiver of the right to demand rent on the first of the month does not exist. However, I find that by:

1) failing to enforce its right to collect rent on the first of the month;

2) failing to show (on a balance of probabilities) that it pursued the tenants for payment of monthly rent in a timely fashion;
3) not issuing a single 10 Day Notice to End Tenancy during the last 17 months; and
4) routinely accepting the tenants late payment of rent for the last 17 months,

the landlord has made a clear, unequivocal, and decisive act to show the tenants that it does not intend to rely on the provision in the tenancy agreement that the tenants must pay rent by the first of each month. As such, I find that the landlord has impliedly waived its right to insist that monthly rent be paid on the first day of the month that it is due.

I find that, through implication caused by its own actions (or inaction), the landlord has implicitly agreed to modify the tenancy agreement to allow the tenants to pay monthly rent by the 27th day of the month that it is due.

As such, I find that the Notice is not valid, as the amount sought by the landlord (April 2019's monthly rent) was not yet due at the time the Notice was issued (it was due by April 27, 2019).

I find that the tenants are entitled to continue to rely on the landlord's implied waiver, and that monthly rent will continue to become due on the 27th of each month for the duration of the tenancy.

Accordingly, I grant the tenants' application to cancel the Notice, and I dismiss the landlord's application, without leave to reapply.

Conclusion

I dismiss the landlord's application, without leave to reapply.

Pursuant to section 46 of the Act, I order that the Notice is cancelled and of no effect.

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: May 16, 2019

Residential Tenancy Branch