



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC 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 "**Notice**") pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant attended the hearing. The landlord's property manager ("**WT**") appeared on behalf of the landlord. Each were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

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

Issue(s) to be Decided

Is the tenant entitled to:

- 1) the cancellation of the Notice; and
- 2) recover his 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.

The parties entered into a written tenancy agreement starting July 9, 2012. Monthly rent is \$1,163 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$500. The landlord still retains this deposit.

WT testified, and the tenant confirmed, that the tenant was served with the Notice via registered mail on September 11, 2019. The Notice indicates an effective move-out date of October 31, 2019. The tenant continues to reside in the rental unit.

The ground to end the tenancy cited in that Notice is that "the tenant is repeatedly late paying rent."

The Notice provided additional details of the causes leading to its issuance:

Tenant has been late paying the rent 70 times and we have issued 22 notices to end tenancy.

The landlord provided copies of 22 10-day notices to end tenancy for non-payment of rent, as well as a copy of her ledger showing the tenant's rental charges and payments. The 10-day notices were issued throughout the course of the tenancy. WT testified that the landlord has never applied to end the tenancy on the basis of any of these notices. The landlord did not deny this.

The ledger shows that the tenant has been late paying his rent for the months of January, March, May, June, July, August, and September 2019 (among other many months). The ledger also shows that the tenant has paid the balance of each of these months' rental arrears later in the same month they are due (sometimes within five days of the rent becoming due, other times not). The tenant is not currently in any rental arrears.

Among the copies of 10-day notices to end tenancy for non-payment of rent provided by the landlord are ones for August and September 2019.

The ledger also indicates that rent for the months of July, August, and September 2019 was accepted by the landlord for "use and occupancy only". The landlord also entered

into evidence copies of notices to the tenant which state that rent payments for October and November 2019 were accepted on the basis of “use and occupancy only”.

The tenant testified that he was never served with any notice that the landlord was accepting his rent for “use and occupancy only” for any of the months indicated in the ledger or on the notices entered into evidence. He testified that the first he learned of the landlord’s intention to accept rent for “use and occupancy only” was when he received the landlord’s evidence package one week before this hearing.

WT did not deny the tenant’s assertion. Rather he testified that he was unsure if the notices for “use and occupancy only” had been served on the tenant and would have to check with his staff. He did not do this during the hearing, and I have no evidence from WT or his staff as to whether the tenant was made aware that his rent payments for the months of June to November 2019 were being accepted by the landlord for “use and occupancy only.”

Landlord's Position

WT testified that the landlord no longer wants to deal with the tenant’s constant late payments of rent. He argued that the landlord is entitled to an order of possession for repeated late payment of rent because the tenant has been late in paying his rent 70 times over the course of the tenancy.

Tenant's Position

The tenant does not dispute the fact that he has been late in paying rent. Rather he states that the fact he has paid rent late so frequently during the course of the tenancy (70 times out of 88 months) means that the landlord should be estopped from being able to end a tenancy for non-payment of rent.

Furthermore, he testified that in the first year of the tenancy, he was late in paying his rent 10 months out of 12, and, despite this, the landlord renewed the tenancy agreement.

In support of this argument for estoppel, the tenant submitted a written decision from another proceeding before the Residential Tenancy Branch. In that decision, the presiding arbitrator wrote:

Estoppel is a legal doctrine which holds that one party may be prevented from strictly enforcing a legal right to the detriment of the other party, if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly. In order to return to a strict enforcement of their right, the first party must give the second party notice (in writing), that they are changing their conduct and are now going to strictly enforce the right previously waived or not enforced.

In other words, the Landlords established a pattern of accepting late rent payments from the Tenant and the Tenant relied on the pattern to continue to make late payments.

The Landlords may not now try to strictly enforce their right to being paid on time without giving some notice to the Tenant that they wish to strictly enforce the payment of rent on time.

Therefore, I find and Order that the Notice must be cancelled.

[emphasis added]

The tenant also cited *Hinkson Holdings Ltd. v Silver Sea Developments Limited Partnership*, 2007 BCSC 118, in support of his position. It states:

[51] The law with respect to waiver is usefully summarized in *Saskatchewan River Bungalows Ltd v. Maritime Life Assurance Co.*, [1994 CanLII 100 \(SCC\)](#), [1994] 2 S.C.R. 490 at paras. 18-20 and 27. The two essential elements of waiver are full knowledge of one's contractual rights arising from a breach by the opposing party, and an unequivocal and conscious intention to abandon them. The principle underlying waiver is that a party should not be allowed to reverse a choice when it would be unfair to the other party to do so. Waiver can be retracted on reasonable notice being given to the party in whose favour it operates. The notice requirement protects reliance by that party on the waiver.

[...]

[66] [...] Waiver may be established by conduct, in particular, acceptance of a payment: [citation omitted].

[67] On July 16, 2005 when the plaintiff presented the payment of \$50,500, the defendant had two choices: it could have refused the payment and terminated the Agreement, or accepted the payment. By accepting the payment, I find the defendant affirmed the Agreement, and abandoned its right to terminate for non-payment of the third instalment of the deposit by any deadline that pre-dated July 16, 2005.

The tenant argued that by continually accepting late payment of rent, the landlord is estopped from ending the tenancy for repeated late payment of rent. He concedes that the landlord may be able to retract this waiver by making him aware of her intention to do so. The tenant argued that the landlord failed to do so, as the landlord did not serve him with copies of the notices advising him that the rent was being accepted for use and occupancy only.

Analysis

I find that the Notice was served on the tenant on September 11, 2019 by registered mail. Pursuant to section 89 and 90, I find that the tenant is deemed served with Notice on September 16, 2019, five days after the landlord mailed to Notice.

Section 47(1)(b) of the Act states, “a landlord may end a tenancy by giving a notice to end tenancy if the tenant is repeatedly late paying rent.” This issue is examined in more detail by the Policy Guidelines.

Residential Tenancy Policy Guideline 38 states:

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. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late.

A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.

[...]

Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision.

Section 26 of the Act states:

Rules about payment and non-payment of rent

26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

[emphasis added]

Per section 26 of the Act, and Policy Guideline 38, the tenant is obligated to pay monthly rent on time. Section 47(1)(b) authorizes a landlord to end a tenancy if rent is repeatedly paid late. I accept that the tenant has been late in paying rent 70 times over the course of the tenancy, in particular during the months of January, March, May, June, July, August, and September 2019.

However, this does not mean that the Notice is valid.

I am persuaded by the tenant's arguments that the landlord is estopped from ending the tenancy for repeated late payment of rent. I find that through the landlord's conduct of *consistently* accepting rent after it was due and failing to initiate any form of enforcement proceeding following the service of any of the many 10-day notices to end tenancy amounts to the landlord's waiver of her right to end the tenancy for repeated late payment of rent. It is clear that such conduct of the tenant was repeatedly tolerated by the landlord.

I accept that such conduct ultimately became unacceptable for the landlord. However, given that the landlord's prior conduct amounted to a waiver, the landlord is required to

provide reasonable notice to the tenant of her intention to reassert her right to be paid rent on time, as set out in *Hinkson Holdings* (see above).

Based on my review of the evidence, I find that the landlord failed to do this. I accept the tenant's uncontroverted evidence that he never received notification from the landlord that the rent he was paying was being accepted for "use and occupancy only." WT was not able to provide me with any evidence to the contrary. Had the tenant received such notices, they may have been sufficient for the landlord to withdraw her waiver (as this did not happen, I make no such determination). As the tenant did not receive any such notice, the landlord had no authority to issue the Notice: the landlord's right to end a tenancy for repeated late payment of rent had been waived.

As such, I order that the Notice is cancelled and of no force and effect. The tenancy shall continue.

I also find that, as of the date of this decision, the tenant is deemed to have notice of the landlord's intention to withdraw the waiver of the right to end the tenancy for late payment of rent. I caution the tenant to be mindful of the timing of any future rental payments.

Pursuant to section 71(1) of the Act, as the tenant has been successful in his application, I order that he may recover the filing fee from the landlord. Pursuant to section 72(2) of the Act, the tenant may deduct \$100 from one future month's rent in satisfaction of this order.

Conclusion

The tenant's application is successful. I order that the Notice is cancelled and of no force and 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: November 29, 2019

Residential Tenancy Branch