Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution, filed on January 27, 2020, wherein the Tenants sought to cancel a 1 Month Notice to End Tenancy for Cause issued on January 13, 2020 (the "Notice"), as well as recovery of the filing fee.

The hearing of the Tenants' Application was scheduled for teleconference at 11:00 a.m. on March 31, 2020. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Should the Notice be cancelled?

2. Are the Tenants entitled to recover the $100.00 filing fee?

Background and Evidence

Residential Tenancy Branch Rules of Procedure—Rule 6.6 provides that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenants applied for dispute resolution and are the Applicants, the Landlord presented their evidence first.

The Landlord testified as follows. She stated that the tenancy began October 1, 2012. Monthly rent is currently $1,475.00.

A copy of the residential tenancy agreement was provided in evidence and which confirmed the Tenants were not permitted to have pets.

The Landlord issued the Notice on January 13, 2020. She stated that she sent it to the Tenants by registered mail. The reasons cited on the Notice are as follows:

- Tenant is repeatedly late paying rent.
- The Tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.
- Tenant has assigned or sublet the rental unit/site without landlord's written consent.

In the "Details of Cause" section, the Landlord wrote as follows:

> "3 late payments in one calendar year
> Disturbed another occupant, party, laundry or vacuum mid night
> Break tenant agreement no pets allowed and they have (large Dog) 2nd warning last time cats
> Brother living without permission for months"
>
> [reproduced as written]

In terms of the allegation that the Tenants were repeatedly late paying their rent, the Landlord stated that the Tenants were late paying their rent as follows:

- December 2, 2019;
- September 4, 2019;

- July 4, 2019; and
- February 8, 2019

The Landlord stated that the rent is due on the first of the month and at no time did she tell the Tenants they could pay their rent after that date.

In terms of the alleged breach of a material term, the Landlord testified that the Tenants have dogs and did not seek permission. The Landlord stated that she was not aware the Tenants had a dog until December 4, 2019 when she received a message from the lower renters who indicated the air vent was full of hair (a copy of this message was provided in evidence before me). The Landlord stated that to her knowledge the Tenants have one big dog. The Landlord further testified that the Tenants admitted to having cats as well.

In terms of the allegation that the Tenants sublet or assigned their tenancy, the Landlord alleged that the Tenant's brother was living with the Tenants at the rental unit. The Landlord stated that the Tenant, A.G.,'s son, and D.G.'s daughter, and the Tenant A.G.'s brother live in the rental unit.

In support of her allegation that the Tenants have unreasonably disturbed or significantly interfered with other occupants, the Landlord testified that the police have been called to the rental property 9 separate times from 2016 to 2020 (the dates and file numbers for those calls were provided in evidence). She stated that the downstairs renters have called the police and to her knowledge the reasons for the calls are as follows:

- the Tenants vacuum at 3:00 a.m.
- the Tenants have done laundry at 4:00 a.m.
- the Tenants have parties late at night.

In response to the Landlord's testimony and evidence, the Tenant, A.G. testified as follows.

The Tenant confirmed that they paid rent on the dates indicated by the Landlord. She stated, however, that she did not believe that they were late as this was the "first banking day of the month".

The Tenant also testified that in 8 years they have been tenants, they have not received a warning, or reminder about the payment of rent. She stated that at other times they

paid their rent after the first of the month, and the Landlord never once raised this as an issue. She testified that they used to pay in cash (when the Landlord lived in the suite below) but when the Landlord moved out from downstairs they started paying by e-transfer. In all cases the Landlord never warned the Tenants about paying their rent on the 1st.

In response to the Landlord's allegation that they have breached the no pets clause of their tenancy agreement, the Tenant testified that they do not have a dog nor do they have a cat.

The Tenant testified that on Christmas Eve 2018, they had a friend visiting who had a dog. The Tenant noted that photo the Landlord submitted in evidence was a photo the Landlord obtained from the Tenant's Facebook account which depicted her family in front of a Christmas tree with a large dog. The Tenant further noted that had the Landlord read the comments she would have seen the Tenant's clarification that it was not her dog, but a friend's dog.

The Tenant also testified that about four years ago they had 2 cats at the house, for a very short period of time, which they cared for when the her husband's sister was terminally ill in hospital.

In terms of the Landlord's allegation that they have sublet or assigned their tenancy, the Tenant stated that she and her husband (the other Tenant D.G.) her son, D.B.G. and her husband's daughter, C.G. all live in the house. The Tenant denied that her brother lives in the rental unit and stated that he lives in Yellowknife. She confirmed that her brother was visiting for 3 weeks after his wife died in 2018, and he was also visiting during Christmas 2019.

The Tenant denied that Landlord's allegation that they have unreasonably disturbed others. In response to the Landlord's testimony regarding the police calls, the Tenant confirmed that each time the downstairs renters have called the police, the calls have been deemed by the police to be wholly unwarranted. She noted that one time the police attended at 12:30 a.m. due to an alleged noise complaint, but when the police arrived, the police noted that there was more noise coming from downstairs.

The Tenant also testified that they have a robot vacuum that goes at 11:00 a.m., not 4:00 a.m. as alleged by the Landlord. She noted that one time at 10:00 p.m., her former husband was visiting, and they blew up an air mattress at 11:00 p.m. The Tenant stated that they were outside for 10 minutes having a cigarette and then went to

bed. The downstairs renters called the police, but when the police arrived the Tenants and their guests were already sleeping. The Tenant further stated that at the time the downstairs tenants' television was so loud the police offered to speak to her.

The Tenant stated that they can't even let their children play in the yard due to the conflict with the downstairs' renters.

The Tenant also claimed they have not had a party since Christmas 2018.

The Tenant also noted that she called the police 4-5 times on the downstairs renters; and further that some of the file numbers provided by the Landlord are when she called the police.

The Tenant stated that they had another arbitration due to the issues they have had with the downstairs renters. The file number for that matter is included on the unpublished cover page of this my Decision. In that Application the Tenants sought monetary compensation for breach of their right to quiet enjoyment due to the behaviour of the downstairs' renters. At that hearing, both parties provided testimony and evidence regarding the issues between the subject Tenants and the downstairs renters. The Tenants monetary claim was dismissed at that time and the presiding Arbitrator made the following findings:

> "While the tenant has found the actions of the other tenants of the shared residential property upsetting, her unsatisfactory interactions with the other occupants of the property are not necessarily subject to intervention by the landlord. Residing in a multi-unit rental property sometimes leads to disputes between the tenants. When concerns are raised by one of the tenants, landlords must balance their responsibility to preserve this tenant's right to quiet enjoyment against the rights of the other tenant who is entitled to the same protections, including the right to quiet enjoyment, under the *Act*. Landlords often try to mediate such disputes if they can, but sometimes this cannot be done in a way that protects the rights of all parties. In the case before me, I find the tenant has provided insufficient evidence to show the landlord has not protected this tenant's right to quiet enjoyment insofar as much as doing so would deny the right to quiet enjoyment of the landlord's other tenants. I find the landlord has not breached section 28 of the *Act* and the tenant's monetary claim for a 50% return of rent is dismissed."

Analysis

Ending a tenancy is a significant request and must only be done in accordance with the *Residential Tenancy Act.* In this case, the Landlord seeks to end this tenancy for cause pursuant to section 47 of the *Act.* The reasons for ending the tenancy, according to the Notice, are as follows:

- Tenant is repeatedly late paying rent.
- The Tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.
- Tenant has assigned or sublet the rental unit/site without landlord's written consent.

I will deal with each reason separately.

Allegation of Repeated Late Payment of Rent

The parties agreed the Tenants have been late paying rent more than three times in a calendar year. The Tenants submit that they have been late on other occasions during their eight-year tenancy and testified that at no time did the Landlord inform them that their tenancy was at risk due to these late payments.

I accept the Tenant's testimony that at no time during their eight-year tenancy did the Landlord inform them that failure to pay rent on the 1st of the month would jeopardize their tenancy. Notably this was not disputed by the Landlord when given an opportunity to reply to the Tenant's testimony. Further, there was no evidence before me that the Landlord had issued notices to end tenancy pursuant to section 46 in response to these past late payments. In all the circumstances I find it more likely the Landlord acquiesced to the Tenants' late payments.

This issue has been addressed in a recent decision of the B.C. Supreme Court, *Guevara v. Louie,* 2020 BCSC 380. The presiding Judge, the Honourable Mr. Justice Sewell, wrote as follows:

> [62]…Therefore, the proper question was whether Ms. Louie could rely on past instances of rent not being paid on the first of the month to terminate the tenancy agreement when for years she had acquiesced in the manner that rent was paid. Specifically, had Ms. Louie represented through her conduct and communications that

she did not require strict compliance with the term of the tenancy agreement stating that rent must be paid on the first day of the month.

[63] While the legal test of waiver requires a “clear intention” to “forgo” the exercise of a contractual right, the equitable principle of estoppel applies where a person with a formal right “represents that those rights will be compromised or varied:” *Tymchuk v. D.L.B. Properties*, 2000 SKQB 155 at paras. 11-17. Unlike waiver, the principle of estoppel does not require a reliance on unequivocal conduct, but rather “whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it:” *Bowen v. O’Brien Financial Corp.*, 1991 CanLII 826 (BC CA), [1991] B.C.J. No. 3690 (C.A.)…

[65] The following broad concept of estoppel, as described by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.* (1981), [1982] Q.B. 84 (Eng. C.A.), at p. 122, was adopted by the Supreme Court of Canada in *Ryan v. Moore,* 2005 SCC 38 at para. 51:

…When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[66] The concept of estoppel was also described by the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* 1988 CanLII 174 (BC CA), [1998] 29 B.C.L.R. (2d) 88 (C.A.), 52 D.L.R. (4th) 459, more recently cited with approval in *Desbiens v. Smith,* 2010 BCCA 394:

…it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment ..." [emphasis added]. That statement was affirmed by the English Court of Appeal in *Habib Bank* and, as we read the decision, accepted by that Court in *Peyman v. Lanjani*, [1984], 3 All E.R. 703 at pp. 721 and 725 (Stephenson L.J.), p. 731 (May L.J.) and p. 735 (Slade L.J.).

…that strict compliance would be enforced, before taking steps to terminate the residency for late payment. Such notice was not provided.

[68] Estoppel has been a fundamental principle of the law for a long time: see *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439. However, the Arbitrator failed to address this fundamental principle in his reasons. By so doing he deprived Ms. Guevara of the right to show that in the circumstances of the application before him it would have been unjust to permit Ms. Louie to terminate the tenancy agreement given the long course of conduct in which she acquiesced.

Applying the above to the case before me, I find that it would be unjust to allow the Landlord to terminate this tenancy given the long course of conduct in which she acquiesced.

Allegation of Significant Interference or Unreasonable Disturbance of Another Occupant or the Landlord.

The evidence of the Landlord was that the police have been called to the rental unit on numerous occasions as a result of noise complaints made by the downstairs renters about the subject Tenants. The Landlord testified that to her knowledge those complaints related to the Tenants allegedly vacuuming and doing laundry in the early hours of the day as well as having parties. The Tenants denied these claims.

The Tenants testified that of the 8-9 times the police have been called to the residence, in the past four years, half of those calls were made by the Tenants concerning the downstairs renters. This was not disputed by the Landlord when she was given the opportunity to reply to the Tenant's testimony during the hearing before me.

If the Landlord's information is correct, it is unfortunate the downstairs renters felt it appropriate to call the police over "noise" emanating from vacuums and laundry machines, as these are clearly not police matters.

The Tenants denied having parties at the rental unit. They stated that the last time they had any sort of party was during Christmas of 2018. Again, the Landlord did not dispute this testimony when offered the opportunity to reply.

This is the second Arbitration dealing with the conflict between the Tenants and the downstairs renters. They clearly do not get along and the Landlord is undoubtedly frustrated with dealing with their squabble. Unfortunately, landlords are too often placed in the middle of conflict between tenants who are unwilling to coexist peacefully in multi unit dwellings.

The question before me, however, is whether the subject tenancy needs to end for the reasons articulated on the Notice; namely, whether these Tenants have *significantly* interfered with or *unreasonably* disturbed another occupant. I find, based on the evidence before me, that the Landlord has failed to meet this burden. While these Tenants may not get along with the downstairs renters, I find this to be insufficient to end this tenancy. One can only hope that during the current Provincial State of Emergency, that these adults can put aside their differences and discontinue their conflict.

Allegation of the Tenants' Breach of the "No Pets Clause"

The Landlord alleged the Tenants have a dog and have had cats in the past. The Tenants deny they have pets.

In support of the Landlord's allegation, she submitted a photo taken from the Tenants' social media page wherein the Tenant and her family are shown in front of a Christmas tree with a dog. The Tenant testified this was not her dog, but a friend's, which was clearly explained in the posted comments on the photo.

The Landlord also submitted text communication from one of the downstairs renters who writes that they smell dog and have seen dog hair.

The Tenant also testified that for a brief period of time, they cared for her brother's cat while his wife was terminally ill.

While it is often the case that the parties' evidence will conflict, without corroborating evidence, I am unable to prefer one parties' version of events over the other. In this case I find the Landlord has failed to prove the Tenants have pets contrary to the tenancy agreement.

Allegation that Tenants have Sublet or Assigned their Tenancy

The Landlord alleges the Tenant's brother lives in the rental unit. The Tenant denies this and stated that he has only visited.

The evidence confirms the Tenants have not moved form the rental unit. An assignment or sublet occurs when the tenants vacate the rental unit and assign their tenancy to a third party or sublet the rental unit after they have left; taking in a roommate is not assigning or subletting a tenancy.

In any event, I accept the Tenant's testimony that her brother does not live with them. Even in the event I found he lived there, this would not constitute cause to end this tenancy. The Landlord may not prohibit the Tenants from having roommates, provided that the number of occupants in the rental unit is not unreasonable. This is specifically provided for in Clause 11 of the tenancy agreement which reads as follows:

11. OCCUPANTS AND GUESTS

1) The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit.
2) The landlord must no impose restrictions on guests and must not require or accept any extra charge for daytime visits or overnight accommodation of guests.
3) If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end a tenancy. Disputes regarding the notice may be resolved through dispute resolution under the *Residential Tenancy Act.*

I therefore find the Landlord has failed to prove that the Tenants assigned or sublet their tenancy without the Landlord's permission, as alleged on the Notice.

For the above reasons I find the Landlord has failed to prove the reasons for ending this tenancy. The Tenant's Application to cancel the Notice is granted.

Conclusion

The Tenants request to cancel the Notice is granted. The tenancy shall continue until ended in accordance with the *Act.*

Having been successful in their Application the Tenants may reduce their next month's rent by $100.00 as recovery of the filing fee.

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: April 8, 2020

Residential Tenancy Branch