



Dispute Resolution Services

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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 to the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

FB and VD represented the landlord in this hearing. The tenant attended the hearing with his counsel GB. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord's agents testified that they were not properly served with the tenant's application for dispute resolution. The agents confirmed that they still wished to proceed with the scheduled hearing, and had no issue with the application being considered. Accordingly, the hearing proceeded as scheduled in consideration of the tenant's application. The tenant confirmed receipt of the landlord's evidentiary materials, which was duly served in accordance with section 88 of the *Act*. The tenant did not submit any written evidence for this hearing.

The landlord served the tenant with a 1 Month Notice to End Tenancy on January 27, 2020, with an effective date of February 29, 2020, by way of posting the 1 Month Notice on the tenant's door. The tenant acknowledged receipt of the 1 Month Notice to End Tenancy for Cause. In accordance with sections 88 and 90 of the *Act*, I find the 1 Month Notice deemed served on January 30, 2020, 3 days after posting.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This month-to-month tenancy began approximately 7 to 8 years ago. Neither party provided a copy of a written tenancy agreement for this tenancy. Both parties confirmed that monthly rent was set at \$878.00, plus \$20.00 for parking. The landlord collected a security deposit of \$400.00, which the landlord still holds.

The agents testified in the hearing that their father has been managing this property since 1965, but is now 85 years old. The agents testified that 8 months ago they started assisting their father with managing the property and resolving outstanding issues.

In their review of the tenancies, the agents discovered that the tenant in this dispute has been repeatedly late in paying his rent. The agents testified that rent is due on the first of every month for every tenant, and that every tenant has made payments on time with the exception of this tenant. The agents provided a copy of the schedule of payments made from January 2019 through to April 2020. The agents testified that the tenant was late in his rent payment on at least 8 occasions between January 2019 and November 2019.

The landlord included a letter dated September 8, 2019 that was issued to all tenants in the 24 unit building. The letter includes the following direction to tenants:

"For the safety and security of all tenants and residents...effective October 1st 2019 remittance of your monthly rent is requested in the form of a personal check with your monthly rent payment paid on time in full dated the 1st of each month. Post dated checks are accepted."

On November 3, 2019, the landlord served the tenant with a breach letter, which is included in the landlord's evidentiary materials. The letter informed the tenant that "full payment of your rent on the 1st day of each month, or alternatively on the 1st day of the rental period if this is not the first day of a month" is a material term of the tenancy

agreement. The letter also informed the tenant that this is “*written notification that any further late rent payment will result in a 1 Month Notice to End Tenancy.*”

The landlord served the tenant with a 1 Month Notice in December of 2019, which was cancelled by an Arbitrator after a hearing was held on January 27, 2020. The landlord submits that the 1 Month Notice was cancelled by the Arbitrator due to an error on the form.

The landlord served the tenant with a new notice to end tenancy on January 27, 2020, providing the following grounds:

1. The tenant is repeatedly late paying rent.

The landlord provided the following submissions about why the 1 Month Notice was issued. The landlord’s agents testified that despite the letters to the tenant, the tenant continues to pay his rent late, and disputes that the tenant was ever given permission to pay his rent late in perpetuity or at his discretion.

The landlord acknowledges that December 2019 and January 2019 rent was paid in full and on time, but that February 2020 rent was paid on February 3, 2020 and short \$9.00. The landlord testified that March 2020 rent was paid on March 3, 2020 and \$8.00 short.

The tenant does not dispute that he had made his rent payments on dates other than the first of the month, but that was with the consent of the landlord. The tenant testified that he had no issues until the agents took over the management of this tenancy for his father, and that they had ulterior motives in attempting to end this tenancy.

Analysis

Section 47 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. The 1 Month Notice is deemed served on January 30, 2020. As the tenant filed his application within the required time period, and having issued a notice to end this tenancy, the landlord has the burden of proving that they have cause to end the tenancy on the grounds provided on the 1 Month Notice, which in this case is for repeated late rent payments.

I note the wording of RTB Policy Guideline #38, which provides the following guidance regarding the circumstances whereby a landlord may end a tenancy where the tenant is repeatedly late paying rent.

Three late payments are the minimum number sufficient to justify a notice under these provisions...

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...

The tenant does not dispute that rent payments were made on dates other than the first of the month, but disputes that the rent was considered late as the landlord had consented to the payment of rent on dates other than the first of the month, with no issues in the past.

I have considered the evidence submitted as well as the sworn testimony of both parties. I note that the landlord provided evidence of written communication to the tenant dated September 8, 2019 and November 3, 2019, notifying the tenant that rent was due on the first of the month. I note that after these letters were issued, the tenant failed to pay the October and November 2019 rent on the first of those months. December 2019 and January 2020 payments were paid in full and on the first.

I find that the landlord has failed to provide sufficient evidence to support that prior to September 8, 2019 the tenant had received sufficient, written warning that monthly rent payments paid after the first of every month are not acceptable. I find the continued acceptance of late rent payments raises the issue of implied waiver. Although rent may be payable on the first of the month, the acceptance or implied acceptance of late payments, may contribute to ambiguity. In this case the landlord's own evidence supports that the tenant had made at least 7 rent payments between January 2019 and September 2019 on dates other than the first of the month, before the issuance of the first letter on September 8, 2019.

A warning to a tenant must be unambiguous and clear. By accepting late rent payments on multiple occasions without properly informing the tenant in writing that these payments were considered late, and could possibly be considered a breach of the tenancy agreement and the *Act*, the terms of the tenancy become ambiguous. I find that the landlord had accepted late rent payments for a long period of time, and had failed to clearly communicate to the tenant that this is not acceptable. On this basis, I find that the landlord failed to provide sufficient evidence to support that the tenant was late in paying his rent prior to September 8, 2019.

I find that the landlord clearly communicated to the tenant that as of September 8, 2019 rent payments are expected on the first of every month. I find that it undisputed that the tenant failed to pay his October and November 2019 rent on time, in accordance with the due date indicated in that letter. However, RTB Policy Guideline #38 sets out that 3 late rent payments to be the minimum number to justify the notice under the provisions of the *Act*. In consideration of my above findings, I find that at the time the 1 Month Notice was issued on January 27, 2020, I find that the tenant had made only 2 late rent payments, which does not qualify the landlord to seek an Order of Possession on the grounds of the 1 Month Notice dated January 27, 2020. Although the landlords reference late rent payments made after the 1 Month Notice was issued, I find that the landlord has failed to provide sufficient evidence to support that the landlord had grounds to issue the 1 Month Notice at the time the 1 Month Notice was served.

I allow the tenant's application to cancel the 1 Month Notice dated January 27, 2020, and this tenancy is to continue until ended in accordance with the *Act*.

As the tenant was successful in their application, I find that the tenant is entitled to recover the filing fee for this application.

Conclusion

The landlord's 1 Month Notice to End the Tenancy dated January 27, 2020 is cancelled and of no continuing force or effect. The tenant is to continue until ended in accordance with the *Act*.

I allow the tenant to implement a monetary award of \$100.00 for recovery of the filing fee by reducing a future monthly rent payment by that amount.

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 17, 2020