



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 an Application for Dispute Resolution (the Application) that was filed by the Tenants under the Residential Tenancy Act (the Act), seeking:

- Cancellation of a One Month Notice to End Tenancy for Cause (the One Month Notice); and
- Recovery of the filing fee.

I note that section 55 of the Act requires that when a tenant submits an Application 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 section 52 of the Act.

The hearing was convened by telephone conference call and was attended by the Tenants, legal counsel for the Tenants, the Landlords, and legal counsel for the Landlords. All testimony provided was affirmed. As the Landlords and their legal counsel acknowledged receipt of the Application and Notice of Hearing, and raised no concerns regarding service of these documents, the hearing proceeded as scheduled. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided in the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure, I refer only to the relevant and determinative facts and issues in this decision.

Preliminary Matters

Preliminary Matter #1

Although documentary evidence was submitted by the parties in relation to September 2020 rent, I have excluded this evidence from consideration in this matter as this documentary evidence was received by the Residential Tenancy Branch (the Branch) and served outside of the timeframes for the service of evidence as set out in the Rules of Procedure. Further to this, I find that the payment of September 2020 rent is unrelated to whether the One Month Notice dated July 2020, is valid.

Preliminary Matter #2

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Branch (the Branch) under Section 9.1(1) of the Act.

Issue(s) to be Decided

Are the Tenants entitled to cancellation of the One Month Notice?

If the Tenants' Application is dismissed or the One Month Notice is upheld, are the Landlords entitled to an Order of Possession for the rental unit pursuant to section 55(1) of the Act?

Are the Tenants entitled to recovery of the filing fee?

Background and Evidence

The one year fixed term tenancy agreement in the documentary evidence before me, signed on October 15, 2016, indicates that the tenancy commenced on November 1, 2016, and became month to month (periodic) after the end date for the fixed term on November 1, 2017. The tenancy agreement states that rent in the amount of \$2,000.00 is due on the first day of each month and the parties agreed in the hearing that rent is currently \$2,150.00, having been increased several times throughout the tenancy. The parties agreed that a \$1,000.00 security deposit was paid and that an addendum to the tenancy agreement forms part of the tenancy agreement.

The Landlords and their legal counsel stated that the Tenants have consistently paid rent late, that they have an unreasonable number of occupants in the rental unit, and that the Tenants and their additional occupant have caused mould issues in the rental unit which have placed the property at significant risk. As a result, the Landlords and their legal counsel stated that a One Month Notice was served on the Tenants on July 30, 2020. During the hearing the Tenants acknowledged receipt on that date.

The One Month Notice in the documentary evidence before me from the Tenants is in writing on the approved form, is signed and dated July 30, 2020, and has an effective date of August 31, 2020. The One Month Notice states that the reason for the notice to end tenancy is because the tenant has allowed an unreasonable number of occupants in the unit/site/property/park, the tenant is repeatedly late paying rent, and the tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk. In the details of cause section, it states the following:

Details of Causes(s): Describe what, where and who caused the issue and include dates/times, names etc. This information is required. An arbitrator may cancel the notice if details are not provided.	
Details of the Event(s):	4
<p>AT ISSUE:</p> <p>3.0 a) Payment of rent on first of the month</p> <p>10.2 a) Condition of unit requires repairs to fix mold issue</p> <p>14.0 i) Number of occupants</p>	

In the hearing the Landlords and their legal counsel argued that the Tenants breached the addendum to the tenancy agreement which states that they must not allow additional occupants in the rental unit without the Landlords' permission, by allowing an additional occupant in the rental unit without their knowledge or consent. Although the Tenants agreed that they have allowed an additional occupant in the rental unit, they stated it is their newborn child and that the Landlords were aware of the pregnancy. The Landlords denied being aware of the pregnancy and reiterated that the Tenants never sought approval from them for an additional occupant. The parties agreed that the rental unit has two bedrooms and the Tenants stated that their child currently reside in the bedroom with them, and as a result, does not even occupy an additional bedroom.

The Landlords and their legal counsel argued that the Tenants have placed their property at risk by causing mold in the rental unit. The Landlords alleged that the

Tenants and the additional occupant are the cause of the mold due to a lack of proper venting, as there was no mold in the rental unit at the start of the tenancy but the Tenants and their legal counsel disagreed, stating that the mold was caused by an improperly functioning downspout which was repaired by the Tenants. The Tenants and their legal counsel stated that the mold was properly cleaned by the Tenants and has not reoccurred since the downspout was cleaned/repared by the Tenants and therefore argued that the property is not at risk. The Landlords acknowledged in the hearing that they have no proof of the cause of the mold and that they have not recently inspected the rental unit due to the risk of COVID-19.

The Landlords also argued that the Tenants have been repeatedly late paying rent throughout the tenancy and submitted a rent payment record showing that late rent payments were made each month between May 2019 – March 2020. The Landlords and their legal counsel also pointed to etransfer records in the documentary evidence before me substantiating these late payments. Although the Tenants did not dispute the majority of the late rent payments, they disagreed that rent for March 2020 was paid late. Although legal counsel for the Tenants initially disputed that rent was paid late after December 2019, they ultimately agreed that it was paid late in January and February of 2020.

Despite the agreement noted above that numerous rent payments were made late since May of 2019, legal counsel for the Tenants stated that the late payments were the result of bounced payments, an inability to pay over weekends, a lack of cheques, and limits on the amount of etransfers which could be sent by the Tenants at any given time, among other things. They also argued that these late payments should not constitute reasonable grounds to end the tenancy under section 47(1)(b) of the Act as the Landlords failed to act diligently in serving the One Month Notice after the Tenants paid rent late in December of 2019. In support of this position legal counsel for the Tenants pointed to a section of Policy Guideline #38 which states that 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.

Legal counsel for the Tenants also argued that communication between the parties throughout the tenancy was amicable and that at no time did the Landlords indicate that they intended to end the tenancy by way of a One Month Notice due to repeated late payment of rent. In support of this position legal counsel for the Tenants pointed to text message and email communications between the parties in the documentary evidence before me, in particular, an email dated March 26, 2020. The Landlords and their legal counsel did not agree that the Landlords failed to act diligently in serving the One Month

Notice after the last late rent payment, as their position was that rent was last paid late in March of 2020, not December of 2019.

The Tenants also sought recovery of the \$100.00 filing fee.

Analysis

As I find that one issue in relation to the One Month Notice is determinative, I have addressed only this issue below. I have made no findings of fact or law in relation to the other grounds given for ending the tenancy on the One Month Notice.

Based on the affirmed testimony of the parties in the hearing and the documentary evidence before me, I find that the One Month Notice was served on the Tenants on July 30, 2020.

Section 26 (1) of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent. Section 47(1)(b) of the Act states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent. Policy Guideline #38 states that three late payments are the minimum number sufficient to justify a notice under section 47(1)(b) of the Act and that 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.

During the hearing there was no dispute that the Tenants had paid rent late more than three times in the 12 months immediately preceding service of the One Month Notice, excluding the time period after March 18, 2020, and service of the One Month Notice, as Landlords were prohibited by Emergency Order #M089 from serving notices to end tenancy between March 18, 2020 – July 23, 2020. While the Tenants legal counsel provided numerous explanations for the late payments of rent, such as being away, bounced payments, or limits on the amounts that could be sent by the Tenants via e-transfer, ultimately I find that these amount to excuses for the late payments, rather than valid reasons under the Act to have withheld rent or to have paid it late, such as an unforeseeable bank error beyond the Tenants' control.

Although Policy Guideline #38 also states that 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, it does not say that they must be determined to

have waived their right to end the tenancy pursuant to section 47(1)(b) of the Act under those circumstances. As a result, I find that I have the discretion to determine whether the Landlords in this case have or have not waived this right.

Although the Tenants' legal counsel argued that the Landlords waived their rights to end the tenancy pursuant to section 47(1)(b) of the Act by failing to act in a timely manner after the most recent late rent payment pursuant to Policy Guideline #38, I disagree. Both parties acknowledge that rent was paid late in January and February of 2020 and the Landlords pointed to e-transfer records in the documentary evidence before me which I find satisfy me that March 2020 rent was also paid late. As landlords were prohibited from serving notices to end tenancy between March 18, 2020 – July 23, 2020, I therefore do not find that the Landlords' service of the One Month Notice on July 30, 2020, constitutes a failure to act diligently with regards to the last late rent payment in March of 2020.

Further to this, although the Tenants' legal counsel argued that communications between the parties were pleasant and that no indication was ever given that the Landlords intended to act on the pattern of late rent payment, there is nothing in the communications submitted by the parties for my consideration indicating that the Landlords ever advised the parties that they would not act on the pattern of late payments and I note that the Tenants were in fact served with warnings regarding the late payment of rent in August and December of 2019. While legal counsel for the Tenants relied on language by the Landlords in an email between the parties on March 26, 2020, stating that it is their intention to work with their tenants to get through this very challenging time, I do not find that this language amounts an agreement, either express or implied, that they will not seek to end the tenancy at any point for late payment of rent.

Further to this, I find that numerous other correspondence between the parties, including an email dated April 20, 2020, and the two warning letters served in 2019, makes it clear that the repeated late payment of rent is an issue. As a result, I do not find it reasonable for the Tenants to have concluded that the repeated late payment of rent was not of concern to the Landlords.

Based on the above, I am satisfied that the Tenants repeatedly paid rent late as defined by policy Guideline #38 between May 1, 2019 and March 1, 2020, in breach of section 26 of the Act and that the Landlords did not waive their rights to serve or enforce a One Month Notice on the basis of late payment of rent. As a result, I therefore find that the Landlord had cause pursuant to section 47(1)(b) of the Act to serve the One Month

Notice and end the tenancy. As a result, I therefore dismiss the Tenants' Application seeking cancellation of the One Month Notice without leave to reapply. As the Application is dismissed, I decline to grant them recovery of the filing fee.

Based on the above and as the One Month Notice in the documentary evidence before me complies with section 52 of the Act, I therefore find that the Landlords are entitled to an Order of Possession for the rental unit pursuant to section 55(1) of the Act. Although the effective date of the One Month Notice, August 31, 2020, has passed, the parties agreed in the hearing that September 2020 rent has now been paid in full. As a result, the Landlords were willing to accept an Order of Possession for the end of September, rather than an Order of Possession effective two days after service. Pursuant to sections 55(1) and 55(3) of the Act, I therefore grant the Landlords an Order of Possession for the rental unit effective 1:00 P.M. on September 30, 2020.

Conclusion

The Tenants' Application seeking cancellation of the One Month Notice and recovery of the filing fee is dismissed without leave to reapply.

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlords effective **1:00 P.M. on September 30, 2020**, after service of this Order on the Tenants. The Landlords are provided with this Order in the above terms and the Tenants must be served with this Order as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

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: September 15, 2020

Residential Tenancy Branch