



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNC, FFT

### Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on August 10, 2020, wherein the Tenant requested an Order canceling a 1 Month Notice to End Tenancy for Cause, issued on July 31, 2020 (the "Notice") and to recover the filing fee.

The hearing was conducted by teleconference at 11:00 a.m. on September 25, 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. Should the Tenant recover the 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 Tenant applied for dispute resolution and is the Applicant, the Landlord presented their evidence first.

A copy of the residential tenancy agreement was provided in evidence before me and which confirmed that the tenancy began December 22, 2017. Rent was payable in the amount of \$2,600.00 on the first of the month.

The Landlord issued the Notice on July 31, 2020. The reasons cited on the Notice were that the Tenant was repeatedly late paying rent. The Landlord provided the following additional details on the Notice indicating the Tenant was late payment rent on the following months:

- May 2018;
- August 2018;
- October 2018;
- December 2018;
- January 2019;
- February 2019;
- March 2019;
- July 2019;
- August 2019;
- October 2019;
- December 2019;
- January 2020;
- February 2020; and,
- March 2020.

The Landlord confirmed the Tenant made his payments by electronic transfer; to confirm the date of payments she also provided copies of her bank account statements confirming the dates of deposit.

The Landlord testified that at time when he was late she texted the Tenant to remind him to pay his rent. In terms of whether she informed the Tenant that his tenancy was in jeopardy for repeated late payment the Landlord stated that she did not inform the Tenant of this.

In the Tenant's Application, the Tenant alleged that the Landlord wanted to regain possession of he rental unit because she intended to move into it and did not want to

issue a 2 Month Notice to End Tenancy for Landlord's Use. In response, the Landlord stated that she "just wants this Tenant out because of damage to the property". She denied that she wanted to move back into the property.

The Landlord confirmed they had a prior hearing on July 23, 2020 wherein she asked for an early end to tenancy due to the alleged damage. She further confirmed that she was unsuccessful in this Application. (The file number for this matter is included on the unpublished cover page of this my Decision.)

In response to the Landlord's testimony, the Tenant testified as follows. The Tenant testified that during the previous hearing, the Landlord stated that she wanted to move back into the property. As such he believes the Landlord should be issuing a 2 Month Notice to End Tenancy for Landlord's Use and providing him with a free month's rent.

The Tenant confirmed that he was late paying rent on all occasions listed on the Notice; however, he stated that at no time was he informed that this was an issue. He testified that never received any warnings or any communication from the Landlord indicating that his late payment was an issue drastic enough that it would result in ending his tenancy.

The Tenant confirmed that since receiving the Notice he has not paid his rent on time. He also confirmed he has not paid rent for August or September 2020.

### Analysis

The Landlord seeks to end the tenancy for cause pursuant to section 47(1)(b) of the *Act*, which allows a landlord to end a tenancy when the tenant has been repeatedly late paying rent.

*Residential Tenancy Branch Policy Guideline 38* provides that three late payments are sufficient to end a tenancy for cause. The evidence before me confirms this Tenant has been late paying his rent at least 14 times in his tenancy.

In a recent decision of the B.C. Supreme Court in *Guevera v. Louie* 2020 BCSC 380, the Honourable Mr. Justice Sewell dealt with a Judicial Review of a Decision of the Residential Tenancy Branch on the issue of repeated late payment of rent. As with the present case, the Tenant in the *Guevera* case had been late paying rent many times during the tenancy. The Court held that three late payments is insufficient to end a

tenancy for cause as consideration must be given to the conduct of the parties. In particular, the Court found that:

“...However, the real issue before [the original Arbitrator] was whether Ms Louie was estopped from enforcing a provision of the tenancy agreement by her past conduct. That issue required a determination of whether Ms. Louie’s conduct led Ms. Guevara to conclude that e-transferring the rent within a day or two after the first of the month was acceptable to her. 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.

I find the above reasoning to be applicable to the case before me. I find that the Landlord in the present case is estopped from enforcing the strict terms of the tenancy agreement as it relates to the date rent is due. There was no dispute in the case before me that the Landlord did not warn the Tenant that his tenancy was at risk due to late payment of rent. While she reminded him of missed payments, at no time did she put him on notice that future late payments would result in an end to his tenancy. I therefore find that the Landlord’s conduct led the Tenant to conclude that transferring the rent a day or two after the first of the month was acceptable to her.

When provided an opportunity to respond to the Tenant’s allegation that she was attempting to end the tenancy for late payment, when in fact it was her intention to move back into the property, the Landlord responded that she wanted the Tenant to move out because he was damaging the property. Notably, this was not cited as a reason on the Notice. Her response suggests to me that even at the hearing the repeated late payment of rent was not an issue for the Landlord.

On balance, I find the Notice should be cancelled. While I find the Tenant has been repeatedly late paying rent, I find the Landlord is estopped from ending this tenancy on that basis due to her past conduct.

As the Tenant has been successful in his Application, I grant his request for recovery of the \$100.00 filing fee. This \$100.00 may be credited to the Tenant against any amounts owing to the Landlord.

The evidence confirms the Tenant has failed to pay rent for the past two months. The Tenant is cautioned that although I have granted his request to cancel the 1 Month Notice to End Tenancy for Cause, this does not preclude the Landlord from issuing a 10

Day Notice to End Tenancy for Unpaid Rent pursuant to section 46 of the *Act* nor does it preclude the Landlord from pursuing monetary compensation for unpaid rent and other related losses.

Conclusion

The Notice is cancelled. The tenancy shall continue until ended in accordance with the *Act*. The Tenant is credited \$100.00 for the filing fee against any amounts owing to the Landlord.

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 28, 2020

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Residential Tenancy Branch