Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- an order of possession for cause pursuant to section 55;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties were represented at the hearing. The landlord by its property manager ("**GC**") and the tenant by its owner ("**MK**"). Both were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

GC testified that she sent the notice of dispute resolution form and supporting evidence package to the tenant by registered mail to the rental unit on December 4, 2020. She testified that the package was returned to sender on December 23, 2020. She testified that she then went to the residential property and left the hearing package with the building's concierge. MK testified that she was in Florida for most of December and the first half of January, and then was quarantining in the rental unit the end of January. She testified that she did not receive the landlord's the hearing package and supporting evidence until February 3 or 4, 2021.

The Act permits service of the hearing package and supporting evidence via registered mail (section 89) and presumes registered mail packages to have been received five days after they were sent (section 90). However, this presumption is rebuttable. Based on MK's testimony that she was out of the country when the hearing package and supporting evidence was served, I find that this presumption is rebutted.

Rule of Procedure 3.14 requires that all evidence of the applicant be served on the respondent no later than 14 days before the hearing. MK retrieved the landlord's hearing package and supporting evidence on February 3 or 4, which is 14 or 15 days before this hearing.

MK indicated that she was prepared to proceed with the hearing as scheduled and had served the landlord with copies of her evidence on February 11, 2021, which GC acknowledged receipt of.
As such, I find that the parties have been served with the relevant documents within the time limits set out on the Act and the Rules of Procedure and find that the hearing may occur as scheduled.

Issues to be Decided

Is the landlord entitled to:

1) an order of possession;
2) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of GC and MK, 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, fixed-term tenancy agreement starting July 10, 2020. Monthly rent is $6,000 and is payable on the tenth of each month. The tenancy agreement required that the tenant pay a security deposit of $3,000 and a pet damage deposit of $3,000 (the "**Deposits**"). The parties disagree as to whether the Deposits were paid.

The parties agreed that, early in the tenancy, the landlord's bank was having problems receiving payments from the tenant, as the rental unit was subject to a lien from the strata corporation, and as the tenant was making its payments by wire transfer from the United States.

On September 1, 2020, the strata corporation filed a petition against the landlord and MK seeking compensation from the landlord for failure to pay a special levy. The parties explained that MK was named due to a requirement of the *Strata Property Act* that occupants of the strata unit also be named parties in the proceeding.

In early November 2020, the landlord hired GC to manage the rental unit. She emailed MK on November 6, 2020 as follows:

> According to the landlord, as of Nov. 06, 2020, we have not received security deposit $3000, pet damage deposit $3000, Rent of Sept/20 $6000, and Rent of Oct/20 $6000; TOTAL OF $18,000

Period		Rent	Paid	Note
From	To			
July 10, 2020	Aug 09, 2020	$6,000	cheque 102	deposited Sept 28, 2020
Aug 10, 2020	Sept 09, 2020	$6,000	cheque 103	deposited Sept 28, 2020
Sept 10, 2020	Oct 09, 2020	$6,000	cheque 160	not received
Oct 10, 2020	Nov 09, 2020	$6,000	cheque 161	not received

GC testified that she also spoke to MK about this email later that day. The landlord submitted an email sent by GC to MK summarizing that conversation following the call. In it, GC wrote:

> 2. Rent Issue
> - please provide a bank receipt or bank statement to verify the money $12000 has been deducted from your account (cheque 160 and cheque 161); you can retract any private information.
>
> We want to verify the rent has been paid and it is the owner's responsibility to work out his issue with his bank if any (even if it requires days to clear into his account).
>
> If we did not receive the information by 12pm Nov. 9, 2020, we will have to proceed with 10 days notice to end tenancy as rent unpaid.
>
> 3. Security Deposit and Pet Damage Deposit $6000.00 - Security Deposit and Pet Damage Deposit is part of any tenancy agreement. It cannot be voided. It is part of binding the contract.

On November 9, 2020, the landlord posted a one month notice to end tenancy effective December 11, 2020 (the "**Notice**") on the door of the rental unit. The Notice stated the reason for ending the tenancy as "security or pet damage deposit not paid within 30 days as required by the tenancy agreement." The landlord did not issue a 10 day notice to end tenancy for non-payment of rent, as indicated may happen in the second November 6, 2020 email.

On November 11, 2020, MK emailed GC as follows:

> Let me summarize what was paid and how it was applied for your records.
> […]
> 1. September 28th. $12000:
>   Applied as follows:
>   September Rent $6000
>   Security Deposit $6000
>   *Deposit Ticket Attached
>
> 2. November 7th. $12000:
>   Applied as follows:
>   October Rent $6000
>   November Rent $6000
>   *Checks Attached
>
> 3. November 10th: $6000
>   Applied as follows:

> July Rent $6000

GC responded by email later that day:

> Just want to let you know, if you want to assume the paying of a security deposit, back in Sept 28, 2020, I will be providing you the 10 day notice to end tenancy for Aug rent $6000.
>
> I put the security deposit (SD+PDD) as unpaid because it is a 30 days notice to end tenancy and you have enough time to provide receipts.
>
> Please advise if the unpaid $6000 amount is security deposit or August rent

MK testified that she understood this email to mean that GC allowed her to choose whether the remaining $6,000 owing was for payment of August rent or for the outstanding Deposit. As such, and as she had indicated in her November 11, 2020 email that she had paid the security Deposits, and as the Notice was issued on the basis of her non-payment of the Deposits, she believed that GC considered the issue of the outstanding Deposits to be resolved, and that she did not need to dispute the Notice.

GC testified that her November 11, 2020 email was not an offer to MK to allow her to elect whether the security deposit had been paid but was rather a warning as to what course of action the landlord would take if MK continued in her position that the Deposits were paid.

MK responded to GC's November 11, 2020 email on November 16, 2020:

> Please try and follow the list you have from me from November 11th.
> Do you understand now?

GC replied later that day:

> We did not agree on your change of payment details sent on Nov. 11, 2020.
>
> This was not what we agreed upon nor communicated to. We are unable to follow if you keep on changing your mind and breaking all the agreements. Please follow what was agreed upon and do not deviate from the agreement.

GC and MK continued to exchange emails over the next few days related to this issue. Each reiterated their respective position. On November 12, 2020, GC wrote that the MK admitted to not paying the Deposits on November 6, 2020 (in email and by text message). Copies of these communications were not entered into evidence. She then closed her email stating "please confirm if it is the security deposit $6000 not paid or the rent of August 2020 $6000 not paid".

GC testified that, when the tenant made the September 28, 2020 payment, it did not indicate what the payment represented. The tenant submitted copies of two cheques dated September 25, 2020, each for $6,000, neither of which contained any reference as to whether they were attributable to the Deposits or to rent.

MK testified that she spoke with the landlord prior to making the payment and indicated it was made partially in satisfaction of the Deposits.

For clarity, I note that the parties agree on the dates and amount of payments made by the tenant, which are as follows:

Date	Owed	Paid	Balance
10-Jul-20	$6,000.00*		$6,000.00
10-Jul-20	$6,000.00		$12,000.00
10-Aug-20	$6,000.00		$18,000.00
10-Sep-20	$6,000.00		$24,000.00
28-Sep-20		$12,000.00	$12,000.00
10-Oct-20	$6,000.00		$18,000.00
07-Nov-20		$12,000.00	$6,000.00
10-Nov-20	$6,000.00		$12,000.00
10-Nov-20		$6,000.00	$6,000.00

*the Deposits owed

The parties disagree as to whether any of these amounts represent payment of the Deposits. MK asserts that $6,000 of the September 28, 2020 payment was to be considered payment of the Deposits. GC asserts that it did not.

For added context, the parties explained that the distinction is significant, as August 2020 rent (which is outstanding, according to MK) was "affected rent" as defined by the *COVID-19 (Residential Tenancy Act and Manufactured Home Park Tenancy Act)* (No. 2) Regulation, and as such was permitted to be repaid pursuant to a repayment plan.

Analysis

1. Is the tenancy ended by operation of the rule of conclusive presumption?

Sections 47(4) and (5) of the Act state:

> (4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

> (5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant
>
> (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
>
> (b) must vacate the rental unit by that date.

Although the tenant participated in the hearing, the tenant did not file an application to dispute the Notice within 10 days or at all. Usually, this would cause the tenancy to be terminated. However, based on the testimony of the parties, and on the evidence produced, this will not be the case in this specific circumstance.

I find it was reasonable for MK to interpret GC's November 11, 2020 email to mean that the GC would allow the tenant to deem that the Deposits had been paid and that instead, the $6,000 shortfall would be attributable to August 2020 rent.

The phrase "Please advise if the unpaid $6000 amount is security deposit or August rent" could be reasonably interpreted to mean that GC is granting the tenant an opportunity to choose what part of the September 28, 2020 payment represents.

The phrase "Just want to let you know, if you want to assume the paying of a security deposit, back in Sept 28, 2020, I will be providing you the 10 day notice to end tenancy for Aug rent $6000" indicated the action the landlord would take, should the tenant take the position that the Deposits were paid on September 28, 2020.

I find that, due to GC writing this email, MK did not dispute the Notice, as she thought the matter regarding the Deposits was resolved. I accept her testimony that she was prepared to accept that she had failed to pay August 2020 rent, and that she expected a payment plan to be issued for those arrears.

As such, I find that GC (either intentionally or inadvertently) induced MK into not disputing the Notice by giving MK reasonable grounds to believe that the issue of the outstanding Deposits had been resolved (at the cost of giving rise to another dispute regarding rental arrears). As such, I do not find it would be just or reasonable to find that the tenancy has ended by operation of section 47(4) and (5) of the Act.

This dispute ought to be determined on its merits.

2. <u>Did the tenant fail to pay the Deposits?</u>

It is not disputed that the first payment of any kind made by the tenant was on September 28, 2020, almost three months after the start of the tenancy. However, based on the testimony of the parties, I understand that this lateness was not due to any fault of the tenant, but rather due to complications with receiving the payments that the landlord's legal issues had caused to his bank account.

Additionally, in the first email she sent to the tenant on November 6, 2020, GC did not take the position that the tenancy should be ended due to the tenant not paying the Deposits. Rather, she sought to have the Deposits paid as soon as possible. I find that this position amounts to a waiver of her right to end the tenancy on the basis that the tenant did not pay the Deposits by August 10, 2020. However, if the landlord is successful in demonstrating that the Deposits have not been paid at all, that the landlord would be entitled to an order of possession due to the tenant's ongoing failure to pay the security deposit, as the service of the Notice amounted to a retraction of the aforementioned waiver.

As stated above, the parties agree on the dates and amounts of payments made. All that is in dispute is whether a portion of the payments should be assigned to rental arrears or to the Deposits.

MK testified she orally advised the landlord that $6,000 of the September 28, 2020 payment was attributable to the Deposits. The landlord did not attend the hearing to confirm or deny this. This payment was made prior to GC starting as property manager, so she has no firsthand knowledge of these events.

In all the correspondence sent by MK to GC, she is consistent in her position that the Deposits were paid as part of the September 28, 2020 payment. In her November 11, 2020 email, she explicitly states that $6,000 of the September 28, 2020 payment is to be applied to the Deposits. She reconfirmed this in her November 12, 2020 email. On November 16, 2020 she again indicated that she was of the position that the November 11, 2020 email was correct.

Based on the evidence before me, it does not seem that GC was confident as to what the September 28, 2020 payment represented. On November 11 and 12, 2020, she sought confirmation as to whether it represented payment of August 2020 rent or the Deposits.

I find it more likely than not that, at the time, the distinction made little difference to GC, as she was merely attempting to determine how best she could proceed to end the tenancy (either for non-payment of the security deposit or for non-payment of August 2020 rent). Her November 11, 2020 email supports this, as she wrote that she would issue a 10 day notice to end tenancy for non-payment of rent and that she put the Deposits as unpaid because it gave the tenant more time to provide receipts.

However, I find likely that, upon realizing that ending the tenancy for non-payment of August 2020 rent would be difficult due to the *COVID-19 (Residential Tenancy Act and Manufactured Home Park Tenancy Act)* (No. 2) Regulation (August rent is "affected rent" and an opportunity to repayment the arrears in installments must be given to the tenant before the landlord may apply to end the tenancy), GC took the position that the Deposits were not paid, contrary to the tenant's assertions.

So, I must determine which party is entitled to determine to which debts the September 28, 2020 payment is assigned. This issue has been considered by the courts. In *Corey Bros. & Co., Ltd. v. The "Mecca"*, [1887] A.C. 286 (H.L.)., the court held:

> "...if the debtor does not make any appropriation at the time when he makes the payment the right of application devolves in the creditor....But it has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment,' and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain....The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. But so long as the election rests with the creditor, and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law such as the rule of civil law, reasonable as it is, that if the debts are equal the payment received is to be attributed to this debt first contracted." (at pp. 293-294)

This passage was affirmed by the Supreme Court of Canadas in *Waisman & Ross v Crown Trust*, [1970] SCR 553, which, in turn has been cited with approval by several courts in British Columbia (*Fill-More Seeds Inc. v Victoria Seeds Inc*., 2009 BCSC 1732, for example)

Put simply, at the time the payment is made, the debtor (in this, the tenant) may assigned indicate which debt the payment should be applied to. If the debtor does not, then the creditor (in this case, the landlord) may assign the payment as he sees fit.

Based on my review of the documentary evidence, and considering the testimony of the parties, I accept MK's testimony that she indicated to the landlord that part of the September 2020 payment should be put towards to the Deposit. In all the communication from her that has been submitted into evidence MK does not deviate from this position. In contrast, GC's position varies. In her initial communication, she asserts the Deposits have not been paid, then, in subsequent communication she gives the tenant the option to elect whether it has been paid or not. These are not actions which I would expect a landlord who has made an election as to how to apply the September 28, 2020 payment to take.

Additionally, as the landlord did not attend the hearing to give evidence, I do not have the benefit of his testimony as to what MK communicated to him at the time the September 28, 2020 payment was made.

Per the case law cited above, the tenant has the right to dictate how the September 28, 2020 payment should be applied. As stated above, I find she indicated that $6,000 should be applied to the amount owed for the Deposits. Accordingly, I find that the

tenant has provided the Deposits as required. The Notice is therefore cancelled and of no force or effect. The tenancy shall continue.

I note that the effect of this finding is a finding that the tenant has failed to pay August 2020 rent, and is $6,000 in rental arrears. The parties should govern themselves accordingly.

As the landlord has not been successful in his application, I decline to order that the tenant reimburse the filing fee.

Conclusion

The application is dismissed without leave to reapply. The Notice is cancelled and of no force or effect. The tenancy shall continue.

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: March 2, 2021

Residential Tenancy Branch