Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC**

Introduction

This hearing was convened as a result of the Tenant's application for dispute resolution ("Application") under the *Residential Tenancy Act* ("Act") for cancellation of the Landlord's One Month Notice to End Tenancy dated May 4, 2021 ("1 Month Notice") pursuant to section 47 of the Act.

An agent of the landlord (hereinafter the "Landlord"), the Tenant and the Tenant's advocate appeared at this participatory hearing. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The parties were informed at the start of the hearing that recording of the dispute resolution hearing is prohibited by Rule 6.11 of the *Residential Tenancy Rules of Procedure*.

The Tenant testified that he served the Application and his evidence on the Landlord by registered mail on June 5, 2021. The Landlord acknowledged receiving the Application and the Tenant's evidence on June 5, 2021. I find the Landlord was served with the Application and Tenant's evidence in accordance with sections 88 and 89 of the Act. The Landlord testified that it had not served any evidence on the Tenant.

Preliminary Matter: The Tenant's amendment

The tenant submitted an amendment to his Application to the Residential Tenancy Branch in a manner that is not in accordance with the *Residential*

Tenancy Branch Rules of Procedure ("RoP") 4.1. The Tenant also testified he had not served the amendment on the Landlord in accordance with RoP 4.6. Consequently, as I find the amendment was not properly filed with the Residential Tenancy Branch and was not served on the Landlord, I will not allow the amendment at this hearing.

Issue to be Decided

Is the Tenant entitled to cancellation of the 1 Month Notice?

Background and Evidence

RoP 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 he is the Applicant, the Landlord presented its testimony first.

The testimony of the parties was this month-to-month tenancy commenced on November 1, 2017. The Tenant is required to pay rent of $700.00 on the 1st of day of each month. A security deposit of $350.00 was paid by the Tenant and the Landlord confirmed that it continues to hold that deposit. The Landlord confirmed that the tenant had paid the rent in full for September 2021 and that, as of the date of this hearing, there was no outstanding rent payable by the Tenant.

The Landlord testified that an employee of the Landlord served the Tenant with the 1 Month Notice in-person on May 4, 2021. The Tenant confirmed that he had been served with the 1 Month Notice on that date. The 1 Month Notice indicates that the "Tenant is repeatedly late paying rent". The details section of the 1 Month Notice state:

> The tenant has repeatedly been late paying rent. After being issued with an eviction order for non-payment of April 2021 rent on April 8, 2021, the rent was paid within five days. The rent for May, due May 1st has not been paid. Another notice to end tenancy was issued on May 4 for late payment. This late payment of rent has been far to frequent for many years and so your tenancy will have to come to an end.

The Landlord disputed ever giving the tenant permission to make late rent payments. He further stated that employees of the Landlord had given the Tenant several warnings about paying the rent late. The Landlord conceded that it had never served the Tenant with a written warning that it would be strictly enforcing the requirement that the Tenant pay the rent by the due date set out in the tenancy agreement and the consequences if the Tenant was late again.

The Tenant admitted that he had been late paying the rent from time to time since the start of the tenancy. The Tenant did not dispute the dates of the late payments listed by the Landlord on the 1 Month Notice. However, the Tenant testified that the Landlord had always accepted the late payments. He further testified that the Landlord had never given him a warning that made it clear that the late payments were an issue, especially to the extent that the late payments would result in the end of the tenancy.

The Tenant's advocate further stated (and the Tenant agreed) that the Tenant always communicated with the Landlord's representative regarding his work and financial situation and paid the rent as soon as possible.

Analysis

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Application and my findings are set out below.

The 1 Month Notice only lists 2 occasions where the Tenant has been late in rent payment, namely April 1 and May 1, 2021. *Residential Tenancy Policy Guideline 38 – Repeated Late Payment or Rent* (the "Policy") provides a landlord may end a tenancy where a tenant is repeatedly late paying rent. The Policy states that three late payments are the minimum number to justify a 1 Month notice under these circumstances. In this case, the 1 Month Notice only specified two occasions on which the Tenant has been late. Accordingly, details provided in the 1 Month Notice itself do not satisfy the requirement that there be at least 3 late payments as set out in the Policy for ending a tenancy.

The Landlord has submitted that the Tenant's own admission that he has been repeatedly late paying the rent is sufficient for me to find that the tenancy should be ended. However, this necessitates that I more fully consider the history of the

Landlord's acceptance of the late rental payments made by the Tenant since the commencement of the tenancy.

As demonstrated by the evidence and testimony before me, the Landlord has established a pattern of accepting late payments from the Tenant since the beginning of this tenancy. Although the Landlord testified that the Tenant had been given several verbal warnings by employees, the Landlord did not provide evidence to corroborate the particulars of those conversations. Based on the evidence before me, I find it more likely that the Landlord acquiesced to the Tenant's late payments during this tenancy. I also find the Tenant's testimony that he had not received a clear warning of the potential consequences of continued late payments of rent was persuasive.

The legal concept of estoppel 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.
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> [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 CanIII 826 (BC CA), [1991] B.C.J. No. 3690 (C.A.)...
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> [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:
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> > ... 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.).

[67] … I find that Ms. Louie was required to give the Ms. Guevara reasonable notice 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 hedeprived 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.

I find that the Landlord has not provided the Tenant with reasonable notice that it was changing its conduct and that in future it was going to strictly enforce the requirement that monthly rent be paid by the Tenant in full and on time as required by the Act and tenancy agreement. Due to the lack of the giving reasonable notice to the Tenant, I find the doctrine of estoppel applies to the dispute before me. It would be unjust to permit the Landlord to terminate the tenancy on the grounds set out in the 1 Month Notice given the long course of conduct in which the Landlord acquiesced. I allow the Application for cancellation of the 1 Month Notice and find the tenancy will continue until ended in accordance with the Act and tenancy agreement.

Conclusion

I allow the Tenant's application to cancel the 1 Month Notice dated May 4, 2021. The 1 Month Notice is of no force or effect. The tenancy continues until ended in accordance with the Act.

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 27, 2021

Residential Tenancy Branch