Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC, RP**

Introduction

Th hearing was convened as a result of the Tenant's application under the *Residential Tenancy Act* (the "Act") for:

- cancellation of a One Month Notice to End Tenancy for Cause dated June 12, 2021 pursuant to section 47 of the Act; and
- an Order that the Landlord perform repairs to the rental unit pursuant to section 32 of the Act.

The landlord and the landlord's agent (collectively the "Landlord") and the Tenant attended the participatory hearing. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The Tenant testified that the Notice of Dispute Resolution Hearing and the Tenant's evidence ("NOH Package") was served on the Landlord's agent by registered mail on July 16, 2021. The Landlord confirmed receipt of the NOH Package on July 22, 2021. I find that the NOH Package and Tenant's evidence were served on the Landlord in accordance with sections 88 and 89 of the Act.

The Tenant testified she served additional evidence on the Landlord by email on October 4, 2021. The Landlord confirmed receipt of that evidence and stated that they had sufficient time to review the Tenant's additional evidence. I find that additional evidence was served on the Landlord in accordance with section 88 of the Act.

The Landlord testified she served evidence on the Tenant by registered mail on September 27, 2021 and served additional evidence on the Tenant by email on October

7, 2021. The Tenant confirmed receipt of the Landlord's evidence. I find the Landlord's evidence was served on the Tenant in accordance with second 88 of the Act.

Preliminary Issue – Incorrect Rental Address

At the commencement of the hearing, I noticed that the street number of the rental address and Tenant's address stated in the application for dispute resolution were different from the address the Tenant provided at the hearing. The Tenant acknowledged she had made an error while making the application and requested that I amend the application to correct the street number.

Residential Tenancy Branch Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
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> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served

As the Landlord did not object to the Tenant's request for an amendment to the application, I amended the Tenant's application to state the correct street number for the rental address and the Tenant's address.

Issues to be Decide

- Is the Tenant entitled to cancellation of the 1 Month Notice?
- If the Tenant fails in her application to cancel the 1 Month Notice, is the Landlord entitled to an Order of Possession?
- Is the Tenant entitled to an order that the Landlord perform repairs to the rental unit?

Background and Evidence

The testimony of the parties was the tenancy commenced on July 1, 2020 for a fixed term ending June 30, 2021. The tenancy agreement provides that the Tenant pay rent of $2,750.00 on the 1st day of each month. The Tenant paid a security deposit of $1,375.00 and a pet damage deposit of $1,375.00 that the Landlord confirmed she is

still holding the deposits. The Landlord also confirmed that the rent is paid until October 31, 2021.

I noted that the address of the rental address and the Landlord's address in the application for dispute resolution are the same even though the Landlord's address stated on the 1 Month Notice was a different address from the rental address. The parties confirmed that the Landlord does not live at the residential property.

The Landlord served the 1 Month Notice on the Tenant in-person on June 12, 2021. The Landlord submitted a Proof of Service on RTB Form-32 confirming service. The Tenant confirmed she received the 1 Month Notice in-person on that date. I find that the 1 Month Notice was served on the Tenant in accordance with section 88 of the Act.

The Landlord testified the Tenant had been late paying rent for the months of December 2020, January 2021, March 2021 and June 2021. The Landlord stated that two 10 Day Notices to End Tenancy for Unpaid Rent and/or Utilities ("10 Day Notice") had been served on the Tenant. The Landlord stated the Tenant paid the unpaid rent specified in each of the 10 Day Notices within the 5-day dispute period after service of those notices. As a result, the two 10 Day Notices were automatically cancelled in accordance with the provisions of the Act.

The Landlord submitted text messages to the Tenant dated November 5, 2020 and February 12, 2021 in which she notified the Tenant that she was late paying the rent and asking when the Tenant expected to pay the rent. The Landlord testified she served the 1 Month Notice on June 12, 2021 with an effective date of July 31, 2021 and, as of the date of this hearing, the Tenant has not vacated the rental unit. As a result, the Landlord has requested an Order of Possession ending the tenancy on October 31, 2021.

The Tenant admitted that she was late paying the rent in full when due for the four months listed by the Landlord. The Tenant testified that some of the late payments were a result of problems caused by restrictions on the maximum daily amounts allowed for e-transfers. She stated that she had separated from her husband in January 2021 and that there were difficulties getting child support resulting in her having insufficient funds to pay the rent in full. The Tenant also stated she was temporarily out of work which cause her financial problems. Lastly, the Tenant stated that a life-threatening incident had occurred to her, the details of which I have not outlined here in order to protect the anonymity of the Tenant. The Tenant testified that she always advised the Landlord when the rent payments were going to be late.

Analysis

Section 46 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. If the tenant files an application to dispute the notice, the landlord bears the burden to prove, on a balance of probabilities, the grounds for the 1 Month Notice.

The Landlord must show on a balance of probabilities, which is to say it is more likely than not, that the tenancy should be ended for the reasons identified in the 1 Month Notice. In the matter at hand the Landlord must demonstrate that the Tenant has been repeatedly late paying rent.

Residential Tenancy Policy Guideline 38 provides that three late payments are the minimum number to justify a notice to end tenancy. I accept the Landlord's evidence, which was eventually acknowledged by the Tenant at the hearing, that the Tenant has been late four times prior to service of the 1 Month Notice on the Tenant.

The Landlord sent two text messages to the Tenant regarding late payments of rent for November 2020 and February 2021 and requested the Tenant advise when payment would be received. The Landlord also served the Tenant with a 10 Day notice regarding a late payment of rent for the month of June 2021. There is no evidence before me that the Landlord explicitly varied the contractual requirement that the Tenant pay the rent in full when due. However, the Landlord did not send a notice to the Tenant advising that the Tenant must pay the rent on time in the future and what the consequences would be if the Tenant did not pay the rent on time. This raises the issue of whether the Landlord is estopped from claiming that the Tenant has been regularly late paying the rent and, therefore, is not entitled to receive an Order of Possession based on the 1 Month Notice on the Tenant.

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.

[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.)...

[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:

> ... 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 BritishColumbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* 1988 CanIII 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 he deprived 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.

In the *Guevara v. Louie* case referred to above, the landlord's acquiescence accepting late payments from the tenant had occurred over a period of years. In this application, the Landlord and Tenant agreed that the four late payments occurred over a period of seven months. I find that the Landlord's acceptance of four late payments over a relatively short period of time did not mean that the Landlord had acquiesced in requiring compliance of the contractual obligation of the Tenant to pay the rent in full when due. Accordingly, I find there is insufficient evidence before me to find that the doctrine of estoppel applies in these circumstances. Based on the foregoing, I find that the Landlord has demonstrated on a balance of probabilities that there is cause to end this tenancy and dismiss the Tenant's application.

Section 55(1) of the Act states:

> 55(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
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> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
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> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

The Landlord's 1 Month Notice meets the form and content requirements of section 52 of the *Act* as it is in the approved form and clearly identifies the parties, the address of the rental unit and the effective date of the notice. The notice provides the reasons for ending the tenancy, namely the repeated late payments of rent.

As I have dismissed the Tenant's application to dispute the 1 Month Notice, the Act requires me to consider if the Landlord is entitled to an Order of Possession pursuant to section 55 of the *Act.* As noted above, I have found the 1 Month Notice complies with section 52 of the Act as to form and content. Therefore, as all the requirements of section 55(1) of the Act are satisfied, I find the Landlord is entitled to an Order of Possession. The Tenant

has paid the rent until October 31, 2021 and the Landlord has requested an Order of Possession for that date. The Landlord is therefore granted an Order of Possession effective at 1:00 pm on October 31, 2021 after service of the Order on the Tenant by the Landlord.

As this tenancy is ending, I find it unnecessary to make a finding on the Tenant's application seeking an order that the Landlord perform repairs to the rental unit. I therefore dismiss the remainder of the Tenant's application.

Conclusion:

The Tenant's application is dismissed in its entirety without leave to reapply.

The Landlord is provided with an Order of Possession effective at 1:00 pm on October 31, 2021 after service of this Order on the Tenant. This Order must be served on the Tenant by the Landlord. Should the Tenant or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: October 26, 2021

Residential Tenancy Branch