



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPC, MNRL-S, FFL**

Introduction

This hearing was convened as a result of the Landlord's application for dispute resolution under the *Residential Tenancy Act* (the "Act") for:

- an order of possession for cause pursuant to sections 47 and 55;
- a monetary order for unpaid rent in the amount of \$925.00 pursuant to section 67;
- authorization to keep the Tenant's security and/or pet damage deposit(s) under section 38; and
- authorization to recover the Landlord's filing fee pursuant to section 72.

The Tenant did not attend this hearing scheduled for 1:30 pm. I left the teleconference hearing connection open for the entire hearing, which ended at 2:12 pm, in order to enable the Tenant to call into this teleconference hearing. The Landlord and the Landlord's legal counsel ("MT") attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the Landlord, MT and I were the only ones who had called into this teleconference.

The Landlord testified the Notice of Dispute Resolution Proceeding ("NDRP") was served on the Tenant registered mail on November 25, 2021. The Landlord submitted the Canada Post tracking number to corroborate his testimony the NDRP was served on the Tenant. I find that NDRP was served on the Tenant in accordance with section 89 of the Act. I find that, pursuant to section 90, the Tenant was deemed to have been served with the NDRP on November 30, 2021.

DR testified the Tenant did not serve any evidence on the Landlord.

Preliminary Issue – Amendment to Include Monetary Claim for Unpaid Rent

The Landlord's application sought \$875.00 for unpaid rent from the Tenant. The Landlord made a request that I amend the amount claimed by the Landlord from the Tenant for the rental arrears of \$1025.00 owing as of the date of this hearing.

4.2 Amending an application at the hearing

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.

[emphasis in italics]

The Tenant has failed to pay the rent in full since the date of the Landlord's application. The Tenant could have reasonably anticipated the Landlord would be seeking the additional rental arrears that have accrued. I allow the Landlord's request to increase the Landlord's claim for unpaid rent to \$1,025.00.

Issues to be Decided

Is the Landlord entitled to:

- an order of possession?
- a monetary order for \$1,025.00?
- retain the security deposit in partial satisfaction of the monetary orders made?
- recover the filing fee for the Landlord's application?

Background and Evidence

While I have considered the documentary evidence and the testimony of the Landlord's agent, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the Landlord's claims and my findings are set out below.

The Landlord submitted a copy of the tenancy agreement between the Landlord and Tenant. The Landlord testified the tenancy commenced on November 1, 2010, on a month-to-month basis with rent of \$825.00 payable on the 1st day of each month. The Tenant was to pay a security deposit of \$412.50 on October 31, 2010. The Landlord acknowledged the Tenant paid the security deposit which he is still holding in trust for the Tenant. The Landlord stated the parties entered into a new tenancy agreement pursuant to which the rent was raised to \$875.00.

The Landlord stated he served a One Month Notice for Cause dated October 13, 2021 ("1 Month Notice") on the Tenant's door on October 15, 2021. The Landlord submitted a signed Proof of Service on Form RTB-34 corroborating his testimony the 1 Month Notice was served on the Tenant. I find that the 1 Month Notice was served on the Tenant in accordance with section 88 of the Act. Pursuant to section 90 of the Act, I find the 1 Month Notice was deemed to have been served on the Tenant on October 18, 2021.

The 1 Month Notice stated that Landlord was ending the tenancy for cause as the Tenant was repeatedly late paying rent. The details of the cause stated in the 1 Month Notice are:

October rent was paid on October 8, 2021
 September rent was paid on September 3, 2021
 April rent was paid on April 11, 2021
 March rent was paid on March 7, 2021
 February rent was paid on February 3, 2021
 January rent was paid on January 3, 2021
 December 2020 rent was paid on December 2, 2020

The Landlord stated the Tenant currently has rental arrears of \$1,025.00 calculated as follows:

Date	Rent Owed	Paid	Balance
01-Nov-21	\$875.00		\$875.00
01-Dec-21	\$875.00		\$1,750.00
06-Dec-21		\$1,600.00	\$150.00
01-Jan-21	\$875.00		\$1,025.00
Total	\$2,625.00	\$1,600.00	\$1,025.00

The Landlord submitted the receipt for the payment of \$1,750.00 issued to the Tenant on December 6, 2021. The receipt was endorsed with the notation "Use and Occupation Only". The Landlord testified he served the Tenant with a warning letter on August 25, 2021 ("Warning Letter") which stated:

Since the beginning of COVID, you have been paying rent in cash. Your rent is often late by a number of days and I often have to contact you to remind you rent is due. This is a situation that cannot continue.

I also do not want to have to chase you for payment of rent as I have had to do these past months.

Therefore, from now on, payment will be by direct deposit into my bank account or by electronic e-transfer.

Timing of payment will be according to terms of the initial rental agreement we signed, namely, it is due on or before the 1st day of the Month and late payment of rent is not acceptable.

You have paid by direct deposit in the past. In case you have lost the information, money can be deposited to: [Bank Deposit Information]

If you do not pay your rent in a timely manner, I will use the power available to me under the Residential Tenancy Act to ensure compliance with the Act and protection of my rights as a landlord.

I look forward to receiving your rent in a timely manner going forward.

Analysis

A. Order of Possession

Subsection 47(1)(b) and section 47(4) and 47(5) provide:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

[...]

(b) the tenant is repeatedly late paying rent;

[...]

- (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.

[emphasis added in italics]

I accept the undisputed affirmed testimony of the Landlord and find the 1 Month Notice was properly served by posting it on the Tenant's door on October 15, 2021. Pursuant to section 90 of the Act, it is deemed to have been served three days after it was posted on the Tenant's door, being October 18, 2021. Pursuant to section 47(4), the Tenant had until October 28, 2021, to file an application for dispute resolution to dispute the 1 Month Notice. There is no evidence before me that the Tenant made an application to dispute the 1 Month Notice. Based on the above, section 47(5) provides the Tenant is conclusively presumed to have accepted the tenancy ended on the effective date of the 1 Month Notice, being November 30, 2021.

Subsections 55(2) and 55(4) of the Act state:

- 55(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:
 - (a) a notice to end the tenancy has been given by the tenant;
 - (b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;

- (c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
 - (c.1) the tenancy agreement is a sublease agreement;
 - (d) the landlord and tenant have agreed in writing that the tenancy is ended.
- (4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 [*Resolving Disputes*],
- (a) grant an order of possession, and
 - (b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

I have reviewed the 1 Month Notice and find it complies with the section 52 form and content requirements. Accordingly, pursuant to section 55(4)(a) of the Act, I order the Tenant provide the Landlord with vacant possession of the rental unit.

Although I have found the tenancy has ended pursuant to section 55(4)(a), I will nevertheless consider whether the Landlord had cause to end the tenancy. Subsection 47(1)(b) provides a landlord may give notice to end the tenancy if the tenant is repeatedly late paying the rent. The undisputed testimony of the Landlord was the Tenant failed to pay the rent on time for each of seven months during the past 12-month period. *Residential Tenancy Policy Guideline 38* ("PG 38") provides guidance on repeated late payments of rent made by a tenant. PG 38 states, in part:

Three late payments are the minimum number sufficient to justify a notice under these provisions.

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. However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be "repeatedly" late

The Tenant has been repeatedly late paying the rent for each seven times during the past 12 months. I find the number of late payments made by the Tenant meets the criteria of PG 38. However, the number of times the Tenant has been late, raises the issue of whether the Landlord is estopped from claiming the Tenant was regularly

late paying the rent and, therefore, is not entitled to an Order of Possession based on the 1 Month Notice.

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 Canlll 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 SEC 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 British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* [1988 Canlll 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 served the Tenant with the Warning Letter which advised the Tenant the time of payment of the rent was to be made when due on or before the 1st day of the month and late payment of rent was not acceptable. Furthermore, acceptance of seven 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 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 was cause to end this tenancy pursuant to section 47(1)(b).

B. Monetary Order

Sections 26 of the Act state:

26 (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

The undisputed testimony of the Landlord is the monthly rent is \$875 payable on the 1st day of each month. The undisputed testimony of the Landlord was the Tenant has not vacated the rental unit and the Tenant has rental arrears of \$1,025.00 as of January 1, 2022. Pursuant to section 68(2)(1) of the Act, I order the tenancy ended on January 31,

2022. I order the Tenant pay the Landlord \$1,025.00 for rental arrears accrued as of January 31, 2022. As stated in *Residential Tenancy Branch Policy Guideline 3*, the Landlord has the option of filing an application for dispute resolution to make a claim for compensation for the period the Tenant overholds the rental unit after January 31, 2022.

As the Landlord was successful in his application, I order the Tenant to pay \$100.00 to reimburse the Landlord for the filing fee of his application.

Pursuant to section 72(2) of the Act, the Landlord may retain the security deposit in partial satisfaction of the monetary orders made above.

Conclusion

The Landlord is provided with an Order of Possession effective two (2) days after service of this Order on the Tenant. 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.

Pursuant to section 67 of the Act, I order that the Tenant pay the Landlord \$712.50, representing the following:

Description	Amount
Rental Arrears	\$1,025.00
Landlord's filing fee	\$100.00
Security Deposit Credit	-\$412.50
Total	\$712.50

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: February 10, 2022

Residential Tenancy Branch