



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, LRE, OLC, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") to cancel a One Month Notice to End Tenancy for Cause dated September 10, 2021 ("One Month Notice"); to suspend or restrict the Landlord's right to enter; for an Order for the Landlord to Comply with the Act or tenancy agreement; and to recover the \$100.00 cost of his Application filing fee.

The Tenant, the Landlord, and counsel for the Landlord, P.M. ("Counsel"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it.

During the hearing the Tenant and the Landlord were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

When we reviewed service of the Notice of Hearing documents and evidence between the Parties, the Tenant said that he taped his documents to the Landlord's door on September 29, 2021. The Landlord said that she had received the Notice of Hearing documents from the Tenant, but only one letter in evidence from him. The Tenant said that he had received Landlord's evidence package that was taped to the rental unit door on January 22, 2022. I advised the Parties to let me know if the other Party addressed a document which the first Party has not received. Neither Party let me know that this was an issue in the hearing.

Preliminary and Procedural Matters

The Tenant provided the Parties' email addresses in the Application and they

confirmed these addresses in the hearing. Counsel added his email address for receipt of the Decision, as well. The Parties also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing, and that anyone who was recording it was required to stop immediately.

When we were first reviewing the Tenant's claims, I advised the Parties that Rule 2.3 authorizes me to dismiss unrelated disputes contained in a single application. In this case, the Tenant indicated different matters of dispute on the Application, the most urgent of which is the claim to set aside the One Month Notice. I found that not all the claims on the Application are sufficiently related to be determined during this proceeding. I, therefore, advised the Parties that we would only review the Tenant's request to set aside the One Month Notice and the recovery of the filing fee at this proceeding. Therefore, the Tenant's other claims are dismissed, with leave to re-apply, depending on the outcome of this hearing.

When a tenant applies to cancel a notice to end tenancy issued by a landlord, section 55 of the Act requires me to consider whether the landlord is entitled to an order of possession. This is the case, if I dismiss the application and if the notice to end tenancy is compliant with section 52 of the Act, as to form and content.

Issue(s) to be Decided

- Should the One Month Notice be cancelled or confirmed?
- Is the Landlord entitled to an order of possession?
- Is the Tenant entitled to Recovery of the \$100.00 Application filing fee?

Background and Evidence

The Parties agreed that the periodic tenancy began on May 1, 2015, with a current monthly rent of \$1,933.74, due on the first day of each month. The Parties agreed that the Tenant paid the Landlord a security deposit of \$850.00, and a pet damage deposit of \$850.00. The Landlord confirmed that she still holds the deposits in full.

The Landlord submitted a copy of the One Month Notice into evidence. The One Month Notice was signed and dated September 10, 2021, it has the rental unit address, it was served by posting it on the rental unit door on September 10, 2021, with an effective vacancy date of October 31, 2021. The One Month Notice was served on the ground that the Tenant is repeatedly late paying rent.

I asked the Landlord to tell me why I should confirm the One Month Notice and give her an order of possession, rather than cancelling it, as the Tenant has requested. Counsel explained:

The broad strokes of this are between December 2020 and September 2021, as [the Tenant] was late in paying rent in some instances well after the 1st of each month. Eight out of ten months he was late paying rent. In the text messages submitted, there is evidence that he was late paying rent in:

- December 2020,
- January 2021,
- February 2021,
- March 2021,
- April 2021,
- May 2021,
- July 2021, and
- September 2021.

Counsel referred to Policy Guideline #38, "Repeated Late Payment of Rents", which he noted states that three late payments are the minimum number sufficient to justify a notice under these provisions. Counsel said:

There have been eight out of ten months paid late. Policy Guideline #38 says it doesn't matter if they are consecutive, or whether one or more rent payments have been made on time between the late payments. However, the Guideline says if the late payments are far apart, an arbitrator may determine that, in the circumstances, the tenant cannot be said to be 'repeatedly' late. Here two payments were made on time in those ten months.

The only way he can skate away from this Notice, is if he had exceptional circumstances as to why he couldn't pay the rent on time. For example, an unforeseen bank error may be considered by an arbitrator. In my submission, there doesn't appear to be an unforeseen bank error or the like. It was for unfortunate circumstances.

The Tenant did not dispute having paid rent late, as set out by the Landlord. However, he explained it as follows:

[The Landlord] has accused me of paying rent late – true - but it was never my intent to not pay her on time, or to delay or be late for any amount. It was always my intent to be a good tenant. I do apologize. I always paid my rent in full – I never stiffed her.

Pre 2021, we had a good working relationship. This case and my paying rent late is a direct result of Covid. The sudden shut down of the entire planet - my clients couldn't meet their obligations. The only project I had was . . . ; it was a four-building build-out, and they were my only client. Because of Covid, the project got behind . . . lack of trades, multiple shut downs and delays. The only reason I couldn't pay my rent on time is because of these delays., When I saw the writing on the wall. I reached out to [the Landlord] and she was patient. She was extremely patient with this situation, but unfortunately her patience eventually ran out.

I was open, honest, and completely transparent, but she didn't trust me. I showed her the cheque, and that it was too large for the bank to cash, and that it needed to be held for seven days; all trust was lost. She thought I was withholding my rent and making these delays. I had the bank manager push it through, and I caught up with all my bills.

Covid . . . trickled down. This is why I was late; I simply had no money. It wasn't because I was trying to live here for free; I just didn't have any money. BC Hydro cut power off, [the phone company] cut the phone off. . . I have 100% proof. I was completely broke . . . for two months I survived on the graciousness of friends and family - my daughter and I would have starved, otherwise.

I was open and transparent with [the Landlord] the entire time. She even offered to change my rent date to another date – showed her willingness at the time. Unfortunately, we never decided on this change. This case was filed after she received all the rent – it was up to date. She knew she couldn't win the first case. I was able to prove her arguments were all lies. This case is an attempt to move my daughter and me out.

Since that difficult time, things have been back on track and not late for the last six months. There's no need to change dates. I'm sorry for any grief I caused; it

was just simply out of my hands.

Counsel responded:

It's been agreed that he was late on eight out of ten months. I'll address some of the elements he mentioned. First, it appears that this excuse for these eight months is Covid-19 and the fact that his business was affected. While that is terrible, and no one wishes ill on someone's business or livelihood, it's not an excuse to not pay rent on time.

He said he's always paid the rent in full, while true in the scheme of things, that doesn't put him in compliance with the Act.

I'll take you to the Landlord's evidence package. [The Tenant] talks about this cheque. After he had it worked out with the bank, he was able to make the payments on time. But that is incorrect. I'll take you to page 13.

Counsel directed my attention to texts and emails between the Parties from December 17, 2020, through September 2021. These communications involve a large cheque that the Tenant expected and then received from his client. It also involves the Landlord repeatedly asking when rent would be paid. Counsel said:

We see the constant theme of asking and urging for the rent, which is contrary to what his evidence was a few minutes ago. His client is couriering cheques, they are going to pay next week. . . we flip to the next page and [the Landlord] says on January 14, 2021: 'Just checking in ? Any word?' His response is that he is still waiting on the cheque. **She** is asking **and** giving him a long time, and she has to again ask him for an update.

On the 22nd, she said she paid a water bill that was in arrears. He's not paying the things he is supposed to be paying. And he is not as up front as he says he is.

On page 16 is a long text from [the Tenant]. Now he says he won't have the cheque until the 5th of February. On page 17, he's talking about his problems with the bank. Here was a situation in which, again, [the Landlord] is asking him on February 5th, 'Where's the rent?' He hasn't paid for December, January, or February. I reiterate, this is [the Landlord] approaching [the Tenant].

This pattern goes on for several pages. On page 27, [the Landlord] sends [the Tenant] a text thanking him for the January rent (on February 17th), and 'When will you pay me the remaining . . .?'; he doesn't answer.

On page 29, [the Landlord] sends another message, as she hasn't had a response, seemingly. She said she doesn't want to, but she'll have to give him a 10 Day Notice. His response is indicative of his attitude:

Wow and hello

Actually, these texts and a threat of a 10-day notice is a slap in the fact [Landlord], WTH!!?!

Have you come unglued?

[The Landlord] has experienced late rent all the time - late by over a month. She is pounding [the Tenant] for updates on when she's going get to paid. She sees this \$28,000.00 cheque of his, but he only pays her part of the money. She says to him that she'll have to serve him with a 10 Day Notice. He is not transparent and up front with her.

Essentially , he said once he sorted out this . . . he'll have no problem paying. He has admitted to paying March 2021 late after he received this cheque; April 2021 late, May 2021 late, July 2021 late, and September 2021 late, which is when [the Landlord] finally provided him with a One Month Notice for repeated late payment.

[The Landlord], as you can see from text messages, was not okay with the rent being paid late. She provided him with 3 to 4, 10 Day Notices during this period. The submission that she was okay with it is incorrect. The open and honest communication seems to be completely inaccurate. He said he's always paid the rent in full – sure - but that's after 8 of 10 months not paying it on time. Now he's paying it on time after a One Month Notice.

He started by saying that his intent was to pay on time. [The Tenant's] intention, while if it were his intention is admirable, but it is of no consequence in this type of matter.

He is a glaring example of why there is this PG #38 – this is the exact situation where someone should be provided with a One Month Notice to vacate for late payment. There is no reasonable excuse pursuant to PG #38; as such, it is clean - he admitted to late rent payments, with no contrary evidence to say that his Application should be successful today. He has clearly flouted the RTB rules and the agreement between the Parties.

The Tenant said:

I'm kind of taken back here, because my statement was 100% accurate. Leading up to 2020, there were no problems. Then I fell into hard times, and I let her know.

Their evidence on page 30 – where I say, 'Have you come unglued' - I owed only \$2,500.00 . . . I was hit by other road blocks by the bank. I had to get a statutory declaration notarized in order to get that cheque. I couldn't do my etransfers. I was not doing it out of any callousness, I just didn't have the money and was waiting for the statement to come. 'Have you come unglued' – that expressed my feelings. I was behind with every single creditor; there was no food in the fridge. My hands were tied.

I can't be hired, because you couldn't get into peoples' homes then. I could feel her frustration, which was also mine. On the human side of this. Everything was fine. That's called life.

I was under circumstances that were not under my control. I'm still chasing them for \$3,500.00 – it's been a year now. But now I'm back on track. It's not because of this case that I've started paying my rent. I'm paying on the first because work is starting to pick up. Things are opening up. At no time did I try to be mean or withhold rent or cause her any harm at all. Everything was going well until December 2020, and then it fell apart for a few months. I hope that you find in our favour. I've been back on track for the last six months.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

While the Tenant commented on his hardships being part of life, and he asked that I try to understand the human side of the equation, I must advise that my authority to make decisions is limited to the Act. As Counsel noted, the Tenant's intentions are not relevant to his obligations under the Act. It is the Tenant's actions in repeatedly paying rent late that are relevant. I am limited to analyzing the evidence before me pursuant to the relevant legislation and Policy Guidelines.

Section 26 of the Act states: "A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the 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."

Section 47 of the Act allows the landlord to end a tenancy for cause:

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;

...

Rule 6.6 sets out the standard of proof and the onus of proof in dispute resolution proceedings, as follows:

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

As such, the burden of proof in this matter is on the Landlord.

Policy Guideline 38 explains that, absent any exceptional circumstances (such as a bank error through no fault of the tenant), three instances of late payment of rent are the minimum number of instances of late payments required to support this type of Notice to End Tenancy.

In this case, the Landlord alleged that the Tenant was late in eight out of ten months between December 2020 and September 2021. The Tenant said that it was not his fault, because his work shut down with the onset of the pandemic, and the bank had a policy of holding a large cheque before cashing it. However, the Tenant did not indicate that the bank's policy was in "error"; rather, I find based on the evidence before me and based on common sense and ordinary human experience that banks have policies like this to avoid the potential consequences of cashing a bad cheque. It is just business, as the Tenant said about his misfortunes: "That's called life".

When I consider all the evidence before me overall, I find that the Landlord has provided sufficient evidence to meet her burden of proof on a balance of probabilities, and to support the validity of the One Month Notice.

I also find that the One Month Notice issued by the Landlord complies with section 52 of the Act as to form and content. Given the above, and pursuant to section 55 of the Act, the Landlord is entitled to an **Order of Possession**. I, therefore confirm the One Month Notice and grant the Landlord an Order of Possession of the rental unit. Given that the effective vacancy date has passed, the Order will be **effective two days after it is served** to the Tenant.

The Tenant's Application is dismissed wholly without leave to reapply, pursuant to sections 26, 47, and 62 of the Act.

Conclusion

The Tenant is unsuccessful in his Application to cancel the One Month Notice. I dismiss the Tenant's Application wholly, as I find that the One Month Notice is valid and effective as of October 31, 2021.

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlord effective **two days after service of this Order** on the Tenant. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible.

Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the

Act, and 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 02, 2022

Residential Tenancy Branch