



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened by way of conference call concerning an application made by the tenants seeking an order cancelling a notice to end the tenancy for cause and to recover the filing fee from the landlord for the cost of the application.

Both tenants attended the hearing and were accompanied by Legal Counsel and an Articled Student. The landlord also attended, accompanied by the owner, who is the landlord's father and Legal Counsel. The owner gave affirmed testimony and Legal Counsel for the tenants was permitted to question the landlord. Legal Counsel for the tenants indicated that the tenants will rely on Affidavit evidence and submissions of Legal Counsel.

Legal Counsel for both parties were also given the opportunity to give oral submissions, however, the landlord's connection was lost during his submissions; the line remained open for approximately 8 minutes however the landlord did not reconnect.

Issue(s) to be Decided

Has the landlord established that the One Month Notice to End Tenancy for Cause was issued in accordance with the *Residential Tenancy Act*, specifically with respect to the reason for issuing it?

Background and Evidence

The landlord (JK) testified that this month-to-month tenancy began on June 29, 2012 and the tenants still reside in the rental unit. Rent in the amount of \$1,500.00 was

originally payable on the 1st day of each month, however a new tenancy agreement was entered into for a month-to-month tenancy beginning on January 1, 2017. It specifies rent in the amount of \$1,615.00 payable on the 1st day of each month. On June 29, 2012 the landlord collected a security deposit in the amount of \$750.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a suite in a 15 suite apartment building, and the landlord does not reside on the property. Copies of both tenancy agreements have been provided as evidence for this hearing.

The landlord further testified that on November 17, 2021 the tenants were served by registered mail with a One Month Notice to End Tenancy for Cause, a copy of which has been provided by the tenants for this hearing. It is dated November 17, 2021 and contains an effective date of vacancy of December 31, 2021. The reason for issuing it states: Tenant is repeatedly late paying rent.

The tenant was late with all or a portion of rent for several months, paying on January 2, 2021; June 3, 2021; August 2 and August 11, 2021; September 2, 2021; October 5, 2021 and November 2, 2021. The landlord frequently had to write to the tenants to remind them to pay rent on the 1st of the month. Even as late as after the Notice to end the tenancy was given, the tenant's letter, a copy of which has been provided for this hearing, dated November 27, 2021 the tenant acknowledged that rent is due on the 1st. For 5 of the last 6 months rent was late.

Section 26 of the *Residential Tenancy Act* states that rent is to be paid when it is due.

Historically rent was paid by certified cheque but since the 1st of December when the new tenancy agreement came into effect, rent has always been paid by e-transfer.

The Affidavit of the first tenant (JK) states that there have been rent increases over the years, and rent was originally paid by post-dated cheques payable on the 1st day of each month. However, the landlord didn't deposit or cash the cheques often until the 2nd or 3rd of the month.

On February 6, 2020 the tenant requested auto-deposit, however the landlord did not respond. In March, 2020 the tenant received a temporary rental supplement of \$300.00 paid directly to the landlord, and on April 25, 2020 the tenant advised the landlord that a reduced amount of rent for May, 2020 would be paid to make up for the rent that the landlord received from the subsidy. The landlord did not respond. However, due to the

rent subsidy, the tenant paid \$260.00 for rent in May, 2020 and \$560.00 from June to September, 2020. The landlord never asked to ensure that rent be paid on the 1st of each month or advise that the tenant could be evicted for failure to pay rent on time.

On January 4, 2021 the landlord requested by email that the rent be paid by e-transfer from February 2, 2021 onward, but to a different email than the tenant had used previously.

During 2021 the rent was paid to the landlord by e-transfer before the 1st of each month from February to May and December. Four times the e-transfer was sent on the 2nd of the month, and on or after the 3rd of the month 3 times.

On August 11, 2021 the tenant e-transferred rent for August and asked the landlord to fill out a pre-authorization form, which would ensure transfer would happen automatically on the 1st day of each month, however on August 30, 2021 the landlord stated that it was not possible due to the cost, and that the tenants should remember that rent is due on the 1st of each month.

The tenants were never served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities and were never told that late rent payments would result in terminating the tenancy.

The Affidavit of the second tenant (JG) states that the tenant moved into the rental unit on December 5, 2020 with confirmation by the landlord, at the invitation of the other tenant, and that rent was paid directly to the landlord. Despite multiple requests to have the tenancy agreement updated to include both tenants, the landlord did not offer an opportunity for that.

The Affidavit also states that rent was paid prior to the 1st of each of the months of December, 2020, February, March, April, May, June and October, 2021 directly to the landlord or the landlord's father. In January, July, August, September and October, 2021 rent was paid on the 2nd day of each month, and no response was received by the landlord or the owner stating that rent must be paid on the 1st of the month or face eviction. Rent for March 1, 2021 was paid by e-transfer.

The landlord served the tenants with a One Month Notice to End Tenancy for Cause by serving the other tenant, which names both tenants even though only 1 tenant is named in the tenancy agreement, and the owner as landlord, not the landlord named in the

tenancy agreement. On November 27, 2021 the tenant sent an email to the landlord stating that the tenant was confused and saddened by the drastic measure of eviction for late rent, and asking the landlord to reconsider the eviction.

SUBMISSIONS OF THE TENANTS' LEGAL COUNSEL:

One of the tenants (JK) has lived in the rental unit since 2012, and a new tenancy agreement was created in 2017. The tenant agreed to an increase in rent from \$1,720.00 to \$1,740.00 per month during a freeze on rent increases, in order to be able to continue the tenancy, which was acknowledged by the landlord named in the tenancy agreement, and for an increase in maintenance. The tenants wanted a new tenancy agreement to include both tenants (JK and JG), and nothing in writing was provided to the tenants that would suggest a tenancy, so the tenant (JG) is an occupant.

Section 1 of the *Residential Tenancy Act* defines a tenant, which includes a former or prospective tenant. Section 45 (1) states: "...other than a tenant who occupies a rental unit," which shows who qualifies as a tenant, and the other is an occupant.

The tenant (JG) resides in the rental unit at the pleasure of the other tenant (JK), and paid rent directly to the landlord. A verbal tenancy agreement does not create a landlord/tenant relationship. If a landlord fails to execute a new tenancy agreement, the person is an occupant and is not responsible as a tenant.

The tenants submit that the landlord(s) are estopped from enforcing the terms of rent payable on the 1st of the month because the tenants didn't deal with the owner until rent started to be paid by e-transfer. Prior to that, the tenant paid by post-dated cheques until December, 2019. Once e-transfers started, both the landlord and the owner, by their own conduct and silence, engaged in course of communication and cannot issue a notice to end the tenancy without previous notice. The correct remedy is to set aside the notice to end the tenancy; Section 26(1) is not applicable because it has no relevance.

The doctrine of estoppel applies in common law to prevent parties from insisting on legal rights where it would be unjust to allow enforcement due to prior conduct. The Supreme Court of Canada ruled: The principles of promissory estoppel are well settled. The party relying on doctrine must establish that other party has, by words or conduct made a promise or assurance intended to affect a legal relationship and to be acted on.

Furthermore, the representee must establish that in reliance on the representation, he acted on it or in some way changed his position.

Counsel for the tenants also submits that a recent decision of the Supreme Court of British Columbia, *Guevara vs. Louie* 2020 BCSC 380, considered in a Judicial Review proceeding involving late payment of rent and a notice to end the tenancy, and whether the landlord was estopped from enforcing a notice to end the tenancy by her past conduct. The tenant in that case paid the landlord by e-transfer. Some were late, but the landlord accepted it without complaint but with friendly reminders by the landlord. A 3 month notice of rent increase was issued in May, 2019 effective August 1, 2019, and a notice to end the tenancy for repeated late rent was posted to the door of that rental unit on June 26, 2019.

The Court stated that ending a tenancy is a significant request only in accordance with the *Residential Tenancy Act*, and if disputed, an Arbitrator is required to consider the totality of the evidence. The Court also mentioned Policy Guideline 38 – Repeated Late Payment of Rent, which must be considered but would be a legal failure by an Arbitrator to properly consider the statutory interpretation of Section 47 without considering the entire circumstances given the context in which Section 47 (1)(b) finds itself. The Court also stated that an Arbitrator is to consider that the context of Section 47 is serious enough to warrant eviction, and an Arbitrator is to consider 4 things:

1. the frequency of the defaults in the context of the length of the tenancy;
2. the length of default;
3. the content and communication between the parties in respect of any of the defaults; and
4. the expectations of the parties.

The Supreme Court also found that by not considering estoppel, the Arbitrator committed an error. It also stated that “The distinction between waiver and estoppel is vital because the landlord relies on alleged defaults that occurred before she gave any indication that the required strict compliance with the requirement to pay rent on the first of the month.” Such a notice would have had to be clear. The landlord was required to give the tenant reasonable notice that strict compliance would be enforced before taking steps to end the tenancy for late payments, and in this case, no such notice was provided to the tenants.

The first and second factors are the frequency of defaults in context of the length of tenancy and length of the default. The tenancy length is 9.5 years, or 115 months. The tenant was late with rent for 19 of those months, since 2012. From 2015 to 2019 rent

was paid by post-dated cheques, so rent was never late, but the landlord deposited the cheques on the 2nd day of the month or later for 44 of the 48 months.

The third factor is correspondence of the defaults. The tenant notified the owner on January 6, 2020 that the tenant was in Hawaii and forgot to complete an e-transfer for rent, but would complete an automatic pay advice, however the owner did not reply. The next correspondence dated November 30, 2020 is a text message wherein the tenant informed the landlord that the other tenant would be moving in and requested repairs. On August 11, 2021 the tenant asks the landlord to fill out the pre-authorized form to ensure rent is paid on the 1st, but the landlord indicated that it was expensive on that end.

The last factor of “Guevara” is respectful communication. The landlord did not issue a clear and reasonable notice of possible eviction, but reminders to pay, and another that states that if rent is on the way, it’s all good. The landlord’s failure to issue a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities when the landlord could have done so in 2021, was a course of conduct giving the tenants an expectation that the tenancy would continue. There is no evidence of the seriousness of the failure to pay on time, and it was not serious because the landlord deposited 44 payments of rent later than the payments were received, and stated it was too expensive to set up the automatic debits.

Both tenants in this application engaged in communication with the landlords to rescind the notice to end the tenancy, both indicating shock and surprise, and say that the matter could have been dealt with, suggesting that future payments would be made on time, and the tenants did not know that late rent would cause eviction.

Counsel submits that the test for estoppel has been met; the legal relationship, words and conduct that the landlord would not strictly enforce their rights, which ensured the tenants it would not warrant eviction. Section 26 of the *Act*, given its placement in the *Act* under “During a Tenancy,” is meant to prevent a tenant from withholding rent for lack of repairs and is not relevant to this case.

SUBMISSIONS OF THE LANDLORD AND OWNER:

The placement of Section 26 in the *Act* doesn’t un-entitle a landlord to give a notice to end a tenancy if a tenant fails to pay rent. The language couldn’t be any clearer. No one suggests the landlord or the owner are not complying with the *Act*. It states that even if a

landlord doesn't do what is necessary, the tenant must still pay rent. Rent must be paid when it is due, which in this case is on the 1st day of the rental period. There are emails back and forth continuously asking for rent to be paid. It is not understandable how the tenants didn't think rent had to be paid on time. Even in her own words, on November 27, after the notice to end the tenancy was issued, the tenant states, "Of course we realize rent is due on the 1st." Badgering the tenant to pay rent should be considered to be more than pleasant correspondence, but chasing the tenant to pay rent on time. Being pleasant should not be held against the landlord or the owner. The landlord has to have reasonable conduct with tenants. It's always been a reference to late rent, chasing the tenant each month for almost a full year and because the landlord nor the owner has not issued termination notices each month, and the tenant having acknowledging that, and now it's held against the landlord, doesn't make sense.

There was an understanding about the newer tenancy agreement, wherein the landlord named in the tenancy agreement states, "... we always raise rent when there's a new contract." The tenant expected a new contract with an increase of rent. The landlords don't allow people to move in or out, but proceed with a new tenancy agreement. When the new tenancy agreement was made in 2017 the security deposit was transferred and when another person moved into the rental unit in 2020, there was contemplation of a new tenancy agreement. If the tenant (JK) failed to pay rent, the landlord would be entitled to get rent money from the tenant who moved out in 2017. The tenant (JG) writes asking for a new tenancy agreement, obviously wanting to enforce her rights as a tenant and not an occupant so it makes no sense that there is no relationship, and standard terms apply.

Rent was due on the 1st. Some tolerance was given initially, but eventually enough was enough.

With respect to rent increases, a moratorium was brought in by a press release, that from May to December, 2020 no increases were allowed or given. The rent increase was effective December 1 to \$1,760.00 per month. On the 9th of November, prior to that, the press release shows that the government extended it to mid-2021 and again to the end of 2021. At the time that the landlord gave the increase on May 20 effective December, 2021, it was valid and enforceable increase, until the government policy changed in November.

There was an agreement in the correspondence settling that 2 tenants paying rent would be an amount of \$1,760.00 agreed to by the tenant (JK) which was accepted and agreed to by the tenant (JG) and she sent the rent in that amount within a day or 2. If the tenant (JG) is only an occupant, she has no obligation to pay rent and the tenant (JK) still has the

obligation to pay the rent. If not all paid, it's a default. However, the tenant (JG) would have had all the rights of a tenant, and wrote to the landlord named in the tenancy agreement about maintenance.

With respect to the landlord's and owner's refusal to accept automatic rent payments in November, the owner submits that on 2 instances prior to August, 2021 the tenants asked about setting it up and the owner agreed. However it was not until August 11, 2021 that the tenant gave the bank form to the bank.

Analysis

Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was given in accordance with the *Residential Tenancy Act*, which can include the reason(s) for issuing it. I have reviewed the One Month Notice to End Tenancy for Cause and I find that it is in the approved form and contains information required by the *Act*. The reason for issuing it, repeated late rent, is in dispute.

The Policy Guidelines are just that – guidelines that I am not bound by; they do not cover every situation in which disputes arise. I am bound by the *Act* and the tenancy agreement, both of which state that rent must be paid on time.

Legal Counsel for the tenants has not provided a copy of the cases referred to in submissions, however I accept that the Supreme Court, on Judicial Review found that 4 factors exist in determining whether or not a tenant can be held to be repeatedly late paying rent:

1. the frequency of the defaults in the context of the length of the tenancy;
2. the length of default;
3. the content and communication between the parties in respect of any of the defaults; and
4. the expectations of the parties.

I also accept the undisputed facts that the landlord was given post-dated cheques for a time but didn't deposit them until sometime later. Whether or not the landlord was inconvenienced by the late payments is not something I can consider, however the factors set out by the Supreme Court on Judicial Review indicates that I must consider the communication between the parties and the expectations. I am not satisfied that the tenants ever considered that, in the circumstances over the 9.5 year tenancy, that the

tenancy would be in jeopardy for failure to pay rent on the first day of each month. Therefore, I cancel the One Month Notice to End Tenancy for Cause and the tenancy continues.

Section 62 of the *Act* states, in part:

62 (1) Subject to section 58, the director has authority to determine

(a) disputes in relation to which the director has accepted an application for dispute resolution, and

(b) any matters related to that dispute that arise under this Act or a tenancy agreement.

(2) The director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act.

(3) The director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

In the circumstances, I find it reasonable to order the tenants to comply with the *Act* and the tenancy agreement by ensuring that rent is paid on or before the first day of each month.

Since the tenants have been successful with the application the tenants are also entitled to recovery of the \$100.00 filing fee. I grant a monetary order in favour of the tenants as against the landlord in that amount, and I order that the tenants be permitted to reduce rent for a future month by that amount or may otherwise recover it by filing the order for enforcement in the Provincial Court of British Columbia, Small Claims division as a judgment.

Conclusion

For the reasons set out above, the One Month Notice to End Tenancy for Cause dated November 17, 2021 is hereby cancelled and the tenancy continues.

I hereby order pursuant to Section 62 of the *Residential Tenancy Act* that the tenants pay rent when it is due under the terms of the tenancy agreement.

I hereby grant a monetary order in favour of the tenants as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$100.00, and I order that the tenants be permitted to reduce rent for a future month by that amount or may otherwise recover it.

This order is final and binding and may be enforced.

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 15, 2022

Residential Tenancy Branch