



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **TT: CNR**
 LL: OPR, MNRL-S, FFL

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the “Act”). The Tenants made one application (“Tenants’ Application”) for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent and/or Utilities pursuant to section 46.

The Landlord made one application (“Landlord’s Application”) for:

- an Order of Possession pursuant to sections 47 and 55;
- a Monetary Order for unpaid rent under sections 55 and 67;
- authorization to keep the Tenants’ security deposit under section 67; and
- authorization to recover the filing fee of the Landlord’s application from the Tenants under section 72.

The Tenants did not attend this hearing. I left the teleconference hearing connection open until 9:54 am in order to enable the Tenants to call into this teleconference hearing scheduled for 9:30 am. The Landlord and the Landlord’s agent (“CC”) 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 Tenants’ Notice of Dispute Resolution Proceeding (“Tenants’ NDRP”). I also confirmed from the teleconference system that the Landlord, CC and I were the only ones who had called into this teleconference.

CC stated the Landlord received the Tenants’ NDRP by mail sometime in early December 2021. I find the Tenants’ NDRP was served on the Landlord by the Tenants in accordance with section 89 of the Act.

CC stated the Landlord served the Landlord's Notice of Dispute Resolution Proceeding and evidence ("Landlord's NDRP Package") on the Tenants in-person on February 16, 2022. I find the Landlord's NDRP Package was served on the Tenants by the Landlord in accordance with sections 88 and 89 of the Act.

Preliminary Matter – Effect of Non-Attendance by Tenants

Rule 6.6 of the *Residential Tenancy Branch Rules of Procedure* ("RoP") states:

6.6 The standard of proof and onus of proof

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 Landlord bears the burden of proof it is more likely than not that the 10 Day Notice is valid. The Landlord must meet this burden even if the Tenants do not attend the hearing.

Rules 7.1, 7.3 and 7.4 of the RoP state:

7.1 Commencement of the dispute resolution hearing

The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.

7.3 Consequences of not attending the hearing

If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of the party, or dismiss the application, with or without leave to re-apply.

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

Given the Tenants did not attend the hearing within 10 minutes of its commencement, the Tenants' Application is dismissed without leave to reapply. As the Tenants were not present at the hearing, I will not consider any of the evidence submitted by the Tenants in advance of the hearing when adjudicating the Landlord's Application.

Issues

Is the Landlord entitled to:

- an Order of Possession?
- a Monetary Order for the rental arrears owing by the Tenants to the Landlord?
- authorization to apply the security deposit to the rental arrears?
- recover the filing fee of the Landlord's Application?

Background and Evidence

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

CC submitted a copy of the tenancy agreement and testified the tenancy commenced on March 27, 2020, for a fixed term ending March 26, 2021, and continued on a month-to-month basis thereafter. CC stated the Tenants were to pay the Landlord rent of \$1,500.00 on the 1st day of each month and \$1,500.00 on the 15th day of each month for total rent of \$3,000.00 per month. CC stated the Tenants paid a security deposit of \$1,500.00 which the Landlord is holding in trust on behalf of the Tenants. CC the Tenants have not vacated the rental unit.

CC stated the Landlord served a Ten Day Notice to End Tenancy for Unpaid Rent and/or Utilities dated December 6, 2021 ("First 10 Day Notice") on the Tenants in-person on December 6, 2021. I find the First 10 Day Notice was served on the Tenants

in accordance with section 88 of the Act. CC stated the Landlord served another Ten Day Notice to End Tenancy for Unpaid Rent and/or Utilities dated December 28, 2021 ("Second 10 Day Notice") on the Tenants in-person on December 28, 2021. CC submitted a signed Proof of Service on Form RTB-34 to corroborate service of the Second 10 Day Notice on the Tenants. I find the Second 10 Day Notice was served on the Tenants in accordance with section 88 of the Act.

CC stated the First 10 Day Notice stated the Tenants owed the Landlord \$18,500.00 for unpaid rent as of December 5, 2021, and the Second 10 Day Notice stated the Tenants owed the Landlord \$17,000.0 for unpaid rent as of December 15, 2021. CC stated that, as the Landlord had not served the Tenants with a COVID repayment plan in respect of \$3,000.00 of rental arrears arising during the period March 12 through August 15, 2020, the Landlord was not seeking to recover those arrears. CC stated the Tenants owed, as of the date of this hearing, a total of \$24,500.00 for rental arrears, excluding the aforesaid \$3,000.00, calculated as follows:

Date	Rent Owed	Paid	Balance
01-Sep-20	\$1,500.00		\$1,500.00
04-Sep-20		\$1,500.00	\$0.00
15-Sep-20	\$1,500.00		\$1,500.00
01-Oct-20	\$1,500.00		\$3,000.00
15-Oct-20	\$1,500.00		\$4,500.00
15-Oct-20		\$1,500.00	\$3,000.00
01-Nov-20	\$1,500.00		\$4,500.00
03-Nov-20		\$1,000.00	\$3,500.00
13-Nov-20		\$500.00	\$3,000.00
15-Nov-20	\$1,500.00		\$4,500.00
01-Dec-20	\$1,500.00		\$6,000.00
15-Dec-20	\$1,500.00		\$7,500.00
15-Dec-20		\$1,500.00	\$6,000.00
01-Jan-21	\$1,500.00		\$7,500.00
07-Jan-21		\$1,000.00	\$6,500.00
15-Jan-21	\$1,500.00		\$8,000.00
21-Jan-21		\$3,000.00	\$5,000.00
01-Feb-21	\$1,500.00		\$6,500.00
15-Feb-21	\$1,500.00		\$8,000.00
17-Feb-21		\$1,500.00	\$6,500.00
26-Feb-21		\$1,500.00	\$5,000.00

01-Mar-21	\$1,500.00		\$6,500.00
15-Mar-21	\$1,500.00		\$8,000.00
24-Mar-21		\$1,000.00	\$7,000.00
01-Apr-21	\$1,500.00		\$8,500.00
01-Apr-21		\$2,000.00	\$6,500.00
15-Apr-21	\$1,500.00		\$8,000.00
29-Apr-21		\$1,500.00	\$6,500.00
01-May-21	\$1,500.00		\$8,000.00
14-May-21		\$1,500.00	\$6,500.00
15-May-21	\$1,500.00		\$8,000.00
28-May-21		\$1,500.00	\$6,500.00
01-Jun-21	\$1,500.00		\$8,000.00
15-Jun-21	\$1,500.00		\$9,500.00
01-Jul-21	\$1,500.00		\$11,000.00
08-Jun-21		\$1,500.00	\$9,500.00
15-Jul-21	\$1,500.00		\$11,000.00
22-Jul-21		\$1,500.00	\$9,500.00
01-Aug-21	\$1,500.00		\$11,000.00
15-Aug-21	\$1,500.00		\$12,500.00
29-Aug-21		\$1,500.00	\$11,000.00
01-Sep-21	\$1,500.00		\$12,500.00
15-Sep-21	\$1,500.00		\$14,000.00
17-Sep-21		\$1,500.00	\$12,500.00
01-Oct-21	\$1,500.00		\$14,000.00
02-Oct-21		\$1,500.00	\$12,500.00
15-Oct-21	\$1,500.00		\$14,000.00
15-Oct-21		\$1,500.00	\$12,500.00
01-Nov-21	\$1,500.00		\$14,000.00
05-Nov-21		\$1,500.00	\$12,500.00
15-Nov-21	\$1,500.00		\$14,000.00
01-Dec-21	\$1,500.00		\$15,500.00
15-Dec-21	\$1,500.00		\$17,000.00
01-Jan-22	\$1,500.00		\$18,500.00
15-Jan-22	\$1,500.00		\$20,000.00
01-Feb-22	\$1,500.00		\$21,500.00
15-Feb-22	\$1,500.00		\$23,000.00
01-Mar-22	\$1,500.00		\$24,500.00
15-Mar-22	\$1,500.00		\$26,000.00
Total	\$57,000.00	\$31,000.00	\$26,000.00

Analysis

Sections 46(1) through 46(4) of the Act state:

- 46(1)** A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than *10 days after the date the tenant receives the notice*.
- (2) A notice under this section must comply with section 52 [*form and content of notice to end tenancy*].
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
- (4) Within 5 days after receiving a notice under this section, the tenant may
 - (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.

CC stated the Landlord served the First 10 Day Notice on the Tenants in-person on December 6, 2021. The Tenants are deemed to have received the First 10 Day Notice on December 9, 2021, being three days after it was emailed by the Landlord to the Tenants. Pursuant to section 46(4) of the Act, the Tenants had 5 days, or December 14, 2021, within which to make an application for dispute resolution to dispute the 10 Day Notice. The records of the Residential Tenancy Branch disclose the Tenants made their application on December 9, 2021. Accordingly, the Tenants made their application within the five-day dispute period. Where a landlord serves additional Ten Day Notices on a tenant and the tenant has disputed the first Ten Day Notice within the 5-day dispute period, an arbitrator has the discretion to amend the tenant's application to seek cancellation of all subsequent Ten Day Notices. However, as noted above, the Tenants did not attend the hearing and the Tenants' Application has been dismissed. Based on the above, it is unnecessary for me to consider whether to add a claim to the Tenants' Application to seek cancellation of the Second 10 Day Notice.

I accept CC's undisputed testimony in its entirety. I find the Tenants failed to pay \$17,000.00 in rent as of December 15, 2021. I find the Tenants are in rental arrears of \$26,000.00 covering the period September 1, 2021 to the date of this hearing on March 25, 2022. Section 26(1) of the Act states:

- 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 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 late payments occurred over a period of 19 years. I find that the Landlord's acceptance of the late payments over 19 months did not mean that the Landlord had acquiesced in requiring compliance of the contractual obligation of the Tenants 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. I find the First 10 Day Notice meets the form and content requirements of section 52 of the Act.

Sections 55(1) and 55(1.1) of the Act state:

- 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
- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
 - (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

- (1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 [*landlord's notice: non-payment of rent*], and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

Based section 55(1.1) of the Act, I order the Tenants pay the Landlord \$26,000.00, representing unpaid rental arrears from September 1, 2020 through to March 25, 2022, as specified above. Pursuant to section 72(2) of the Act, the Landlord may retain the security deposit of \$1,500.00 in partial satisfaction of the Monetary Order made above.

In addition, pursuant to section 55(1) of the Act, I grant the Landlord an order of possession effective two days after she serves the Tenants with a copy of this decision and attached order. As I have found the Landlord is entitled to an Order of Possession based on the First 10 Day Notice, it is unnecessary for me to consider whether the Landlord is entitled to an Order of Possession based on the Second 10 Day Notice.

As the Landlord has been successful in her application, pursuant to section 72(1), I order the Tenants pay for the Landlord's filing fee.

Residential Tenancy Branch Policy Guideline 3 states in part:

B. Overholding tenant and compensation

Section 44 of the RTA (section 37 of the MHPTA) sets out when a tenancy agreement will end. A tenant is not liable to pay rent after a tenancy agreement has ended. If a tenant continues to occupy the rental unit or manufactured home site after the tenancy has ended (overholds), then the tenant will be liable to pay compensation for the period that they overhold pursuant to section 57(3) of the RTA (section 50(3) of the MHPTA). This includes compensation for the use and occupancy of the unit or site on a per diem basis until the landlord recovers possession of the premises. In certain circumstances, a tenant may be liable to compensate a landlord for other

losses associated with their overholding of the unit or site, such as for loss of rent that the landlord would have collected from a new tenant if the overholding tenant had left by the end of the tenancy or for compensation a landlord is required to pay to new tenants who were prevented from taking occupancy as agreed due to the overholding tenant's occupancy of the unit or site.

Based on PG 3, Landlord has the option of making an application for dispute resolution to seek compensation for use and occupation of the rental unit by the Tenants for any time they overhold the rental unit after March 25, 2022.

Conclusion

The Tenants' application is dismissed without leave to reapply.

Pursuant to section 55(1.1) of the Act, I order the Tenants pay the Landlord \$24,600.00 representing the following:

Description	Amount
Rental Arrears from December 1, 2021 to March 1, 2022	\$26,000.00
Filing Fee for Landlord's Application	\$100.00
Less Tenant's Security Deposit	\$1,500.00
Total	\$24,600.00

This Monetary Order must be served by the Landlord on the Tenants and may be enforced in Provincial Court.

Pursuant to section 55(1) of the Act, I order the Tenants deliver vacant possession of the rental unit to the Landlord within two days of being served with a copy of this decision. Should the Tenants 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: March 28, 2022

Residential Tenancy Branch