Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, PSF, OLC, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- cancellation of the One Month Notice to End Tenancy for Cause (the Notice), pursuant to section 47;
- an order requiring the landlord to provide services or facilities as required by the tenancy agreement or the Act, pursuant to section 62;
- an order for the landlord to comply with the Act, the Residential Tenancy Regulation and/or tenancy agreement, pursuant to section 62; and
- an authorization to recover the filing fee for this application, under section 72.

Tenant EH (the tenant) and the respondent attended the hearing. JS represented the respondent. Agents SM and JG also attended. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: “A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000.”

I note that section 55 of the Act requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the Act.

Preliminary Issue – Respondents

The tenancy agreement and the Notice indicate the landlord is 'The Coronada'. JS affirmed she represents 'The Coronada'. The tenant stated he communicates with JS.

Both parties agreed Canadian Tenant Inspection Services Ltd. is not related to the tenancy.

Agent SM testified he represents Vancouver Eviction Services and acted as a representative of the landlord The Coronada.

Based on the tenancy agreement, the Notice and the testimony, pursuant to section 64(3)(a) and (c) of the Act, I have amended the tenant's application to name the respondent 'The Coronada', represented by agent JS (the landlord) and Vancouver Eviction Services and to exclude respondent Canadian Tenant Inspection Services Ltd.

Preliminary Issue – Service

The tenant said he served the notice of hearing by registered mail and did not serve the evidence. The landlord confirmed she received the notice of hearing and had enough time to review it. Based on the testimony offered by the tenant and the landlord, I find the tenant served the notice of hearing in accordance with section 89(1)(c) of the Act.

Per rule of procedure 3.14, I am excluding the tenant's evidence from consideration.

The tenant confirmed receipt of the landlord's evidence on March 08, 2022 and that he had enough time to review it.

I find the landlord sufficiently served the response evidence, per section 71(2)(c) of the Act.

Preliminary Issue - Unrelated Claims

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an application for dispute resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the Notice and the continuation of this tenancy is not sufficiently related to any of the tenant's other claims to warrant that they be heard together.

The tenant's other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the notice. I exercise my discretion to dismiss all of the tenant's claims with leave to reapply except cancellation of the notice to end tenancy which will be decided upon.

Issues to be Decided

Is the tenant entitled to:

1. Cancellation of the Notice?
2. An authorization to recover the filing fee?

If the tenant's application is dismissed, is the landlord entitled to an order of possession?

Background and Evidence

While I have turned my mind to the accepted evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending party; it is the landlord's obligation to present the evidence to substantiate the Notice.

Both parties agreed the tenancy started in September 2017. Monthly rent, including parking, is $1,745.00, due on the first day of the month. At the outset of the tenancy a security deposit of $797.50 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It indicates: "rent in full must be received by the landlord on or before the first calendar day of each month."

Both parties agreed the landlord served the Notice and the tenant received it on December 23, 2021. The tenant submitted this application on December 31, 2021 and continues to occupy the rental unit.

The Notice was submitted into evidence. It is dated December 23, 2021 and the effective date is January 31, 2022.

The reasons to end the tenancy are:

- The tenant is repeatedly late paying rent.
- The tenant or a person permitted on the property by the tenant has
    - Significantly interfered with or unreasonably disturbed another occupant or the landlord.
    - Seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

The details of the cause are:

> The tenant has been repeatedly late paying rent for the following months July 2021 , August 2021, November 2021, December 2021.
> The tenants girlfriend has caused extreme disturbances in the building.

The landlord stated the only reason she is seeking an order of possession is because the tenant is repeatedly late paying rent.

The landlord testified the tenant paid July rent on July 02 and August rent on August 03, 2021 by electronic transfer. SM said that electronic transfers can be completed any day of the year, including Sundays and statutory holidays.

Both parties agreed that rent must be paid with cheques of drafts. The landlord affirmed she informed the tenant on August 03, 2021 that he cannot pay rent by electronic transfers. The tenant stated the landlord informed him on August 31, 2021 that he cannot pay rent by electronic transfers.

The landlord testified the tenant paid November rent on November 02 (Tuesday) and December rent on December 02, 2021 (Thursday) by draft issued and delivered to the landlord. The landlord said the tenant puts the drafts in a mail slot and she picks up the drafts on the second day of the month.

The tenant affirmed that he is allowed to put the draft in the mail slot until 11:59 P.M. on the first day of the month, and the landlord informed him she only collects the draft on the second day of the month.

The landlord stated that rent must be paid until 11:59 P.M. on the first and it is not relevant when she picks up the drafts or cheques from the mail slot.

The tenant testified he has been putting the draft in the mail slot on the second day of the month most of the months since the onset of the tenancy.

The landlord said the tenant paid rent late in other months. SM affirmed the consulted with the landlord's accountant and he confirmed the tenant did not pay rent late in the last three years. Later the landlord stated the tenant only paid rent late in July, August, November and December 2021.

The landlord and SM testified they did not warn the tenant that his tenancy may end if he does not pay rent on the due date. The tenant said the landlord served a warning in writing in September 2021 about late payment of rent, but the landlord did not specify the due date of rent.

The tenant affirmed the Notice must be cancelled because of estoppel.

Analysis

I accept the undisputed testimony that the landlord served the Notice and the tenant received it on December 23, 2021. I find the tenant's application was submitted before the ten-day deadline to dispute the Notice, in accordance with Section 47(4) of the Act.

Pursuant to Rule of Procedure 6.6, the landlord has the onus of proof to establish, on a balance of probabilities, that the notice issued to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct and sufficient cause to end the tenancy.

Section 47(1)(b)of the Act states:

> A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
> the tenant is repeatedly late paying rent;

Residential Tenancy Branch Policy Guideline 38 states:

> 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
> A landlord who fails to act in a timely manner after the most recent late rent payment may be determined by an arbitrator to have waived reliance on this provision.
> […]
> Whether the landlord was inconvenienced or suffered damage as the result of any of the late payments is not a relevant factor in the operation of this provision.

I accept both parties uncontested testimony that rent is due on the first day of the month.

The tenant’s testimony about paying rent on the second day of the month since the onset of the tenancy was convincing. The testimony offered by the landlord and agent SM about late payment of rent was contradictory. Based on the tenant’s convincing testimony, I find the tenant has been paying rent late since the onset of the tenancy in September 2017.

Based on the testimony offered by both parties, I find the landlord did not warn the tenant in writing that the landlord was no longer accepting payment of rent after the first calendar day of the month.

The landlord has not been enforcing her right to receive payment in full on the first calendar day of the month. The legal doctrine of estoppel is a concept that restricts a party from relying on its full legal rights if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly. In order to return to a strict enforcement of their right, the first party must give the second party notice in writing, that they are changing their conduct and are now going to enforce the right previously waived or not enforced.

In the March 16, 2020 decision from the British Columbia Supreme Court, Guevara v. Louie, 2020 BCSC 380, Justice Sewell writes:

> [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:
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> > …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 [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:
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> > …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.).

The landlord is estopped from enforcing the provision of the tenancy agreement that rent is due in full on the first of the month by her past conduct of accepting late payments of rent.

The landlord is required to provide reasonable notice in writing to the tenant of her intention to reassert her right to be paid rent in full on the first calendar day of the month pursuant to the tenancy agreement.

As such, I find the landlord failed to prove, on a balance of probabilities, the ground of the Notice. Accordingly, the Notice is cancelled and of no force or effect.

I authorize the tenant to recover the filing fee, as the tenant was successful.

Conclusion

The Notice dated December 23, 2021 is cancelled and of no force or effect. This tenancy will continue in accordance with the Act.

Pursuant to section 72(2)(a) the tenant is authorized to deduct $100.00 from the next rent payment to recover the filing fee.

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 16, 2022

Residential Tenancy Branch