



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, DRI, FFT

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the “*Act*”):

- To cancel a One-Month Notice to End Tenancy signed March 7, 2022 (the “One-Month Notice”) pursuant to s. 47;
- To dispute a rent increase pursuant to s. 43;
- An order under s. 62 that the Landlord comply with the *Act*, Regulations, and/or the tenancy agreement; and
- Return of the Tenant’s filing fee pursuant to s. 72.

H.F. appeared as Tenant. A.V. appeared as Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Tenant advises that he served the Landlord with the Notice of Dispute Resolution and his evidence by way of registered mail. The Landlord acknowledges receipt of the Tenant’s application materials. I find that the Tenant served his application materials on the Landlord by way of registered mail in accordance with s. 89 of the *Act* and the Landlord acknowledges its receipt.

The Landlord advises that he served his response evidence on the Tenant by way of registered mail. The Tenant acknowledges receipt of the Landlord’s evidence. I find that the Landlord served his response evidence on the Tenant by way of registered mail in accordance with s. 89 of the *Act* and the Tenant acknowledges its receipt.

Preliminary Issue – Service of the One-Month Notice

The Landlord advises that he served the One-Month Notice by way of registered mail sent on March 7, 2022. The Landlord provides tracking information with respect to the One-Month Notice indicating it was received by the Tenant on March 19, 2022. The Tenant acknowledges receiving the One-Month Notice on March 19, 2022.

The Tenant indicates that he is under a heavy workload and did not take notice of the registered mail delivery notice left at the rental unit. He further advises that he took steps to immediately retrieve the registered mail package from the post office when he discovered the delivery notice.

The Landlord made submissions to the effect that the conclusive presumption under s. 47(5) of the *Act* ought to apply. It was argued that the deemed receipt of the One-Month Notice under s. 90 would be on March 12, 2022 and that the Tenant submitted his application on March 23, 2022.

Policy Guideline #12 provides guidance with respect to the service provisions of the *Act*. It notes that the deeming provisions under s. 90 are applied unless there is evidence to the contrary. It is further noted that s. 90 has been interpreted by the courts as forming a rebuttable presumption of service that can be displaced when fairness requires that to be done.

I am satisfied that the Tenant has rebutted the deemed service presumption of s. 90 of the *Act*. He testified, and I accept, that he did not discover the delivery notice until some time after it had been left at the rental unit by Canada Post as it was not left on his door. I accept that his work schedule was such that he was not present at the rental unit with any frequency. I further accept that he took immediate steps to retrieve the registered mail package when he discovered the notice and filed his application disputing the One-Month Notice shortly thereafter. The Tenant was not neglectful in taking steps to obtain the registered mail package or filing his application.

I find that that the Landlord has served the One-Month Notice in accordance with s. 88 of the *Act* by sending it via registered mail on March 7, 2022. I further find that deeming provision under s. 90 of the *Act* ought not apply as to do so would be unfair given the Tenants evidence and on the clear evidence that it was received on March 19, 2022. I find that the One-Month Notice was received by the Tenant on March 19, 2022.

The conclusive presumption under s. 47(5) of the *Act*, therefore, does not apply.

Issue(s) to be Decided

- 1) Should the One-Month Notice be cancelled?
- 2) If not, is the Landlord entitled to an order for possession?
- 3) Should the rent increase be permitted?
- 4) Should the Landlord be ordered to comply with the *Act*, Regulations, and/or the tenancy agreement?
- 5) Is the Tenant entitled to the return of his filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant took occupancy of the rental unit on October 1, 2013.
- Rent of \$1,340.00 is due on the first day of each month.
- The Landlord holds a security deposit of \$600.00 in trust for the Tenant.

I am told there is a written tenancy agreement by the Tenant. However, none was put into evidence by either party.

The Landlord indicates that he issued the One-Month Notice after the Tenant was repeatedly late in rent. The One-Month Notice notes the following incidents in which rent was paid late:

- September 2021
- October 2021
- December 2021
- February 2022
- March 2022

The Landlord referred me to text messages he had with the Tenant on the incidents as alleged above, and further includes a text indicating rent was late in April 2022, which is after the One-Month Notice was issued. The text message reminders that rent was not paid and are dated September 2, 2021, October 2, 2021, December 3, 2021, February

2, 2022, March 2, 2022, and April 2, 2022. The text message response from the Tenant acknowledges by various means that he forgot to pay rent.

The Landlord acknowledged at the hearing that the Tenant is not in arrears for his rent payments.

At the hearing, the Tenant could not recall whether he failed to pay rent on the first day of the month as alleged by the Landlord. He stated that he always pays on the first. The Tenant did not deny the text message exchange was an accurate reflection of his correspondence with the Landlord. The Tenant confirmed that rent is due on the first but argued that he has been a good tenant and that the issue of late rent payments was only every raised by the Landlord recently. He indicates that his rent payment pattern has not changed significantly over the course of the tenancy.

The Tenant applies to dispute a rent increase and provides a copy of a settlement offer the Landlord provided with respect to settling this dispute. The Landlord says no rent increase was issued.

Analysis

The Tenant applies to cancel a One-Month Notice and to dispute a rent increase.

Under s. 47 of the *Act*, a landlord may end a tenancy for cause and serve a one-month notice to end tenancy on the tenant. A tenant may dispute a one-month notice by filing an application with the Residential Tenancy Branch within 10 days after receiving the notice. If a tenant disputes the notice, the burden for showing that the one-month notice was issued in compliance with the *Act* rests with the landlord. Presently, the Landlord issues the One-Month Notice on the basis that repeated late payments under s. 47(1)(b) of the *Act*.

Policy Guideline #38 provides guidance with respect to when a landlord may end a tenancy for the tenant's repeated late rent payments. It states the following:

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.

In exceptional circumstances, for example, where an unforeseeable bank error has caused the late payment, the reason for the lateness may be considered by an arbitrator in determining whether a tenant has been repeatedly late paying rent.

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.

As acknowledged and confirmed by the parties, rent is due on the first day of each month.

I have reviewed the text message exchange between the parties, which confirm that the Landlord has reminded the Tenant to pay rent on the following occasions:

- September 2, 2021;
- October 2, 2021;
- December 3, 2021;
- February 2, 2022;
- March 2, 2022; and
- April 2, 2022.

The Tenant did not specifically deny the Landlord’s allegations or argue that rent was paid on March 1, 2022, February 1, 2022, December 1, 2021, October 1, 2021, or September 1, 2021. The Tenant did not specifically deny the text messages were inaccurate or that the replies were not sent by him. When I asked specifically if any of the allegations raised by the Landlord were incorrect, the Tenant was evasive in his response.

I find that the text messages provided by the Landlord are accurate. The Tenant did not deny their accuracy. I further find that the text messages indicate that the Tenant was late in paying rent on five occasions prior to the One-Month Notice being issued, which

is acknowledged by the Tenant in the text message correspondence provided by the Landlord.

The Tenant indicated that he had a lot going on his life and that the rent payment pattern is not irregular relative to his conduct during the tenancy. Section 26 of the *Act* sets a clear expectation that rent must be paid when it is due under the tenancy agreement. The Tenant's obligation under s. 26 applies even if the Landlord is in breach of the *Act*, Regulations, or the tenancy agreement.

Considering whether there are any exculpatory reasons for the late payment as suggested by Policy Guideline #38, the Tenant provides none that are valid. Policy Guideline #38 provides clear example that this is only relevant if the late payment can be attributed to something that is out of the Tenant's control. Having a busy work schedule does not excuse an obligation to pay rent on the 1st and merely indicates the need for greater planning by the Tenant in the form of post-dated cheques or the like.

I have reviewed the One-Month Notice and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, states the correct effective date, sets out the grounds for ending the tenancy, and is in the approved form (RTB-33).

I find that the One-Month Notice is valid and was properly issued under the *Act*. Accordingly, the Tenant's application to cancel the One-Month Notice is dismissed without leave to reapply.

Section 55(1) of the *Act* provides that where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with s. 52, then I must grant the landlord an order for possession. That has occurred here. Given that, I grant the Landlord an order for possession.

Though not described in the evidence listed above, the Tenant did discuss that he had recently undergone surgery in early May of 2022 that he was in pain and his shoulder was immobilized. As mentioned, the Landlord acknowledges the Tenant is not in arrears of rent. I am cognizant of the standard practice that an order for possession be effective two-days after it is received by the Tenant, however, there is no requirement that this be done under the *Act* if the effective date set out in a valid the notice to end tenancy has passed. This is made clear by the language of s. 55(3) of the *Act*.

Given the Tenant's recent surgery and the fact that rent has been paid in full for the month of May 2022, I grant the Landlord an order for possession effective on May 31, 2022. The Tenant shall provide vacant possession to the Landlord by no later than 1:00 PM on that date.

As the tenancy is over, I need not consider the application with respect to a disputed rent increase or an order under s. 62 of the *Act*. These portions of the Tenant's claim are dismissed without leave to reapply.

Conclusion

The Tenant's application to cancel the One-Month Notice is dismissed without leave to reapply. The Landlord is entitled to an order for possession. Pursuant to s. 55(1) of the *Act*, I order that the Tenant give vacant possession of the rental unit to the Landlord by no later than **1:00 PM on May 31, 2022**.

As the tenancy is over, the issues of the disputed rent increase and an order that the Landlord comply with the *Act* are moot. The Tenant's claims under s. 43 and 62 of the *Act* are dismissed without leave to reapply.

As the Tenant's application was unsuccessful, I find that he is not entitled to the return of his filing fee. The Tenant's claim under s. 72 of the *Act* is dismissed without leave to reapply.

It is the Landlord's obligation to serve the order for possession on the Tenant. If the Tenant does not comply with the order for possession, it may be filed by the Landlord with the Supreme Court of British Columbia and enforced as an order of that Court.

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: May 12, 2022

Residential Tenancy Branch