Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PLAN A REAL ESTATE SERVICES LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC-MT MNDCT FFT

Introduction

The tenant disputes a One Month Notice to End Tenancy for Cause (the "Notice") pursuant to section 47(4) of the *Residential Tenancy Act* ("Act"). In addition, the tenant seeks compensations under section 67 of the Act based on rent increases not being properly implemented under the Act. Finally, the tenant seeks to recover the cost of the application filing fee under section 72 of the Act.

Attending the dispute resolution hearing were the tenant and two representatives for the corporation landlord, Plan A Real Estate Services Ltd. The parties were affirmed, no service issues were raised, and Rule 6.11 of the Residential Tenancy Branch's *Rules of Procedure* (the "*Rules")* was explained.

Preliminary Issue: Unrelated Claims

Rule 2.3 of the *Rules* 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."

In this application, it is my finding that the issue of whether the Notice is valid is unrelated to the issue of whether the landlord increased rent in compliance with the Act. The Notice was given because the tenant was allegedly repeatedly late paying rent, and the amount of rent itself was not contested by the tenant in respect of the Notice. Further, given that the dispute resolution hearing was scheduled for one hour, there was insufficient time for me to hear and consider testimony, submissions, argument, or evidence in respect of the claim for compensation.

As explained to the parties during the hearing, the tenant's application and claim for compensation is thus dismissed, with leave to reapply. He is, therefore, at liberty to make another application for dispute resolution regarding his claim for compensation.

Issues

1. Is the tenant entitled to an order cancelling the Notice?
2. If the Notice is upheld, is the landlord entitled to an order of possession?
3. Is the tenant entitled to recover the cost of the application filing fee?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the issues of this dispute, and to explain the decision, is reproduced below.

I turn first to the service of the Notice. The landlord gave evidence (including a Proof of Service document) that they posted the Notice to the door of the rental unit on June 3, 2022. By "door" the landlord means the entrance door associated with the legal unit address of the rental unit: 3103.

There are, however, two entrance doors to the rental unit, as it is a two-floor unit in a high-rise building. The tenant argued that while 3103 is the legal address of the rental unit, the more frequently used entrance door is numbered 3203. He testified that he never uses the door to 3103 and that the landlord knows this is the case. Because of the infrequent use of the door, he did not discover the Notice until June 13, 2022, at which time he immediately called the landlord (Mr. M) to discuss matters. The tenant filed his application for dispute resolution on June 17, 2022 (as indicated by internal Residential Tenancy Branch records).

It is the landlord's position that the tenant missed the deadline to dispute the Notice and that section 47(5) of the Act ought to apply. Conversely, the tenant argued that he only received the Notice on June 13 and that the application to dispute it was filed on time.

In respect of the Notice itself, it was served on the ground that the tenant was repeatedly late paying rent. Specifically, the landlord gave evidence that the tenant paid rent (which is $4,278.33) late on December 2, 2021, on February 2, 2022, and again on May 2, 2022. The Notice was then issued the next month. There was, I note, some discussion about the date that the tenant paid the rent and the date that the landlord received the rent; the landlord explained that the late payment dates are tied to the date that the tenant paid the rent, not when the landlord received the rent. In support of the landlord's submission on late rent there was in evidence a payment record report. A "payment initiated date" column indicated which dates payment of rent was late.

The landlord acknowledged that the tenant had paid rent late during the tenancy (which began in December 2016) on “very few occasions.” However, on September 21, 2021, the landlord issued both a notice of rent increase and a warning letter about being late on the rent. The tenant denied ever receiving a copy of the warning letter and submitted that the landlord fraudulently included this letter in the landlord’s evidence package.

In his testimony the tenant said that late rent was “never an issue before,” that it was “not a big deal,” and that on any time rent was late he’d simply pay a $25.00 late rent fee. Late rent only became an issue more recently, he argued, because the landlord intends to re-rent the rental unit at a higher rent. In support of this line of argument the tenant referred to an online listing for the rental unit, where the rent is listed at $5,500.00, a full $1,221.17 higher than the current rent. The landlord acknowledged the listing and remarked that in anticipation of the Notice being upheld, it is standard procedure. (He added, though, there had been no showings or offers from anyone.)

The tenant argued that the principle of estoppel ought to apply in respect of this dispute: the landlord previously accepted, without complaint, the tenant’s late payment of rent and ought not to attempt only now to end the tenancy. He testified that he was late 26 times over the approximately 70 months of the tenancy, and on those occasions was late by a day. The landlord, he argued, had “many, many opportunities” to enforce the timely payment of rent, but chose not to.

In rebuttal, the landlord argued that the tenant was not late 26 times, but rather, late only about 6 times over the 6-year tenancy. These six instances were sporadic, he noted. As for the Notice being issued to give the landlord an opportunity to re-rent the rental unit at a higher price, the landlord denied that this was the case. Last, he argued that the tenant’s assertion about not receiving the warning letter is “totally false,” that it was attached to the notice of rent increase, and that only now is it a “convenient excuse.” Regardless, he noted, a landlord may issue a notice to end tenancy for repeated late payment of rent without having to issue any sort of warning.

During a further rebuttal by the tenant, he argued that the payment system shows 26 actual late payments of rent. A copy of a document titled “Tenant Statement for [Tenant’s Name] was submitted into evidence by the landlord. The statement shows late rent fees being incurred 3 times in 2017, 3 times in 2018, 0 times in 2019, 2 times in 2020, and 0 times in 2021. These numbers are inconsistent with the numbers provided by either party, neither of whom provided any documentation to support the number of times rent was actually late (though the landlord’s statement is closer to the 6 times rent was late, as submitted by the landlord during his testimony).

Analysis

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.

A. Preliminary Issue of Service of Notice

A starting point of analysis for this issue is section 47(4) of the Act which states that "A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice."

In this dispute, the landlord gave evidence that the Notice was posted on the door of the rental unit on June 3, 2022. Section 88(g) of the Act states that a notice to end tenancy (or any document not covered by section 89 of the Act) may be served "by attaching a copy to a door or other conspicuous place at the address at which the person resides [...]" Neither party disputed the fact that the door with the address 3103 is the legal address. As such, I find no issue with how the Notice was served on the tenant: the Notice was properly affixed to the door at the address at which the person resides. That the door to which the Notice was attached was not regularly used by the tenant is, for the purposes of service under the Act, irrelevant.

The tenant testified—and the landlord did not dispute the tenant's testimony on this point—that he only discovered the Notice on June 13. Based on this fact, it is my finding that the tenant received the Notice on June 13. There is a crucial difference between the date that a landlord serves a notice to end tenancy and the date that the tenant receives a notice to end tenancy.

Certainly, in the absence of any evidence to the contrary as to when a tenant receives a notice to end a tenancy, deemed receiving provisions (under section 90 of the Act) will apply. But this is not such a case. Section 47(4) of the Act clearly states that the clock starts ticking from the date that a tenant *receives* a notice, and not from the date that the landlord serves a notice.

Here, the tenant received the Notice on June 13 and had until June 23 to file an application to dispute the Notice. An application was filed on June 17 and thus made within the required deadline. As such, no presumption of acceptance of the Notice has occurred, which would have triggered the issuing of an order of possession.

B. The Notice and Late Payment of Rent

Neither party disputed that the tenant has paid rent late, though the total number of times over the course of the tenancy varies widely. Section 47(1)(b) of the Act states that a landlord may end a tenancy by giving notice to end the tenancy if "the tenant is repeatedly late paying rent."

Residential Tenancy Policy Guideline 38. Repeated Late Payment of Rent (version April 2004) states, in part, that (reformatted for brevity):

> 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 this dispute, the tenant paid rent late in December 2021, February 2022, and again in May 2022. Thus, *prima facie,* it is my finding that the required minimum of three late payments of rent is established. The late payments are not sufficiently far apart, and the landlord cannot be found to not have acted in a timely manner. This having been said, the tenant raised the issue of estoppel, to which I now turn.

Estoppel occurs when one party to a legal claim is stopped from taking legal action that is inconsistent with that party's previous words or conduct. This legal doctrine holds that one party may be prevented from enforcing a legal right to the detriment of the other party if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and acted accordingly. 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 strictly enforce the right previously waived or not enforced.

Here, landlord's failure to (or decision not to) make any effort since 2016 to enforce the timely, on-time payment of rent has, through its inaction, provided implied consent for the tenant to pay rent late without legal consequence. While the tenant was, and is, required under the Act to pay rent on time when it is due on the first day of the month, the landlord has not (until issuing the Notice) made any effort to enforce this obligation.

Finally, in respect of the warning letter purportedly given to the tenant by the landlord, the parties vehemently disagreed on whether this occurred: the landlord is adamant that they gave this letter to the tenant, whereas the tenant denies ever receiving the letter. When two parties to a dispute provide equally plausible accounts of events, the party making the claim has the burden to provide sufficient evidence *over and above* their testimony to establish their claim. In the case before me, I find the landlord has not provided any persuasive evidence that the warning letter was given to the tenant. As such, I cannot find that the landlord put the tenant on notice that they would be returning to a state of strict enforcement of their right to receive rent on the first day of the month. Therefore, it is my conclusion that the principle of estoppel shall apply.

For the reasons given above, I grant the tenant's request to cancel the Notice dated and signed June 3, 2022. The tenancy shall continue until it is ended in accordance with the Act. However, the tenant is now aware that he must commence paying monthly rent on the first day of the month, as per the tenancy agreement.

As the tenant was successful in having the Notice cancelled, he is entitled to recover the cost of the application filing fee. To this end, he may deduct $100.00 from his rent payment for September 1, 2022, pursuant to section 72(2)(a) of the Act.

Conclusion

The application to cancel the Notice is hereby GRANTED.

This decision is final and binding on the parties, and it is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal this decision is limited to grounds provided under section 79 of the Act or by way of an application for judicial review under the *Judicial Review Procedure Act,* RSBC 1996, c. 241.

Dated: August 4, 2022

Residential Tenancy Branch