Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPR-DR MNR-DR FFL**

Introduction

This hearing was reconvened as a result of the Landlord's application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession for non-payment of rent pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent pursuant to section 55; and
- authorization to recover the Landlord's filing fee for this application from the Tenant pursuant to section 72.

This hearing was reconvened from a non-participatory, *ex parte*, "direct request" proceeding. In an interim decision dated April 26, 2022 ("Interim Decision"), the presiding adjudicator determined that a participatory hearing was necessary to address questions that could not be resolved on the documentary evidence submitted by the Landlord. As a result, this hearing was scheduled and came on for hearing on April 15, 2022, to consider the Application. Notices of the reconvened hearing were enclosed with the Interim Decision and were served on the parties by the Residential Tenancy Branch ("RTB")

The Tenant did not attend this reconvened hearing. I left the teleconference hearing connection open until 12:11 pm in order to enable the Tenant to call into this teleconference hearing scheduled for 11:00 am. The Landlord and the Landlord's advocate ("LF") attended the hearing. They 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 Notice of Dispute Resolution Proceeding ("NDRP"). I also confirmed from the teleconference system that the Landlord, LF and I were the only ones who had called into this teleconference.

The Landlord stated he served the original Notice of Dispute Resolution by Direct Request and his evidence (collectively the NDRP-DR Package") on the Tenant in-person on March 25, 2022. The Landlord submitted into evidence a signed and witnessed Proof of Service on Form RTB-44 to corroborate his testimony the NDRP-DR Package was served on the Tenant in-person. I find the NDRP-DR Package was served on the Tenant in accordance with the provisions of sections 88 and 89 of the Act.

The Landlord stated the Tenant did not serve any evidence on the Landlord for this proceeding.

Preliminary Matter – Correction of Rental Address on 10 Day Notice and Application

At the outset of the hearing, I noted that the tenancy agreement provided a unit number for the rental address whereas the 10 Day Notice and the Application did not state a unit number. The Landlord stated this was an oversight and requested I amend the 10 Day Notice and the Application to add the unit number to the rental address. The Landlord stated the 10 Day Notice was served on the Tenant in-person at the rental unit and the Tenant signed the bottom of page 1 of the 10 Day Notice to acknowledge he received the 10 Day Notice.

Rule 4.2 of the RoP states:

> **4.2 Amending an application at the hearing**
>
> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.
>
> If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

The 10 Day Notice was served on the Tenant in-person. The Tenant knew or should have known the unit number of the rental unit was missing from the 10 Day Notice and could reasonably have anticipated the Landlord would seek an amendment to add the unit number to the rental unit stated in the Application. As such, pursuant to Rules 4.2 of the RoP, I order the Application amended to add the unit number of the rental unit to the rental address stated in the Application.

Section 68 of the Act states:

> 68(1) If a notice to end a tenancy does not comply with section 52 *[form and content of notice to end tenancy]*, the director may amend the notice if satisfied that
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> (a) the person receiving the notice knew, or should have known, the information that was omitted from the notice, and
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> (b) in the circumstances, it is reasonable to amend the notice.
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> (2) Without limiting section 62 (3) *[director's authority respecting dispute resolution proceedings]*, the director may, in accordance with this Act,
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> (a) order that a tenancy ends on a date other than the effective date shown on the notice to end the tenancy, or
>
> (b) set aside or amend a notice given under this Act that does not comply with the Act.

The 10 Day Notice was served on the Tenant in-person at the rental unit. I find the Tenant knew , or should have known, the unit number was omitted from the 10 Day Notice. As such, I find in the circumstances, it is reasonable to amend the 10 Day Notice. Based on the foregoing, pursuant to section 58(1) of the Act, I order the 10 Day Notice to be amended to include the unit number of the rental unit in the rental unit address stated in the 10 Day Notice.

Preliminary Matter – Correction of Tenant's First Name

At the outset of the hearing, I noted that the first name of the Tenant stated in the Application and the 10 Day Notice was different from the name of the Tenant stated in the tenancy agreement. The Landlord stated this was a mistake and the correct name of the Tenant was the first name of the Tenant stated in the tenancy agreement. The Landlord requested that I amend the Application and the 10 Day Notice to state the correct first name of the Tenant.

The 10 Day Notice was served on the Tenant in-person at the rental unit. I find the Tenant knew , or should have known, that the spelling of his first name in the 10 Day Notice was an error. As such, I find in the circumstances, it is reasonable to amend the 10 Day Notice and the Application to correct the spelling of the Tenant's first name. Based on the foregoing, pursuant to Rule 3.1 of the RoP and section 58(1) of the Act, I

order the 10 Day Notice and the Application to be amended to correct the Tenant's first name.

Preliminary Matter – Correction of Landlord's First Name

At the outset of the hearing, I noted that the first name of the Landlord stated in the Application and the 10 Day Notice was different from the name of the Landlord stated in the tenancy agreement. The Landlord stated this was a mistake and the correct name of the Landlord was the first name of the Landlord stated in the tenancy agreement. The Landlord requested that I amend the Application and the 10 Day Notice to state the correct first name of the Landlord.

The 10 Day Notice was served on the Tenant in-person at the rental unit. I find the Tenant knew , or should have known, unit that the spelling of his first name in the 10 Day Notice was an error. As such, I find in the circumstances, it is reasonable to amend the 10 Day Notice and the Application to correct the spelling of the Landlord's first name. Based on the foregoing, pursuant to Rule 3.1 of the RoP and section 58(1) of the Act, I order the 10 Day Notice and the Application to be amended to correct the Landlord's first name.

Background and Evidence

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

The Landlord stated the rental unit consisted of a recreational vehicle owned by the Landlord. The Landlord submitted into evidence a copy of the tenancy agreement between the Landlord and Tenant dated March 7, 2008. The Landlord stated the tenancy commenced on April 1, 2008, on a month-to-month basis, with rent of $450.00 payable on the 1st day of each month. The Landlord stated the Tenant was to pay a security deposit of $225.00 and a pet damage deposit of $225.00 by April 1, 2008. The Landlord stated the Tenant paid the security and pet damage deposits and that he was holding the deposits in trust for the Tenant. When I asked, the Landlord stated the rent payable by the Tenant was still $450.00 per month.

The Landlord submitted into evidence a copy of the 10 Day Notice and stated it was served on the Tenant in-person on February 11, 2022. The 10 Day Notice stated the

Tenant owed $1,250.00 for rental arrears as of February 1, 2022. The Landlord submitted into evidence a Direct Request Worksheet that disclosed the rental arrears of $1,250.00 arose from non-payment of rent on February 1, 2022. The Landlord submitted into evidence a receipt dated March 4, 2022 that was issued to the Tenant for $500.00. The receipt stated the $500.00 payment was marked with the notation that the payment was received from the Tenant "for use and occupancy only and does not constitute reinstatement of the tenancy agreement.".

When I asked the Landlord why the amount claimed for rent for February 1, 2022 was for $1,250.00 whereas the rent was $450.00 per month, LF stated the rental arrears of $1,250.00 were for rental arrears that accrued over a period of time. When I asked for the Landlord to provide me with the details on the calculation of the rental arrears, starting with the month in which the rental arrears first started to accrue, LF stated they did not have all of the receipts available at the time of the hearing to provide the information I requested. The Landlord also stated that the Tenant has been late paying the rent about 90% of the time since the tenancy started. LF stated the Landlord served the Tenant with a notice ("Warning Notice")stating the Landlord was going to strictly enforce the terms of the tenancy agreement and that the Tenant was required to pay the rent in full when due. However, the Landlord did not submit the Warning Notice to the RTB at least 14 days prior to the date of the hearing as required by the RoP.

The Landlord stated he did not expect the Tenant to ever pay the rental arrears and that he only wanted to obtain an Order of Possession requiring the Tenant to vacate the rental unit.

Analysis

1. Landlord's Claim for Order of Possession

Sections 26 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.

Pursuant to section 26(1) of the Act, a tenancy must pay the rent when it is due under the tenancy agreement unless the tenant has a right under the Act to deduct all or a portion of the rent.

. Sections 46(1) through 46(5) 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.
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> (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
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> (4) Within 5 days after receiving a notice under this section, the tenant may
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> (a) pay the overdue rent, in which case the notice has no effect, or
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> (b) dispute the notice by making an application for dispute resolution.
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> (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
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> (a) *is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and*
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> *(b) must vacate the rental unit to which the notice relates by that date.*
>
> [emphasis added in italics]

The undisputed testimony of the Landlord was the Tenant was served with the 10 Day Notice in-person on February 11, 2022. Page 1 of the 10 Day Notice had the Tenant's signature acknowledging he received the 10 Day Notice. Pursuant to section 46(4) of the Act, the Tenant had until February 16, 2022 within which to make an application for dispute resolution to dispute the 10 Day Notice. The Landlord stated he was unaware of the Tenant making an application for dispute resolution to dispute the 10 Day Notice.

Section 46(2) requires that a notice under this section must comply with section 52 of the Act. Section 52(d) of the Act requires the notice to end tenancy must provide the

grounds for ending the tenancy. In this case, the 10 Day Notice stated the grounds for ending the tenancy were the Tenant had rental arrears of $1,250.00. The Landlord did not submit a detailed accounting to the RTB, at least 14 days prior to this hearing, disclosing the details on the calculation of the rental arrears stated on the 10 Day Notice. The Landlord was unable to provide me during the hearing with detailed calculations, commencing from the month in which the rental arrears initially started, to demonstrate the Tenant owed the Landlord rental arrears of $1,250.00 as of February 1, 2022. As such, I find the Landlord has not established, on a balance of probabilities, that the Tenant owed $1,250.00 as of February 1, 2022. Based on the foregoing, I find the Landlord has not established the grounds for ending the tenancy as required by section 52(d) of the Act. As a result, I cannot find the Tenant is conclusively presumed to have accepted the tenancy ended on the effective date of the 10 Day Notice pursuant to section 46(5)(a) of the Act.

Furthermore, the Landlord stated the Tenant has been late paying rent about 90% of the time since the tenancy commenced in 2008. This raises the issue of whether the doctrine of estoppel applies to the Landlord seeking an Order of Possession based on rental arrears owing by the Tenant to the Landlord as of February 1, 2022. 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.
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> [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 CanIII 826 (BC CA), [1991] B.C.J. No. 3690 (C.A.)...
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> [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:

> ... 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 CanIII 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. During the hearing, the Landlord stated the Tenant made numerous late payments of rent since the tenancy commenced in 2008. Although LF stated the Landlord served the Tenant with a notice stating the Landlord was going to strictly enforce the terms of the tenancy agreement and that the Tenant was required to pay the rent in full when due, the Landlord did not submit the Warning Notice into evidence to corroborate her testimony. In the absence of the Landlord providing a copy of the Warning Notice at least 14 days prior to the date of this hearing, I find the doctrine of estoppel applies to the Landlord's claim for an Order of Possession pursuant to the 10 Day Notice as it would be unjust.

Based on the foregoing, I find the 10 Day Notice did not comply with section 55 of the Act and was not effective. Accordingly, the Landlord has not complied with section 46(2)

of the Act. I also find the doctrine of estoppel prevents the Landlord from making a claim for an Order of Possession, and the rental arrears, based on the 10 Day Notice. As such, I order the 10 Day Notice to be cancelled and the Application to be dismissed in its entirety without leave to reapply. The tenancy continues until ended in accordance with the provisions of the Act.

I recommend the Landlord call the Contact Centre of the RTB to obtain information on the procedures to end a tenancy in these circumstances.

Conclusion

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: August 17, 2022

Residential Tenancy Branch