



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) filed by the Tenants under the *Residential Tenancy Act* (the Act) on June 6, 2022, seeking:

- Cancellation of a One Month Notice to End Tenancy for Cause (the One Month Notice); and
- Recovery of the filing fee.

The hearing was convened by telephone conference call at 9:30 A.M. (Pacific Time) on October 20, 2022, and was attended by the Tenants D.R. and C.R. (the Tenants), D.R.'s spouse M.C., the Landlord G.S. (the Landlord), the Landlord G.S.'s spouse, D.S. (the Agent) and legal counsel for the Landlords, B.F. All testimony provided was affirmed. As the Landlord, the Agent, and legal counsel for the Landlords acknowledged service of the notice of dispute resolution proceeding (NODRP), the parties acknowledge receipt of each others documentary evidence, and the parties stated that they had no concerns with regards to the dates or methods of service, the hearing therefore proceeded as scheduled and I accepted the documentary evidence before me for consideration. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The parties were advised that pursuant to rule 6.10 of the Residential Tenancy branch Rules of Procedure (the Rules of Procedure), interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over me and one another and to hold their questions and responses until it was their opportunity to speak. The Parties were also advised that personal recordings

of the proceeding were prohibited under the Rules of Procedure and confirmed that they were not recording the proceedings.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in accordance with the Rules of Procedure, I refer only to the relevant and determinative facts, evidence, and issues in this decision. At the request of the parties, a copy of the decision and any orders issued in their favor, will be sent to them by the Residential Tenancy branch (the Branch) by e-mail at the e-mail addresses provided at the hearing.

Issue(s) to be Decided

Are the Tenants entitled to cancellation of the One Month Notice?

If not, are the Landlord entitled to an Order of Possession pursuant to Section 55(1) of the Act?

Are the Tenants entitled to recovery of the filing fee pursuant to section 72 of the Act?

Background and Evidence

The tenancy agreement in the documentary evidence before me indicates that the periodic (month-to-month) tenancy commenced on April 1, 2009, and that \$1,000.00 in rent is due on the first day of each month.

The Landlord D.S. and the Agent stated that due to a history of repeated late payment of rent, the One Month Notice was personally served on the Tenants on May 30, 2022. At the hearing, the Tenants confirmed receipt on this date and Branch records indicate that the Tenants filed their Application seeking cancellation of the One Month Notice on June 6, 2022.

The One Month Notice in the documentary evidence before me is on a 2021 version of the form, is signed and dated May 29, 2022, contains the address for the rental unit, has an effective date of June 30, 2022, and states that the Landlords are seeking to end the tenancy because of repeated late payment of rent. No details were added in the details of cause section.

There was no disagreement between the parties that the Tenants had paid rent late on numerous occasions going back many years. The Agent stated that the Tenants have paid rent late three times in the last 12 months, seven times in the last two years, and numerous other times as far back as 2018. In support of this testimony, the Agent pointed to a Ledger and bank transaction records and stated that the Tenants have no exceptional reasons for having continuously paid the rent late. Legal counsel for the Landlords pointed to Residential Tenancy Policy Guideline (Policy Guideline) #38, stating that it requires a minimum of three late payments of rent in order to end a tenancy under section 47 of the Act, and that it does not matter if these late payments are consecutive or not. Legal counsel argued that the Tenants' rent payment history clearly meets the requirement set out under the policy guideline for ending a tenancy pursuant to section 47(1)(b) of the Act.

The Tenants stated that they have been paying rent late since the beginning of their tenancy, and that although they mentioned the matter of late rent payments to the Landlord/Agent G.S., they were advised that the late payments were not an issue. As a result, the Tenants argued that the Landlord or the Landlords' agents had agreed to allow them to pay their rent late. The Tenants further argued that given the long standing history of late rent payments dating back to the start of the tenancy in 2009, the Landlords also waived their right to strict enforcement of the rent payment terms set out in the tenancy agreement and therefore should not be permitted to end their tenancy via the One Month Notice, without prior notice from the Landlords that they intend to enforce the term of the tenancy agreement requiring that they pay rent on the first day of each month. The Tenants also stated that they have no problem paying the rent on time on the first day of each month and that since receiving the One Month Notice, they have done so.

Legal counsel for the Landlords stated that although rent for July, August, September, and October of 2022 has been paid on time, the Tenants were still late in paying rent in May and June of 2022, despite having received a notice in April of 2022 reminding them that rent is due on or before the first day of each month and advising them that the Landlord D.S. has noticed their history of late payment and is monitoring their rent payments. As such, legal counsel argued that the Tenants were in fact forewarned prior to service of the One Month Notice that rent was required to be paid on time. Legal counsel for the Landlords pointed to the copy of this reminder letter in the documentary evidence before me from the Tenants in support of their submissions. Legal counsel for the Landlords also argued that the Landlords never agreed that rent could be paid late and that several times over the last 10 years the Landlord D.S. had asked G.S. to

advise all tenants that rent is due on the first day of the month, and that in any event, the Act does not require landlords to give forewarning that repeated late payment of rent will result in the end of the tenancy prior to serving and enforcing a One Month Notice for this reason.

G.S. stated that tenants are to pay rent on or before the first day of each month except for holidays that fall on the first day of the month, in which case they are permitted to pay their rent on the following business day. G.S. denied telling the Tenants that they could pay rent late or that paying rent late was OK, except for early in the tenancy when C.R., who is their extended family member, was not working. G.S. stated that they advised the Tenants several times that the Landlord D.S. was only going to put up with late rent payments for so long, and although they could not do anything about late rent payments during COVID, they had noticed the pattern of late rent payments and were monitoring it. G.S. stated that they live in the other half of the duplex rented to the Tenants and that they put a letter dated April 29, 2022, reminding the Tenants that rent is due on the first day of the month, in their mailbox that same day. G.S. stated that they also gave several other tenants the same letter on that day.

Although the Tenants acknowledged receipt of the letter dated April 29, 2022, reminding them that rent was due on or before the first day of each month, and advising them that their rent payment history had been noticed and was being monitored, they stated that it was found wedged between something on their porch on June 3, 2022, which is after the One Month Notice was served. The Tenants therefore called into question G.S.'s testimony that the letter had been placed in their mailbox on April 29, 2022, and pointed to a video in the documentary evidence before me of them opening the letter, which they argued establishes that it was not served on April 29, 2022, as it would have been outside for over a month and is undamaged in any way.

Both parties submitted documentary evidence for my consideration which includes but is not limited to an affidavit, copies of email communications, a video, bank transaction records, a copy of the April 29, 2022, letter, photographs, the tenancy agreement, and written submissions/arguments.

Analysis

Section 47(b) of the Act states a landlord may end a tenancy by giving notice to end the tenancy if the tenant is repeatedly late paying rent. Policy Guideline #38 states that three late payments are the minimum number sufficient to justify a notice to end tenancy under section 47(b) of the Act. It also states that it does not matter whether the late

payments were consecutive or whether one or more rent payments have been made on time between late payments.

There was no dispute between the parties that the Tenants had repeatedly paid rent late over the course of the tenancy, and that the Tenants had paid rent late on at least three occasions in the last 12 months, which I find does not make the late payments sufficiently far apart as to be considered not “repeatedly” late under Policy Guideline #38. However, the Tenants argued at the hearing that the Landlord or the Landlord’s agents had waived the right to strict enforcement of the term of the tenancy agreement requiring that rent be paid on the first day of each month, by failing over the course of the very lengthy tenancy to enforce this term. They also argued that the Landlord’s agent G.S., who is an extended family member of one of the Tenant’s, had expressly waived the requirement to pay rent on time as set out in the tenancy agreement at various points in time over the tenancy. For the following reasons, I agree.

During the hearing G.S. stated that on at least one occasion during the tenancy they had advised the tenants that it was OK that rent was paid late because they were family and one of the Tenants, C.R., was not working. Although C.R. acknowledged that they were later advised at some point by G.S. that they needed to start paying rent on the first, which I find constitutes a revocation of any express waiver that existed between the parties with regards to the late payment of rent, C.R. stated that they did not take this seriously because their relationship with G.S. was “chill”. There was also agreement between the parties that the Tenants’ pattern of late rent payments continued for some time thereafter. As a result, I nevertheless find that the actions or inactions of the Landlord and their agents thereafter with regards to enforcement of the term of the tenancy agreement requiring that rent be paid on the first day of each month, constitutes implied waiver as I am satisfied that the Landlord or their agents failed to act reasonably with regards to enforcement of this term, even after the Tenants were explicitly told by G.S. that rent needed to be paid on time.

Although the parties disagreed about when a letter dated April 29, 2022, reminding the Tenants that rent needed to be paid on time and warning them repeated late payments were being monitored, was received, I am satisfied that it was placed in the Tenants mailbox by G.S. on April 29, 2022, and I deem it received three days later on May 2, 2022, pursuant to section 90(d) of the Act. Although the Tenants stated that it was not received until June 3, 2022, when they found it wedged behind something on the porch, I find this implausible. Although they submitted a video of one of the Tenants opening the envelope, it does not show the Tenants finding the envelope on the porch, and it is not date stamped. As a result, I prefer the affirmed testimony of the agent G.S. that it was placed in the Tenants’ mailbox on April 29, 2022, which is also the date noted on

the letter. Further to this, a photograph submitted by the Tenants of their porch clearly shows a mailbox. As a result, I find it implausible that the Agent therefore wedged the envelope behind something on the porch, rather than placing it in their mailbox.

As a result, I find that the Tenants were duly advised as of May 2, 2022, that moving forward the Landlord intends to strictly enforce the term of the tenancy agreement requiring that rent be paid on the first day of each month, and that the Landlord subsequently took action to do so by serving the One Month Notice. As a result, and based on the findings above, I find that the Landlord is estopped from counting late rent payments made on or before May 2, 2022, towards the three minimum late payments required in order to issue a One Month Notice for repeated late payment of rent, as I am satisfied the Landlord, or their agents, waived their right to do so through both words and actions. However, I am also satisfied that the Landlord or their agents made the Tenants aware that moving forward, they intended to strictly enforce the terms of the tenancy agreement requiring that rent be paid in full and on time on the first day of each month, by serving on them the above noted letter dated April 29, 2022, which I find was their legal right.

Since I have already found above that the Tenants were deemed served with this letter on May 2, 2022, I find that the Landlord is therefore permitted to count any late rent payments made thereafter towards the minimum number of late payments required to issue a One Month Notice under section 47(b) of the Act. Despite this fact, I nonetheless find that the One Month Notice served on the Tenants is invalid and therefore unenforceable as at the time it was issued the Tenants could only have been considered to have paid rent late twice, once on May 5, 2022, and once on June 6, 2022, for the purposes of section 47(b) of the Act and Policy Guideline #38. I therefore grant the Tenants' Application seeking cancellation of the One Month Notice. As the Tenants were successful in their Application, I also grant them authority pursuant to section 72 of the Act to deduct \$100.00 from the next months rent payable under the tenancy agreement for recovery of the filing fee.

The Tenants are nonetheless forewarned that failure to pay rent on time in the future will likely result in the issuance of another One Month Notice for repeated late payment of rent by the Landlord as the Landlord has made it clear by the issuance of the April 29, 2022, letter, service of the One Month Notice, and by way of the testimony and submissions provided by them and their agents at the hearing, that they intend to strictly enforce the payment terms set out under the tenancy agreement.

Conclusion

I grant the Tenants' Application seeking cancellation of the One Month Notice dated May 29, 2022, and order that the tenancy continue in full force and effect until it is ended in accordance with the Act.

Pursuant to sections 72(1) and 72(2)(a) the Tenants are permitted to deduct \$100.00 from the next months rent payable under the tenancy agreement for recovery of the filing fee.

This decision is made on authority delegated to me by the Director of the Branch under Section 9.1(1) of the Act.

Dated: November 9, 2022

Residential Tenancy Branch