



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

CNC FFT

Introduction

This hearing was convened by way of conference call in response to an application for dispute resolution (“Application”) filed by the Tenants pursuant to the *Residential Tenancy Act* (the “Act”). The Tenants applied for the following:

- an order cancelling a One Month Notice to End Tenancy for Cause dated August 2, 2022 (“1 Month Notice”) pursuant to section 47; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

The Landlord, one of the two Tenants (“TO”) and the Tenant’s advocate (“SM”) attended the hearing. The other Tenant (“MO”) did not attend the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure*. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

SM stated the Tenants served the Notice of Dispute Resolution Proceeding and their evidence (collectively the “NDRP Package”) on the Landlord by registered mail. Although SM was unable to provide the date of mailing, he provided the Canada Post tracking stub to corroborate his testimony and the Landlord acknowledged receiving the NDRP Package by registered mail. I find the NDRP Package was served on the Landlord in accordance with the provisions of sections 88 and 89 of the Act.

The Landlord stated he served his evidence on each of the two Tenants by registered mail on September 23, 2022. The Landlord provided the Canada tracking numbers to corroborate his testimony. SM acknowledged the Tenants received the Landlord's evidence by registered mail. I find the Landlord's evidence was served on each of the Tenants in accordance with section 88 of the Act.

Issues to be decided

- Are the Tenants entitled to cancellation of the 1 Month Notice?
- Are the Tenants entitled to recover the filing fee of the Application from the Landlord?
- If the Tenants are not entitled to cancellation of the 1 Month Notice, is the Landlord entitled to an Order of Possession pursuant to section 55 of the Act?

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 submitted into evidence a copy of the tenancy agreement ("Tenancy Agreement") dated March 31, 2022 between the Landlord and the Tenants. The parties agreed the tenancy commenced on April 1, 2020, for a fixed term ending March 31, 2021, with rent of \$1,600.00 payable on the 1st day of each month. The parties agreed the rent was increased to \$1,624.00 on January 1, 2022. The Tenants were required to pay a security deposit of \$800.00. The Landlord stated the Tenants paid the security deposit and that he was holding it in trust on behalf of the Tenants. The Landlord stated the Tenants did not have any rental arrears at the current time.

The Landlord stated he served the 1 Month Notice on the Tenants on August 2, 2022. The Landlord provided the Canada Post tracking number for service of the 1 Month Notice on the Tenants. SM acknowledged the Tenants received the 1 Month Notice from the Landlord by registered mail. I find the Landlord served the 1 Month Notice on the Tenants in accordance with the provisions of section 88 of the Act.

The 1 Month Notice stated the effective date for move-out was September 30, 2022.
The 1 Month Notice stated the reason to end the tenancy was:

- Tenant is repeatedly late paying rent.

The details of the cause provided in the 1 Month Notice were:

After multiple times of paying rent late since moving in on April 1/2020 I sent a warning text on February 1/2022 when advised that rent would be late again. I emailed a caution notice April 3/2022 when rent was late, and finally sent a one month notice to end tenancy Aug. 2/2022 when I didn't receive rent on Aug. 1/2022. Previous dates of late rents: June 2020, Jan 2021, Feb 2021, July 2021, Jan 2022.

The Landlord testified the Tenants had been late paying the rent as follows:

Date Rent was Due	Date on which Rent was Paid in Full
June 1, 2020	June 25, 2020
January 1, 2021	January 2, 2021
February 1, 2021	February 2, 2021
July 1, 2021	July 2, 2021
December 1, 2021	December 3, 2021
January 1, 2022	January 2, 2022
February 1, 2022	February 11, 2022
April 1, 2022	April 8, 2022
August 1, 2022	August 2, 2022

The Landlord submitted into evidence a text in which MO stated he was laid off but would be going back to work and asked if it would be okay to pay \$1,000.00 and the balance on February 11, 2022. The Landlord responded to this message and stated "... I do need to pay my mortgage but I can make an exception this time and wait for the rest on the 11th". The Tenants paid \$1,000.00 on February 1, 2022 rent and the remainder of \$625.00 on February 11, 2022. The Landlord submitted into evidence an email dated April 3, 2022 to TO that had an attachment ("Caution Notice") in which the Landlord stated he required the rent to be paid in full by the Tenants on the first day of the month and failure to do so would result in a notice to end the tenancy.

SM noted that the late rental payment made by the Tenants on June 25, 2020 for the rent due on June 1, 2020 was during the provincial moratorium on evictions for late rent that did not end until September 1, 2020. SM acknowledged that the Tenants were technically late on the dates indicated by the Landlord following the end of the provincial COVID-19 moratorium that ended on September 1, 2020. SM stated that MO is paid by his employer by paper cheque and, as a result, MO must negotiate his paycheque through his bank. SM stated MO's bank places a hold on Mo's paycheques until the next business day after his cheque is deposited with his bank. MO stated most of the late payments of rent were the result of MO being unable to obtain cash from his bank to pay the rent whenever MO's cheque was deposited on a weekend or a statutory holiday.

Analysis

Section 26(1), subsection 47(1)(b) and section 47(4) of the Act state:

- 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.
- 47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
 - [...]
 - (b) the tenant is repeatedly late paying rent;
 - [...]
- (4) *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.*

Subsection 26(1) of the Act makes it clear that payment of rent when it is due is a material term of a tenancy unless the tenant has a right under the Act to deduct all or a portion of the rent. SM and TO did not provide any testimony or evidence that the Tenants had a right under the Act to deduct all or a portion of the rent.

The Landlord stated he served the 1 Month Notice on the Tenants by registered mail on August 2, 2022. Pursuant to section 90 of the Act, the Tenants were deemed to have received the 1 Month Notice on August 5, 2022. Pursuant to section 47(4) of the Act, the Tenants had 10 days, or until August 16, 2022, being the next business day after the expiry of the 10-day dispute period, to make an application for dispute resolution to dispute the 1 Month Notice. The records of the Residential Tenancy Branch indicate the Tenants made the Application on August 12, 2022. As such, the Tenants made the Application within the 10-day dispute period required by section 47(4) of the Act.

The Landlord stated the Tenants were late paying the rent on nine occasions from June 2020 through to August 1, 2022 as set out above. The first late payment made by the Tenants on June 25 during the provincial moratorium on evictions for late rent payments, As such, I find that the payment made for the August 2022 rent was not late. *Residential Tenancy Policy Guideline 38* ("PG 38") provides guidance for landlords who seek to end a tenancy where the tenant is repeatedly late paying the rent. PG 13 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.

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.

The Landlord served the Tenants with the Caution Notice by email on April 3, 2022. The Caution Notice stated the Landlord required the rent to be paid in full on the first day of the month and failure to do so would result in a notice to end the tenancy.

Paragraph section 36 of the Tenancy Agreement states:

36. SERVICE OF NOTICES. The tenant must accept any notice, order, process or document required or permitted to be given, when served in accordance with the Act.

At the end of the Tenancy Agreement, the Tenants provided an email address. Section 43 of the *Residential Tenancy Regulations* ("Regulations") states:

- 43(1) For the purposes of section 88(j) *[how to give or serve documents generally]* of the Act, the documents described in section 88 of the Act may be given to or served on a person by emailing a copy to an email address provided as an address for service by the person.
 - (2) For the purposes of section 89(1)(f) *[special rules for certain documents]* of the Act, the documents described in section 89 (1) of the Act may be given to a person by emailing a copy to an email address provided as an address for service by the person.
 - (3) For the purposes of section 89(2)(f) of the Act, the documents described in section 89(2) of the Act may be given to a tenant by emailing a copy to an email address provided as an address for service by the tenant.
- 44 A document given or served by email in accordance with section 43, unless earlier received, is deemed to be received on the third day after it is emailed.

Residential Tenancy Policy Guideline provides 12 ("PG 12") provides guidance on the service requirements of the Act and Regulations. Under the heading "1. Address for Service", PG 12 states:

At any time, a tenant or landlord may provide an email address for service purposes. By providing an email address, the person agrees that important documents pertaining to their tenancy may be served on them by email. *A person who does not regularly check their email should not provide an email address to the other party for service purposes.*

[emphasis in italics added]

By providing the Landlord with their email address, I find the Tenants agreed that important documents pertaining to their tenancy may be served on them by the

Landlord using email. Based on the foregoing, I find the Caution Notice was served by the Landlord on the Tenants in accordance with section 88 of the Act. Pursuant to section 44 of the Regulations, I find the Tenants received the email on April 6, 2022.

The last late payment of rent made by the Tenants after they were deemed to have received the Caution Letter was due August 1, 2022 and the Tenants made that rent payment on August 2, 2022. In the decision for *Guevara v. Louie*, 2020 BCSC 380 (CanLII) (“Guevara”), the BC Supreme Court considered an application for dispute resolution in which a landlord sought to end a tenancy for caused based on the tenant being repeatedly late paying the rent. In that decision, the Honourable Mr. Justice Sewell stated in part:

[49] The central issue between the parties before the Arbitrator was whether Ms. Guevara had been “repeatedly late” in paying her rent, as that phrase is used in [s. 47\(1\)\(b\)](#) of the [RTA](#):

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(b) the tenant is repeatedly late paying rent;

[53] The Arbitrator recognized that ending a tenancy is a significant request that must only be done in accordance with the [RTA](#). However, his analysis went no further than to refer to Guideline 38 of the *Residential Tenancy Branch Policy Guidelines* which states that the *minimum* number of late payments required to justify a notice for termination under the [RTA](#) provisions is three. Therefore, *Guideline 38 gives little real guidance on the manner in which the provision should be applied to the circumstances of this case.*

[54] In my view, the Arbitrator failed completely to consider or apply the modern principle of statutory interpretation to his consideration of [s. 47\(1\)\(b\)](#) of the [RTA](#) and its application to the circumstances of Ms. Guevara. *At a minimum, the Arbitrator was required to consider the context and purpose of s. 47 and adopt an interpretation consistent with those factors.*

[55] Section 47 sets out a number of grounds on which a landlord may rely upon to terminate a tenancy. *A review of all of the grounds on which a tenancy may be terminated under s. 47 makes it apparent that the tenant must have engaged in serious misconduct that seriously affected the landlord or the other tenants of the building in which the premises are located, failed to comply with a condition precedent to the rental agreement coming into effect (s. 47(1)(a)) or have taken an unreasonable amount of time to comply with a material term of the tenancy agreement.*

[56] In addition, the Arbitrator appeared to give no consideration to the circumstances relating to the defaults he found to have occurred. Beyond noting that three late payments of rent were the minimum number to engage s. 47(1)(b), he did not address the frequency of the defaults in the context of the length of the tenancy, *the length of the default*, or the expectations of the parties. He did not give full consideration to the content of the communications between the parties in respect of any of the defaults—such as Ms. Louie indicating that she was okay with receiving late rental payments on several occasions and several discussions of banking errors arising from the e-transfer format—aside from concluding that

Ms. Louie was forced to follow up with Ms. Guevara when rent was not paid on time. *In my view, that approach fell so far short of the required standard of statutory interpretation as to render the decision patently unreasonable.*

[emphasis in italics added]

As stated in the *Guevara* decision, the grounds for ending a tenancy for cause set out in section 47 of the Act require that the tenant has engaged in serious misconduct that seriously affected the landlord or other tenants or that the tenant has taken an unreasonable amount of time to comply a material term of the tenancy agreement. SM testified that most of the late rental payments were the result of MO needing to negotiate his paycheque through his bank which often results in delay until the next business day after MO deposits his paycheque before he can withdraw moneys to pay the rent to the Landlord.

The Landlord did not provide any evidence that the late payment made on August 2, 2022 impacted his mortgage. As such, I find the one delay in payment of the August rent was not seriously prejudicial to him. With this in mind, I must weight the prejudice to the Tenants if they are required to vacate the rental versus the prejudice to the Landlord who has served the Caution Notice on them if I cancel the 2 Month Notice. After carefully considering the legislative intent of section 47 of the Act and then analysing the testimony and evidence before me, I find the Landlord has not proven demonstrated that the one-day delay paying the rent due on August 1, 2022 was an unreasonable amount of time to comply with a material term of the tenancy agreement. Based on the

foregoing, I find the Landlord has not proven, on a balance of probabilities, that the Tenants have breached section 47(1)(b) of the Act. As such, I cancel the 1 Month Notice. The Tenancy continues until ended in accordance with the provisions of the Act.

The Tenants are warned that, if they do not pay the rent in full on time in the future, they risk of having the Landlord serve another notice to end tenancy on them. The Tenants would be well advised to make arrangements to ensure that all future payments of rent are made in full and on time in accordance with the requirements of section 26(1) of the Act.

As the Tenants have been successful in the Application, I grant the Tenants recovery of the filing fee of \$100.00 pursuant to subsection 72(1) of the Act and, pursuant to section 72(2)(a) of the Act, the Tenants are allowed to enforce this order by deducting \$100.00 from the next month's rent, notifying the Landlord when this deduction is made. The Landlord may not serve the Tenants with a 10 Day Notice to End Tenancy for Unpaid Rent when this deduction is made by the Tenants.

Conclusion

The 1 Month Notice is cancelled. The Tenancy continues until ended in accordance with the provisions of the Act.

The Tenants are ordered to deduct \$100.00 from next month's rent payable to the Landlord in satisfaction of their monetary award for recovery of the filing fee for the Application.

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: November 2, 2022

Residential Tenancy Branch