



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 the Tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

1. Cancellation of the Landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to Sections 47 and 62 of the Act; and,
2. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord's Property Manager and the Tenant attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

Both parties acknowledged receipt of:

- the Landlord's One Month Notice served by registered mail on July 25, 2022, Canada Post Tracking Number on cover sheet, deemed served on July 30, 2022;
- the Tenant's Notice of Dispute Resolution Proceeding package was personally served early August 2022, the Landlord confirms receipt, sufficiently served on August 26, 2022,
- the Tenant's evidence package was personally served on December 22, 2022, the Landlord confirms receipt, served on December 22, 2022; and,

- the Landlord's evidence package was served by registered mail on November 11, 2022, Canada Post Tracking Number on cover sheet, the Tenant confirms receipt, deemed served on November 16, 2022.

Pursuant to Sections 71(2), 88, 89 and 90 of the Act, I find that both parties were duly served with all the documents related to the hearing in accordance with the Act.

Issues to be Decided

1. Is the Tenant entitled to cancellation of the Landlord's One Month Notice?
2. If the Tenant is unsuccessful, is the Landlord entitled to an Order of Possession?
3. Is the Tenant entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions presented to me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The Tenant believes that this periodic tenancy began in September 2014. The current property management company took over in 2020. The Landlord testified that the monthly rent is \$2,380.00, while the Tenant testified that the monthly rent is \$2,354.00. Rent is payable on the first day of each month. A security deposit of \$1,050.00 was collected at the start of the tenancy and the Landlord stated it is presently held by the RTB.

The One Month Notice stated the reason the Landlord was ending the tenancy was because the Tenant is repeatedly late paying rent. The effective date of the One Month Notice was September 1, 2022.

The Landlord provided further details of the causes to end this tenancy as:

Tenant has been repeatedly being late with paying rent in 2021 and 2022 and most recently tenant was late paying rent for March 2022; April 2022 and July 2022 which was due on the 1st of each month.

The Landlord testified that since May 2021 to July 2022, the Tenant has been late eight times paying rent. The Tenant was late May, June, August, November 2021, and

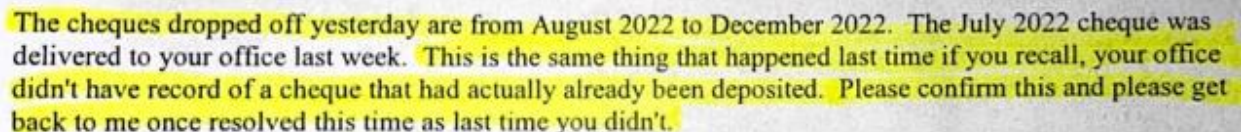
January, March, April, and July 2022. Since issuing the One Month Notice, the Tenant has not been late paying the rent.

The Tenant submits that the Landlord is wanting to evict him due to bad faith. In the past, the Landlord has asked for rent cheques which the Tenant had already dropped off and the funds had already been taken out of his bank account. The Tenant is aware that the rent amount for the rental unit is below the current market rent.

The Tenant testified that before January 2022, the Landlord asked him to hold off paying rent until the Landlord knew what the rental increase was going to be. The Tenant followed up with the Landlord on January 4, 2022 asking the Landlord, "I need to get you new cheques, what is the new increased rent amount?" On January 5, 2022, the Landlord replied, "I'll send you this in one hour. I'm just not in front of my laptop now". The Tenant messaged the Landlord that he received the amount from the accountant on January 11, 2022 and he issued a cheque to the Landlord. The transaction date for January's rent was January 19, 2022.

In April and March 2022, the Tenant said he had changed bank accounts and he had to issue new cheques to the Landlord. The Tenant said the rent was late. The Landlord never mentioned to the Tenant that three late rent payments could end his tenancy. The Tenant stated that the Landlord has never issued a 10 Day Notice for unpaid rent to him.

The Tenant testified that he dropped off July 2022's rent personally on June 27, 2022 before he left for an international trip leaving YVR on June 28, 2022, then returning to YVR on July 8, 2022. The Tenant uploaded an email sent to the Landlord on July 13, 2022:



The cheques dropped off yesterday are from August 2022 to December 2022. The July 2022 cheque was delivered to your office last week. This is the same thing that happened last time if you recall, your office didn't have record of a cheque that had actually already been deposited. Please confirm this and please get back to me once resolved this time as last time you didn't.

The Tenant corrected that the July 2022 cheque was not delivered "last week" as stated in the above email because he was still away on his trip, but confirmed he dropped it off before he left for his trip so the rent would not be late. On July 12, 2022, the Tenant dropped off the five remaining post-dated rent cheques for 2022. The Tenant has provided the Landlord with post-dated rent cheques for 2023.

The Landlord's uploaded rent ledger shows that the transaction date for July's rent was July 13, 2022.

The Tenant seeks to cancel the One Month Notice, the Landlord seeks an Order of Possession.

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. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 26(1) of the Act states that 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.

Section 47 of the Act outlines how a tenancy can end for cause. It states:

Landlord's notice: cause

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;*

...

(3) *A notice under this section must comply with section 52 [form and content of notice to end tenancy].*

(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.*

...

The Landlord's One Month Notice was deemed served on July 30, 2022. I find that the One Month Notice complies with the form and content requirements of Section 52 of the Act. The Tenant applied to dispute the One Month Notice on August 7, 2022 which is within the 10 days after receipt of the notice.

Residential Tenancy Policy Guideline #38-Repeated Late Payment of Rent provides a statement on the policy intent of the legislation in regard to repeatedly late rent payments. It 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 testified that the Tenant was late paying rent in May, June, August, November 2021, and January, March, April, and July 2022. Since issuing the One Month Notice, the Tenant has not been late paying the rent.

The Tenant testified that the Landlord asked him to hold off paying rent in January 2022 until he knew what the rental increase was going to be. On January 11, 2022, the Tenant got the information from the accountant and paid January's rent. The Landlord

had not issued the Tenant a formal notice of rent increase. The Landlord's office processed January's rent cheque on January 19, 2022.

The Tenant confirmed that he changed banks and his March and April 2022 rent payments were late.

On June 28, 2022, the Tenant left for an international trip and returned on July 8, 2022. The Tenant testified that he paid July 2022's rent before he left on June 27, 2022. The Landlord's office processed July's rent cheque on July 13, 2022.

Rent is due on the first day of the month in this tenancy whether or not the Landlord complies with the Act, regulations or the tenancy agreement. I find the Tenant has relied on the Landlord's instructions to hold off on paying January 2022's rent until he knew what the rental increase was going to be. Also, I find that the Tenant was not late paying July 2022's rent as I find his evidence more credible than the Landlord's that rent was late that month. There have been times the Landlord has already received rent payments from this Tenant, then they are asking for those payments again because they have not processed the rent cheques given by the Tenant. I find that the Tenant has been diligent in paying his rent even when asked to hold off.

It appears that the Landlord's office is relaxed about when they will be depositing rent cheques from their rental units, as transaction dates are over seven days when cheques are given to the Landlord. This Landlord has never issued 10 Day Notices for Unpaid Rent on the Tenant; therefore, I find the Landlord has waived reliance on Policy Guideline #38. Accordingly, I cancel the Landlord's One Month Notice and this tenancy will continue until ended in accordance with the Act.

As the Tenant is successful in his claim, he is entitled to recovery of the application filing fee. The Tenant may, pursuant to Section 72(2)(a) of the Act, withhold \$100.00 from next month's rent due to the Landlord.

A note to the Landlord: there is no mechanism at the RTB where a security deposit would be held by the branch.

Conclusion

The Tenant's application to cancel the Landlord's One Month Notice is granted.

The Tenant may withhold \$100.00 from next month's rent to recover his application filing fee.

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

Dated: January 26, 2023

Residential Tenancy Branch