



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNC, FFT

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- an order pursuant to s. 47 cancelling a One-Month Notice to End Tenancy signed on January 6, 2023 (the “One-Month Notice”); and
- return of the filing fee pursuant to s. 72.

J.Z. appeared as the Tenant and was joined by her lawyer V.G.. Z.Z. appeared as the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other’s application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other’s application materials.

Issue to be Decided

- 1) Is the One-Month Notice enforceable?
- 2) If so, is the Landlord entitled to an order of possession?
- 3) Is the Tenant entitled to her filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on June 9, 2021.
- Monthly rent is due in the amount of \$2,500.00.

Both parties provide a copy of the tenancy agreement. The copy provided to me by the Tenant notes that rent is due on the 9th of each month. The copy provided to me by the Landlord similarly marks the 9th, though this is crossed out and the 1st is noted in its place with the parties initialling the change.

The Landlord says that rent had been due on the 9th of each month but that this was changed to the 1st in June or July of 2021. In the Landlord's telling, the original due date was chosen as the tenancy began on June 9th, though says this was changed at the Tenant's request to coincide with the beginning of the month.

The Tenant denies the due date was changed as alleged by the Landlord, saying she did so when the term of the tenancy was extended in January or February 2022. The Landlord emphasized that different pen colour was used between the two amendments, implying that the term extension and due date were changed on separate occasions.

According to the Landlord, the Tenant has been repeatedly late in paying her rent, which is what caused him to issue the One-Month Notice. The Landlord says that the One-Month Notice was served via email on January 6, 2023. The Tenant acknowledges receiving it the same date and raised no issue with service via email. The Tenant provides me a copy of the One-Month Notice, which describes the cause as follows:

The rental agreement have clearly stated that the rent is due on the 1st day of the month however the tenant [Redacted] has been repeatedly being late with rent payment including:

Feb 2022 (Paid on Feb 2, 2022)

Apr 2022 (Paid on Apr 2, 2022)

May 2022 (Paid on May 2, 2022)

June 2022 (Paid on Jun 2, 2022)
July 2022 (Paid on July 11, 2022)
Aug 2022 (Paid on Aug 6, 2022)

During Aug 6, 2022, the tenant and the landlord have mutually agreed to change the rent payment date to the 28th of each month prior to the month of the rental period, but the tenant have continued being late with this new agreement

Nov 2022 (Paid on Oct 31, 2022)
Jan 2023 (Paid on Jan 1, 2023)

I have redacted the Tenant's name from the description listed in the One-Month Notice in the interest of the parties' privacy. In the Landlord's telling, in addition to being late as listed in the One-Month Notice, the Tenant was also late in paying her rent in September 2021 and in February 2023.

As alluded to in the One-Month Notice, the Landlord says that he and the Tenant came to an agreement to change the due date for rent such that it would be due on the 28th of each month rather than the 1st. At the hearing, the Landlord clarified that the second amendment for the due date was made on July 11, 2022 rather than August 6, 2022 as listed in the One-Month Notice, which he says was an error. The Landlord directs me to a translated text message exchange in his evidence dated July 11, 2022, which he says shows that he and the Tenant agreed to change the due date for rent to 28th of each month. I reproduce the exchange below:

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- I have expressed good faith by not raising the rent. You are very busy, and I don't have Landlord much energy to ask for the rent every month. If you want to sign a long-term contract, please pay all the rent for the contract period in one lump sum. Or we can sign the contract month by month. If another case like this happens again, I will terminate the contract.

Tenant - [REDACTED], sorry to cause you trouble in the past year, and thank you for not raising the rent. How about this? I'll pay the next month's rent on the 28th of each month, by which you can confirm renting it to me monthly. Every time I pay the rent, I will just need your message to confirm, and there is no need to sign another contract. We will trust each other. I will rent it until the end of next June. Just do what you want. I pay the rent monthly, and you are sure I'll continue to rent for another month. If something else happens that violates the rent payment rules, you can terminate the contract.

- Okay. If either of us wishes to terminate the contract, we must give at least one month's Landlord notice.
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I have redacted the Landlord's name from the reproduction above in the interest of the parties' privacy.

Tenant's counsel raised issue with the second amendment purporting to change the due date to the 28th saying that this was done without written addendum or initialed change to the tenancy agreement. He highlighted clause 2) in section 1 of the tenancy agreement, which states the following:

- 2) Any change or addition to this tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. If a change is not agreed to in writing, is not initialed by both the landlord and the tenant or is unconscionable, it is not enforceable.

On cross-examination, the Landlord confirms there was no written addendum or initialed change to the tenancy agreement changing the due date to the 28th. Tenant's counsel submitted that the term in the tenancy agreement is a standard term mandated by the Regulations such that it cannot be avoided. It was argued that the due date of the 1st continued to be in effect as that had been properly changed by the parties.

The Landlord provides a series of e-transfer screenshots as evidence of late payment by the Tenant. Tenant's counsel did not raise issue with the dates listed in the Landlord's evidence with respect to the payment history. However, Tenant's counsel argued that the Tenant overpaid the security deposit such that she was permitted to withhold the overpayment as per s. 19(2) of the *Act*. The parties in this matter confirm the Tenant initially paid a security deposit of \$1,250.00, a subsequent deposit of \$1,250.00 on September 24, 2021, and a final \$1,000.00 security was paid by the Tenant in August 2022.

In the Landlord's telling, the additional deposit from September 2021 was provided due to late rent payments. The Tenant says she was concerned the Landlord would terminate her tenancy and agreed to provide the additional deposit as a guarantee on her rent. The \$1,000.00 payment by the Tenant was similarly described by the Landlord as security on late rent payments, though he described it as a penalty that would be reimbursed at the end of the tenancy. I note that the tenancy agreement addendum does not permit pets and there is no suggestion by the parties that the deposit was paid as a pet damage deposit.

As argued by Tenant's counsel, the Tenant carried forward an overpayment balance of \$1,250.00 from September 2021 onwards such that, when coupled with the payments as demonstrated by the Landlord's evidence rent was paid in full on the first for the months of February, April, May, and June 2022. Tenant's counsel acknowledges rent was paid late in July and August 2022. Tenant's counsel further argued rent for November 2022 was paid on October 31, 2022 and January 1, 2023 such that they were not late as the due date was the 1st.

The Tenant further argued that the One-Month Notice was issued by the Landlord as he wished to sell the property. I was directed to a text message from the Landlord to the Tenant to that effect dated December 30, 2022. The Landlord confirms sending the text message, which says that Landlord wished to terminate the lease on January 31. The Landlord argued this was done pursuant to a clause permitting the same in the addendum.

The parties confirm the Tenant continues to reside within the rental unit with her family.

Analysis

The Tenant seeks an order cancelling the One-Month Notice.

Under s. 47 of the *Act*, a landlord may end a tenancy for cause by given a tenant at least one-month's notice to the tenant. Under the present circumstances, the Landlord issued the notice to end tenancy pursuant to s. 47(1)(b) of the *Act*, which is due to repeated late rent payments. Upon receipt of a notice to end tenancy issued under s. 47 of the *Act*, a tenant has 10 days to dispute the notice as per s. 47(4). If a tenant files to dispute the notice, the onus of showing the notice is enforceable rests with the landlord.

In this instance, I accept the undisputed evidence of the parties that the One-Month Notice was served via email on January 6, 2023 and that the Tenant received it on the same date. Though I am provided with no evidence to show that email is an approved form of service as contemplated by s. 43 of the Regulation, I accept that the Tenant raised no objection to service via email. Accordingly, I find that pursuant to s. 71(2) of the *Act* the One-Month Notice was sufficiently served on the Tenant, who received it on January 6, 2023.

Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find the Tenant filed her application on January 9, 2023 such that it was filed within the 10 days permitted to her under s. 47(4) of the *Act*.

As per s. 47(3) of the *Act*, all notices issued under s. 47 must comply with the form and content requirements set by s. 52 of the *Act*. I have reviewed the One-Month Notice and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, states the correct effective date, sets out the grounds for ending the tenancy, and is in the approved form (RTB-33).

In this instance, the Landlord cites repeated late rent payment as cause for ending the tenancy. Policy Guideline #38 provides guidance with respect to when a landlord may end a tenancy for the tenant's repeated late rent payments. It states the following:

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 parties in this matter have some dispute on when rent is currently due. I accept that the tenancy agreement originally set a due date of the 9th, though this was amended to the 1st of each month. It is unclear to me when this first amendment was made, with the

Landlord saying June or July 2021 and the Tenant saying January or February 2022. However, I note that most of the alleged late rent payments in the One-Month Notice are after both dates such that throughout most of the period mentioned by the parties, rent was undisputedly due on the 1st.

Leaving aside for the moment the issue of when rent is due and the overall enforceability of the purported amendment of July 11, 2022, I have a difficult time accepting the Landlord can assert the Tenant is repeatedly late in paying rent. Even if I were to characterize the payments from the spring and early summer of 2022 as “late”, the Landlord clearly acquiesced and accommodated the Tenant through the purported amendment of July 11, 2022. It is incongruous for the Landlord to assert those payments could form the basis for ending the tenancy when he came to purported agreement changing the due date for rent, which I treat as a settlement of the issue up to July 11, 2022. Simply put, the Landlord waived his right to claim strict enforcement of the due date for any purported late rent payments prior to July 11, 2022.

This leaves three purported late rent payments from August 2022, November 2022, and January 2023. This directly raises the issue of the purported amendment of July 11, 2022. Tenant’s counsel argues that the amendment via text message exchange is unenforceable by virtue of clause 2 in section 1 of the tenancy agreement. Tenant’s counsel correctly notes that that clause is a standard term proscribed by s. 13(2) of the *Act* and set out in the Schedule for the Regulation. I would further note that s. 5 of the *Act* establishes that a landlord and tenant cannot avoid or contract out of the *Act* and that any attempt to do so is of no effect.

I accept the argument of Tenant’s counsel that the amendment of July 11, 2022 is not enforceable as the change to the due date was not agreed to in writing and was not initialled by the parties pursuant to the procedure set out in the tenancy agreement. The last time the amendment process had been done properly was when the due date was changed from the 9th to the 1st of each month. I accept that rent is currently due on the 1st as per the last proper amendment to the tenancy agreement.

Review of the payment history provided to me by the Landlord, I accept that rent for August 2022 was fully paid on August 5, 2022 such that it was late. However, rent for November 2022 was paid in full on November 1, 2022 and January 2023 paid in full on January 1, 2023. In other words, the Tenant paid rent for November 2022 and January 2023 on time. Though not set out in the One-Month Notice as a late rent payment, I

would further note that rent for February 2023 was also paid in full on its due date of February 1, 2023.

I find that the Landlord has failed to demonstrate the Tenant is repeatedly late in paying rent as he has only demonstrated one late rent payment. The One-Month Notice is, therefore, of no force or effect. I grant the Tenant her application and cancel the One-Month Notice.

Though I determined the application on another basis than was argued by Tenant's counsel, there was a great deal of discussion about the additional deposits paid by the Tenant. In this instance, there is no dispute that the Tenant paid additional deposits of \$1,250.00 and \$1,000.00 to the Landlord. To be clear, the *Act* does not permit security from a tenant other than as permitted Part 2, Division 2. I note that s. 19(1) of the *Act* specifically prohibits a security deposit in excess of half a month's rent and s. 19(2) of the *Act* permits a tenant to deduct the overpayment on the security deposit from rent due to the landlord. There is no contention here that no pet damage deposit was requested as, based on the addendum to the tenancy agreement, no pets are allowed. Accordingly, the additional deposits appear to run afoul both s. 19 and 20 of the *Act*. Further, as mentioned above, s. 5 of the *Act* renders any attempt to avoid the *Act* of no effect. I provide this commentary in the hopes that the parties may be able to sort this issue without further need of intervention from the Residential Tenancy Branch.

Conclusion

The One-Month Notice is hereby cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

The Tenant was successful in her application. I find that she is entitled to her filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenant's filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenant withhold \$100.00 from rent owed to the Landlord on one occasion in full satisfaction of her 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 *Residential Tenancy Act*.

Dated: February 27, 2023

Residential Tenancy Branch