



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, CNC, DRI, OLC, FFT

Introduction

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

- an order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed on January 2, 2023 (the “First 10-Day Notice”); and
- return of the filing fee pursuant to s. 72.

By way of amendment signed on January 17, 2023, the Tenant adds the following claims to the application:

- an order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed January 15, 2023 (the “Second 10-Day Notice”);
- an order pursuant to s. 47 cancelling a One-Month Notice to End Tenancy signed on January 15, 2023 (the “One-Month Notice”);
- an order pursuant to s. 43 disputing a rent increase; and
- an order pursuant to s. 62 that the landlord comply with the Act, Regulations, and/or the tenancy agreement.

B.T. appeared as the Tenant and was joined by his sister L.S., who assisted the Tenant. G.B. appeared as the Landlord and was joined by her son, P.B., who spoke on behalf of the Landlord and assisted her during the hearing.

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.

At the outset of the hearing, I enquired whether the parties application materials had been served. The Tenant advised having served his application, amendment, and evidence, which was acknowledged to have been received by the Landlord. Issue was raised by the Landlord with respect to the Tenant’s evidence, though upon review of the

documents received by the Residential Tenancy Branch the Landlord confirmed having received all the evidence. I am advised that the Tenant served a second evidence package on January 19, 2023, though the Landlord raised no issue with respect to late service. The Tenant acknowledged having received the Landlord's response evidence without objection. Having cleared the issues of service and based on both parties acknowledge receipt of the other's application materials 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.

Preliminary Issue – Tenant's Claims

Pursuant to Rule 2.3 of the Rules of Procedure, claims in an application must be related to one another. Where they are not sufficiently related, I may dismiss portions of the application that are unrelated. Hearings before the Residential Tenancy Branch are generally scheduled for one-hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

In this instance, the primary issue in dispute is whether the tenancy will end or continue based on the three notices to end tenancy. Indeed, the two substantive claims disputing a rent increase and an order that the Landlord comply with the *Act* would be rendered moot if the tenancy comes to an end. Accordingly, I find that the Tenant's claims under ss. 43 (disputing a rent increase) and 62 (order that the Landlord comply) of the *Act* are not sufficiently related to the issues raised in the notices to end tenancy and dismiss both these claims pursuant to Rule 2.3. Should the tenancy continue, these claims will be dismissed with leave to reapply. Should the tenancy come to an end, the two claims will be dismissed without leave to reapply.

The hearing proceeded strictly with respect to the issue of the enforceability of the three notices to end tenancy.

Issues to be Decided

- 1) Is the First 10-Day Notice enforceable?
- 2) Is the Second 10-Day Notice enforceable?
- 3) Is the One-Month Notice enforceable?
- 4) If not, is the Landlord entitled to an order of possession and an order for unpaid rent?
- 5) Is the Tenant entitled to his 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 confirm the following details with respect to the tenancy:

- The Tenant moved into the rental unit sometime in 2001 or 2002.
- Monthly rent of \$850.00 is due to the Landlord.
- The Tenant paid a security deposit of \$350.00.

The Tenant advises that there is no written tenancy agreement. The Landlord advises that she has been the Landlord throughout the tenancy and cannot recall whether there was a written tenancy agreement. Both the Landlord and P.B. confirm that no written tenancy agreement was on file with respect to the tenancy.

The Landlord advises that the First 10-Day Notice was posted to the Tenant's door on January 2, 2023. The Tenant acknowledges its receipt on January 2, 2023. The Landlord further advises that the Second 10-Day Notice and the One-Month Notice was posted to the Tenant's door on January 15, 2023. The Tenant acknowledges receipt of the Second 10-Day Notice and the One-Month Notice on January 15, 2023. I have been provided with copies of the various notices to end tenancy.

P.B. advises that the his brother and the Landlord attended the rental unit on January 1, 2023 to discuss issues with respect to some outstanding arrears and unpaid rent for January 2023. The Tenant acknowledges having this conversation, though says that it was with respect to a demand by the Landlord that he pay an additional \$350.00 per month in rent. I am told by both parties that an argument took place at this time. The Tenant argued the rent increase demand was illegal.

P.B. testified that rent is due on the first day of each month as per the tenancy agreement and says that it was not paid on January 1, 2023. I am told that the amount listed in the First 10-Day Notice is with respect to unpaid rent for January 2023 and some \$1,600.00 in unpaid rent arising during bankruptcy proceedings the Tenant went through in either 2013 or 2015. The Tenant confirms he went through bankruptcy in 2013. According to P.B., rent for January 2023 was received on January 3, 2023 and I am directed to banking information to that effect in the Landlord's evidence. The Tenant

acknowledges paying the \$850.00 but says he e-transferred it to the Landlord on January 2, 2023.

The Second 10-Day Notice lists \$1,600.00 owing, which I am told by P.B. pertains to the same arrears mentioned above and arose when the Tenant failed to pay two months' rent when he was going through his bankruptcy. P.B. says the Landlord has never been paid these arrears and that it was a struggle to get paid rent in full on any given month such that the \$1,600.00 arrears were never dealt with.

The Tenant acknowledges having been behind in rent in 2013, but says the arrears accrued in a greater amount and that he made partial payments on these arrears during that time. The Tenant says that he stopped paying down his arrears to the Landlord after one of her son's told him he did not need to continue. By the Tenant's telling, he says that the arrears were forgiven. The Landlord denies forgiving the Tenant's rent arrears from 2013. The Tenant also argues that the Landlord's claim for rent in 2013 would be statute barred in any event given the passage of time. The Tenant says he cannot recall what the arrears were as it was over 10 years ago and says that the Landlord did not take steps to enforce over that period, only raising the issue after the heated conversation they had on January 1, 2023.

The One-Month Notice provided to me lists that it was issued due to the Tenant's repeated late rent payments. As mentioned above, according to the Landlord, rent is due on the first. P.B. advises that the Tenant has not complied with this and paid irregularly, saying the Landlord has been dealing with these irregular payments for the past 20 years. P.B. argued that the Landlord will no longer accept late rent or payments made at the Tenant's convenience. According to the Tenant, he says has an understanding with the Landlord that he pay rent in two installments, which he says coincide with his paydays.

The Landlord has provided various text messages, which I am told are between the Tenant and the Landlord. These messages detail various discussions over the course of years in which the Landlord requests rent from the Tenant and the Tenant's various responses.

I reproduce the following exchange from August 26, 2022:

Landlord: Hi [Tenant] today is 26 August reminder for rent
 Also can you please start paying rent on first of the month now

I would appreciate thanks

Tenant: sorry [Landlord] I have to split it up to ever pay day...yesterday was payday I will send u money tomorrow morning when I am home from work

Landlord: Can you please split the first and fifteen thanks

In another text message dated October 8, 2022, the Landlord sends the following to the Tenant:

Landlord: Hi [Tenant] can you please start paying at least 600 in the beginning of the month thanks

The Landlord also provides recent payment history from the Tenant, showing rent receipts from January 1, 2020 to January 12, 2023. The rent receipts are on irregular dates and in irregular amounts, though generally payment is made in two installments over the month.

The parties confirm that the Tenant continues to reside within the rental unit.

Analysis

The Tenant applies to cancel the First 10-Day Notice, the Second 10-Day Notice, and the One-Month Notice.

I find that the various notices to end tenancy were served in accordance with s. 88 of the *Act* after having been posted to the Tenant's door. I accept that the Tenant received the First 10-Day Notice on January 2, 2023, the Second 10-Day Notice on January 15, 2023, and the One-Month Notice on January 15, 2023.

As a general comment, I find that the present tenancy is disorganized and acts as a clear reminder why s. 13(1) of the *Act* requires all tenancy agreements be written, though I note that this section only applies to tenancies entered into on or after January 1, 2004. It seems likely that many of the present issues faced by the parties might have been avoided or at least better managed had there been a written tenancy agreement.

I make these comments because beyond the parties' confirmation that the Tenant is to pay \$850.00 per month in rent, I am unclear on whether the Tenant was ever obliged to pay rent on the first. Correspondence provided to me by the Landlord demonstrates that the Landlord has not been fastidious about enforcing the first as the due date, even if that was the expectation. Indeed, the correspondence of August 26 shows that the Landlord requested that rent be paid on the first prospective, which the Tenant refused, and the Landlord then offered that rent be paid on the first and fifteenth. It is unclear based on the correspondence provided whether the parties were able to agree on fixed dates for rent payments. At the very least, the correspondence of October 8 demonstrates that the Landlord tacitly accepted rent would be paid in two portions when she requested that the first payment be made in the amount of \$600.00.

Turning to the 10-Day Notices, pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant. Pursuant to s. 46(4) of the *Act*, a tenant has 5-days from received a 10-day notice to end tenancy to either pay the overdue rent or file an application to dispute the notice. If a tenant files to dispute the notice, the burden of proving it was issued in compliance with s. 46 of the *Act* rests with the respondent landlord.

Looking first at the issue of the purported arrears of \$1,600.00, we are talking about an amount that by the Landlord's own admission accrued many years ago. I accept the Tenant's evidence that the arrears accrued sometime around 2013. I am told by the Tenant that he cannot recall the specific arrears and denies that it was in relation to missing two months rent as alleged by the Landlord. The Landlord has not provided me with an accounting for rent dating back to this time to prove the arrears or demonstrate how the \$1,600.00 was determined. Frankly, I doubt that such an accounting could even be produced given the disorganized nature of this tenancy.

The Landlord says that no steps were taken to seek these arrears as the Tenant had difficulty paying his monthly rent in full. That is no explanation or rationale for why a notice to end tenancy was not issued in 2013. One would expect that if these purported arrears were in issue, the Landlord would have issued a notice to end tenancy many, many, many years ago. This does not appear to have been done. Further, there does not even appear to have been demands made for its payment as none of the correspondence provided to me even mentions these arrears.

The Tenant acknowledges that he was in arrears, though says that the Landlord's son forgave the arrears in or about 2013. As appears to be typical to these parties, the purported arrears forgiveness was verbal. The Landlord denies there ever being an agreement to this effect. On a balance of probabilities, I find that it is more likely than not that there was a forgiveness of the arrears from that time. It defies logic and common sense that any landlord would hold in their back pocket a claim for \$1,600.00 for unpaid rent for approximately 10 years and not have mentioned it, made demand for it, or issue a notice to end tenancy with respect to it. The Landlord's conduct clearly demonstrates that the Landlord forgave the arrears from that period.

Given the above, I find that the Landlord has failed to demonstrate that there was unpaid rent in the amount of \$1,600.00. The Second 10-Day Notice is, therefore, unenforceable. The amount from the First 10-Day Notice that could be proven, being rent for January 2023, was paid within 5 days of receipt of the First 10-Day Notice, whether that was on January 2nd or 3rd does not matter. I find that the First 10-Day Notice was rendered ineffective automatically by virtue of s. 46(4) of the *Act*. Accordingly, I find that the Landlord has failed to demonstrate either of the 10-Day Notices was properly issued. They are hereby cancelled and of no force or effect.

Looking next to 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) ff the *Act*, being for 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.

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.

In this instance, I am unable to make any finding on when rent is due. Given the conduct of the parties, it is difficult for the Landlord to argue that rent is due on the first, with the message of August 26th clearly showing that this was not the case. Even if there were a firm due date which the parties may have agreed over the course of this 20 year tenancy, I find that the Landlord has long since waived any right to assert that it is of any meaning given the longstanding conduct of the parties, which appears to have been altered to monthly rent being paid in two installments. Again, it is entirely unclear if there is a firm due date or due dates for rent. I find that the One-Month Notice cannot be enforced and must be cancelled under the circumstances.

I would conclude by encouraging the parties to sit down and complete a written tenancy agreement. It is both required by the *Act* for current tenancies and would help avoid further confusion on this issue prospectively. A copy of the standard form tenancy agreement prepared by the Residential Tenancy Branch (Form #RTB-1) can be found at <https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/forms>.

Conclusion

I hereby cancel the First 10-Day Notice, the Second 10-Day Notice, and the One-Month Notice, none of which are of any force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

The Tenant's claims under ss. 43 and 62 that were severed pursuant to Rule 2.3 of the Rules of Procedure are dismissed with leave to reapply.

The Tenant was successful in his application. I find he is entitled to the return of his filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlord pay the Tenant's \$100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenant withhold \$100.00 from rent due to the Landlord on **one occasion** in full satisfaction of his 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 1, 2023

Residential Tenancy Branch