



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

A matter regarding DIVERSIFIED PROPERTY MANAGEMENT
(D.P.M.) and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **CNR, RR, RP, OPC, FFL.**

DECISION

Introduction

This hearing dealt with Cross-Applications for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) under sections 46 and 55 of the Act;
- an Order for Possession based on a One Month Notice to End Tenancy for Cause under section 47 of the Act for repeated late payment of rent (Notice for Cause);
- authorization to recover the filing fee for this application from the Tenant under section 72 of the Act.

Notice and Service:

The parties acknowledged service of the respective cross-applications comprised of the of the 10 Day Notice, the One Month Notice, Notice of Dispute Resolution Proceeding (Proceeding Package) & Service of Evidence. The parties having acknowledged service and receipt of the evidence packages, the hearing proceeded.

Preliminary Matters:

At the outset of the hearing, S.M for the Landlord advised that there was no outstanding rent due and payable by the Tenant and that the Landlord was withdrawing the 10 Day Notice. The Notice was cancelled accordingly. The Landlord advised it wished to proceed on the Notice for Cause for repeated late payment of rent.

Issue(s) to be Decided

- 1. Is the Landlord entitled to an Order for Possession for cause due to continued late payment of rent?**
- 2. Is the Landlord entitled to recover the filing fee for this application from the Tenant?**

Background and Evidence

I have reviewed all evidence, including the testimony of the parties, but will refer only to what I find relevant to my decision.

Evidence was filed showing that this tenancy began on July 1, 2017, for a one-year term with a monthly rent of \$1020.00 due on the first day of the month, with a security deposit in the amount of \$510.00. The tenancy converted to a month-month agreement on July 1, 2018. The rent payable increased to \$1081.00 per month as of the date of the hearing.

S.M for the Landlord gave evidence that the Tenant had been late with his rent payment throughout the tenancy. In reviewing the evidentiary package filed on behalf of the Landlord, I note that the Tenant was late with his rent 24 times over a 6-year period, an average of four times per year. The record also shows that the Tenant was late with rent 4 times in the last 12 months, although some of those late payments were made after the Landlord commenced these proceedings, as "occupancy and use" has been noted since March.

The Tenant, for his part, conceded he has been late with the rent. The Tenant was adamant that he always paid the rent but had trouble consistently paying it on time. The payment record filed by the Landlord supports the assertion of the Tenant. He pays, but he pays late depending on his financial circumstances.

The Tenant testified to personal circumstances and challenges in paying the rent on time starting in 2023. I note from my review of the record that the Tenant paid rent on time from August 2021 to August 2022. The Tenant also testified that he pays a late fee of \$25.00 with every overdue rent payment.

Agent S.M. says that late payment by the Tenant causes difficulties with the office administration of the Landlord. That the corporate Landlord will no longer tolerate the Tenant's late payment practices and that the Landlord possession of the Rental Unit as soon as possible, to replace the Tenant with a tenant who pays on time.

Analysis

The party making the claim has the burden of providing sufficient evidence over and above their testimony to establish their claim.

The Act requires the payment of rent due under a Tenancy Agreement in a timely manner. The rent must be paid when due. However, I'm troubled with the current application to end this tenancy for cause due to late payment of rent filed by the Landlord. This Tenant has paid rent to the Landlord monthly since 2017. There is no rent outstanding as of the date of the hearing held on September 11, 2023.

From my review of the record filed by the Landlord, the Tenant has been consistently with the rent late since the start of the tenancy. For more than 5 years the Landlord has accepted the late payments of the Tenant and charged and collected a late payment fee. What does the Tenant receive in exchange for the payment of the late payment fee on the 18 occasions that he has paid? Why has the Landlord been content to date to collect the late fee and accept the late payment of rent from the Tenant and now seeks an order for possession?

In my view, by allowing the Tenant to pay late and collecting a fee in consideration for the late payment of rent for over five years, the Landlord has waived the right to rely on the late payment of rent as the foundation for the Notice for Cause filed. This isn't a short-term tenancy, but rather a long-standing month-to-month tenancy arrangement since 2018 between the parties. The Landlord stated that the Tenant has always paid late, and for over 5 years the Landlord accepted these payments and collected the late fee.

Waiver has been applied in the commercial context, and these principles are equally applicable in residential tenancies. In North Gordon Industrial Park Inc. v. Rackster Hosting Inc. 2008 BCSC 267 the court stated the following with respect to waiver which is on point with respect to the facts before me in this hearing:

Waiver

[29] The landlord's position is that if the tenant had passed one or even two N.S.F. rent cheques, and if those cheques had been promptly made good by the tenant, then, if the landlord accepted the late payments, that might amount to waiver of the landlord's right to require on-time payment of rent. However, in this case, the landlord points to the tenant's history of persistently writing of bad cheques. That history comprises six separate instances of the tenant bouncing cheques made out to the landlord. The landlord says, quite simply, that enough is enough – it ought not to be required to put up with such an unreliable tenant, and it ought to be allowed to exercise its right as a landlord to evict a tenant in default.

[30] The tenant says that by accepting the tenant's make-up payments, the landlord has waived its right to insist on timely payment of rent. Although the tenant did not exactly say so in court, presumably the tenant means to say that the landlord has waived the individual instances of default and that the landlord may not terminate the tenancy on the theory that the tenant is likely to default again.

[31] The tenant relies on the principles relating to waiver found in *Delilah's Restaurants v. 8-788 Holdings Ltd.* 1994 CanLII 3170 (BC CA), [1994] B.C.J. No. 1340 (C.A.). In that case, the restaurant was the tenant, and the holding company was the landlord. The landlord alleged that the restaurant had committed two breaches of its lease. One breach was a change in the tenant's ownership amounting to an assignment of the lease, and the other was the tenant operating its business outside the hours stipulated in the lease. The tenant asserted that the landlord knew about these alleged breaches and accepted rent, nonetheless. According to the tenant, this amounted to a waiver by the landlord of its right to require the tenant to strictly comply with the terms of the lease. The lease contained a non-waiver clause. That clause stipulated that any condoning or overlooking by the landlord of a tenant's breach should not amount to waiver of the landlord's right to require the tenant to perform its obligations under the lease. The Court of Appeal accepted the findings below that the landlord accepted rent from the tenant during the months that the landlord knew of the tenant's breaches. Those were the very months with respect to which the landlord claimed the tenant was in breach and that gave the landlord the right to evict the tenant. On the issue of waiver, the Court of Appeal adopted the statement of Parker J. in *Matthews v. Smallwood*, [1910] 1 CH. 777, as follows:

Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon [which his] right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease.

[32] The Court of Appeal found that acceptance of rent in the face of knowledge of the tenant's breach constitutes such an unequivocal act and amounts to waiver of the breach. Further, that acceptance trumps any limitation that might be found in a non-waiver clause.

[33] In the present case, the landlord accepted make-up payments from the tenant. Each acceptance constituted a waiver of the breach that preceded it. Given that inescapable conclusion, the landlord's case for eviction on the basis of non payment of rent is reduced to an argument that that tenant must go because it has been late before and is likely to be late again.

[34] In my view, a tenant cannot be evicted for anticipated bad behavior. Having waived past breaches of timely payment of rent, the landlord is stuck with

its decision to accept late payment, and its forgiveness of those breaches.(emphasis added).

The Notice for Cause filed by the Landlord here is essentially the same. After 5 years the Landlord has said “enough is enough”. However, by accepting the previous late payments and collecting late fees, the Landlord has waived the timely payment of rent and is stuck with its decision to accept late payment in consideration for a late payment fee charged and collected from the Tenant.

In my view, these late payment charges are in consideration for the late payment made by the Tenant. In other words, the late charges “mean something” as far as the contractual relationship between the parties. Tenant pays late, Landlord charges fee, Tenancy Agreement continues.

Section 47 of the Act states as follows:

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.

Section 47 of the Act is permissive, not mandatory. A Landlord may end a tenancy where the tenant is repeatedly late with rent. In my review of the record produced by the Landlord demonstrates an acceptance of the repeated late payment of rent and waiver of this conduct by the collection of a late payment fee in consideration for the continuation of the tenancy. The Landlord cannot, as a result of this conduct, now turn to the Tenant and say, “enough is enough”. As noted, the Landlord has accepted all rent payments paid by the Tenant to the date of the hearing before me. No rent is outstanding.

Finally, I note that although I have dismissed the Landlord’s application based upon the acceptance of late rent payments and late fee to date, this would not preclude the Landlord from reapplying in future where the Landlord was able to establish repeated late payment and no waiver of this conduct under the Tenancy Agreement.

Conclusion

For the foregoing reasons I cancel the Notice for Cause and dismiss the Landlord’s direct request for an Order for Possession.

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: September 13, 2023