



Dispute Resolution Services

Page: 2

Residential Tenancy Branch
Ministry of Housing

DECISION

Introduction

This hearing was convened under the *Residential Tenancy Act* (The **Act**) in response to cross applications from the parties. The Landlord filed their application on February 21, 2024, and seeks:

- An order of possession pursuant to a one month notice to end tenancy for cause, dated February 7, 2024 (the **One Month Notice**).
- Authorization to recover the filing fee for this application from the Tenant.

The Tenant filed their application on March 4, 2024, and seeks cancellation of the One Month Notice and an extension of the time limit to dispute the One Month Notice under sections 47 and 66 of the *Act*.

Service of Records

Both parties acknowledged receipt of their counterparty's Proceeding Packages by registered mail, in accordance with section 89 of the *Act*. The Tenant acknowledged receipt of the Landlord's documentary evidence in accordance with the *Act*.

The Landlord acknowledged receipt of all the Tenant's documentary evidence in accordance with section 88 of the *Act*, except for a 38-page document that was served to the Landlord by the Tenant's advocate, VB, by text message, on April 26, 2024 (less than two full business days prior to the hearing). VB testified that they also sent the 38-page document to the Landlord by registered mail, but they acknowledged that Canada Post may not have delivered the package yet.

I reviewed the 38-page document during the hearing. The document is comprised of a six-page written submission by VB, a previous Residential Tenancy Branch decision regarding a similar matter involving third parties, and a copy of Mr. Justice Sewell's Reasons for Judgment in the case of *Guevara v Louie*, 2020 BCSC 380. As I informed the parties during the hearing, I am familiar with *Guevara* and I generally do not rely on hearsay written statements when the parties are present at the hearing to provide affirmed testimony, even if the statement was served to the counterparty on time and in accordance with the *Act*. In this case, because the six-page statement by VB was not served in accordance with section 88 of the *Act*, and because it was served late, I will not be considering the statement in my decision. The Tenant and their advocate were



Dispute Resolution Services

Page: 3

Residential Tenancy Branch
Ministry of Housing

provided an opportunity to provide submissions and affirmed testimonies during the one-hour hearing.

The parties agreed that the One Month Notice was served to the Tenant on February 7, 2024, in person.

Background Facts and Evidence

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

The parties agreed that this tenancy began on May 31, 2007, that the current monthly rent is \$625.00, and that the Landlord is holding \$300.00 as security deposit in trust for the Tenant.

The parties submitted a one-page hand-written note that they say governs this tenancy (the **Tenancy Agreement**). The Tenancy Agreement reads in full as follows:

May 12th/07

I, [the Tenant] accept this residence as is. Rent will be paid on a monthly basis. I give \$300.00 for damage deposit. [A]ny labour will be compensated.

The Tenant's advocate, VB, submitted that it was never a term of the parties' agreement that the Tenant must pay rent on the first day of every month, just that they must pay their rent monthly. The Landlord disputed this submission and testified that the Tenant has always known that they must pay their rent on the first day of every month and they have sent the Tenant repeated text messages regarding this issue. The Landlord did not submit any text messages for consideration.

The Tenant testified that at the start of this 17-year-long tenancy, the parties never discussed when rent is to be paid and that if it is found that a term of this agreement is to pay rent on the first day of every month, they have paid their rent to the Landlord late on multiple occasions throughout the past 17 years without the Landlord ever issuing them a notice or a warning.

The Tenant testified that when they know their rent will be late, they contact the Landlord by phone and inform them of the same. The Tenant testified that the Landlord always responds with "no problem". The Landlord denied this testimony.



Dispute Resolution Services

Page: 4

Residential Tenancy Branch
Ministry of Housing

The Tenant provided undisputed testimony that prior to the issuance of the One Month Notice, the only other notices served to the Tenant were a 10-day notice for unpaid rent (the **10 Day Notice**) signed by the Landlord on January 23, 2024, and a hand-written note regarding excessive noise that was issued to the Tenant approximately 10 years prior to the hearing.

The parties agreed that the Tenant paid the outstanding rent that led to the Landlord issuing the 10 Day Notice.

On January 23, 2024, along with the 10 Day Notice, the Landlord served the Tenant with a letter outlining their reasons for issuing the Tenant with the 10 Day Notice and the One Month Notice (the **Letter**). In the Letter, the Landlord states that “[the Tenant has] made late rent payments for the months of February, March, April, June, July, September, and October 2023”.

The parties both submitted typed records listing the occasions that the Tenant paid their rent late. The Tenant testified that they began using Interac e-Transfer as their method of payment in March 2020. The Tenant’s records indicate that they paid their rent late three times in 2021, late more than three times in 2022, and late five times in 2023. According to the Tenant’s records, the Tenant was last late in October 2023, six months prior to the hearing and approximately four months prior to the issuance of the One Month Notice.

The Tenant’s position during the hearing was that the relevant date is the date that payments are sent by the Tenant to the Landlord via Interac e-Transfer, not when the Landlord receives those payments. The Landlord’s records show that the Tenant was late at least eight times in 2023, because the Landlord considered a payment late if they received the payment after the first day of the month. Both parties submitted bank records.

The Landlord testified that even if the Tenant’s position is accepted, the Tenant was still late numerous times in 2023.

VB submitted that as soon as the Tenant received the Letter, the One Month Notice and the 10 Day Notice, the Tenant took steps to remedy the matter and no payments have been late since. Records by both parties show that the Tenant has not been late since being served with the Letter, the One Month Notice, and the 10 Day Notice.



Dispute Resolution Services

Page: 5

Residential Tenancy Branch
Ministry of Housing

With regard to why the Tenant filed their application late, VB submitted that the Tenant received assurances from the Landlord that they will not be proceeding with enforcement of the One Month Notice, which is why the Tenant never filed their application until they were served with the Landlord's application for an order of possession. The Tenant testified that they received the Landlord's application on February 26, 2024, and they immediately contacted friends who informed them of the need to seek an advocate. The Tenant filed their application within one week of February 26, 2024.

The Tenant testified that when they first received the One Month Notice, they went to the Landlord's office in person and discussed the matter with the Landlord. The Tenant testified that the Landlord informed them to not "stress about it". The Tenant testified that they "literally" asked the Landlord if the Tenant should dispute the One Month Notice and they were informed by the Landlord that there is no need. The Tenant testified that they had clear indication that the Landlord will not be enforcing their notice.

The Landlord, in response to the above testimony, testified that after the Tenant was served with the One Month Notice, the Tenant visited their office two times, with each visit lasting approximately 30 minutes to one hour. The Landlord testified that they were being questioned by the Tenant "in front of my colleagues" and they felt pressured, so they informed the Tenant that they are "not going to promise anything." The Landlord testified that they informed the Tenant that "it is not etched in stone".

Analysis

When two parties to a dispute provide equally possible accounts of events or circumstances related to a dispute, the party making the claim has the responsibility to provide evidence over and above their testimony to prove their claim.

The standard of proof in this tribunal is balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

Is the Tenant entitled to more time to cancel the Landlord's One Month Notice?

Section 47 of the *Act* states that a landlord may issue a Notice to End Tenancy for Cause to a tenant if the landlord has grounds to do so. Section 47 of the *Act* states that upon receipt of a Notice to End Tenancy for Cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. In this case, the Tenant was served with the One Month Notice on



Dispute Resolution Services

Page: 6

Residential Tenancy Branch
Ministry of Housing

February 7, 2024, but they did not file an application to dispute the One Month Notice until March 4, 2024, approximately one month after being served with the One Month Notice, and within one week of being served with the Landlord's application for an order of possession. I must first decide if the Tenant is entitled to more time to cancel the Landlord's One Month Notice.

Section 66 of the *Act* states that the Director may extend the time limit established by this *Act* only in exceptional circumstances. Policy Guideline 36 explains that the "word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse. Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said."

In this case, I find the Tenant's reason to be strong and compelling. I listened to the Landlord's testimony regarding their two meetings with the Tenant after the Tenant was served the One Month Notice. I find that it is more likely than not that a reasonable tenant in this situation would consider the matter dealt with, especially considering that this is a 17-year-old tenancy, involving the same parties, without any prior history of eviction notices being issued by the Landlord. I note that not knowing the law is not an excuse and not a valid reason to not file an application to dispute a notice, but not knowing the law in this case was not the main reason why the Tenant did not file their application in time. Within days of realizing that the Landlord was intending to enforce their eviction notice, the Tenant sought legal advice and filed their own application in dispute.

I find the Tenant did not willfully fail to comply with the relevant time limit, that reasonable and appropriate steps were taken to comply with the relevant time limit (two visits to the Landlord's office to ask whether they should dispute the eviction notice), that the application was filed as soon as practical under the circumstances and finally, and most importantly, the Tenant's application has merit.

In this case, the effective date of the One Month Notice was March 31, 2024, and the Tenant filed their application on March 4, 2024. Therefore, section 66(3) of the *Act* is not applicable, and I find I have jurisdiction to extend the time limit in exceptional circumstances, which I find the Tenant has established. I extend the time limit to file a dispute, pursuant to section 66 of the *Act*, to March 4, 2024.

Therefore, the Landlord has the burden to prove that they have sufficient grounds to end this tenancy.

Should the Landlord's One Month Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?



Dispute Resolution Services

Page: 7

Residential Tenancy Branch
Ministry of Housing

In this case the Landlord bears the onus to prove, on a balance of probabilities, that the Tenant has repeatedly paid their rent late.

Section 12 of the *Act* states that every tenancy agreement, whether written or oral, whether entered into before or after January 1, 2004, includes the standard terms outlined under the *Regulation*. The standard terms can be found under the Schedule section of the *Regulation*. Section 5(1) of the Schedule states that “the tenant must pay the rent on time...”.

Section 26(1) of the *Act* also states 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.

In this case, the Tenancy Agreement does not include a payment due date and simply states that rent is to be “paid on a monthly basis”.

I find, based on the Tenant’s own evidence, that the parties considered the first day of every month to have been the due date. While the Tenant has been late on numerous occasions throughout this 17-year long tenancy, they have either remitted payment or deposited their rent on the first day of every month, or on a date very close to the first day of every month, in nearly every month of this tenancy.

In *Guevara v Louie*, 2020 BCSC 380 [*Guevara*], at paragraph 55, Justice Sewell states that a “review of all of the grounds on which a tenancy may be terminated under s. 47 [of the *Act*] makes it apparent that the tenant must have engaged in serious misconduct that seriously affected the landlord or consider the building in which the premises are located ...” Justice Sewell then goes on to state that an arbitrator must give consideration to the circumstances relating to the defaults of the tenant.

In *Senft v Society For Christian Care of the Elderly*, 2022 BCSC 744 [*Senft*], Justice Wilkinson states that arbitrators must interpret section 47 of the *Act* in a manner that is consistent with the text, context and purpose of the *Residential Tenancy Act*. At paragraph 38 of the decision, Justice Wilkinson states: “several decisions of this Court confirm that RTB arbitrators must keep the protective purpose of the *RTA* in mind when construing the meaning of a provision of the *RTA*.”

One of the main purposes of the *Act* is protection of tenants from the power imbalance that may exist between landlords and tenants. The Court in *Senft* stated that the post-notice conduct of the tenant is also relevant in deciding whether an end to tenancy is justified.



Dispute Resolution Services

Page: 8

Residential Tenancy Branch
Ministry of Housing

Guevara was a case regarding late payments. At paragraph 56 of *Guevara*, the Court stated the following:

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.

I find the above paragraph to be directly relevant to the case before me. The tenancy between the parties in this case is nearly two decades long. There is no dispute that in nearly two decades, the Landlord never issued the Tenant with any formal eviction notices for late payment of rent, until the One Month Notice of February 2024. There is some evidence that had the parties not had a dispute over unpaid rent, the One Month Notice may not have even been issued. In October 2023 the Tenant failed to remit approximately \$200.00 to the Landlord for what they testified was work performed during the tenancy. The Landlord disagreed with the Tenant's take and eventually issued the Tenant with the Letter and the 10 Day Notice. Along with the foregoing, the Landlord also decided to issue the Tenant with a One Month Notice.

Policy Guideline 38 states that 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 this case, whether I consider the Tenant's records or the Landlord's records, the Tenant was late on multiples occasions in 2022 and 2023. I disagree with the Tenant and their counsel that the Tenant is responsible for when rent is sent and not when it is received. With respect, barring any issues with bank errors, I find this take to be irrational. A tenant is of course not responsible for bank errors, but I have not been provided with any evidence of a bank error in this case. The Tenant must investigate the cause of the delay between when they send their payments and when the Landlord's bank receives them (perhaps there is a cut-off time) and take measures to ensure that the Landlord receives payment when it is due. In this case, I have already found that rent is due on the first day of every month.



Dispute Resolution Services

Page: 9

Residential Tenancy Branch
Ministry of Housing

However, equally absurd would be to not consider the surrounding circumstances of this case. Justice Sewell in *Guevara* made it clear that surrounding circumstances must be considered by arbitrators and the Court in *Senft* made it clear that the post notice conduct of the Tenant is highly relevant. In this case, this elderly tenant paid their rent in cash until March 2020, when the parties switched to Interac e-Transfer. An elderly tenant without previous experience with online payments may fairly believe that if they send their payments on the first day of the month, that the Landlord will also receive it on the same date. They are now on notice that they must investigate the issue with their bank and take alternative measures if necessary. Since the One Month Notice was issued by the Landlord, the Tenant has never been late, as admitted by the Landlord. The issue therefore may already be resolved.

I now turn my mind to the Landlord's testimony that even if I were to accept the Tenant's argument that rent is paid when sent not when received, the Tenant was still late more than three times in 2023.

Policy Guideline 38's guidance (outlined above) relies on the doctrine of estoppel, which is a legal doctrine that holds that one party may be prevented from strictly enforcing a right to the detriment of the other party, if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly.

The Landlord in this case never issued the Tenant with a written warning regarding late payment of rent, until the Letter and the 10 Day Notice were issued. The Tenant has not paid their rent late since. The parties disputed each other's accounts about whether the Landlord acquiesced to the Tenant's late payments throughout the term of this tenancy. The Tenant testified that the Landlord would tell them not to worry about late payment. The Landlord provided opposing testimony. I note that the Landlord has the onus to establish they have ground to end this tenancy.

I find the Landlord established a pattern of accepting rent late and the Tenant relied on the pattern to continue to make payments late. During the hearing the Landlord repeatedly made references to "being nice". If the Landlord intends to strictly enforce their rights under the *Act* within the context of this tenancy, they must first issue the Tenant with a notice that they wish to strictly enforce the payment of rent on time.

Therefore, the Tenant's application is granted for cancellation of the Landlord's One Month Notice. The Notice is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

As I informed the Tenant during the hearing, the Tenant is now deemed to have notice of the Landlord's intention to withdraw their waiver and they are no longer estopped



Dispute Resolution Services

Page: 10

Residential Tenancy Branch
Ministry of Housing

from enforcing their rights under the parties' tenancy agreement strictly. I have already found that rent is due on the first day of every month (pursuant to section 62 of the *Act*).

The Landlord's application is dismissed in full, including their application to recover the filing fee, because they were unsuccessful in their claim for an Order of Possession.

Conclusion

The Tenant's application is granted for cancellation of the Landlord's One Month Notice and an extension of the time limit to dispute the Notice under sections 47 and 66 of the *Act*. The One Month Notice, signed by the Landlord on February 7, 2024, is cancelled and is of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

The Landlord's application is dismissed, in full.

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: April 30, 2024

Residential Tenancy Branch