



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DGC HOLDING CORP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC LAT

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Tenants on December 19, 2016. The Tenants filed seeking an order to cancel a 1 Month Notice to end tenancy for cause and to allow access to (or from) the unit or site for the Tenants or the Tenants' guests.

The hearing was conducted via teleconference and was attended by two agents for the corporate Landlord (the Landlords) and both Tenants. Each person gave affirmed testimony. I informed the parties how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process; however, each declined and acknowledged that they understood how the conference would proceed.

The female Tenant confirmed that her surname had been spelled incorrectly on their application for Dispute Resolution. Neither party objected to the style of cause being amended to include the correct spelling of the female Tenant's name. Accordingly, the style of cause was amended, pursuant to section 64(3)(c) of the Act.

The Landlords submissions were submitted by the female Landlord while the Tenants' submissions were primarily provided by the male Tenant. Therefore, for the remainder of this decision, terms or references to the Landlords or Tenants importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

The Landlord confirmed receipt of the Tenant's application; Notice of hearing documents; their initial evidence submission; and a one page document was received in a second submission. The Tenant stated that they did not serve the Landlord a copy of the December 12, 2016 Decision in their second evidence package because she would have received a copy from the Residential Tenancy Branch (RTB). The Landlord confirmed she had received a copy of the December 12, 2016 Decision earlier and raised no issues about not receiving it as part of the Tenants' evidence.

The Tenants confirmed receipt of the Landlords' evidence package and stated that they received 55 pages in that submission. I heard the Landlord state that she served the Tenants with 57 pages of evidence, exactly the same as the package they submitted to

the RTB and she questioned why they would be saying they did not receive the last two pages.

A random check of the evidence was initially conducted with the male Tenant. I then conducted a review of the Landlords' evidence package with the female Tenant. After the review I accepted the Tenants' submissions that they received 55 pages of evidence from the Landlords. I then advised the Landlord that if she wished me to consider the contents of pages 56 and 57 of her evidence submission she was at liberty to read those pages into evidence. The Landlord did not read those pages into evidence; therefore, they will not be considered as evidence for these proceedings.

At the outset of the hearing I explained to both parties that in cases where a landlord issued a 1 Month Notice to end tenancy listing numerous reasons for ending the tenancy, the landlord need only prove one reason listed on that Notice. Each person was given the opportunity to ask questions about the foregoing, and everyone declined and confirmed they understood.

The hearing continued for 53 minutes during which I heard oral submissions from both parties relating to the first reason listed on the 1 Month Notice: "the Tenant is repeatedly late paying rent". I have considered all relevant oral and written submissions from both parties, excluding pages 56 and 57 of the Landlords' submissions, relating to that first reason on the Notice. Although all submissions relating to the aforementioned reason for ending the tenancy were considered, they may not be referenced in is Decision.

Issue(s) to be Decided

1. Has the Landlord proven the Tenants have repeatedly paid their rent late?
2. If so, is the Landlord entitled to an Order of Possession?

Background and Evidence

These parties were before me on January 2, 2015 regarding the Tenants' application to cancel a 1 Month Notice to end tenancy for cause, issued December 1, 2014, for reasons not related to repeated late payment of rent. On January 5, 2015 I issued my Decision finding there was insufficient evidence to uphold that 1 Month Notice. That Notice was cancelled and the tenancy continued.

Both parties confirmed that the terms of the tenancy have not changed since their submissions on December 1, 2014. That is to say the tenancy began on August 22, 2014 and rent was payable on the first of each month in the amount of \$800.00. The Landlords remained in possession of the \$400.00 security deposit that was paid on July 22, 2014.

On December 12, 2016 the parties attended dispute resolution before another Arbitrator regarding the Tenants' application to cancel a 1 Month Notice issued September 6,

2016. That Arbitrator found the September 6, 2016 Notice had not been completed in accordance with section 52 of the *Act* and cancelled the Notice. Both previous Decisions are referenced on the front page of this Decision.

On December 12, 2016 the Landlords personally served the Tenants another 1 Month Notice to end tenancy listing an effective date of January 31, 2017. That 1 Month Notice was issued pursuant to Section 47(1) of the *Act* listing the following reasons:

- Tenant is repeatedly late paying rent
- Tenant or a person permitted on the property by the tenant has:
 - Significantly interfered with or unreasonably disturbed another occupant or the landlord
 - Seriously jeopardized the health or safety or lawful right of another occupant or the landlord
- Tenant has engaged in illegal activity that has or is likely to
 - Adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord

I heard the Landlords' submissions regarding the first reason listed on the Notice: "the Tenant is repeatedly late paying rent" which are summarized below:

- On August 1, 2016 the male Tenant contacted the Landlord to advise that he would not be able to pay his \$800.00 rent on time.
- On August 23, 2016 the male Tenant paid the \$800.00 August 2016 rent.
- On November 1, 2016 the male Tenant contacted the Landlord and again advised that he would not be able to pay his \$800.00 rent on time.
- On November 2, 2016 the Landlord served the Tenants a 10 Day Notice to end tenancy for \$800.00 unpaid rent. A copy was submitted into evidence.
- On November 8, 2016, rent remained unpaid and a second 10 Day Notice to end tenancy for \$800.00 was served upon the Tenants; as submitted into evidence.
- On November 10, 2016 a partial payment of \$660.00 was received from the Tenant leaving a balanced owed of \$140.00. A receipt was issued to the Tenant November 10, 2016 as submitted into evidence.
- On December 1, 2016 the Tenants paid \$800.00 of which \$140.00 was applied to the outstanding November 2016 rent which left \$140.00 unpaid for December 1, 2016 rent.
- On December 2, 2016 the Landlords personally served the Tenants a third 10 Day Notice indicating \$140.00 remained outstanding that was due December 1, 2016.
- On December 7, 2016 the Tenants paid the outstanding \$140.00 and were issued a receipt the same date; as provided in the Landlord's evidence.

The Landlord testified that the Tenants' rent payments started being automatically deposited into the Landlord's bank account in December 2016. I heard her state that an \$800.00 payment was automatically deposited for January 2017 pending the outcome

of this hearing and at no time have they discussed continuing this tenancy with the Tenants.

I heard the Tenants' submissions regarding the late payments of rent which are summarized as follows:

- The Tenant confirmed their August 1, 2016 rent was paid late on August 23, 2016.
- I heard the Tenant state that he had not paid his November 2016 rent on the first of the month and they had applied for assistance and were waiting for "the Ministry" to approve their application.
- The Tenant stated he received a telephone call from the Ministry on November 12 or 15, 2016 telling him that his application had been approved and they were mailing the Landlord a cheque that date for payment for his November 2016 rent.
- I heard the Tenant state they had received the two 10 Day Notices to end tenancy issued November 2, 2016 and November 8, 2016 and they did not file an application to dispute either Notice.
- The Tenant argued he was not aware his November 2016 rent was short paid and asserted the Landlord did not call him to tell him they only received \$660.00 towards November 2016 rent.
- I heard the Tenant state that he usually went into the Landlord's office to pick up his rent receipts and that he had picked up the receipt dated November 10, 2016. The Tenant asserted he did not know the exact date he had received that receipt.
- I heard the Tenant confirm they received the December 2, 2016 10 Day Notice.
- The Tenants paid the outstanding \$140.00 balance within the 5 days, on December 7, 2016.

I asked the Tenants why they did not file an application to dispute the 10 Day Notices to end tenancy to which the male Tenant responded they were told not to waste their \$100.00 on a filing fee as the Landlord should file an application if they wish to pursue the 10 Day Notices.

The male Tenant continued his submissions stating that payment for February 2016 was received by the Landlord on January 18, 2017, the day before this hearing. The Tenant said that he intended on going to the Landlord's office after this hearing to pick up his receipt for the February 2016 payment. I then heard him state that he always went to the office to pick up his rent receipts within a day or two of his rent being paid. The Tenant then confirmed he had picked up his November receipt in November 2016.

I then heard the Landlords' final submissions regarding the late payment of rent. The Landlord disputed the Tenant's submissions stating the male Tenant personally hand delivered the November 2016 payment to their office on November 10, 2016, with a cheque issued by the Ministry. She stated the receipt was issued while the Tenant was there on November 10, 2016; and that receipt clearly stated that the "Partial Rent" payment of \$660.00 was received. She asserted the Ministry began sending the

payments directly to the Landlord by direct deposit after that first cheque was received from the Tenant.

I heard the Landlord state that they were aware that an \$800.00 payment had been deposited into their bank account on January 18, 2017 but they had not yet confirmed who that payment was received from and for whom. She stated if that payment was made for these Tenants for February 2017 it was the Landlords' intention to return the payment as they wished to be issued an Order of Possession effective January 31, 2016. She noted that they had no control over when the Ministry deposited payments.

At this time I informed the parties the hearing time had expired and there was sufficient evidence before me to end this tenancy on the grounds the Tenants had repeatedly paid their rent late. As such, I would not be hearing submissions regarding the remaining reasons listed on the 1 Month Notice to end tenancy; as per the process I explained at the beginning of this hearing; and I would be issuing the Landlord an Order of Possession effective January 31, 2016.

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing; documentary evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

Upon review of the 1 Month Notice to End Tenancy issued December 12, 2016, I find the Notice to be completed in accordance with the requirements of section 52 of the *Act* and I find that it was served upon the Tenants in a manner that complies with section 88 of the *Act*.

As stated above, when considering a 1 Month Notice to End Tenancy for Cause the Landlord has the burden to provide sufficient evidence to establish at least one reason for issuing the Notice to End Tenancy. When determining the reason relating to repeated late payment of rent I considered Residential Tenancy Branch Policy Guideline 38 which states, in part, that three late payments are the minimum number sufficient to justify a notice under these provisions. Policy 38 further provides that 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.

The undisputed evidence was tenancy agreement stipulated rent was payable on the first of each. The Tenants paid rent late as follows: August rent of \$800.00 was paid on August 23, 2016; November rent was paid \$660.00 on November 10, 2016 plus \$140.00 paid on December 1, 2016; December rent was paid \$660.00 on December 1, 2016 and \$140.00 was paid on December 7, 2016.

When weighing the evidence, I favored the Landlords' submissions that the Tenant personally delivered the \$660.00 payment on November 10, 2016 and he was issued a receipt for "Partial Rent" on the same date. I favored the Landlords' submissions over the Tenants' as they were forthright and consistent. From his own submission the Tenant alleged the Ministry called him on November 12 or 15 to inform him that his application was approved and the November 2016 payment was allegedly being mailed to the Landlord that day. I note the Landlord had already received the \$660.00 payment on November 10, 2016, several days before, and the Tenant had already been issued the receipt.

Furthermore, I found the Landlord's submissions that the Tenant was provided the November 2016 cheque directly from the Ministry and the Tenant personally delivered it to the Landlord to be reasonable given the circumstances presented to me. By his own submission, the Tenant confirmed they were waiting for their application to be approved by the Ministry in November 2016 and the \$660.00 cheque was the first payment made once that application for assistance was approved.

In addition, I accept the undisputed submissions that following the initial cheque, payments were made by Direct Deposit into the Landlord's bank account. As such, I accept the Landlord's submission that the Tenant was provided the receipt on November 10, 2016 indicating his rent had been partially paid in the amount of \$660.00, leaving a balance owed of \$140.00.

Generally Accepted Accounting Principles (GAAP) provides that payments received are generally applied to previous outstanding amounts first. By his own submission, the Tenant confirmed receiving the November 10, 2016 rent receipt clearing showing a partial payment of \$660.00. Therefore, I do not accept the Tenant's submission that he was never told his November 2016 rent had been short paid. Accordingly, I accept that when the Tenant's December 1, 2016 payment of \$800.00 was received, \$140.00 paid the balanced owed for November 2016 leaving \$140.00 outstanding for December 2016 rent. That balance was not paid until December 7, 2016, which constitutes a late payment of December 2016 rent.

Based on the above, I find there was sufficient evidence to support the first reason listed on the 1 Month Notice issued December 12, 2016; the Tenants had repeatedly paid their rent late. Therefore, there were sufficient grounds to uphold that 1 Month Notice. In addition to finding there was sufficient evidence to support at least one reason issued on the 1 Month Notice, I could not ignore the evidence before me that related to the three 10 Day Notices and which formed part of each party's evidence submissions. I then considered Policy Guideline 11 which provides that as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

When a tenant receives a 10 Day Notice to end tenancy for unpaid rent they have (5) days to either pay the rent in full or to make application to dispute the Notice. If a tenant fails to pay the rent or file an application for dispute resolution, section 46(5)(a) of the

Act stipulates the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice.

Upon review of the three 10 Day Notices to end tenancy, the November 2, 2016 Notice did not list an effective date; therefore, that Notice did not meet the form and content requirements of the *Act*. The 10 Day Notice issued December 2, 2016 would be void based on the Tenants' December 7, 2016 payment. However, the 10 Day Notice issued November 8, 2016 was issued and served in accordance with the *Act*; and was therefore in full force and effect.

I do not accept the Tenant's submission that they were not required to file an application to dispute the 10 Day Notice(s) because they were told not to waste \$100.00 to file an application to dispute them or that they were told the burden was on the Landlord to file an application relating to the 10 Day Notices. I note that the RTB record shows the Tenants have not paid a filing fee in any of the three applications they brought forward in the evidence before me. Rather, in each case the Tenants had applied for and were granted a fee waiver. Therefore, their argument regarding a filing fee was meritless.

As the 10 Day Notice issued November 8, 2016 was still in full force and effect, and the evidence before me was the November 2016 rent was not paid in full until December 1, 2016; 22 days after the Tenants received the 10 Day Notice; the Tenants were conclusively presumed to have accepted this tenancy ended on November 19, 2016, pursuant to section 46(5)(a) of the *Act*.

When rent payments are directly deposited into a landlord's bank account by a third party, on random days before the rent payment is due and during a period when a Notice to end tenancy is going through the Dispute Resolution process, I do not find the Notices to end tenancy to be waived based on those direct deposits. I make this finding in part after consideration that hearings for dispute resolution are not scheduled for several weeks, sometimes months, after the application is filed. The *Act* provides that a landlord is entitled to payment for use and occupation of the rental unit during the time a tenant remains in the rental unit. In addition, given the history of this tenancy, and the amount of Notices issued to these Tenants, I accept the Landlord's submissions their intentions to pursue an Order of Possession were clearly communicated to the Tenants.

Although I have found sufficient evidence to end this tenancy in accordance with the 1 Month Notice above, I note the issuance of the December 12, 2016 1 Month Notice did not cancel the 10 Day Notices, pursuant to Policy Guideline 11. Therefore, there was sufficient evidence before me that this tenancy technically ended **November 19, 2016**, the effective date of the 10 Day Notice for unpaid rent issued November 8, 2016. As such, I find the Tenants have continued to over hold the rental unit making payments for use and occupancy only.

Based on the totality of the evidence before me, I find the Tenants submitted insufficient evidence that the 1 Month Notice issued December 12, 2016 should be set aside or

cancelled. As such, I dismiss the Tenants' application in its entirety, without leave to reapply.

Section 55(1) of the *Act* stipulates that if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I find the criteria have been met and I grant the Landlord's request for an Order of Possession, effective **January 31, 2017 at 1:00 p.m.**, pursuant to section 55(1) of the *Act*. In the event the Tenants do not comply with this Order it may be filed with the Supreme Court and enforced as an Order of that Court.

The Landlord is ordered to return the February 2017 payment to the Ministry forthwith.

Conclusion

The Tenants were not successful with their application and the Landlords were granted an Order of Possession effective January 31, 2017.

This decision is final, legally binding, and 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: January 20, 2017

Residential Tenancy Branch