Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **LL: OPC FFL**
TT: CNL-4M DRI OLC FFT

Introduction

This hearing dealt with two applications for dispute resolution pursuant to the *Residential Tenancy Act* (the "Act"). The Landlord made one application for dispute resolution ("Landlord's Application") for:

- an Order of Possession pursuant to a One Month Notice to End Tenancy for Cause dated October 12, 2021 ("1 Month Notice"), pursuant to section 47; and
- authorization to recover the filing fee of the Landlord's Application from the Tenants pursuant to section 72.

The Tenants made one application for dispute resolution ("Tenants' Application") for:

- cancellation a Four Month Notice to End Tenancy pursuant to section 49;
- an order regarding a disputed rent increase pursuant to section 43;
- an order that the Landlord comply with the Act, *Residential Tenancy Regulations* and/or tenancy agreement pursuant to section 62; and
- authorization to recover the fling fee from the Landlord pursuant to section 72.

Neither of the two Tenants ("GS" and "DK") attended this hearing scheduled for 9:30 am. I left the teleconference hearing connection open for the entire hearing, which ended at 10:19 am, in order to enable the Tenants to call into this teleconference hearing. An agent ("AR") for the Landlord appeared at the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Landlord's Notice of Dispute Resolution Proceeding ("Landlord's NDRP")

and the Tenants' Notice of Dispute Resolution Proceeding ("Tenants' NDRP"). I also confirmed from the teleconference system that AL and I were the only ones who had called into this teleconference.

AR testified the Landlord served the Landlord's NDRP and its evidence ("Landlord's NDRP Package") on each of the Tenants by placing the two packages in front of the Tenants' door on April 8, 2022. AK stated she observed the two Landlord's NDRP Packages had been removed later the same day. I find, on the undisputed testimony of AR, that the Tenants were each served with the Landlord's NDRP Packages. I find that the Landlord's NDRP Packages were served on each of the Tenants in accordance with sections 88 and 89 of the Act.

AR stated the Tenants did not serve the Landlord with any evidence for this hearing.

Preliminary Matter – Removal of AR as respondent on Tenants' Application

At the outset of the hearing, AR stated she was not a landlord of the rental unit but was the agent for the Landlord. AR stated the tenancy agreement and the 1 Month Notice named ABCo as the Landlord as did the Landlord's Application. AR requested that I amend the Tenants' Application remove her as a respondent and to name ABCo as the respondent to the Tenants' Application

Residential Tenancy Branch Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
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> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

The Tenants could reasonably have anticipated the Landlord would request an amendment to remove a party, who is not a landlord to the tenancy, as a respondent and to name ABCo as the respondent in the Tenants' Application. As such, I order the Tenants' Application be amended to remove AR as a respondent and add ABCo as the respondent.

Preliminary Matter – Effect of Tenants Not Serving Tenants' NDRP and Not Attending Hearing

AR stated the Tenants did not serve the Landlord with the Tenants' NDRP.

Rules 3.1 of the *Residential Tenancy Branch Rules of Procedure* ("RoP") states:

> 3.1 Documents that must be served with the Notice of Dispute Resolution Proceeding Package
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> The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:
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> a) *the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;*
> b) the Respondent Instructions for Dispute Resolution;
> c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and
> d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].
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> See Rule 10 for documents that must be served with the Notice of Dispute Resolution Proceeding Package for an Expedited Hearing and the timeframe for doing so.
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> [emphasis in italics added]

Based on the undisputed testimony of AR, the Tenants did not serve the Tenants' NDRP on the Landlord, or on her as agent for the Landlord, as required by Rule 3.1.

Rule 6.6 of the RoP states:

> **6.6 The standard of proof and onus of proof**
>
> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Pursuant to Rule 6.6 of the RoP, the Tenants bear the onus to prove they are entitled to the claims made in the Tenants' Application.

Rules 7.1, 7.3 and 7.4 of the RoP state:

> **7.1 Commencement of the dispute resolution hearing**
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> The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.
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> **7.3 Consequences of not attending the hearing**
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> If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of the party, or dismiss the application, with or without leave to re-apply.
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> **7.4 Evidence must be presented**
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> Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

Given the Tenants did not serve either of the Landlord, or AR as agent for the Landlord, with the Tenants' NDRP nor did either of the Tenants attend the hearing within 10 minutes of its commencement, pursuant to Rule 7.3, I dismiss the Tenants' Application in its entirety without leave to reapply.

Notwithstanding I have dismissed the Tenants' Application, the Landlord nevertheless has the onus to prove, on a balance of probabilities, there is cause to end the tenancy pursuant to the 1 Month Notice.

Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession for cause?
- recovery of the filing fee for the Landlord's Application from the Tenants?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Landlord's Application and my findings are set out below.

AR submitted into evidence a signed copy of the tenancy agreement between the Landlord and the Tenants dated January 28, 2021. AR stated the tenancy commenced on February 1, 2021, on a month-to-month basis, with rent of $1,060.00 payable on the 1st day of each month. AR stated GS paid a security deposit of $430.00 pursuant to a predecessor tenancy agreement between the former landlord and GS.

AR submitted into evidence a signed agreement between AR, as agent for the Landlord, and the Tenants in which the Landlord agreed to cancel a previously issued One Month Notice dated February 26, 2021. AR stated the agreement stated:

> Late rent payments are unacceptable and if the tenants continue to pay late an eviction will be considered again. Rent is due not later than the first of every month. No exceptions.

AR stated, after signing the agreement of February 26, 2021, the Tenants were late paying the rent for the months of May, August and October 2021. AR submitted a copy of the 1 Month Notice into evidence and stated the Landlord served the 1 Month Notice on the Tenants in-person on October 12, 2022. AR stated the 1 Month Notice had an effective date for move-out on December 31, 2021. The 1 Month Notice stated the cause for ending the tenancy was the tenant was repeatedly late paying the rent. The details of the cause for ending the tenancy stated in the 1 Month Notice were:

> Rent is due no later than the 1st of the month. NO EXCEDPTIONS. Late payments: 1) May 2, 2022 2) August 3, 2021 3) October 2, 2021. See agreement signed for details on the eviction notice extension.
>
> Rent for January to April 2022 must be paid no later than the 1st of each month. If rent is paid late you will be served with a 10 day eviction and no extensions will be provided to you at that time.

AR stated that, after serving the Tenants with the 1 Month Notice, there was a meeting with AR and an agent for the Landlord on December 30, 2021. AR stated that, at that meeting, the Tenants requested more time to move out. AR stated the Landlord agreed to change the effective date of the 1 Month Notice from December 1, 2021 to April 30, 2022. AR stated the Tenants have refused or neglected to vacate the rental unit by April 30, 2022.

Analysis

Subsections 47(1)(c), 47(1)(d)(i) and 47(4) of the Act state in part:

> 47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
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> […]
>
> (b) the tenant is repeatedly late paying rent;
>
> […]

> (4) *A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.*
>
> [emphasis in italics added]

AR stated the Landlord served 1 Month Notice on the Tenants in-person on October 12, 2022. Pursuant to section 47(4), the Tenants had 10 days after they received the 1 Month Notice within which to make an application for dispute resolution to dispute the 1 Month Notice, being October 22, 2021. The records of the RTB disclose the Tenants made the Tenants' Application on March 31, 2022. As such, the Tenants made the Tenants' Application more than 10 days after they received the 1 Month Notice. Furthermore, the Tenants did not attend this hearing and, as a result, I have dismissed the Tenants' Application.

Residential Tenancy Branch Policy Guideline 38 ("PG 38") provides guidance on a landlord ending a tenancy based on repeatedly late payments of rent. PG 38 states in part:

> Three late payments are the minimum number sufficient to justify a notice under these provisions.
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> 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.
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> 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.

The undisputed testimony of AR was the Tenants were late paying the rent for May, August and October 2021. In accordance with the provisions of PG 38, and based on the undisputed testimony of AR, I find the Tenants were repeatedly late paying the rent.

The legal concept of estoppel has been addressed in a recent decision of the B.C. Supreme Court, *Guevara v. Louie,* 2020 BCSC 380. The presiding Judge, the

Honourable Mr. Justice Sewell, wrote as follows:

> [62] ... Therefore, the proper question was whether Ms. Louie could rely on past instances of rent not being paid on the first of the month to terminate the tenancy agreement when for years she had acquiesced in the manner that rent was paid. Specifically, had Ms. Louie represented through her conduct and communications that she did not require strict compliance with the term of the tenancy agreement stating that rent must be paid on the first day of the month.
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> [63] While the legal test of waiver requires a "clear intention" to "forgo" the exercise of a contractual right, the equitable principle of estoppel applies where a person with a formal right "represents that those rights will be compromised or varied:" *Tymchuk v. D.L.B. Properties,* 2000 SKQB 155 at paras. 11-17. Unlike waiver, the principle of estoppel does not require a reliance on unequivocal conduct, but rather "whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it:" *Bowen v. O'Brien Financial Corp.,* 1991 CanIII 826 (BC CA), [1991] B.C.J. No. 3690 (C.A.)...
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> [65] The following broad concept of estoppel, as described by Lord Denning in *Amalgamated Investment* & *Property* Co. *(In Liquidation) v. Texas Commerce International Bank Ltd.* (1981), [1982] Q.B. 84 (Eng. C.A.), at p. 122, was adopted by the Supreme Court of Canada in *Ryan v. Moore,* 2005 SCC 38 at para. 51:
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> > ... When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them -neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.
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> [66] The concept of estoppel was also described by the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* 1988 CanIII 174 (BC CA), [1998] 29 B.C.L.R. (2d) 88 (C.A.), 52 D.L.R. (4th) 459, more recently cited with approval in *Desbiens v. Smith,* 2010 BCCA 394:
>
> > ... it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment ..." [emphasis added]. That statement was affirmed by the English Court of Appeal in *Habib Bank* and, as we read the decision, accepted by that Court in *Peyman v. Lanjani,* [1984], 3 All E.R. 703 at pp. 721 and 725 (Stephenson L.J.), p. 731 (May L.J.) and p. 735 (Slade L.J.).

> [67] … I find that Ms. Louie was required to give the Ms. Guevara reasonable notice that strict compliance would be enforced, before taking steps to terminate the residency for late payment. Such notice was not provided.
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> [68] Estoppel has been a fundamental principle of the law for a long time: see *Hughes v. Metropolitan Railway* Co. (1877), 2 App. Cas. 439. However, the Arbitrator failed to address this fundamental principle in his reasons. By so doing he deprived Ms. Guevara of the right to show that in the circumstances of the application before him it would have been unjust to permit Ms. Louie to terminate the tenancy agreement given the long course of conduct in which she acquiesced.

In the *Guevara v. Louie* case referred to above, the landlord's acquiescence accepting late payments from the tenant had occurred over a period of years. I find that the Landlord's acceptance of three late payments over a relatively short period of time since the tenancy commenced on February 1, 2021 did not mean that the Landlord had acquiesced in requiring compliance of the contractual obligation of the Tenants to pay the rent in full when due. Accordingly, I find there is insufficient evidence before me to find that the doctrine of estoppel applies in these circumstances. Based on the foregoing, I find the Landlord has proven, on a balance of probabilities, cause for ending the tenancy pursuant to subsection 47(1)(b) of the Act.

Section 55(1) of the Act states:

> 55(1) 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
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> (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 have reviewed the 1 Month Notice and find it complies with the form and content requirements of section 52 of the Act. Section 55(1) of the Act provides that, where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with section 52 of the Act, then I must grant the landlord an Order of Possession. At the hearing, AR stated one of the two Tenants has not vacated the rental unit. As such, pursuant to section 55(1) of the Act, I must grant the Landlord an Order of Possession of the rental unit. Pursuant to section 68(2)(a), I find the tenancy ended on July 19, 2022.

As the Landlord has been successful in its claim, it may recover the $100.00 filing fee for the Landlord's Application from the Tenants pursuant to section 72(1) of the Act. Pursuant to section 72(2)(b) of the Act, the Landlord may deduct the $100.00 filing fee of the Application from the Tenant's deposit of $430.00. The balance of the security deposit of $330.00 is to be administered by the Landlord in accordance with the provisions of the Act.

Conclusion

I order the Tenants deliver vacant possession of the rental unit to the Landlord within two days of being served with a copy of this decision and the attached Order of Possession by the Landlord. Should the Tenant or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

The Landlord is awarded the filing fee for the Landlord's Application and may deduct this amount from the Tenant's deposit of $430.00.

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: July 19, 2022

Residential Tenancy Branch