Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #310073456: RP, CNR, FFT
File #310074032: OPC, FFL

Introduction

The Tenants apply for the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order pursuant to s. 32 for repairs to the rental unit;
- an order pursuant to s. 46 to cancel a 10-Day Notice to End Tenancy; and
- return of their filing fee pursuant to s. 72.

The Landlords file their own application seeking the following relief under the *Act*:

- an order of possession pursuant to s. 55 after serving a One-Month Notice to End Tenancy signed on May 17, 2022 (the "One-Month Notice"); and
- return of their filing fee pursuant to s. 72.

K.H. appeared as the Tenant. J.A. appeared as agent for the Landlord and was joined by H.G. as the Landlord.

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. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties acknowledge having served and received the other sides Notice of Dispute Resolution. Based on the mutual acknowledged receipt by the parties, I find that pursuant to s. 71(2) of the *Act* that each party was sufficiently served with the other side's Notice of Dispute Resolution.

Both parties provided documentary evidence to the Residential Tenancy Branch. Both parties advise that they did not serve their evidence on the other side. Rules 3.1, 3.14, and 3.15 of the Rules of Procedure require applicants and respondents to serve the evidence they intend to rely upon on the other side. Here, it was acknowledged that no evidence was served.

I enquired whether the parties would consent to the inclusion of basic documents that were likely in everyone's possession, being the tenancy agreement and the One-Month Notice. The parties consented to the inclusion of these two documents. Based on the parties' consent, I include the tenancy agreement and the One-Month Notice and shall consider it as part of these reasons. All other evidence provided by the parties is excluded as it was not served as required under the Rules of Procedure.

Preliminary Issue – Style of Cause

The two applications before me have the Landlords listed with different names. The Tenants name one individual as the Landlord. The Landlords application names three individuals as the Landlords. Policy Guideline #43 is clear that parties in dispute proceedings ought to be named using the correct spelling of their legal names.

I enquired with respect to this discrepancy. The tenancy agreement lists a corporate entity as the Landlord. I was advised by the Tenant that that was the previous owner. I was advised by the parties that the current owners as listed in the Landlords application recently purchased the property and that an updated tenancy agreement had not been signed with the correct legal names for the relevant parties. The Tenant advised that she named the Landlord as the individual that they interacted with and was uncertain on who the Landlords were as there had not been an updated tenancy agreement. The Landlord and the Landlord's agent confirmed the three individuals listed in their application are the owners and Landlords of the property.

Given the circumstances, I proposed amending the Tenants' application to correct the style of cause to align with the parties and spelling named in the Landlords' application. The Tenant consented to doing so. Accordingly, I amend the Tenants' application to correct the spelling of the Landlords.

Preliminary Issue – Tenants' Application

The Tenants applied to cancel a 10-Day Notice to End Tenancy for unpaid rent. However, no 10-Day Notice was provided to me and the Tenants themselves submitted a copy of the One-Month Notice as part of their application. The Tenant advised that they incorrectly filed their application as a dispute of a 10-Day Notice rather than a One-Month Notice.

Rule 4.2 of the Rules of Procedure permits the amendment of applications at a hearing in circumstances that can be reasonably anticipated. I find that such circumstances exist here as the One-Month Notice was provided by the Tenants, their application coincides with the date for the One-Month Notice, and that the Tenants erroneously ticked the wrong box when filing. The Tenants ought not be penalized for the inadvertent error when they clearly demonstrated an intention to dispute the One-Month Notice.

Rule 2.3 of the Rules of Procedure requires claims in an application to be related to one another. This rule exists because hearings before the Residential Tenancy Branch are summary in nature and generally scheduled for one-hour hearings. Applications with disparate issues and claims, which require different considerations and findings, are not readily dealt with in the type of hearings conducted by the Residential Tenancy Branch.

The primary issue in the applications before me is whether the One-Month Notice ought to be enforced or cancelled. The Tenants have also applied for an order for repairs, which I find is not sufficiently related to the whether the One-Month Notice is enforceable. Further, should the tenancy come to an end, such an order would be moot in any event.

Accordingly, I sever the Tenants' claim for repairs from the application. Should the tenancy continue, it will be dismissed with leave to reapply. If the One-Month Notice is enforced and the tenancy end, it will be dismissed without leave to reapply.

Issues to be Decided

1) Should the One-Month Notice be cancelled?
2) If not, are the Landlords entitled to an order of possession?
3) Is either party entitled to the return of their 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.

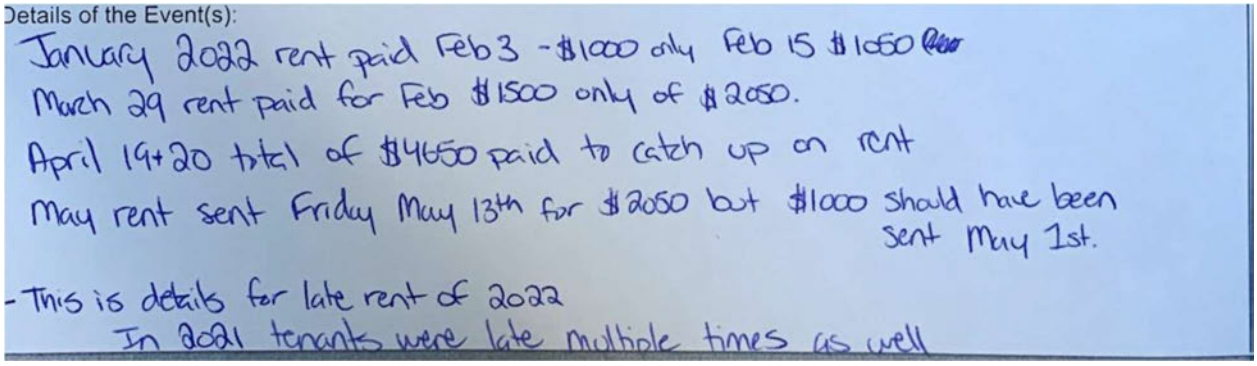
The parties confirmed the following details with respect to the tenancy:

- The Tenants took occupancy of the rental unit on January 1, 2018.
- Rent of $2,050.00 is payable each month by the Tenants.
- The Landlords hold a security deposit of $1,000.00 in trust for the Tenants.

A copy of the tenancy agreement was put into evidence.

The Landlord's agent advised that the One-Month Notice was served on the Tenants first by way of email on May 18, 2022 and then by way of being taped to the door on May 21, 2022 as email is not an approved form of service between the parties. The Tenant acknowledged receipt of the paper One-Month Notice on May 21, 2022.

A copy of the One-Month Notice was put into evidence. It lists that the tenancy ought to end due to the Tenants being repeatedly late in paying rent and provides the following description:


Details of the Event(s):
January 2022 rent paid Feb 3 - $1000 only Feb 15 $1050
March 29 rent paid for Feb $1500 only of $2050.
April 19+20 total of $4650 paid to catch up on rent
May rent sent Friday May 13th for $2050 but $1000 should have been sent May 1st.
- This is details for late rent of 2022
In 2021 tenants were late multiple times as well

The Landlords' agent advised that the Tenants had been late in paying their rent in April, March, February, and January 2022 and December, October, September, August, July, and June 2021. The Tenant did not deny paying rent late on those months.

I am advised by the parties that the Landlords issued a 10-Day Notice in April 2022 but that the Tenants paid the total arrears listed within 5 days of receiving that notice. This

was acknowledged by the Landlords' agent and is confirmed within the One-Month Notice itself.

The tenancy agreement lists that rent is due on the first day of each month. The Landlords' agent testified that this arrangement was altered by the previous owner such that rent was paid in two installments on the 1st day and 15th day of each month. The Landlords' agent further testified that this was altered in April or May 2022 such that the second installment could be paid on the 18th rather than 15th.

The Tenant denies that the agreement was for two installments, with the 1st and 18th being the dates. The Tenant testified to her understanding that total rent would be due on the 18th from May 2022 onwards. The Tenant further testified that full rent was paid on May 13, 2022 such that they were not late as per their understanding of the new arrangement. The Landlords' agent later confirmed at the hearing that rent would be due in full by the 18th and further confirmed that rent had been received on May 13th.

The Tenant argued that they had paid all their arrears in April 2022 and came to a new arrangement on when rent would be due for the following months. The Tenant says that they made good on paying rent on the new arrangement and paid rent before the 18th only to have the Landlords then issue the One-Month Notice.

The Landlords' agent advised that rent has not been paid at all since the One-Month Notice was served. In the Landlords' reckoning, the Tenants are in arrears of rent in excess of $11,000.00.

Analysis

The Tenants seek an order cancelling the One-Month Notice. The Landlords seek an order of possession after issuing the One-Month Notice.

I am advised by the Landlords' agent that the One-Month Notice was served on the Tenants by posting it to their door on May 21, 2022. The Tenant acknowledges its receipt on May 21, 2022. I find that the One-Month Notice was served in accordance with s. 88 of the *Act* and was received by the Tenants on May 21, 2022 as acknowledged at the hearing.

Under s. 47 of the *Act*, a landlord may end a tenancy for cause and serve a one-month notice to end tenancy on the tenant. Pursuant to s. 47(4) of the *Act*, a tenant may file an

application disputing the notice but must do so within 10 days of receiving it. If a tenant disputes the notice, the burden for showing that the one-month notice was issued in compliance with the *Act* rests with the landlord.

Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Tenants filed their application on May 25, 2022, which is within the 10 days permitted under s. 47(4).

As per s. 47(3) of the *Act*, all notices issued under s. 47 must comply with the form and content requirements set by s. 52 of the *Act*. I have reviewed the One-Month Notice and find that it complies with the formal requirements of s. 52 of the *Act*.

The One-Month Notice was issued under s. 47(1)(b) of the *Act*, being for repeated late rent. 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.

There is no dispute that the Tenants were late in paying rent as alleged by the Landlords. Indeed, the Tenant admitted to as much at the hearing. However, the

argument from the Tenant was, essentially, that the slate was clean when the arrears were paid off and a new rent due date was agreed to in April 2022.

Policy Guideline #38 makes mention of the doctrine of waiver. However, estoppel, which is a distinct legal concept, is also relevant to whether a landlord can rely upon the strict compliance when rent is due as per the tenancy agreement. *Guevara v Louie*, 2020 BCSC 380 provides further clarity with respect to the question of waiver and estoppel in the context of the application of s. 47(1)(b) and states the following:

> [62] Another fundamental problem with the Arbitrator's reasons is his failure to understand the vital distinction between waiver and estoppel in his analysis of the parties' rights and obligations. This resulted in the Arbitrator taking an unreasonably narrow view of all of the circumstances relevant to the decision he had to make. The Arbitrator decided that Ms. Louie had not "waived" her right to receive the rent on the first of the month as a term of the tenancy agreement. However, the real issue before him was whether Ms Louie was estopped from enforcing a provision of the tenancy agreement by her past conduct. That issue required a determination of whether Ms. Louie's conduct led Ms. Guevara to conclude that e-transferring the rent within a day or two after the first of the month was *acceptable* to her. 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.
>
> [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 CanLII 826 (BC CA), [1991] B.C.J. No. 3690 (C.A.). Thus, the relevant legal concept before the Arbitrator was not waiver of a contractual right, but rather whether Ms. Louie's prior conduct estopped her from relying on past rental payments made a day or two after the

first of each month to evict Ms. Guevara on the grounds of “repeatedly late” payment under s. 47(1)(b) of the *RTA.*

[64] In this case, on the record that was before the Arbitrator, there had been a period of years in which Ms. Louie had acquiesced to an occasional payment being made shortly after the first of the month. Earlier in these reasons I reviewed some of that history. I note that in May 2019, Ms. Louie gave Ms. Guevara notice of an increase in rent— clearly suggesting a continuation of the parties’ landlord-tenancy relationship. In my view, no reasonable person in Ms. Guevara’s position would have concluded that Ms. Louie was contemplating terminating the lease for late payment until she physically received the notice to terminate.

[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:

> …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.

[66] The concept of estoppel was also described by the British Columbia Court of Appeal in *Litwin Construction (1973) Ltd. v. Pan* 1988 CanLII 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.).

In this instance, the parties came to an agreement in April 2022 that rent would be due prospectively on the 18th of each month. Though the Landlords' agent advised that the two rent payments per month arrangement had been slightly altered, she later confirmed in the hearing the rent would be due on the 18th in line with the Tenant's asserted understanding of the new arrangement. It is uncontested that the Tenants paid rent in full on May 13, 2022, such that the Tenants clearly acted on the new arrangement.

It unreasonable, in my view, to come to an agreement in April 2022 that rent will be due on the 18th prospectively only to issue a notice to end tenancy in May 2022 citing rent paid late prior to the new agreement. It is clear from the parties conduct that the contractual of right of the Landlord to expect rent in full was varied to the 18th and it would be unfair for the Landlords, mere weeks later, to enforce on the late rent payments that were made prior to the agreement on the new due date.

The Landlords raised issue with respect to no rent being paid since the One-Month Notice was issued. I make no findings on whether this is the case as it is not relevant to determining the issue before me. Even if there were late (or no) rent payments in June, July, August, September, or October 2022, it cannot be the basis for why the One-Month Notice was issued in May 2022.

I find that the Landlords are estopped from ending the tenancy based on late rent which occurred prior to the parties' agreement in April 2022 that rent would be due on the 18th moving forward. Accordingly, I find that the One-Month Notice was not properly issued. These findings do not apply to any late rent payments that may have been made after the April 2022 agreement had been made, all of which may form the basis for the Landlords issuing a new notice to end tenancy.

I grant the Tenants application and dismiss the Landlords application. The One-Month Notice is hereby cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

Conclusion

The One-Month Notice is herby cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

The Landlords' application for an order of possession based on the One-Month Notice is dismissed without leave to reapply.

The Tenants application for repairs which was severed at the outset is dismissed with leave to reapply.

The Tenants were successful in their application. The Landlords were unsuccessful. Accordingly, I find that the Tenants are entitled to the return of their filing fee and the Landlords are not. Pursuant to s. 72(1) of the *Act*, I order that the Landlords pay the Tenants $100.00 filing fee. The Landlords application for return of their filing fee is dismissed without leave to reapply. Pursuant to s. 72(2) of the *Act*, I direct that the Tenants withhold $100.00 from rent owed to the Landlords on **one occasion** in full satisfaction of their 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: October 05, 2022

Residential Tenancy Branch