



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **OPC FFL**

Introduction

This hearing was convened telephone conference as a result of the Landlord's application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession for cause pursuant to section 47 and 55; and
- authorization to recover the filing fee of the Application from the Tenant pursuant to section 72.

The Landlord's agent ("GC") appeared at the participatory hearing. The Tenant did not attend the hearing even though I left the teleconference hearing connection for the entire duration of the hearing scheduled for 11:00 am. I confirmed the correct call-in numbers and participant codes were provided in the Notice of Dispute Proceeding Hearing ("NDRP") generated when the Landlord applied. I also confirmed throughout the duration of the hearing that the Tenant was not in attendance and that GC and I were the only ones on the conference call. GC was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

GC stated the Landlord served the NDRP on the Tenant by registered mail on November 2, 2022. GC submitted into evidence a registered mail receipt with the tracking number for service by registered mail to corroborate his testimony. Based on the undisputed testimony of GC, I find the NDRP was served on the Tenant in accordance with the provisions of section 89 of the Act. Pursuant to section 90 of the Act, I find the Tenant was deemed to have received the NDRP on November 7, 2022, being five days after posting of the NDRP by registered mail.

GC stated the Landlord served his evidence on the Tenant by registered mail on February 8, 2023. GC submitted into evidence a registered mail receipt with the tracking number for service by registered mail to corroborate his testimony. Based on the undisputed testimony of GC, I find the Landlord's evidence was served on the Tenant in accordance with the provisions of section 88 of the Act. Pursuant to section 90 of the Act, I find the Tenant was deemed to have received the Landlord's evidence on February 13, 2023, being five days after posting of the Landlord's evidence by registered mail.

GC stated the Landlord did not receive any evidence from the Tenant for these proceedings.

Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession?
- recover the filing fee for the Application from the Tenant?

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 Application are set out below.

GC stated there was no written tenancy agreement for the tenancy. GC stated the tenancy commenced on May 1, 2012, on a month-to-month basis. GC stated the current rent is \$755.00 payable on the 1st day of each month. GC stated the Tenant paid the Landlord \$300.00 for a security deposit and that the Landlord was holding on behalf of the Tenant. GC stated the Tenant has paid the rent for March 2023. Based on GC's undisputed testimony, I find there is a tenancy between the Landlord and Tenant and that I have jurisdiction to hear the Application.

GC submitted into evidence a copy of a One Month Notice to End Tenancy for Cause dated November 8, 2022 ("1 Month Notice"). GC stated the 1 Month Notice was served on the Tenant by registered mail on November 8, 2022. GC submitted into evidence a signed Proof of Service on Form RTB-34 certifying the 1 Month Notice was served by registered mail together with a copy of the Canada Post receipt with the tracking number to corroborate his testimony on service. Based on the undisputed testimony of GC, I find the 1 Month Notice was served on the Tenant in accordance with the provisions of section 88 of the Act. Pursuant to section 90, I find the Tenant was deemed to have received the 1 Month Notice on November 13, 2022.

GC stated the Tenant has been late paying the rent to the Landlord on seven times in the seven month period preceding the date the Landlord served the 1 Month Notice. GC submitted into evidence a spreadsheet that provided the dates of payment of rent made by the Tenant from May 1, 2022 to February 1, 2023.

GC stated he was unaware of the Landlord giving the Tenant a written warning that the Landlord would be strictly enforcing the requirement pay the rent in full on time in accordance with the requirements of the Act. GC stated he was unaware of the Landlord serving a Ten Day Notice to End Tenancy for Unpaid Rent and/or Utilities at any time prior to service of the 1 Month Notice on the Tenant.

After the hearing, I issued an Interim Decision, dated March 14, 2023, in which I ordered the Landlord to prepare and serve the Tenant, and submit to the Residential Tenancy Branch, a spreadsheet, that provided, in chronological order for each month commencing from January 2020 through October 2022, on a line-by-line basis, the date and amount the rent was due, the amount and date of each payment made by the Tenant with a running balance ("Spreadsheet"). The Landlord did not fully comply with my order and the Spreadsheet only provides the information I requested from January 2021 to March 2023 as set out in the table below:

Accounting of Late Payments

Rent Due Date	Rent Amount Owning	Date of Payment	Amount of Partial Payment(s)	
January 01, 2021	\$ 755.00	January 03, 2021	\$ 755.00	LATE
February 01, 2021	\$ 755.00	February 02, 2021	\$ 755.00	LATE
March 01, 2021	\$ 755.00	March 01, 2021	\$ 755.00	
April 01, 2021	\$ 755.00	April 02, 2021	\$ 755.00	LATE
May 01, 2021	\$ 755.00	May 02, 2021	\$ 755.00	LATE
June 01, 2021	\$ 755.00	June 01, 2021	\$ 755.00	
July 01, 2021	\$ 755.00	July 01, 2021	\$ 755.00	
August 01, 2021	\$ 755.00	August 03, 2021	\$ 755.00	LATE
September 01, 2021	\$ 755.00	September 02, 2021	\$ 755.00	LATE
October 01, 2021	\$ 755.00	October 02, 2021	\$ 755.00	LATE
November 01, 2021	\$ 755.00	November 02, 2021	\$ 755.00	LATE
December 01, 2021	\$ 755.00	December 02, 2021	\$ 755.00	LATE
January 01, 2022	\$ 755.00	January 03, 2022	\$ 755.00	LATE
February 01, 2022	\$ 755.00	February 02, 2022	\$ 755.00	LATE
March 01, 2022	\$ 755.00	March 02, 2022	\$ 755.00	LATE
April 01, 2022	\$ 755.00	April 03, 2022	\$ 755.00	LATE
May 01, 2022	\$ 755.00	May 02, 2022	\$ 755.00	LATE
June 01, 2022	\$ 755.00	Jun 02, 2022	\$ 755.00	LATE
July 01, 2022	\$ 755.00	Jul 04, 2022	\$ 755.00	LATE
August 01, 2022	\$ 755.00	Aug 02, 2022	\$ 755.00	LATE
September 01, 2022	\$ 755.00	Sep 03, 2022	\$ 755.00	LATE
October 01, 2022	\$ 755.00	Oct 02, 2022	\$ 755.00	LATE
November 01, 2022	\$ 755.00	Nov 15, 2022	\$ 755.00	LATE
December 01, 2022	\$ 755.00	Dec 06, 2022	\$ 755.00	LATE
January 01, 2023	\$ 755.00	Jan 03, 2023	\$ 755.00	LATE
February 01, 2023	\$ 755.00	Feb 03, 2023	\$ 755.00	LATE
March 01, 2023	\$ 755.00	Mar 05, 2023	\$ 755.00	LATE
TOTAL	\$ 20,385.00		\$ 20,385.00	

Analysis

Sections 26 and 46(1) through 46(5) of the Act state:

- 26 (1) 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.
- 46(1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

- (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (4) Within 5 days after receiving a notice under this section, the tenant may
 - (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
 - (a) *is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and*
 - (b) *must vacate the rental unit to which the notice relates by that date.*

[emphasis added in italics]

Although the Tenant did not attend the hearing, the Landlord is nevertheless required to demonstrate the 1 Month Notice was issued for a valid reason.

The Spreadsheet submitted by the Landlord discloses the Tenant was regularly late paying the rent from January 2021 to November 2022, being a total of 20 payments over a 23 month period. GC admitted the Landlord did not serve the Tenant with a written notice that the Landlord would be strictly enforcing the terms of the tenancy agreement and, in particular, that the Tenant would henceforth be required to pay the rent in full on time.

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.

[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.)...

[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 sec 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.).

[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.

[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* referred to above, the landlord's acquiescence accepting late payments from the tenant had occurred over a period of years. In this application, the Landlord accepted the rent from the Tenant for 20 months over a 23-month period from January 2021 to November 2023. As the Landlord did not provide information on of the Tenant's payments for the period January to December 2020 as I requested in my Interim Decision, I have drawn an adverse inference that there were further late payments of rent during that period as well.

Based on the foregoing, I find the Landlord acquiesced in requiring strict compliance of the contractual obligation of the Tenant to pay the rent in full when due. Accordingly, I find there is sufficient evidence before me to find that the doctrine of estoppel applies in these circumstances. As such, I find the Landlord has not demonstrated, on a balance of probabilities that there is cause to end this tenancy. Based on the above, I order the 1 Month Notice to be cancelled. The tenancy will continue until it is lawfully ended in accordance with the provisions of the Act.

As the Landlord was not successful in the Application, the Landlord is not entitled to recover of the filing fee for the Application.

Based on the foregoing, the Application is dismissed in its entirety without leave to reapply.

Conclusion

The Application is dismissed without leave to reapply. The tenancy continues until it is lawfully ended in accordance with the provisions of the Act.

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: April 11, 2023

Residential Tenancy Branch