Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNC, OLC

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order pursuant to s. 47 cancelling a One-Month Notice to End Tenancy signed on March 14, 2023 (the "One-Month Notice"); and
- an order pursuant to s. 62 that the landlord comply with the Act, Regulations, and/or the tenancy agreement.

M.H. appeared as the Tenant and was joined by her daughter, I.C., who made submissions on her behalf. P.Y appeared as the Landlord and was also joined by her daughter, S.Y., who assisted in the Landlord's submissions.

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. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

I enquired with the Tenant whether the Notice of Dispute Resolution had been served. The Landlord denied receipt of the Notice of Dispute Resolution saying she received notice from the Residential Tenancy Branch on March 31, 2023. I enquired with the Landlord if, despite service, she was prepared to proceed. I was told the Landlord was prepared to proceed with the hearing.

I am unable to find the Tenant's application was served. Despite this, I accept that the Landlord is prepared to proceed such that it is appropriate to do so under these circumstances despite the Tenant's failure to serve her application.

The Landlord advised that her evidence was served on the Tenant, which the Tenant's daughter acknowledged was received without issue. Pursuant to s. 71(2) of the *Act*, I find that the Tenant was sufficiently served with the Landlord's evidence.

Preliminary Issue – Tenant's Claims under s. 62 of the *Act*

The Tenant's application states the following with respect to her claim under s. 62 of the *Act*:

> Reasons for Eviction is False. 1. Tenant repeatedly late paying rent. 2. Tenant has assigned or sublet the rental unit/site/property/park without landlord's written permission.

Rule 2.2 of the Rules of Procedure limits claims to what is stated in the application. In this instance, I find that the Tenant's claim under s. 62 is an extension of the claim disputing the One-Month Notice. As such, it is not independent relief as nothing is sought beyond disputing the notice to end tenancy.

Properly, it ought not have been pled, however, I accept that it is not an issue to be adjudicated. Accordingly, I dismiss the Tenant's claim under s. 62 of the *Act* without leave to reapply.

Issues to be Decided

1) Is the One-Month Notice enforceable?
2) If not, is the Landlord entitled to an order of possession?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

General Background

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

- The Tenant moved into her rental unit in August 1996.
- Rent of $945.00 is due on the first of each month.
- A security deposit of $300.00 was paid by the Tenant.

I am provided with a copy of the original tenancy agreement. I am told by the parties that the tenancy agreement was updated most recently in 2019 and I have been provided with a copy of that tenancy agreement by the Landlord (the "2019 tenancy agreement"). The 2019 tenancy agreement lists a co-tenant, J.G., who I am told moved out of the rental unit sometime in 2019.

Is the One-Month Notice Enforceable?

Under s. 47 of the *Act*, a landlord may end a tenancy for cause by given a tenant at least one-month's notice to the tenant. Under the present circumstances, the Landlord issued the One-Month Notice pursuant to the following sections of the *Act*:

- 47(1)(b) – repeated late rent payments; and
- 47(1)(i) – purporting to assign or sublet the rental unit without written consent from the landlord of the *Act*.

Upon receipt of a notice to end tenancy issued under s. 47 of the *Act*, a tenant has 10 days to dispute the notice as per s. 47(4). If a tenant files to dispute the notice, the onus of showing the notice is enforceable rests with the landlord.

The Landlord advises that the One-Month Notice was posted to the Tenant's door on March 14, 2023. The Tenant's daughter acknowledges the Tenant received the One-Month Notice. I find that the Tenant was served with the One-Month Notice pursuant to s. 88 of the *Act*. Review of the information on file shows the Tenant filed to dispute the notice on March 17, 2023, such that I am satisfied she filed within the 10 days permitted to her under s. 47(4) of the *Act*.

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 provided to me and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, states the

correct effective date, sets out the grounds for ending the tenancy, and is in the approved form (RTB-33).

i) Repeated Late Rent Payments

The Landlord's daughter advises that the Tenant has been frequently late in paying rent throughout her tenancy. I am told that the Tenant has been late 31 times during the tenancy, which I am told is approximately 27% of all her rent payments. I am further told that the Tenant was late paying her rent in March 2023, December 2022, and November 2022.

The Tenant's daughter does not dispute that her mother has a history of paying rent late nor does the Tenant's daughter dispute any of the specific allegations by the Landlord with respect to late rent payment. However, the Tenant's daughter says that her mother advised the Landlord when she was going to be late in November 2022 and March 2023 and that the Landlord did not raise issue on those occasions.

The Landlord denies having a conversation about late rent in November 2022 but acknowledges discussing receipt of rent late in March 2023. The Landlord says that she frequently only received NSF charges in depositing rent cheques such that the Tenant frequently provided no notice. According to the Landlord, she has been lenient in the past with respect to late rent payments but that there has been a loss of trust between her and the Tenant.

Policy Guideline #38 provides guidance with respect to repeated late rent payments. It states that 3 late payments are the minimum number to justify issuing a notice to end tenancy, though also states that a landlord who fails to act in a timely fashion after the most recent late rent payment may be determined to have waived reliance on this provision.

I also note that *Guevara v Louie*, 2020 BSCS 380 ("*Guevara*") provides guidance on the application of s. 47(1)(b) of the *Act*. In *Guevera*, Justice Sewell cautioned in drawing a distinction between the doctrine of waiver and estoppel in cases such as these (see paras 62 and 63). Waiver requires a clear intention to forego the exercise of a contractual right. Estoppel applies where a person with a formal right represents in their conduct, through the eyes of the person raising the doctrine, that it would be unreasonable to strictly apply the contractual right.

I provide this explanation because I find that both waiver and estoppel apply under these circumstances. It is undisputed that in March 2023, the Tenant communicated with the Landlord that she would be late in rent, and the Landlord acknowledges acquiescing without raising issue, thus constituting waiver for that month.

Further, there is an extensive history of late rent payments. The Landlord herself acknowledging she had been lenient with the Tenant throughout most of the tenancy. Given this, I find estoppel applies such that the Landlord cannot after many years of late rent payments, raising no issue and showing leniency, now assert strict compliance of the due date for rent.

I find that the Landlord has failed to establish the One-Month Notice was issued in compliance with s. 47(1)(b) of the *Act*. I decline to uphold the notice on this ground.

ii) Unauthorized Sublet or Assignment

The Landlord and her daughter advise that the Tenant had in 2018 taken on an occupant in the rental unit before getting permission from the Landlord. I am told that the Landlord did accommodate this and signed a new tenancy agreement. In 2018, the Tenant and Landlord signed a new tenancy agreement and the occupant was listed as a co-tenant. I am further told that the Tenant asked to get another roommate in 2019, which the Landlord accepted, and resulted in the 2019 tenancy agreement being signed.

I am further advised that the Landlord took notice of another individual at the building on March 9, 2023. Upon discussing matters with this individual, the Landlord discovered that he was an occupant of the rental unit having moved in with the Tenant on March 1, 2023. The Landlord says this was without her consent and that the tenancy agreement prohibits subletting or subleasing the apartment.

I enquired whether the Tenant continued to occupy the rental unit when this other individual moved in on March 1, 2023. I am told that the Tenant did continue to reside there such that the additional occupant was a roommate. I am further told that the co-applicant on this application is the other occupant, but that he has since vacated the rental unit.

Review of the 2019 tenancy agreement shows an addendum, the first clause states that the rental unit is solely leased to the Tenant (and her former co-tenant J.G.) and that there will be “no sub-lease or additional occupant allowed”.

The Tenant’s daughter does not deny that her mother took in another occupant and acknowledges it ought to not have happened.

The One-Month Notice lists, as its cause, that the Tenant “has assigned or sublet the rental unit…without the landlord’s written consent.” I highlight this because there is a difference between an assignment, a sublease, and having an occupant move into the rental unit.

In an assignment, the original tenant assigns their rights under a tenancy agreement to another individual, who then becomes the new tenant. In other words, the old tenant swaps themselves out for a new one. A sublease occurs when a tenant signs a tenancy agreement with a sub-tenant such that the tenant under the head lease is landlord to the sub-tenant. In a sublease, the original tenant continues to hold obligations to the original landlord and then takes on the new role as landlord to the sub-tenant. Both an assignment and a sublease are prohibited by standard clause 9.1) of the tenancy agreement, which reflects the prohibition of s. 34 of the *Act*

I provide this explanation because the Tenant has not assigned her tenancy agreement to a new tenant. The Tenant continues to reside within the rental unit and has continued to pay rent to the Landlord. Further, no sublease occurred because the Tenant continued to reside within the rental unit such that she cannot be considered an occupant and a landlord to the sub-tenant by virtue of ss. 4 and 1 of the *Act*. In other words, the Tenant obtained a roommate such that no assignment nor sublease occurred.

I make this point because the causes for ending the tenancy listed within the One-Month Notice are limited to what is stated within it. The Landlord does not allege that the Tenant breached a material term of the tenancy agreement in the One-Month Notice. Strictly speaking, the issue of whether first clause of the addendum is a material term is not before me as it is not listed within the One-Month Notice. The Landlord did not request that I correct the One-Month Notice under s. 68 of the *Act*, nor would I have found that such a request would be appropriate.

Further, the Landlord has provided no evidence to support that the first clause of the addendum is material or that she provided the Tenant sufficient written notice to comply with the term. In other words, I would have insufficient evidence to support a finding of a breach of a material term of the tenancy agreement warranting an end to the tenancy even if I were to have corrected the One-Month Notice on the Landlord's request.

I find that the Tenant did not assign her tenancy agreement or sublet her rental unit. As such, I further decline to enforce the One-Month Notice on this basis.

I find that the One-Month Notice is unenforceable. It is hereby cancelled.

Conclusion

I grant the Tenant her relief and cancel the One-Month Notice, which is of no force or effect. The tenancy shall continue until it is ended in accordance with 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: May 29, 2023

Residential Tenancy Branch