

Introduction

- [1] On December 28, 2023 the Tenant filed a *Tenant Application to Determine Dispute* (Form 2(A)) (the "Application") with the Residential Tenancy Office (the "Rental Office"). The Application is disputing an eviction notice pursuant to subsection 61(5) of the *Residential Tenancy Act* (the "Act").
- [2] Attached with the Application was an *Eviction Notice* (Form 4(A)) (the "Notice") dated December 27, 2023 effective January 31, 2024. The Notice was given to the Tenant for the following reasons:
- You have not paid the security deposit; and*
You are repeatedly late in paying rent.
- [3] On January 2, 2024 the Tenant filed a second Form 2(A) with the Rental Office disputing a second *Eviction Notice* dated January 2, 2024 effective January 22, 2024 for non-payment of rent. The parties agreed that the rent was paid in full on January 3, 2024. Therefore, the *Eviction Notice* dated January 2, 2024 is automatically invalidated and the Tenant's second Form 2(A) application is dismissed as it is not necessary to make a finding on the second *Eviction Notice*.
- [4] All documents (including the Notice of Hearing and Eviction Package) were properly served to the parties in accordance with subsection 100(1) of the *Act*.
- [5] On January 18, 2024 a teleconference hearing was held before a Residential Tenancy Officer (the "Officer"). The Tenant appeared, representing themselves. The Representative appeared, representing the Landlord.

Issue to be Decided

- i. Does the Tenant have to vacate the Residential Property due to the Notice?

Summary of the Evidence

- [6] On May 31, 2023 the Landlord purchased the Residential Property and took over the verbal month-to-month tenancy agreement with the Tenant. Rent is \$1,250.00 due in two installments (the 1st day and the 15th day of each month). A security deposit of \$500.00 was required and paid.

Landlord's Evidence and Submissions

- [7] The Landlord submitted numerous documents into evidence including: written submissions, communication between the parties and an *Income and Expense Tracker* (the "Rent Ledger") for the Residential Property. The Representative admitted that the parties have since resolved the security deposit dispute. The only remaining issue is the repeatedly late payment of rent.
- [8] The Representative testified that the Tenant has issues paying the rent on time. The Representative testified that she has regularly texted the Tenant to remind him about rent due. The Representative testified that the Landlord has shown patience but has always reminded the Tenant that rent was due on the first day of the month and another payment was expected on the fifteenth day of the month.
- [9] The Representative directed attention to page sixty-six (66) of the Evidence Package where the Rent Ledger discloses the rent payment history for the Tenant. The Representative testified that since June 2023 the Tenant has regularly paid rent late which results in late fees. The Representative testified that the Landlord charges 1.0% gross rent per day.
- [10] The Rent Ledger shows the following payments of rent since June 2023 and the Tenant's documentary evidence supports the Landlord's Rent Ledger details.

Month	Payment(s)	Date(s)	Considered Late
June 2023	\$625.00 & \$625.00	June 2 & June 16, 2023	Yes
July 2023	\$625.00 & \$625.00	June 30 & July 14, 2023	No
August 2023	\$625.00 & \$625.00	July 28 & August 11, 2023	No
September 2023	\$625.00 & \$125.00	August 25, 2023 & September 16, 2023 ¹	No
October 2023	\$300.00; \$400.00 & \$550.00	October 4, October 17 & October 25, 2023	Yes
November 2023	\$625.00 & \$625.00	November 8 & November 22, 2023	Yes
December 2023	\$625.00 & \$625.00	December 6 & December 20, 2023	Yes
January 2024	\$1,250.00	January 3, 2024	Yes & No

- [11] The Representative admitted that the Landlord received \$625.00 on January 17, 2024 which is for half of February 2024 rent. The Representative stated that she did not know the password for the e-transfer and it has not been accepted as of the date of the hearing.

Tenant's Evidence and Submissions

- [12] The Tenant submitted numerous documents into evidence including communication between the parties, written submissions and a breakdown of rent paid since June 2023.
- [13] The Tenant testified that he lost employment which caused him to fall behind in rent in October 2023. The Tenant testified that he was transparent with the Landlord and paid whenever his employment insurance processed. The Tenant testified that he always paid rent within the month and is currently caught up and even paid half of February 2024 rent. The Tenant testified that he is fully employed and intends to pay the full amount of rent on the first of each month moving forward.
- [14] The Tenant directed to a text message conversation between the parties on page 31 of the evidence package. It is summarized as follows:

October 4, 2023

Landlord - Hello Tenant, I see you sent \$300 is rent going to become an issue? Or when should I be receiving the other \$950 plus late fees?

Tenant – I will pay the remainder by the end of the month hopefully sooner. Doing the best I can.

Landlord – So your saying that rent is going to become a problem?

Tenant – No it will be caught up as I did before.

October 12, 2023

Tenant – Hi Landlord, finally started back to work this week. I will have the rest of this month's rent paid off by the 25th I will send you some money on Tuesday and the rest on the 25th. After that I'll send you 625 biweekly and extra when I can to get up to date. Thank you for your patience.

Landlord – Ok great thanks.

- [15] The Tenant characterized this conversation as the Landlord being patient and understanding about rent being late while he got back to employment. The Tenant argued that he will not have any further issues with paying rent on time and suggested that the Landlord may wish to terminate the tenancy due to other reasons outside of rent lateness.

¹ The parties used two extra payments: \$300.00 on June 9, 2023 and \$200.00 on June 26, 2023 to cover a portion of September 2023 rent.

Analysis

- [16] The Officer begins by referencing the relevant law for the Application. The Landlord's reason for terminating the tenancy agreement is pursuant to clause 61(1)(b) of the Act which states:

61. Landlord's notice for cause

(1) A landlord may end a tenancy by giving a notice of termination where one or more of the following applies:

(b) the tenant is repeatedly late in paying rent.

- [17] The Officer comments that in such matters where there is a dispute over an *Eviction Notice*, it is the landlord's burden to prove, on a balance of probabilities, any and all claims alleged in the Notice. This means a landlord must provide the decision-maker with sufficiently clear, convincing and cogent evidence to establish their claim(s).
- [18] In this case, the Landlord seeks to terminate the tenancy because the Tenant is repeatedly late paying rent on the agreed upon due date(s): the 1st day and the 15th day of the month. The Landlord argues that despite the misunderstanding at the beginning of the tenancy when the Landlord took over ownership, regarding when rent was due, the Tenant still has not paid rent on or before the 1st day and the 15th day of the month on numerous occasions. The Tenant argues that despite being late a couple months due to loss of employment, the Landlord received their rent in full and that the Landlord was understanding and accepting of the rent being late due to the circumstances.
- [19] The Officer has considered the testimony of the parties and has reviewed the documentary evidence. The Tenant's argument suggests that the Landlord allowed and/or condoned the temporary late payment of rent due to the financial circumstances of the Tenant. The Tenant pointed to a text message conversation between the parties on October 4 and 12, 2023.
- [20] Although the Tenant did not specifically use the term "equitable estoppel," it appeared that this is the legal principle upon which the Tenant relies. This raises the question whether the Officer has authority to consider equitable estoppel.
- [21] Equitable estoppel is a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.

Application of the "Common Law"

- [22] At page 192 of *Halsbury's Laws of Canada* (1st ed., LexisNexis, 2017 Reissue) the purpose of residential tenancy legislation is described as follows:

"The overarching objective of the residential tenancy regime is to protect the rights of tenants, who are often not in an equal bargaining position with landlords when leases are negotiated. Residential tenancies legislation is therefore remedial in nature and, according to the Ontario Court of Appeal, "its provisions must be interpreted liberally to ensure the realization of its objectives". Any ambiguity in the language of the legislation must be resolved in favour of tenants."

- [23] Further, in the Daily Debates of the Legislative Assembly regarding the Act, Bill No. 87. Section 101 was immediately carried during the Committee of the Whole House (Second Session of the Sixty-Sixth General Assembly, November 24, 2022, Page 5771), without additional debate. The original bill tabled in the Legislature does not have explanatory notes.

- [24] At page 530 of the *Construction of Statutes* (7th ed., LexisNexis, 2022) the following is stated regarding legislation and the common law:

“It follows from the principle of legislative sovereignty that validly enacted legislation is paramount over the common law.⁸ Acting within its constitutionally defined jurisdiction, the legislature can change, add to or displace the common law as it thinks appropriate and the courts must give effect to that intention...”

⁸ *Common law in this context refers to all judge-made law, including equity...”*

- [25] Part 7, Division 2 of the *Act* sets out the *Application of Other Law* to residential tenancies on Prince Edward Island (sections 101 to 105). In particular, section 101 states:

Except as modified or varied under this Act, the common law respecting landlords and tenants applies in Prince Edward Island.

- [26] It appears to the Officer that the purpose of section 101 is to set out the Legislature’s intention regarding the interplay between the *Act* and the common law. Further, it appeared that in this context common law means – all judge made law, including equity.

- [27] The term “common law” is not defined in the *Act*, the *Residential Tenancy Act Regulations*, EC269/23, or the *Interpretation Act* RSPEI 1988, I-8.1. The ordinary meaning of the term “common law” is defined at page 198 of *The Dictionary of Canadian Law* (5th ed., Thomson Reuters, 2020):

COMMON LAW. 1. In contrast to statute law, canon (or ecclesiastical) law and the civil law, law which relies for its authority on the decisions of the courts and is recorded in print or electronically as decisions of judges along with the reasons for their decisions. 2. Judge-made law. Includes the interpretation of statutes and subordinate legislation by judges.

- [28] The ordinary meaning of “common law” would permit the Officer to consider equitable estoppel, so long as this principle has not been modified or varied by the *Act*.

- [29] The Officer notes that section 101 of the *Act* is very similar to section 10 of Saskatchewan’s *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, which states:

Except as modified or varied by this Act or the regulations, the common law applies to tenancy agreements.

- [30] In the Saskatchewan case *Cheon v. Altern Properties Inc.*, 2015 SKQN 23, the following is stated at paragraph [18]:

“...It is beyond question that the common law (including equitable estoppel) applies to tenancy agreements unless otherwise modified by the Act. (s. 10 of the Act; Smith v Elite Property Management Ltd., 2012 SKQB 12, 389 Sask R 63).”

- [31] There are also many similarities between the *Act* and British Columbia’s *Residential Tenancy Act* SBC 2002, c.78 (the “*BCRTA*”). In particular, Part 7, Division 2 of the *Act* is similar to Part 6, Division 2 (Application of Other Law) of the *BCRTA*, which states as follows at section 91:

Except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia.

[32] The British Columbia Supreme Court has applied equitable estoppel in judicial reviews of Residential Tenancy Branch decisions. The case *Guevara v. Louie*, 2020 BCSC 380 (the “*Guevara Decision*”) considered whether equitable estoppel was a defence for a residential tenant being evicted for repeatedly late rent payments. The legislation regarding repeatedly late rent payments in the *BCRTA* (clause 47(1)(b)) is very similar to clause 61(1)(b) of the *Act*.²

[33] Equitable estoppel has been found to be a necessary consideration in another judicial review of a Residential Tenancy Branch before the British Columbia Supreme Court, *LaBrie v Liu*, 2021 BCSC 2486. The following is stated at paragraphs [54] and [55]:

“[54] In Guevara, Justice Sewell considered a case in which the landlord had, over a period of years, occasionally acquiesced to late rent payments. He held the landlord could not rely on late payments made and received without complaint to count toward the requisite minimum three late payments to justify termination based on the principle of equitable estoppel. The tenant did not raise the equitable estoppel argument using those precise words, but the facts of matter raised it in substance. Justice Sewell concluded it was patently unreasonable to have not addressed it.

[55] I reach the same conclusion.”

[34] Thus, it appeared to the Officer that equitable estoppel must also be considered in this case.

Does Equitable Estoppel Apply

[35] In this case, the tenancy period between the parties started May 31, 2023 when the Landlord took over ownership of the Residential Property. The Rent Ledger provided into evidence establishes that rent was “late” for the months of June, October, November and December 2023. Further, the first payment in January 2024 was due on the 1st, however, rent was not paid until the 3rd. Despite the Tenant paying the full amount of January 2024 rent and paying the first half months’ rent for February 2024, such considerations do not play a substantial role in the legal analysis when considering a termination of the tenancy due to repeatedly late payment of rent.

[36] However, the Tenant testified that the nature of the conversations between the parties suggested to him that he was provided time to catch up on his arrears due to his personal circumstances. After reviewing the text message conversation between the parties dated October 4, 2023, the Officer concludes that the Landlord did not acquiesce on late payments of rent.

[37] The Officer notes that the Landlord demonstrated patience with the Tenant's personal circumstances and did not attempt to terminate the tenancy in June, October or November 2023 when the Tenant was late each of those months. It was not until December 2023 that the Landlord finally served the Notice. During the tenancy the evidence establishes that the Landlord repeatedly asked the Tenant and/or reminded the Tenant that rent was due on its due date.

² See paragraphs [62], [63], [67] and [68] of the *Guevara Decision*

- [38] Further, the Officer notes that the Island Regulatory and Appeals Commission, most recently, has provided greater clarity around evictions for repeatedly late payments of rent, which *all landlords and tenants* should be familiar with in Order LR23-66, paragraph [17], which states:

[17] *The Commission notes that the Act provides that a Landlord may, under section 61(1)(b), evict a tenant who is repeatedly late paying rent. It is therefore in the Landlord's discretion whether to evict and so long as the Landlord proves that the Tenant was repeatedly late in paying rent, and that the Notice was served, then the eviction will stand. **While a landlord may seemingly tolerate late payment for some time, the Act permits an eviction based on repeated late payment of rent and no warning is required.*** [emphasis added]

- [39] Therefore, the Officer finds that the Landlord is not equitably estopped from terminating the tenancy for repeatedly late payments of rent, and that the Notice is valid and the Application is denied. However, the Officer extends the effective date and the tenancy agreement shall terminate effective 5:00 p.m. on February 29, 2024.
- [40] Additionally, the Officer directs the parties to clauses 20(1) and (2) of the Act when it comes to prohibited and allowed fees charged during a tenancy.

Conclusion

- [41] The Notice is valid and the Application is denied.
- [42] The tenancy agreement between the parties shall terminate effective 5:00 p.m. on February 29, 2024. The Tenant shall vacate the Residential Property by this time and date.
- [43] **Order LD24-024 will be served on the parties by e-mail on January 23, 2024.**

IT IS THEREFORE ORDERED THAT

- A. The tenancy agreement between the parties shall terminate effective 5:00 p.m. on February 29, 2024. The Tenant shall vacate the Residential Property by this time and date.
- B. A certified copy of this Order may be filed in the Supreme Court and enforced by Sheriff Services as permitted by the Act.

DATED at Charlottetown, Prince Edward Island, this 23rd day of January, 2024.

(sgd.) Cody Burke
Cody Burke
Residential Tenancy Officer

NOTICE

Right to Appeal

This Order can be appealed to the Island Regulatory and Appeals Commission (the “Commission”) by serving a Notice of Appeal with the Commission and every party to this Order within **7 days of this Order**. If a document is sent electronically after 5:00 p.m., it is considered received the next day that is not a holiday. If a document is sent by mail, it is considered served on the third day after mailing.

Filing with the Court

If no appeal has been made within the noted timelines, this Order can be filed with the Supreme Court of Prince Edward Island and enforced as if it were an order of the Court.