Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, O, CNC, MT

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Witness #1 testified on behalf of the landlord that she personally served the tenant with a copy of the Notice to End Tenancy dated January 27, 2014 on January 28, 2014 in the presence of Witness #2. The tenant disputes being served. I find that the Application for Dispute Resolution/Notice of Hearing filed by each party was sufficiently served on the other as both parties were present at the hearing

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to an order cancelling the one month Notice to End Tenancy dated January 27, 2014
b. Whether the landlord is entitled to an Order for Possession?

Background and Evidence

The parties entered into a written tenancy agreement that provided that the tenancy would start on August 1, 2012. The rent is subsidized and the tenant pays $368 per

month payable in advance on the first day of each month. The landlord does not require a security deposit.

There is a long history of disagreement between the landlord and the tenant. The tenant complained at the number of Notices that he has received. The complaints involve allegations the tenant has failed to keep his room cleaned, storing hazardous materials and using public areas to store his belongings. The landlord has given the tenant numerous breach notices with the latest one dated January 23, 2014. The tenant disputes these allegations.

The landlord submits that it is entitled to an Order for Possession based on section 47(4) and (5) of the Residential Tenancy Act which provides as follows:

> "Section 47(4) and (5) provides as follows
>
> 47(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.
> (5) If a tenant who has received a notice under this section does not 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 by that date."

The landlord also relies on Policy Guideline #37 which includes the following statement:

> **Application for Arbitration Filed After Effective Date**
>
> An arbitrator may not extend the time limit to apply for arbitration to dispute a Notice to End if that application for arbitration was filed after the effective date of the Notice to End.
>
> For example, if a Notice to End has an effective date of 31 January and the tenant applies to dispute said Notice to End on 1 February, an arbitrator has no jurisdiction to hear the matter ***even where the tenant can establish grounds that there were exceptional circumstances.*** In other words, once the effective date of the Notice to End has passed, there can be no extension of time to file for arbitration.

In short the landlord submits the tenant was served a one month notice to End Tenancy on January 28, 2014. The tenant never disputed the Notice within the 10 days required under the Residential Tenancy Act. As a result he is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date. The landlord further submits that as the tenancy has come to an end in accordance with the Act an arbitrator does not have the jurisdiction to grant and extensive to time to hear the tenant's application to cancel the Notice which was filed on March 13, 2014.

Analysis:

I accept the submission of the landlord on the law. The B.C. Court of Appeal in the case of Ganitano v. Metro Vancouver Housing Corporation, 2014 BCCA 10 made the following statement of principle:

> "[42] The RTA has also abolished the common-law right of a landlord to treat a tenancy as forfeited when a tenant fails to pay rent. To terminate a residential tenancy a landlord must follow the procedures set out in s. 44(1) of the RTA, which stipulates that "[a] tenancy ends only" in specified circumstances. When faced with a tenant who has not paid his or her rent in full, a landlord's only avenue of redress is to serve a notice under s. 46 ("Landlord's notice: non-payment of rent"): s. 44(1)(a)(ii). When a tenant is repeatedly late in paying rent, the landlord's only avenue of redress is to serve a notice under s. 47 ("Landlord's notice: cause"): s. 44(1)(a)(iii). Also of note is s. 31, which prohibits a landlord from unilaterally changing locks or the means of access to a residential property.
>
> [43] When a landlord serves a notice for non-payment of rent, s. 46(4) gives a tenant five days to either pay the overdue rent or dispute the notice. If a tenant does neither, then, by operation of s. 46(5), he or she "is conclusively presumed to have accepted that the tenancy ends" and must vacate the unit by the date set out in the notice. In the case of a notice for cause, s. 47(4) gives a tenant ten days to dispute the notice. If a tenant does not dispute the notice, then by operation of s. 47(5), he or she "is conclusively presumed to have accepted that the tenancy ends" and must vacate the unit by the date set out in the notice. If a tenant unsuccessfully disputes a notice the landlord can obtain an order for possession from a DRO under s. 55(1). If a notice is not disputed, then the landlord can obtain an order for possession from a DRO under s. 55(2).

> [44] In my view, the Legislative Assembly has clearly and expressly stated that a tenant's failure to respond within the statutory time limits to a notice given in accordance with either s. 46(4) or s. 47(4) will, by operation of law, bring a tenancy to an end and entitle the landlord to regain possession of the rental unit. Such a termination is a statutory forfeiture (i.e., a taking back of the remainder of the term of the tenancy) and is beyond the reach of s. 24 of the *Law and Equity Act*. Indeed, it would be anomalous to allow a tenant to call in aid the equitable jurisdiction of the courts to reinstate a tenancy he or she is "conclusively presumed to have accepted" is at an end."

While the Ganitano case involves a determination as to whether the Supreme Court of British Columbia has the jurisdiction grant relief from forfeiture under the Law and Equity Act in a residential tenancy case it has also given arbitrators clear instructions to apply the time provisions set out in the Act.

The issue remaining is whether the tenant was properly served with the one month Notice to End Tenancy dated January 28, 2014.

Witness #1 testified that she served a copy of the one month Notice to End Tenancy while he was near the elevators. Witness #2 testified he witnessed the service. The representative of the landlord testified Witness #1 confirmed with her that the service had taken place. Witness #1 further testified that the tenant attended at her office a few hours later and was verbally abusive to her for giving him the Notice to End Tenancy. He tried to force his way into the office and the police were called.

The tenant denies being served. He testified he suffers from ADD and has been given over 50 notices from the landlord. When specifically asked to respond to the testimony of Witness #1 that he forced his way into her office a few hours after being served with the Notice he initially testified with respect to a more recent incident that occurred in March. When questioned again he denied that it occurred.

On February 20, 2014 the landlord gave the tenant a letter that refers to the service of the one month Notice, reminds the tenant he is to vacate on February 28, 2014 and advising that the failure to leave would result in a Bailiff being retained.

The tenant responded by e-mail threatening to bring a small claims action and reporting the events to the media.

The tenant also attended at the Residential Tenancy Branch at the end of February. He filed his own application seeking compensation, restricting the landlord's right of access and a repair order. The tenant's Application does not include an Application to cancel the one month Notice to End Tenancy. That hearing is set for April 2014.

At the request of the tenant the landlord e-mailed the tenant a copy of the Notice to End Tenancy. It is unclear precisely when this request was made and when the tenant received the landlord's e-mail with attached Notice. The best evidence is that the Notice was e-mailed at the end of February.

Analysis:

In Faryna v. Chorny, [1952] 2 D.L.R. 354, the B.C. Court of Appeal set out the following test for assessing credibility:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (page 357)"

After hearing the disputed evidence determined the evidence of the representative of the landlord, Witness 1 and Witness 2 is more credible. I accept the testimony of Witness 1 that she served the tenant with a copy of the Notice to End Tenancy dated January 28, 2014 on that date for the following reasons:

- Her evidence was precise as to all of the events that happened that day.

- The service was witnessed by a second employee of the landlord and that service was confirmed with her superior which is the landlord's practice.
- The tenant was evasive with his testimony and failed to sufficiently respond the testimony of Witness 1 as to what occurred after a few hours later when he attended at the office of Witness 1. When asked to respond to the testimony of Witness 1 he deflected my question by responding to an unrelated event that occurred in March. When he was asked a second time he made a general denial.
- The tenant testified he has been served with over 50 notices from the landlord. There is insufficient evidence to support such a statement.
- The landlord's conduct subsequent to the service of the Notice in giving the tenant a letter dated February 20, 2014 confirming the end of the tenancy is consistent with their practice and with the service of the earlier Notice.
- The letter dated February 20, 2014 refers to the Notice to End Tenancy dated January 28, 2014. It is unclear precisely when the landlord provided the tenant with another copy of the Notice to End Tenancy by e-mail although the best evidence is that this was provided sometime at the end of February. The tenant's Application for Dispute Resolution was filed on March 13, 2014 which is outside of the 10 day period set out in the Residential Tenancy Act.

It may be that the tenant failed to place much importance on the Notice and he subsequently disposed of and/or has forgotten about it. However, that does not invalidate the service of the Notice by the landlord.

Tenant's Application:

I determined the landlord has established sufficient service of the one month notice. The tenant has 10 days in which to file an Application to dispute the Notice. The tenant failed to file the Application within that period of time and in accordance with section 47(4) and (5) he is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date. Further,

the tenancy ended on February 28, 2014. As a result an arbitrator does not have the jurisdiction to consider the tenant's application for more time to make the application because the tenancy has come to an end. The British Columbia Court of Appeal in the Ganitano case reconfirms the requirements of following the time provisions set out in the Residential Tenancy Act. **As a result I ordered that the application of the tenant for an order cancelling the one month Notice to End Tenancy be dismissed.**

Landlord's Application

I determined the landlord is entitled to an Order for Possession based on the Notice to End Tenancy dated January 28, 2014. The Tenant's application to cancel the one month Notice to End Tenancy has been dismissed. The Residential Tenancy Act provides the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit. **Accordingly, I granted the landlord an Order for Possession on 5 days notice.**

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, the landlord may register the Order with the Supreme Court of British Columbia for enforcement.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

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: March 21, 2014

Residential Tenancy Branch