Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR MNR
OPT FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by both the Landlord and the Tenant.

The Landlord filed his application through the Direct Request process on June 01, 2015 for an Order of Possession for unpaid rent or utilities and a Monetary Order for unpaid rent or utilities. Upon receipt of the Landlord's application the Residential Tenancy Branch (RTB) staff determined that the application did not meet the requirements of the Direct Request process for an ex-parte proceeding and the matter was scheduled to be heard at this participatory hearing.

The Tenant filed on June 25, 2015 seeking to obtain an Order of Possession for the Tenant and to recover the cost of the filing fee from the Landlord for this application. The Tenant amended his application on July 02, 2015 clarifying that his application was filed under the Residential Tenancy Act (the Act).

The hearing was conducted via teleconference and was attended by the Landlord, the Tenant, and the Tenant's Witness. Each person gave affirmed testimony. I explained how the hearing would proceed; the order in which the testimony would be presented; and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

The Landlord testified that the Tenant has refused to give him a mailing address and the Tenant has been avoiding him. The Landlord submitted that he served the Tenant with copies of his application for Dispute Resolution, the hearing documents, and his evidence by leaving the documents on the inside of the rental unit on the interior steps on June 2, 2015.

The Landlord stated that he included a USB drive with photographs as part of his evidence submission. The Landlord submitted that when he handed the Service BC staff his USB drive and his evidence they asked him if he wanted the USB drive back and he told them that he did not want it back and to keep it with his evidence.

I informed the Landlord that there was no record of a USB drive being submitted to the RTB and there was no indication on Service BC's fax cover sheet of a USB drive being forwarded separately from the fax. The USB drive consisted of evidence relating to the condition of the rental property and is not relevant to the issues that were before me during this hearing. Therefore, I told the Landlord that we would be proceeding in absence of the USB drive.

The Tenant testified that he had not provided the Landlord with a mailing address because he often travels for work and school. He stated that although he travels, he has always kept a room at the rental unit and the longest he has ever been away was for one month. The Tenant asserted that he is currently residing on the rental property and that he did not receive copies of the Landlord's application documents or evidence.

The Landlord asserted that the Tenant referenced his evidence documents several times in the Tenant's evidence submission and argued that was proof that the Tenant had to have received the Landlord's documents.

Section 89 (2) of the Act stipulates that an application by a landlord under section 55 *[order of possession for the landlord]*, 56 *[application for order ending tenancy early]* or 56.1 *[order of possession: tenancy frustrated]* must be given to the tenant in one of the following ways:

> (a) by leaving a copy with the tenant;
> (b) by sending a copy by registered mail to the address at which the tenant resides;
> (c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;
> (d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;
> (e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*.

Section 89(1) of the Act stipulates how an application for Dispute Resolution must be served if the application includes a request for monetary compensation. Section 89(2) is for an application that requests only an Order of Possession. Section 89(1) does not provide the option to attach a copy to a door or other conspicuous place at the address at which the tenant resides, as provided for in section 89(2)(d).

Based on the above, I favored the Landlord's submission that the Tenant had received his application and evidence which was left on the stairs inside the rental unit when the Tenant regained access to the rental unit. Accordingly, I find the Tenant has been sufficiently served with copies of the Landlord's application and evidence in accordance with section 89(2) of the Act.

As indicated above, if the Landlord was seeking an Order of Possession and a Monetary Order he would have had to serve his application in accordance with section 89(1) of the Act which does not include leaving the documents in a conspicuous place

at the rental unit property. Therefore, I find the Landlord's application may proceed with his request for an Order of Possession and I dismiss the Landlord's request for a Monetary Order for unpaid rent and unpaid utilities, with leave to reapply.

The Landlord confirmed receipt of the Tenant's application and evidence documents and argued that he only received them at 3:30 p.m. on July 16, 2015, the day before the hearing. He noted that the Tenant failed to serve his application within the required 3 day period, therefore, the Tenant's application should not be considered. The Landlord testified that he had reviewed the Tenant's application and evidence and asserted that he has not had enough time to provide a written response to the Tenant's evidence.

Upon further clarification the Tenant stated that he had amended his application in his written submission that was included in his evidence submission. The Tenant stated that that evidence submission was faxed to the RTB about a week before he served the Landlord with his application and documents on July 16, 2015.

Section 59(2) of the Act stipulates that an application for dispute resolution must (a) be in the applicable approved form, (b) include full particulars of the dispute that is to be the subject of the dispute resolution proceedings, and (c) be accompanied by the fee prescribed in the regulations.

Rule of Procedure 2.11 provides that the applicant may amend the application without consent if the dispute resolution proceeding has not yet commenced. The applicant **must** submit an amended application to the Residential Tenancy Branch and serve the respondent with copies of the amended application [emphasis added].

In this case the Tenant did not file an amended application and simply listed the additional items he wished to claim in his written submission provided in his evidence. Accordingly, I declined to hear matters which were not listed on the Tenant's application. The Tenant is at liberty to file another application if he wishes to proceed with those additional items listed in his evidence.

Section 59(3) of the Act stipulates that except for an application referred to in subsection (6), a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director.

The undisputed evidence was the Tenant served his application to the Landlord on July 16, 2015, the day before this hearing, in breach of section 59(3) of the Act. Notwithstanding the foregoing, I proceeded to hear the merits of both applications for Dispute Resolution as each party made application for an Order of Possession. I made the Decision to hear both applications as the applications offset each other and therefore, if I find in favor of the Tenant's application for an Order of Possession the Landlord's application for an Order of Possession would fail and vice versa.

Rule of Procedure 3.14 provides that documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the RTB not less than 14 days before the hearing.

At the time of this hearing the Tenant's evidence had not be received on the hard copy RTB file. There was an electronic record which indicated that late evidence was received from the Tenant for the Tenant's application. That evidence was received via fax on July 10, 2015 at 3:26 p.m. There was no record of evidence received from the Tenant as respondent to the Landlord's application.

Based on the above, I find the Tenant had not served his evidence upon the Landlord or the RTB in accordance with Rule of Procedure 3.14. I accept the Landlord's argument that because he had only received the Tenant's evidence submission the day prior to this hearing that he had not had an opportunity to provide a written response to the Tenant's submission. Accordingly, I declined to consider the Tenant's documentary evidence. I did however consider the Tenant's oral submissions.

The Residential Tenancy Branch Rule of Procedure 11.11 (hereinafter referred to as Rule of Procedure) stipulates that except as provided by the Act, the arbitrator may exclude witnesses from the in-person or conference call dispute resolution proceeding until called to give evidence and, as the arbitrator considers it appropriate to do so, may exclude any other person from the dispute resolution proceedings.

The Witness had dialed into the teleconference prior to the start of the hearing. Therefore, I instructed the Witness to provide his submission at the beginning of the hearing. The Witness testified that he had been approached by the Tenant sometime in April or May 2015 to discuss the possibility of entering into a business deal to purchase the Landlord's property. He said he contacted the Landlord on May 30, 2015 via email and had requested copies of all documents he had entered into with the Tenant. He argued that he did not receive any signed documents from the Landlord. The Witness later submitted that the Tenant had brought him on as a consultant to advise him in the purchase of the property.

Upon further clarification both the Tenant and the Witness confirmed again that the Witness was at the hearing strictly as a Witness and not as an advocate for the Tenant. The Tenant testified that the Witness had no dealings regarding his occupation of the rental property and the Witness was only engaged in these matters with respect to a business opportunity to consider investing in the purchase of the rental unit and property.

When the Witness completed his submissions the Landlord and Tenant were given opportunity to question the Witness and each declined. In accordance with the Rule of Procedure 11.11, the Witness was given the choice to disconnect from the proceeding or remain connected to the hearing with his phone on mute so he could not hear what was being said during the rest of the hearing in case we needed to add him back into the proceeding for questioning. I explained that I would take his phone off of mute at the

end of the hearing and would advise if he needed to submit additional information. The Witness was instructed to call back into the proceeding if his telephone line disconnected.

At approximately 10:55 a.m., I attempted to unmute the Witness' telephone line which resulted in some technical problems and the Witness was disconnected from the hearing. The Witness did not call back into the hearing. At the end of the Landlord's and Tenant's submissions I asked if either party needed to ask the Witness any questions. Both the Landlord and Tenant confirmed that they did not need the Witness to submit any further testimony and they did not have any questions for the Witness; therefore, the Witness was not called back into the teleconference hearing.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. Following is a summary of the submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Does this matter fall within the jurisdiction of the Residential Tenancy Branch?
2. If so, has the Landlord proven entitlement to an Order of Possession?
3. If not, has the Tenant proven entitlement to an Order of Possession?

Background and Evidence

The undisputed evidence was the parties entered into a written agreement on or around September 24, 2008 for the Tenant to occupy the rental property for the monthly rent of $1,200.00. The agreement included an option for the Tenant to purchase the property and at the time the option to purchase was exercised one half of all rents paid would be credited to the purchase price. The Tenant was given immediate possession of the rental property and began paying the monthly rent of $1,200.00 as of October 1, 2008. No security deposit was required to be paid and the Tenant did not pay a down payment towards the purchase of the rental property.

The Landlord submitted a copy of the signed agreement into evidence and the last paragraph on this agreement states as follows:

> *This agreement will be in effect for 6 months, beginning October 1, 2008, with the option to renew. Early occupancy is available.*
>
> [Reproduced as written]

The Landlord testified that the Tenant has not exercised his option to purchase this property. He said the Tenant has fallen behind on the payment of rent, utilities and property taxes so on May 11, 2015 he personally served the Tenant with a 10 Day Notice for unpaid rent and utilities.

The Landlord submitted an unsigned document into evidence which was dated May 2, 2013 which indicated that from 2013 the Tenant would pay the property taxes until the purchase is complete. The Landlord argued that the Tenant has never paid the property taxes and that he has also failed to pay rent for June and July 2015. The Landlord now seeks an Order of Possession for as soon as possible.

The Tenant confirmed that he had not exercised his right to purchase the property but that he has been trying to enter into a business deal with his Witness to purchase the property April or May 2015. The Tenant asserted that at the time he entered into the rental/purchase agreement that he was only 19 years of age. He also submitted that his monthly rent payments were increased a few years ago to include payment for the property taxes because he could not afford the lump sum payment for the taxes.

The Tenant confirmed receipt of the 10 Day Notice as described by the Landlord and confirmed that he had fallen behind on his rent in the past. He argued that he had made lump sum payments to catch up on his past due rents in previous years. He stated that he knew he was behind in his rent for April and May and that his last payment towards those arrears was on May 15, 2015. The Tenant said he was advised not to pay his outstanding rent or the rent due for June or July until these matters were determined in this hearing.

The Landlord submitted that the monthly rent was increased in accordance with the Act. He asserted that rent was $1,200.00 at the beginning, was increased to $1,250.00 in 2013; increased to $1,275 in 2014, and up to $1,300.00 in 2015. He argued that the Tenant had not filed an application to dispute the 10 Day Notice; therefore, he was conclusively presumed to have accepted that this tenancy ended in accordance with section 46 of the Act. The Landlord said he would like possession of the rental unit as soon as possible.

The Landlord argued that he has never met the Tenant's Witness and he was never told by the Tenant that this person wanted to purchase his property. He said that after he served the Tenant with the eviction Notice he started receiving emails from this person, the Witness, demanding copies of the Landlord's documents and he refused to send him anything because he did not know who this person was.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Section 2(1) of the Act stipulates that despite any other enactment but subject to section 4 *[what this Act does not apply to]*, this Act applies to tenancy agreements, rental units and other residential property.

Residential Tenancy Policy Guideline (Policy Guideline) 27, states that a tenancy agreement is a transfer of an interest in land and buildings, or a license. The interest

that is transferred, under section 1 of the Act, is the right to possession of the residential premises. If the tenant takes an interest in the land and buildings which is higher than the right to possession, such as part ownership of the premises, then a tenancy agreement may not have been entered into. In such a case the RTB may again decline jurisdiction because the Act would not apply.

In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement. If the agreement meets either of the tests outlined above, then the Act may not apply. However, if the parties intended a tenancy to exist prior to the exercise of the right to purchase, and the right was not exercised, and the monies which were paid were not paid towards the purchase price, then the Act may apply and the RTB may assume jurisdiction. Generally speaking, the Act applies until the relationship of the parties has changed from landlord and tenant to seller and purchaser.

In this matter the undisputed evidence was that the parties had entered into a rental agreement which included an option for the Tenant to purchase the property and that option to purchase was not exercised by the Tenant. As indicated above, the written agreement that was signed by both parties indicated "*This agreement will be in effect for 6 months, beginning October 1, 2008, with an option to renew."* The parties did not sign a subsequent written agreement.

The Tenant did not pay the Landlord a down payment towards the purchase price of the property. Furthermore, there was conflicting testimony whether the Tenant's rent was increased in 2013, 2014, and 2015 for rent or if the increased amounts were for payment of the property taxes. There was however, undisputed evidence that the Tenant had not paid his rent if full for May, June or July 2015. The Tenant has remained in possession of the rental unit and property from September 2008 onward in the capacity as a Tenant.

Section 44(3) of the Act states that if on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

Section 3 of the Act provides that a person who has not reached 19 years of age may enter into a tenancy agreement or a service agreement, and the agreement and this Act and the regulations are enforceable by and against the person despite section 19 of the *Infants Act*.

Based on the foregoing, I conclude that this matter falls within the jurisdiction of the Act. The Tenant entered into the tenancy agreement when he was 19 years of age which included an option to purchase if exercised within six months. The option was not exercised and the parties did not enter into and sign a subsequent written agreement to renew the purchase option. Therefore, I find the Tenant remained in possession of the

rental unit and property in the capacity of a tenant and all money paid to the Landlord as rent remains as payment for rent and are NOT considered as payment towards the purchase price of the rental unit and property. Accordingly, I accepted jurisdiction and make the following decisions with respect to the two applications for Dispute Resolution that are before me.

When a tenant receives a 10 Day Notice to end tenancy for unpaid rent they have (5) days to either pay the rent and utilities in full or to make application to dispute the Notice or the tenancy ends.

In this case the Tenant received the 10 Day Notice on May 11, 2015; therefore, the Tenant was required to pay the rent and utilities in full no later than May 16, 2015 and vacate the rental unit and property by the effective date of the Notice which was **May 21, 2015.**

The Tenant neither paid the rent and utilities nor disputed the Notice; therefore, the Tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice, **May 21, 2015,** and must vacate the rental unit to which the notice relates pursuant to section 46(5) of the *Act.*

In addition to the foregoing, the undisputed evidence was that at the time of this hearing the Tenant had not paid the Landlord the outstanding rent or utilities that were due on May 1, 2015, and the Tenant had not paid the June or July 2015 rents.

Accordingly, I find the Landlord has proven the merits of his application for an Order of Possession for unpaid rent and I approve the Landlord's request for an Order of Possession.

Based on the above, I also find that the Tenant has provided insufficient evidence to prove he is entitled to an Order of Possession for the tenant. Accordingly, I dismiss the Tenant's application, without leave to reapply.

As the Tenant has not been successful with his application, I decline to award recovery of the Tenant's filing fee.

Conclusion

As noted in the Introduction above, the Landlord's request for a Monetary Order is dismissed with leave to reapply. In regards to the Tenant's application, I declined to hear any matters that were not listed on the Tenant's application that had been properly filed with the RTB.

The Landlord has been successful with his application and has been granted an Order of Possession. The Landlord has been issued an Order of Possession effective **Two (2) Days after service upon the Tenant.** In the event that the Tenant does not comply

with this Order it may be filed with Supreme Court and enforced as an Order of that Court.

Section 88(g) of the Act provides that service of an Order of Possession when given to a tenant may be served by attaching a copy to a door or other conspicuous place at the address at which the person resides.

Section 71(1) of the Act provides that the director may order that a notice, order, process or other document may be served by substituted service in accordance with the order.

Section 71(2)(b) stipulates that in addition to the authority under subsection (1), the director may order that a document has been sufficiently served for the purposes of this Act on a date the director specifies.

The parties displayed an adversarial relationship during the hearing and I found the Tenant to be very evasive with respect to his service address and about where he was currently residing. After considering that the Tenant will be made aware of my Decision to grant the Landlord an Order of Possession when he picks up his copy of this Decision, I hereby grant the Landlord a substitute service order for service of the Order of Possession, pursuant to section 71(1) of the Act, as follows:

> The Landlord is hereby granted authority to serve the Tenant with a copy of the Order of Possession by posting the Order of Possession to the rental unit front door. The Tenant is to be considered served with the Order of Possession three days after the Landlord posted the Order of Possession to the rental unit front door, in accordance with sections 71(1) and 71(2)(b) of the Act.

The Tenant was not successful with his application and his application was dismissed in its entirety.

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: July 20, 2015

Residential Tenancy Branch