



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding UNDERHILL GAGE LITIGATION
and [tenant name suppressed to protect privacy]

DECISION

Dispute Code: OPL, OPC, MNR, FF, O

Introduction

This matter was heard by conference call in response to a Landlord's Application for Dispute Resolution (the "Application") made on September 28, 2015 for: an Order of Possession based on a notice to end tenancy for cause and for the Landlord's use of the property; for unpaid rent; to recover the filing fee, and for "Other" issues.

Preliminary Issues

Legal counsel for the Landlord appeared for the hearing and presented evidence and made submissions on behalf of the Landlord. The hearing was also attended by the Landlord's selling agent; however, she did not provide any testimony during the hearing.

There was no appearance for the Tenant during the 30 minute hearing or any submission of evidence prior to the hearing. Therefore, I turned my mind to the service of documents by the Landlord. Legal counsel explained the Tenant had been served with a copy of the Application and the Notice of Hearing documents by registered mail on September 28, 2015 to rental unit. The Landlord provided a copy of the Canada Post tracking number and receipt as evidence to verify this method of service. Legal counsel confirmed the package sent to the Tenant was returned as unclaimed.

Section 90(a) of the *Residential Tenancy Act* (the "Act") provides that a document is deemed to have been received five days after it is mailed. A party cannot avoid service through a failure or neglect to pick up mail. As a result, based on the undisputed evidence of the Landlord, I find the Tenant was deemed served with the required documents on October 3, 2015 pursuant to the Act.

During the hearing legal counsel withdrew the Landlord's Application requesting a Monetary Order as the Landlord did not want to pursue this matter at this stage. Therefore, in the absence of the Tenant, I allowed legal counsel to withdraw the

Landlord's monetary claim for unpaid rent and the Landlord is at liberty to re-apply for this. Legal counsel also confirmed that there were not any "Other" issues to be dealt with during this hearing, as had been elected on the Landlord's Application.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession?

Background and Evidence

Legal counsel explained that this tenancy started in 1995. No written tenancy agreement was completed and no security deposit was exchanged. However, legal counsel explained that the parties engaged into an express verbal tenancy agreement. The terms of the verbal agreement agreed between the parties were that rather than the Tenant pay monthly rent, he would pay the utilities and property taxes for the rental unit.

Legal counsel also explained that in lieu of rent, the Tenant was also required to perform general maintenance of the property which included, but not limited to, mowing the lawn and shovelling the snow. Legal counsel confirmed that this did not involve the Tenant doing major repairs such as the replacement of a furnace which the Landlord took care of. Legal counsel confirmed that the Tenant paid utilities, which included but was not limited to, telephone and electrify bills. Legal counsel explained that the Tenant has paid these utilities directly to the utility companies during this tenancy and has also paid some property taxes; although legal counsel could not be sure of the exact payments made by the Tenant relating to property taxes.

Legal counsel submitted that this tenancy was an oral agreement and confirmed that the Landlord and Tenant do not reside together and none of the criteria as laid out in Section 4 of the Act applied to this tenancy.

Legal counsel confirmed that on August 24, 2015, the Tenant was served with a 1 Month Notice to End Tenancy for Cause (the "1 Month Notice"). This was provided into evidence and shows a vacancy date of September 30, 2015. The reasons for ending the tenancy indicated on the notice was that the Tenant: had significantly interfered with or unreasonably disturbed the Landlord; and, breached a material term of the tenancy agreement that was not corrected after written notice to do so was given. Legal counsel confirmed the proof of service evidence which proved the service of the 1 Month Notice to the Tenant by placing it in the Tenant's mail box and also posting it to the rental unit door.

Legal counsel also confirmed that the Tenant was then served with a 2 Month Notice to End Tenancy for Landlord's Use of Property (the "2 Month Notice") on August 26, 2015. A copy was posted to the rental unit door and placed into the Tenant's mail box as verified by a proof of service document. The 2 Month Notice provided into evidence shows a vacancy date of October 31, 2015 and the reason for ending the tenancy under the 2 Month Notice is because the Landlord has sold the property, all of the conditions of the sale have been lifted, and the new owner has informed the current owner in writing that they intend to occupy the rental unit.

Legal counsel stated that the reason why the Tenant had been given the 1 Month Notice was because the Tenant had been advised by the Landlord that the rental unit was going to be placed on the market for sale. In preparation for this the Tenant was provided with proper written and legal notice for entry into the rental unit by the Landlord's selling realtor for the purpose of a land survey and assessment of hidden oil tanks. The Landlord provided this notice into evidence for this hearing. The Landlord also provided a number of other written notices which were served to the Tenant for entry into the rental unit for the purpose of selling the rental unit.

Legal counsel explained that the Tenant called the Landlord after receiving the notices for entry and advised that he would not be allowing access to the selling realtor or to potential buyers. As a result, the Tenant was served with the 1 Month Notice.

Legal counsel explained that in relation to the 2 Month Notice, the Landlord accepted an offer of purchase for the rental unit and that the buyer had requested in writing for the Landlord to issue the Tenant with the 2 Month Notice. The Landlord provided a copy of the purchase agreement and copies of documents to show that the conditions of the sale had been lifted; this included written notice from the buyer for the Landlord to serve the 2 Month Notice to the Tenant that they intended to occupy the rental unit.

Legal counsel stated that despite repeated attempts to inform the Tenant of his requirement to vacate the rental unit, the Tenant has no intention to vacate the rental unit. Therefore, the Landlord requests an Order of Possession to end the tenancy.

Analysis

I first turn my mind to the issue of how this tenancy was established. The Act defines a **"tenancy agreement"** as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit. Section 91 of the Act stipulates that except as modified or varied under this Act, the common

law respecting landlords and tenants applies in British Columbia. Common law has established that oral contracts and/or agreements are enforceable. The Act defines “rent” as money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenancy to a landlord in return for the right to possess the rental unit, for the use of common areas and for services and facilities.

Based on the foregoing and taking into consideration the undisputed evidence provided by the Landlord and the submissions of legal counsel, I make the following findings. Although there was no written tenancy agreement signed or security deposit exchanged, I find the Tenant and the Landlord engaged into an oral tenancy agreement for possession of the rental unit. I find there is no evidence before me to suggest that occupancy of the rental unit was provided to the Tenant out of generosity but rather it relied on a business arrangement for the return of services and payment of utilities by the Tenant. In addition, I find there is no evidence before me that the Landlord retained the right to enter the rental unit at any time during the tenancy. This is evidenced by the fact that the Landlord provided the Tenant with multiple written notices to enter the rental unit during the most recent part of this tenancy.

I accept the Landlord’s undisputed evidence the Tenant agreed to pay utilities and property taxes and perform maintenance to the rental unit in lieu of paying monthly amount of monies to the Landlord for rent. I find the Landlord agreed to these conditions as a value given in return for the Tenant to possess the rental unit. Furthermore, Section 4 of the Act lays out what the Act does not apply to. I find there is no evidence before me that the provision of Section 4 of the Act applies to this tenancy agreement. Therefore, based on the above, I find that the terms of this verbal tenancy agreement are recognized and enforceable under the Act. As a result, I continue to examine the Landlord’s Application for an Order of Possession.

In this respect, I find that the 1 Month Notice and the 2 Month Notice (collectively referred to as the “Notices”) are on the approved forms and the contents of the Notices comply with Section 52 of the Act. I also accept the undisputed evidence that the Tenant was served with both Notices by placing them in the Tenant’s mail box and posting them to the rental unit door pursuant to Sections 88(f) and 88(g) of the Act respectively.

Sections 90(c) and (d) of the Act states that a document posted to the door or placed into a mail slot is deemed to have been received three days later. Therefore, I find that the Tenant was deemed to have been served with the 1 Month Notice on August 27, 2015, and the 2 Month Notice on August 29, 2015. As a result, I find the vacancy dates on both Notices are correct.

In relation to the 1 Month Notice, Sections 47(4) and (5) provide that a tenant has ten days to dispute it. If the tenant fails to do so they are conclusively presumed to have accepted that the tenancy ends on the vacancy date of the Notice and must vacate the rental unit by that date.

In relation to the 2 Month Notice, Section 49(8) and 49(9) of the Act provides a tenant with 15 days to dispute the Notice. If the tenant fails to do so they are conclusively presumed to have accepted that the tenancy ends on the vacancy date of the notice and must vacate the rental unit by this date.

Based on the foregoing, I find there is no evidence before me that the Tenant disputed the Notices. Therefore, the Tenant is conclusively presumed to have accepted the vacancy date on the Notices and must now vacate the rental unit. As the vacancy date on the Notices has now passed and the Tenant is still occupying the rental unit, the Landlord is entitled to a two day Order of Possession to end the tenancy. This order must be served to the Tenant and may then be filed and enforced in the Supreme Court of British Columbia as an order of that court if the Tenant fails to vacate the rental unit.

As the Landlord has been successful in this matter, the Landlord is also entitled to the \$50.00 Application filing fee pursuant to Section 72(1) of the Act. As a result, the Landlord is also issued with a Monetary Order for this amount. This order must be served to the Tenant and may then be filed in the Small Claims Court as an order of that court. Both orders are attached to the Landlord's copy of this decision.

Conclusion

The Tenant has breached the Act by not moving out of the rental suite in accordance with both Notices. As a result, the Landlord is granted an Order of Possession effective two days after service on the Tenant. The Landlord is granted a Monetary Order to recover the filing fee. The Landlord's monetary claim was withdrawn.

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: December 01, 2015

Residential Tenancy Branch

