



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL, MND, FF; CNL, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for landlord's use pursuant to section 55;
- a monetary order for damage to the rental unit pursuant to section 67; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were represented by counsel. The tenant elected to call one witness.

Preliminary Issue – Late Evidence

Both parties submitted late evidence. Both the tenant and the Residential Tenancy Branch were not yet in possession of the landlord's evidence sent on 14 June 2016. The parties were given the option of consenting to the opposing party's evidence or making submissions on admissibility. The landlord was cautioned that if I admitted the landlord's late evidence that it may result in an adjournment in order to permit the tenant

to examine the document and respond. The landlord elected to exclude the late evidence and proceed. The tenant also elected to withdraw her late filed evidence.

Preliminary Issue – Severed Claim

Residential Rules of Procedure, Rule 2.3 states that, if, in the course of the dispute resolution proceeding, the dispute resolution officer determines that it is appropriate to do so, the officer may sever or dismiss the unrelated disputes contained in a single application with or without leave to apply.

As the landlord's application for a monetary order for damage to the rental unit is not related to the 2 Month Notice, I am exercising my discretion to dismiss that portion of the landlord's claim with leave to reapply.

Issue(s) to be Decided

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an order of possession? Is the tenant or the landlord entitled to recover the filing fee for this application from opposing party?

Background and Evidence

While I have turned my mind to all the documentary evidence, and testimony, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlord's claim and my findings around each are set out below.

This tenancy began in June 2013. Monthly rent was initially \$4,500.00 and due on the first. Rent was later reduced to \$3,500.00. The landlord continues to hold a security deposit and pet damage totaling \$4,500.00 paid by a prior occupant of the rental unit.

The landlord is the owner of the rental unit. The landlord testified that he is in a difficult financial situation that required him to sell the rental unit. In April 2016 the landlord listed the rental unit for sale. The rental unit sold within one week.

At 1700 on 29 April 2016, subjects were removed and the conditions for sale were complete. The landlord provided me with a letter from the purchasers indicating that the purchaser or their close family members intend in good faith to occupy the rental unit. This letter is dated 29 April 2016.

On 29 April 2016 the landlord texted the tenant informing her that the rental unit had sold and that the landlord would be issuing the 2 Month Notice. The tenant did not respond to this message. The tenant testified that she did not receive this message at the time it was sent.

The landlord's mother attempted to serve the 2 Month Notice in person the evening of 29 April 2016, but the tenant was not at home.

On 30 April 2016, the landlord's mother attended at the rental unit to attempt to serve the 2 Month Notice. The landlord did not find the tenant there, but did find the witness at the rental unit. The landlord's mother delivered the 2 Month Notice to the witness. The witness is a person who cleans the tenant's home. The witness does not reside with the tenant.

The tenant testified that on 30 April 2016 she left the rental unit in the morning with her daughter to attend the child's sporting event. The tenant testified that she and her daughter stayed overnight and returned to the rental unit at approximately 1300 on 1 May 2016. The tenant testified that she saw the 2 Month Notice at that time. The tenant testified that she texted the witness when she saw the notice to ask when it was delivered.

On 5 May 2016, the landlord sent a text message to the witness:

Landlord: Ok great. I was wondering with mom came by to drop off the ending tenancy forms for [the tenant] on Saturday. Did you make contact with [the tenant] and tell her about them?

Witness: Yeah your mom gave to me Saturday. And [the tenant] had it already.

Landlord: You mean she know I was giving her notice?

Witness: Yeah it is

The landlord testified that communication with the tenant would often occur by email or text message. The landlord testified that he accepted the tenant's notice by email in 2015, which was later rescinded. The landlord testified that his mother has spoken with the tenant's cleaner a few times when the landlord's mother has been at the rental unit attending to the landscaping. The landlord admitted on cross examination that he has no direct knowledge of his mother's and the cleaner's interactions.

The witness's first language is Tagalog. The witness has worked as the tenant's cleaner for approximately three years on a biweekly basis. The witness does not live with the tenant. The witness testified that she does not regularly see the landlord's mother and would not speak to her as the witness was generally busy with work.

The witness testified that she spoke with the landlord's mother on 30 April 2016 between 1130 and 1200. The witness testified that she told the landlord's mother that the tenant was away for the weekend. The witness testified that the mother asked she could leave the 2 Month Notice. The witness testified that she said it was up to the mother whether or not to leave it. The witness testified that the mother asked the witness for her telephone number so that the mother could refer the witness to the purchasers.

The witness testified that she did not see the tenant that day and did not contact the tenant by phone. The witness testified that she left the 2 Month Notice on the kitchen island with a note. The witness testified that she left the notice there because it is easy to see things there.

The witness testified that she spoke with the tenant on 1 May 2016. The witness testified that she received a text message from the landlord on 5 May 2016. The witness testified that her intent in her text messages was to convey that she received the 2 Month Notice from the mother on 30 April 2016 and left it for the tenant and that, by the time of the text message, the tenant had received the notice.

The landlord submits that he made every effort to ensure that the tenant received the 2 Month Notice before the end of April. The landlord submits that if he is unable to secure possession by 30 June 2016, he will suffer extreme prejudice as he stands to be in breach of the purchase and sale agreement. The landlord asks that I find that he provided sufficient notice.

The tenant submits that service in fact was made on 1 May 2016. The tenant submits that the landlord should have served the 2 Month Notice earlier in April and that by waiting to the end of the month, the landlord was risking being unable to provide notice. The tenant submits that the landlord is aware of the rules and should follow them.

The landlord seeks a finding that the 2 Month Notice is valid with an effective date of 30 June 2016. The tenant does not dispute the validity of the 2 Month Notice, but asks that I find that the corrected effective date of the 2 Month Notice is 31 July 2016.

Analysis

Pursuant to subsection 49(5) of the Act, a landlord may end a tenancy in respect of a rental unit if:

- (a) the landlord enters into an agreement in good faith to sell the rental unit,

- (b) all the conditions on which the sale depends have been satisfied, and
- (c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
 - (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;...

Subsection 49(6) of the Act sets out the notice requirement of a notice given pursuant to subsection 49(5) of the Act:

- (6) by giving notice to end the tenancy effective on a date that must be
 - (a) not earlier than 2 months after the date the tenant receives the notice,
 - (b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, ...

The tenant admits that the landlord validly issued the 2 Month Notice for the reason given; however the tenant disputes the effective date of the 2 Month Notice. No issue has been raised with the form and content of the notice (section 52 of the Act).

The landlord asks that I find that the 2 Month Notice was served on 29 April 2016 or in the alternative on 30 April 2016. The tenant asks that I find that the 2 Month Notice was served on 1 May 2016. Pursuant to subsection 49(6), if I find that the notice was served on or before 30 April 2016, the effective date of the notice is 30 June 2016; however, if I find that the notice was served on or after 1 May 2016, the corrected effective date of the notice (pursuant to section 53 of the act) is 31 July 2016.

Pursuant to paragraph 52(e) of the Act, in order to be effective a notice to end tenancy by a landlord must be in the approved form. The approved form contains important information that informs a tenant of his or her rights and obligations on receipt of the 2 Month Notice. In accordance with paragraph 52(e) of the Act, I find that the text message sent by the landlord on 29 April 2016 is not an effective form.

A 2 Month Notice must be served in accordance with section 88, which permits service in the following relevant methods:

- (a) by leaving a copy with the person;...
- (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides ...
- (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;

- (f) by leaving a copy in a mail box or mail slot for the address at which the person resides ...
- (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides ...;
- (i) as ordered by the director under section 71 (1) [director's orders: delivery and service of documents];...

Further, the Act sets out various deeming provisions for service in section 90:

- (a) if given or served by mail, on the 5th day after it is mailed;
- (b) if given or served by fax, on the 3rd day after it is faxed;
- (c) if given or served by attaching a copy of the document to a door or other place, on the 3rd day after it is attached;
- (d) if given or served by leaving a copy of the document in a mail box or mail slot, on the 3rd day after it is left.

The purpose of the deeming provisions in section 90 is to account for the delay in receipt that may occur as a result of delivery by a method other than personal service. It is prudent to account for these deeming provisions calculating the service timeline.

Residential Tenancy Branch Policy Guideline, "12. Service" provides further information regarding service requirements under the Act:

Failure to serve documents in a way recognized by the Legislation may result in the director determining that the party was not properly served with the document.

It is agreed to that the notice was delivered by the mother to the witness on 30 April 2016. The landlord did not suggest that the cleaner appears to reside with the tenant and in any event no evidence was provided in support of that position. The tenant admits receipt of the 2 Month Notice on 1 May 2016 when she returned to the rental unit.

Leaving the notice with the cleaner does not constitute delivery in accordance with any of the methods set out in paragraphs 88(a), (c), (e), (f), (g) or (i). Accordingly, I find that service was not completed in accordance with any of those provisions set out in section 88 of the Act.

Paragraph 71(2)(c) allows me to order that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act. By the tenant's admission she received a copy of the 2 Month Notice on 1 May 2016. I do not find that landlord's submission that the tenant had received the 2 Month Notice on 30 April 2016

based on the witness's text message to be persuasive. The witness testified that the landlord's interpretation was not what she meant and the text message itself is ambiguous. On this basis, I find that the 2 Month Notice was sufficiently served on the tenant on 1 May 2016 when she found the notice on her kitchen island. For the foregoing reasons, the landlord is entitled to an order of possession effective 31 July 2016.

The Residential Tenancy Branch regulates the landlord-tenant relationship. The statute permits an end to tenancy in specific prescribed situations and by specific prescribed methods. This is the law that I am obliged to apply. The landlord's potential breach of contract as a result of the delay in possession is not a matter for this Branch. Similarly, my decision is not in any way influenced by the family or employment situation of the tenant.

As the tenant has experienced greater success in her application than the landlord, I find that the tenant is entitled to recover the filing fee paid from the landlord. The landlord is not entitled to recover his filing fee.

Conclusion

The landlord is provided with a formal copy of an order of possession effective 31 July 2016. Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

I issue a monetary order in the tenant's favour in the amount of \$100.00. Should the landlord(s) fail to comply with this order, this 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 subsection 9.1(1) of the Act.

Dated: June 17, 2016

Residential Tenancy Branch