Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding KANDOLA VENTURES INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNDC, MNSD, ERP, RP, PSF, RPP, LAT, RR, FF

Introduction

This hearing was convened in relation to the tenants' application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for the cost of emergency repairs to the rental unit pursuant to section 33;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of their security deposit pursuant to section 38;
- authorization to change the locks to the rental unit pursuant to section 70;
- an order to the landlord to make repairs to the rental unit pursuant to section 32;
- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order requiring the landlord to return the tenants' personal property pursuant to section 65; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both tenants appeared. The landlord's agents appeared. I heard testimony from the tenants' witness NF.

Issue(s) to be Decided

Should the tenants' application be dismissed for failure to comply with the order dated 23 March 2016?

Background and Evidence

While I have turned my mind to all the evidence and submissions provided by the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of this issue and my findings around it are set out below.

This is the third hearing date in respect of these matters.

The first hearing occurred on 30 December 2015. Cross applications by the tenants and landlord were scheduled to be heard. The landlord's application related to a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice). The tenants' application related to the 10 Day Notice as well as the above-noted claims. At that time and pursuant to rule 2.3 of the *Residential Tenancy Branch Rules of Procedure* (the Rules), the unrelated portions of the tenants' claim were severed to be reconvened on 23 March 2016.

In the course of the hearing 30 December 2015, I made an order excluding witnesses from the room pursuant to rule 7.20 of the Rules. As hearings are conducted by teleconference, the Residential Tenancy Branch relies on participants to be honest and diligent in fulfilling this order. In the course of the hearing, the tenant OF's language indicated that at least one of her witnesses had remained in the room during when excluded. The landlord raised the issue at the hearing. The tenants denied that this had occurred. The issue was noted and the hearing continued.

On 23 March 2016, the hearing reconvened on the severed portion of the claim. At that time, the landlord made a request to reconvene the hearing in person as the landlord submitted that the tenants had not complied with my order excluding witnesses and stated that the only way to ensure compliance was to hold an in-person hearing. In particular, the landlord provided testimony from a witness who observed parties loitering outside the open door and window to the rental unit and going in and out of the rental unit.

I ordered the hearing be convened in person, in part, because of this concern. I issued an interim decision dated 23 March 2016 making this order.

In my interim decision of 23 March 2016, in addition to the order for the in-person hearing, the tenants were ordered to serve the landlord with the tenants' address for service in writing on or before 1 April 2016. This issue arose as the landlord did not have the tenants' address for service as the tenants had vacated the rental unit in the period between the first and second hearings. The landlord had been unable to serve evidence in accordance with the Act and Rules without an address for service.

The tenant OF testified that she provided the tenants' address in writing to a mail slot in a shed on the residential property after the conclusion of the 23 March 2016 hearing. The tenant OF testified that the witness NF was there when she did this. The tenants called NF to testify.

I asked NF if she recalled going anywhere with OF after the hearing on 23 March 2016. NF could not recall doing anything with OF. I asked NF if she was present with the tenants when they served documents to the landlord. NF testified that she was there at various times. I asked NF what sort of documents these were. NF indicated that they were requests for repairs. I asked NF if there were any other types of documents, NF indicated that she could not recall. The tenant OF submitted that I should not rely on this as evidence of non-corroboration because NF is seventy years old.

The agent JJ testified that he checks the mail slot every time he attends at the residential property, which is approximately twice per week. The mail slot goes into a supply shed. The agent JJ testified that he did not find the tenants' address in the shed.

The agent JK testified that she did not receive the tenants' address for service. The agent JK testified that agents of the landlord look for items in the shed at the beginning and end of each month. The agent JK testified that the letter was not there.

The agent PK testified that the landlord did not receive the tenants' address for service.

The tenants submitted that there have been issues with the shed being broken into. The landlord denies this.

On 11 April 2016, the landlord sent correspondence to the Residential Tenancy Branch indicating that the tenants had not provided this address as ordered. The landlord's agent indicated that the landlord was unable to serve its evidence.

On 11 May 2016, the landlord sent correspondence to the Residential Tenancy Branch indicating that the tenants had not provided the address as ordered.

The agent JK testified that the landlord received the tenants' address for the first time when they received the tenants' evidence on or about 29 May 2016 sent by registered mail to the landlord's address for service as set out in the application for dispute resolution. The agent JK testified that the landlord sent the tenants their evidence at this time.

The tenants submit that the landlord's agents are being dishonest in their testimony that they did not receive the address.

The landlord submits that it is the tenants who are being dishonest. The landlord submitted that if it had the tenants' address for service it would have attempted to enforce against the tenants the yet unsatisfied monetary order awarded after the hearing on 30 December 2015 in the amount of $1,800.00.

Preliminary Issue – Evidence

The tenants attempted to provide video and text message evidence at the hearing that was stored on her cellular telephone. This evidence had not been disclosed to the landlord in advance of the hearing. The landlord opposed the admission of this evidence.

Rule 3.14 of the Rules require an applicant to serve the respondent with all evidence on which the applicant intends to rely at least fourteen days before the hearing. This disclosure obligation ensures that the respondent is able to prepare for the hearing and provide evidence in response. As it would unduly prejudice the landlord to admit that evidence, I declined to consider the tenants' video and text message evidence that had not been disclosed in accordance with the Rules.

The tenants called one witness. Pursuant to rule 7.23 of the Residential Tenancy Branch Rules of Procedure I asked the witness questions regarding service of the address. The witness NF was not able to corroborate the tenants' evidence regarding service of the address. The tenant OF attempted to ask questions of the witness NF in order to rehabilitate the witness's testimony. The landlord objected to this type of question. The tenant OF was instructed that she was not permitted to ask leading questions of her witness but could ask questions by way of direct examination. The difference between these types of questions was explained and examples were provided. The tenant OF was not able to elicit any evidence by way of non-leading questions.

The tenants closed their submissions on the issue of compliance with my interim order. I indicated to the parties that I had heard all of the evidence at that time. The parties were offered an opportunity to discuss settlement. The tenants elected to speak privately outside the hearing room. When they returned the tenants indicated that they now had another witness to add. The landlord objected to the tenants calling a witness after the hearing had concluded on the issue. I did not permit the tenants to call an additional witness after the hearing on that issue had concluded.

Analysis

Paragraph 59(2)(a) of the Act establishes that a party must use the approved form in order to file an application for dispute resolution. In the application for dispute resolution form, an application is required to provide an "address for service of documents or notices—where material will be given personally, left, faxed, or mailed" (emphasis added). The use of the future tense implies the ongoing functionality of that address.

The tenants vacated the rental unit after the 30 December 2015 hearing and did not provide an address for service in advance of the second hearing on 23 March 2016.

While there is no specific provision that establishes that the tenants must provide an updated address for service, by necessary implication, and in order to give full effect to the respondent's service requirements and right to be heard, there is an obligation on the applications to provide a current address for service. By failing to provide a current address for service in advance of the 23 March 2016 hearing, the tenants frustrated the landlord's attempt to serve evidence in advance of the 23 March 2016 hearing.

Pursuant to subsection 64(3) of the Act, I issued an order that the tenants serve the landlord in writing with the tenants' address for service to remedy the tenants' failure.

The tenants provided evidence that they complied with my order dated 23 March 2016. The landlord provided evidence that the tenants did not comply. These conflicting versions of events require that I make a finding of credibility.

The often cited test of credibility is set out in *Faryna v Chorny,* [1952] 2 DLR 354 (BCCA) at 357:

> The real test of the truth of the story of a witness… 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.

In this case, I prefer the evidence of the landlord and find that the tenants did not comply with my order dated 23 March 2016. I prefer the testimony of the landlord's agents over that of the tenant's because the landlord consistently raised the issue of the tenants' failure to comply in advance of the reconvened hearing. As soon as the landlord had the address, it attempted to serve the evidence. This is consistent conduct with the landlord's version of events. Further, the witness NF was unable to corroborate the tenant OF's version of events. Additionally, I found that the landlord's agents provided their evidence in a forthright manner and sincerely. Conversely, the tenants were less forthright and less sincere in providing their evidence. I find on a balance of probabilities that the tenants did not comply with my order dated 23 March 2016.

As a result of the tenants' failure to provide the address, the landlord was unable to file and serve its evidence in accordance with the Act and Rules. One option to remedy this issue would be to adjourn the hearing. Another option is to dismiss the tenants' application because of their failure to comply.

Paragraph 62(4)(c) of the Act permits me to dismiss all or part of an application for dispute resolution where the application or part is an abuse of the dispute resolution process. "Abuse of process" is a legal doctrine designed to preserve the integrity of judicial or quasi-judicial proceedings by preventing misuse of its procedure. In particular, this doctrine may be used where the process is not being fairly or honestly used.

Parties that appear before the Residential Tenancy Branch mostly appear without the assistance of counsel. The procedures before the Branch are designed with this in mind. Parties are given chances to remedy defects in their applications where it does not unduly prejudice the opposing party.

Owers v Viskaris, 2012 BCSC 1534 at para 42 is particularly helpful in understanding my obligations to the parties:

> Of course, applicants must file their materials and be prepared. But litigants, especially self-represented ones, sometimes make a mistake that calls for some reasonable accommodation where it does not cause significant prejudice to the other party or to the fairness of the hearing process.

In this case, the tenants conduct over the course of the multiple hearing dates was problematic. The tenants were often argumentative, engaged in cross talk, and interrupted proceedings contrary to the Rules. The tenants attempted to rely on evidence not disclosed to the landlord. I have serious concern that the tenants did not comply with my order excluding witnesses from the first hearing. Now, in this hearing, I have found that the tenants did not comply with an order specifically requiring them to serve the landlord with their address for service. The tenants have taken a cavalier approach to these proceedings by repeatedly failing to provide their address for service and have failed to comply with an order of this Branch made in the course of these proceedings. For these reasons, I am exercising my discretion to dismiss the tenants' application without leave to reapply as the tenants' conduct constitutes an abuse of the dispute resolution process that goes to the very integrity of the process.

Conclusion

The tenants' application is dismissed without leave to reapply.

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 14, 2016

Residential Tenancy Branch