Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MT CNC MNDC OLC O RP FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("the Act") for: more time to make an application to cancel the landlord's 1 Month Notice to End Tenancy for Cause ("1 Month Notice") pursuant to section 66; cancellation of the landlord's 1 Month Notice pursuant to section 47; a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; an order to the landlord to make repairs to the rental unit pursuant to section 33; authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing with representatives. The landlord called one witness for this hearing. Both parties were given a full opportunity to be heard, to present their testimony, respond to the other party and to make submissions. Both parties acknowledged receipt of the other party's Application for Dispute Resolution ("ADR"). The landlord confirmed receipt of the tenant's ADR and evidentiary materials. The landlord testified that he served his ADR by registered mail to each of the five tenants residing in the rental unit. I find that the landlord was sufficiently served with the tenant's application package in accordance with section 90 of the Act. I find that the tenant was sufficiently served with the landlord's application package in accordance with section 89 and 90 of the Act.

The landlord testified that he personally served a 1 Month Notice to End Tenancy to the tenants by serving the notice to the tenant's 20 year old daughter. The tenant claims that the notice was personally delivered to the tenant's 18 year old son. As the tenant acknowledges receipt of the landlord's 1 Month Notice, I find that notice was sufficiently served in accordance with section 88 of the Act.

With respect to the timeline of service of the landlord's 1 Month Notice, the tenant testified, through her representative that her son did not give her the 1 Month Notice

until sometime during the month of February 2017. The tenant testified that because her family does not speak English, they did not realize the significance of the notice immediately. The landlord testified that he provided the 1 Month Notice to the tenant's 20 year old daughter who spoke English and that he explained the significance of the notice to the tenant's daughter.

Given the conflicting testimony on the matter of service and receipt of the 1 Month Notice, the decision with respect to service hinges on a determination of credibility. In addition to the manner and tone (demeanour) of the party's testimonial evidence, I have considered their content, and whether it is consistent with the other events that took place during this tenancy. The demeanor of the parties at the hearing was difficult to assess because of the presence of an interpreter and representative. However, the representative provided the tenant's position clearly.

I accept the evidence of the landlord with respect to this particular matter (service of the 1 Month Notice). The demeanor of the landlord representative (with some firsthand knowledge of this matter) as well as the details that the landlord was able to provide with respect to service assisted in convincing me of the landlord's credibility in testifying with respect to service of documents. The landlord was able to provide detailed answers to all questions about service in a calm and candid manner, and he never wavered in his version of how service of the 1 Month Notice transpired.

While it may be the case that the tenant was not provided with the 1 Month Notice immediately on receipt of the notice by her son or daughter, I note that, even according to the timeline provided by her representative, she filed well after the 10 days provided to make an application. The landlord was very careful in providing service of his ADR by sending registered mail individually to all of the tenants. Given the careful steps of the landlord in service of his ADR and the details of his testimony, I find that the landlord's evidence is more credible with respect to the service of documents. Therefore, I find that the tenant was duly served with the 1 Month Notice by February 1, 2017.

Preliminary Matter: More Time to Apply

On March 28, 2017, the tenant applied to dispute the 1 Month Notice. In her application, the tenant wrote that her family does not understand English as they came to Canada just over a year ago as refugees. She also wrote that her husband died in the last few months; that she is not familiar with the laws of Canada or her rights as a tenant; that the landlord treated her very badly. The tenant requested more time to make her application to cancel the notice to end tenancy. Given my finding that the tenant was

aware or should have been aware of the 1 Month Notice by February 1, 2017, I find that the tenant is not entitled to more time to apply.

Section 66 of the *Residential Tenancy Act* allows an arbitrator to extend a time limit only in exceptional circumstances. Residential Tenancy Policy Guideline No. 36 provides further guidance for considering an extension of time,

> The word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.
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> Some examples of what might **not** be considered "exceptional" circumstances include:
>
> - the party who applied late for arbitration was not feeling well
> - **the party did not know the applicable law or procedure**
> - the party was not paying attention to the correct procedure
> - the party changed his or her mind about filing an application for arbitration
> - the party relied on incorrect information from a friend or relative
>
> [**emphasis added**]

Some of the criteria to consider to determine whether or not there were exceptional circumstances to the tenant not filing an application within 10 days include but are not limited to; whether the tenants intended to comply with the timeline; what steps the tenants took to comply with the time limit; whether the tenants filed their application as soon as practicable; and whether there is merit to the tenants' substantive claim.

In this particular case, the tenant relies solely on the reason that she did not know the applicable law or procedures. As stated in Policy Guideline No. 36, this reason does not constitute exceptional circumstances. I am not without appreciation for the difficulty of navigating the variety of systems within Canada when a party has no prior experience. I note that the landlord's witness testified to the availability of translators to the tenant as well as supports to assist with unfamiliar situations. In all of the circumstances, I find that the reason provided by the tenant for failing to file in time does not constitute exceptional circumstances.

I dismiss the tenant's application for more time and, therefore also dismiss the tenant's application to cancel the landlord's notice to end tenancy as the tenant did not apply in time to do so.

Issue(s) to be Decided

Is the landlord entitled to an order of possession?

Is the tenant entitled to a monetary order for compensation for damage or loss under the Act? Is the tenant entitled to an order requiring the landlord to comply with the Act? Is the tenant entitled to an order to the landlord to make repairs to the rental unit?

Is the tenant entitled to recover the filing fee for this application from the landlord? Is the landlord entitled to recover his filing fee from the tenant?

Background and Evidence

This tenancy began on September 1, 2016 and was scheduled for a fixed term of one year. The rental amount of $1500.00 is payable on the first of each month. The landlord testified that, as of the date of this hearing, the tenant had paid all rent. The landlord holds a $750.00 security deposit paid by the tenant on July 28, 2016. The landlord issued a 1 Month Notice to End Tenancy to the tenant and, at this hearing the landlord sought an Order of Possession for the rental unit.

On March 28, 2017, the tenant applied to dispute the 1 Month Notice. In her application, the tenant wrote that her family does not understand English as they came to Canada just over a year ago as refugees. She also wrote that her husband died in the last few months; that she is not familiar with the laws of Canada or her rights as a tenant; that the landlord has treated her very badly.

On March 30, 2017, the landlord filed an application for an Order of Possession for Cause. A copy of the 1 Month Notice was submitted for this hearing with an effective date of March 31, 2017. The landlord cited the following reason for the issuance of the Notice: *Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.*

The landlord also submitted a copy of the residential tenancy agreement for this tenancy and the addendum to the agreement both signed by the tenants and the landlord. The addendum to the tenancy agreement provided a number of terms in addition to those on the tenancy agreement. The landlord refers to the term that reads,

> *The tenant and his guest's [sic] shall not smoke inside the suite. When smoking outside you must contain all cigarette [butts] in an ashtray or a tin can. Do not throw any cigarette [butts] on the ground around the premises.*

The landlord provided copies of warning letters that had been issued to the tenants. Some letters, dated in 2016 refer to issues including; visitor parking restrictions, hanging clothes on balcony rail, disposing of garbage and not using space heaters in the rental unit. I understand those issues are mainly resolved. The letters related to smoking in the rental unit are as follows,

> January 27, 2017: warning to tenants not to smoke cigarettes in the unit; and cigarette butts outside the tenant's rental property
>
> February 19, 2017: warning to tenants not to smoke in the rental unit

The landlord's witness (a sponsor to the tenants) indicated that he is aware of the warning letters received by the tenant prior to January 2017. He testified that he attempted to mediate between the parties on several occasions. He described the supports available to the tenants including; a translator and the translator's contact information; supports through other organizations including those who could act as translators; and his support up to the time of the end of the tenant's sponsorship.

The tenant's representative spoke to the tenant's application for a monetary award in the amount of $25,000.00. The tenant testified that they have not had heat in their rental unit for the entire time of their tenancy. The tenant testified that she has been ignored when asking to have the heat turned on. The tenant also sought an order that the landlord either turn on the heat or repair the heat as it is not working properly. The tenant did not submit any evidence with respect to the lack of heat in the unit. The tenant testified that she made no written requests of the landlord regarding the heat.

The landlord testified that, prior to the provision of two warning letters relating to smoking in the rental unit, the tenant was provided with verbal warnings in an attempt to allow the tenants an opportunity to comply with the residential tenancy agreement and its addendum. The landlord testified that he provided at least two verbal warnings to the tenant prior to sending written warnings. The landlord also testified that he has received at least two recent complaints from the downstairs neighbour who has a newborn baby and regularly smells cigarette smoke from the tenant's rental unit.

Analysis

I have dismissed the tenant's application for more time to apply to cancel the landlord's 1 Month Notice to End Tenancy and, therefore, I dismiss the tenant's application to cancel the landlord's 1 Month Notice to End Tenancy. I will consider the landlord's application for an Order of Possession. Regardless of the dismissal of the tenant's application to cancel the 1 Month Notice to End Tenancy, the landlord continues to bear the burden of proof to show that the tenancy should end subject to this notice.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss (the tenant) bears the burden of proof. In applying for a monetary award, the tenant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the tenant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, the tenant relied solely on her testimony to show that the landlord had failed to provide heat to the rental unit. While failure to provide sufficient heat would be a serious infraction on the part of the landlord, I find that the tenant has provided insufficient evidence to show that the rental unit is without heat. I note that the landlord denied this allegation. I dismiss the tenant's application for a monetary order for insufficient evidence to support the allegation.

I dismiss the tenant's application requiring the landlord to comply with the Act as there is no particularization or information to support this application. My understanding, from the tenant's submissions, is that the landlord's compliance with the Act also relates to the provision of heat. As stated above, the tenant supplied insufficient evidence to show that the rental unit is without heat. For these same reasons, I dismiss the tenant's application for an order to the landlord to make repairs.

I also dismiss the tenant's application to recover the filing fee as she was unsuccessful in their application.

One Month Notice to End Tenancy for Cause

The landlord referred to a variety of issues with this tenancy however he relied on the tenant(s) smoking inside the rental unit as the reason for the issuance of the Notice. In their Notice to End Tenancy, he relied on the ground that the tenant had breached a

material term of the tenancy and had failed to correct the behaviour resulting in a breach in a reasonable amount of time.

The landlord's evidence to prove that the tenant(s) smoke in the rental unit includes;

- 2 warning letters regarding smoking dated January 2017 and February 2017;
- testimony of the witness that the tenants had access to translators;
- testimony of the witness that he had addressed previous warnings with the tenants;
- landlord's own testimony that the tenants continue to violate that provision of the tenancy agreement addendum;
- a copy of the residential tenancy agreement and the addendum signed by all parties.

The landlord's letter dated January 27, 2017 states that, "it has come to my attention that you have been smoking in your rental suite." The first letter also refers to cigarette butts outside the rental unit. The first letter indicates that it is the tenant's final warning. I find that the verbal warnings to the tenant as well as the landlord's first letter and the signing of the residential tenancy agreement and addendum provided sufficient warning and notice to the tenant to abide by the tenancy rules related to smoking.

The second letter submitted by the landlord, dated February 19, 2017 states that, "I have also come to know that you still continu[e] to smoke in your rental unit." I find that the second letter to the tenants provided a further additional opportunity for the tenant to stop smoking in the rental unit or otherwise address the complaints to the landlord.

I find that the landlord has provided sufficient information to justify the issuance of the 1 Month Notice and to warrant the end of tenancy. I find that smoking inside the rental unit is a breach of a material term of the tenancy in that it is prohibited in the addendum in a clear and legible manner. In all of the circumstances, I find that the landlord is entitled to an Order of Possession for having shown cause to end the tenancy.

I grant the landlord's application to recover the $100.00 filing fee as he was successful in his application. Pursuant to section 72(2), I allow the landlord to retain $100.00 of the tenant's security deposit, reducing the security deposit amount held by the landlord to $650.00.

Conclusion

I dismiss the tenant's application for more time to apply.
I dismiss the tenant's application to cancel the landlord's notice to end tenancy.
I dismiss the tenant's application for a monetary order.
I dismiss the tenant's application requiring the landlord to comply with the Act.
I dismiss the tenant's application for an order to the landlord to make repairs.
I dismiss the tenant's application to recover the filing fee.

The landlord is provided with a formal copy of an Order of Possession effective May 31, 2017. 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.

Subject to section 26 of the Act, the tenants are required to pay rent for the month of May 2017.

I grant the landlord recovery of his filing fee by reducing the tenant's security deposit from $750.00 to $650.00.

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: May 2, 2017

Residential Tenancy Branch