



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute codes OPC FF

Introduction

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

- an order of possession for cause pursuant to section 55;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The hearing was conducted by conference call. All named parties attended the hearing and were given a full opportunity to provide affirmed testimony, to present evidence and to make submissions.

Issues

Is the landlord entitled to an order of possession pursuant to a One Month Notice to End Tenancy for Cause (the One Month Notice)?

Is the landlord entitled to recover its filing fee?

Background and Evidence

This single room occupancy tenancy had been in place prior to the current landlord taking over the rental property. The tenant testified that he has been residing in the building for approximately 12 years. The current monthly rent is \$400.00 payable on the 1st day of each month.

The landlord's agent testified that at 1:30 a.m. on January 23, 2018 he served the tenant with the One Month Notice by posting a copy to the door of the rental premises. A second copy was also left in the tenant's mailbox which was not picked up. A Proof of Service form of the Notice to End Tenancy was provided on file. The landlord's agent also testified that a photograph was taken of the One Month Notice posted to the tenant's door. A copy of the photograph was not available on file although the landlord's agent submits it was uploaded. The landlord is requesting an order of possession on the grounds that the tenant is conclusively presumed to have accepted the tenancy ended as he did not file an application to dispute the One Month Notice.

The tenant's advocate submits that a copy of the proof of service form was not provided to the tenant. The tenant's advocate submits that the tenant brought her the complete stapled application package as received from the landlord and a proof of service form was not included. The landlord submits a copy was provided to the tenant with the application.

The tenant's advocate acknowledged receiving a photograph in the application package but notes that it is not very legible although you can tell it is some kind of RTB form in the image. The tenant's advocate submits that there is nothing in the picture to indicate a unit # to which the alleged notice is posted.

The tenant testified that he was never served with the One Month Notice. The tenant testified that he first became aware of the issue when he received a letter on his door posted by the landlord on February 13, 2018. A copy of the letter was submitted as evidence by the tenant. The letter informed the tenant that the time period to dispute the 30 day Notice of Eviction had passed. He then immediately went to see his advocate who wrote a letter to the landlord dated February 15, 2018 advising the landlord that the tenant had not received any One Month Notice and was requesting a copy so he could file a dispute. The tenant testified that he gave a copy of this letter to the woman who works at the front desk lobby. The tenant's advocate submits that she got no response from the landlord to this letter and the next correspondence received from the landlord was the Notice for this hearing.

The tenant further testified that his mail has to be collected from behind the lobby desk which is not accessible to the tenants. The person sitting at the lobby desk has to physically hand the mail to the tenants. The tenant testified that he never received any One Month Notice from his mailbox.

The tenant's advocate submits the One Month Notice was not received and as such the landlord's application for an order of possession should be set aside.

In reply, the landlord's agent argued that an order of possession should be granted as the One Month Notice was posted to the tenant's door and the copy left in the mail slot was not picked up by the tenant. The landlord also disputed being served with the February 15, 2018 letter drafted by the tenant's advocate.

Analysis

Section 47 of the Act contains provisions by which a landlord may end a tenancy for cause by giving a notice to end tenancy. Under this section, the tenant may make a dispute application within ten days of receiving the One Month Notice. If the tenant does not make an application for dispute within ten days, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the One Month Notice. The onus is on the landlord to prove that the One Month Notice was served to the tenant.

Section 90 of the Act deems a person to have received documents three days after being posted or left in a mail slot. The Supreme Court of British Columbia has, however, ruled that this deeming provision is a rebuttable presumption. Thus, where there is evidence to rebut the deeming provision I must consider it.

A copy of the witnessed proof of service form submitted by the landlord was not provided to the tenant to review and respond to prior to this hearing. Nor was the person who witnessed the service of these documents called to testify in this hearing. Additionally, although the landlord submitted a photograph as proof of the One Month Notice being posted to the tenant's door, the landlord did not provide a copy on file for me to examine. Therefore, I accept the submission of the tenant's advocate that the photograph was not very legible nor did it indicate that it was in fact the tenant's door or unit# in the photograph. A clear photograph submitted as evidence and/or supporting witness testimony in this hearing may have helped reinforce the veracity of service.

I find the landlord has not met the onus to prove service, therefore, I am not satisfied that the tenant was served with the One Month Notice.

The landlord's One Month Notice, dated January 23, 2018, is hereby cancelled and of no force or effect. The landlord's application is dismissed without leave to reapply. This tenancy continues until it is ended in accordance with the *Act*.

As the landlord was not successful in this application, I find that the landlord is not entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

The landlord's application is dismissed without leave to reapply. This tenancy continues until it is ended in accordance with the *Act*.

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 02, 2018

Residential Tenancy Branch