Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CHOO BROTHERS INVESTMENTS (2015) LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes   MNRL-S, FFL, OPR, MT, CNR, FFT

Introduction

This was a cross application hearing that dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's notice to end tenancy for unpaid rent pursuant to section 46;
- more time to cancel a notice pursuant to section 66; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

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

- an order of possession for unpaid rent pursuant to sections 46 and 55;
- a monetary order for unpaid rent pursuant to sections 26, 67 and 72;
- authorization to retain the tenant's security deposit in part satisfaction of their monetary claim pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

These applications were originally scheduled for separate days, however, during the landlord's application it came to light that the tenant made a cross application that was set to be heard the following week. The matters in each application were substantially the same and both parties agreed to hear the matters together and cancel the second hearing.

During the hearing it became apparent that in the landlord's application the tenant's name was spelt incorrectly and in the tenant's application the landlord's name was spelt incorrectly. Pursuant to section 64 of the *Act*, I amended the aforementioned applications to correct the spelling errors.

Landlord L.M. (the "landlord") testified that he served the tenant the notice of dispute resolution package by registered mail on April 25, 2018. The landlord provided the Canada Post Tracking

Number to confirm this registered mailing. The tenant confirmed receipt of the dispute resolution package. I find that the tenant was deemed served with this package on April 30, 2018, five days after its mailing, in accordance with sections 89 and 90 of the *Act.*

The landlord confirmed receipt of the tenant's application. I find that the landlord was served with the tenant's application in accordance with section 89 of the *Act.*

Issue(s) to be Decided

1. Is the landlord entitled to an Order of possession for unpaid rent pursuant to sections 46 and 55 of the *Act*?
2. Is the landlord entitled to a monetary Order for unpaid rent pursuant to sections 26 and 67 of the *Act*?
3. Is the landlord entitled to retain the tenant's security deposit pursuant to section 38 of the *Act*?
4. Is the landlord entitled to recover the filing fee for this application pursuant to section 72 of the *Act*?
5. Is the tenant entitled to more time to cancel the 10 Day Notice pursuant to section 66 of the *Act*?
6. Is the tenant entitled to cancel the 10 Day Notice pursuant to section 46 of the *Act*?
7. Is the tenant entitled to recover the filing fee for this application pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began in 2009 and is currently ongoing. Monthly rent in the amount of $535.00 is payable on the first day of each month. A security deposit of $265.00 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties but a copy was not submitted for these applications.

The landlord testified that the tenant did not pay rent on April 1, 2018 when it was due. On April 4, 2018 the landlord served a 10 Day Notice to End Tenancy for unpaid rent with an effective date of April 20, 2018 (the "10 Day Notice") on the tenant via registered mail. The landlord provided the Canada Post Tracking Number to confirm this registered mailing.

The tenant testified that he was out of town from February through April 2018 and during that time he had witness C.W. house sit. He testified that it was witness C.W.'s responsibility to deliver his rent cheques on the first of every month to the landlord.

Witness C.W. testified that she agreed to house sit for the tenant and had diligently been putting his rent cheques in the mail on the first of every month, but that just prior to April 1, 2018, she had a death in the family and forgot to deliver the tenant's rent cheque to the landlord. Witness C.W. testified that she checked the mail some time in April 2018 and found a Canada Post delivery notification, a few days later she went to pick it up but found out that it was registered mail and she was not permitted to sign for it. Witness C.W. testified that she contacted the tenant and he provided her with a letter authorizing her to pick up the registered mail on his behalf. Witness C.W. testified that she did not know what the package was and did not know the material inside was urgent.   She testified that she picked up the registered mail on April 19, 2018 and sent the mail to the tenant who was in Prince George.

The tenant testified that he received the registered mail containing the 10 Day Notice on April 23, 2018. The tenant testified that as soon as he found out that Witness C.W. had forgotten to deliver the rent cheque to the landlord he texted the landlord asking him to accept his rent cheque. The tenant testified that he paid April 2018's rent on April 24, 2018 and that he was issued a receipt stating, "for use and occupancy only".

The tenant testified that on April 25, 2018, the tenant made a dispute resolution application requesting more time to apply to cancel the 10 Day Notice. The tenant testified that he paid his May 2018 rent on time and was issued another receipt stating, "for use and occupancy only".

Analysis

Section 90 of the *Act* states that a document given or served in accordance with section 88 *[how to give or serve documents generally]* or 89 *[special rules for certain documents]* is deemed to be received if given or served by mail, on the 5th day after it is mailed.

In this case, the 10 Day Notice was served via registered mail on April 4, 2018. The deeming provisions found in section 90 of the *Act* deem the 10 Day Notice served on April 9, 2018, five days after its mailing. However, the Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done.

According to Policy Guideline 12 section 12, a party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

In this case, based on the testimony of the tenant and witness C.W., I find that the tenant was not in the dispute city on April 4, 2018 when the 10 Day Notice was served or on April 09, 2018 when the five day deeming provision came into effect. Given that the tenant was not in the dispute city at the time of service it was not possible for him to receive the 10 Day Notice. I find that service was effected on April 19, 2018 when his agent, witness C.W., picked up the registered mail from Canada Post on his behalf.

Section 46(1) of the *Act* states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that <u>is not earlier than 10 days after the date the tenant receives the notice.</u>

Section 53(2) of the *Act* states that if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

In this case, I have found that service was effected on April 19, 2018; therefore the effective date on the notice, pursuant to section 53(2) of the *Act* is deemed to be the earliest date that complies with the section 46 of the *Act*, that being 10 days after the date the tenant received notice. The corrected effective date is therefore April 29, 2018.

Section 46(4) of the *Act* states that within 5 days after receiving a notice under this section, the tenant may pay the overdue rent, in which case the 10 Day Notice has no effect.

In this case, service was effected on the tenant on April 19, 2018 and the tenant paid his rent on April 24, 2018, which is within 5 days of receiving the 10 Day Notice. Therefore, I find that the 10 Day Notice has no effect and is cancelled.

Since the 10 Day Notice has no effect, and is the basis of the landlord's entire application, I dismiss the landlord's entire application without leave to reapply.

The tenant applied for more time to cancel the 10 Day Notice pursuant to section 66. I have found that the 10 Day Notice has no effect thereby negating the necessity of a time extension. I dismiss the tenant's application for a time extension without leave to reapply.

I find that the tenancy will continue as per the terms of the tenancy agreement until it ends in accordance with the *Act.*

Conclusion

I dismiss the landlord's entire application without leave to reapply.

I Order that the 10 Day Notice is cancelled pursuant to section 46 of the *Act.*

As the tenant was successful in his application I Order the landlord to pay the tenant the $100.00 filing fee.

I dismiss the tenant's application for a time extension for filing an application to cancel a notice to end tenancy without leave to reapply.

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 22, 2018

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Residential Tenancy Branch