Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Decision Codes: MNSD, MNDCT, FFT

Introduction

The Application for Dispute Resolution filed by the Tenant makes the following claims:

a. A monetary order in the sum of $7920
b. An order to recover the cost of the filing fee.

The landlord failed to appear at the scheduled start of the hearing which was 1:30 p.m. on September 27, 2018. The tenant applicant was present and ready to proceed. I left the teleconference hearing connection open and did not start the hearing until 10 minutes after the schedule start time in order to enable the landlord to call in. The landlord failed to appear. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I then proceeded with the hearing. The tenant was given a full opportunity to present affirmed testimony, to make submissions and to call witnesses.

On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

The tenant testified she served a copy of the Application for Dispute Resolution/Notice of Hearing on the landlord by mailing, by registered mail to where the landlord resides on April 4, 2018. She further testified that she served the Amended Application for Dispute Resolution on the landlord by mailing by registered mail to where the landlord resides on July 23, 2018. In both cases it was addressed to a Box number and the civic address of the rental property.

Issues to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to a monetary order and if so how much?
b. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence:

The tenant produced a document that indicates she entered into a ROOMER LICENCE AGREE of Bedroom 2 on November 28, 2017. The document indicates the rent was $795 plus $45 utilities. The tenant paid a security deposit of $440 at the time she entered into the agreement. The agreement further provided that Respondent was the owner of the rental property and he was living there and that the Residential Tenancy Act did not apply. The owner lived in one of the rooms. The owner, the Applicant and others shared kitchen facilities and bathroom facilities.

The tenant testified the owner spent time in the rental unit and in Vancouver. He is a lawyer.

She further testified that she was forced to leave the rental property on February 12, 2018 because of the harassment and abuse of the housekeeper hired by the landlord. The police were called to assist with the move. The Tenant read a lengthy statement about the intolerable conditions that she was subjected to by the housekeeper.

The original Application for Dispute Resolution filed by the Tenant on April 4, 2018 sought an order for the return of double her security deposit ($220 x 2 = $440). The Amended Application for Dispute Resolution increased the claim from $440 to $7920. The Amendment claimed reimbursement of the balance of the rent for February in the sum of $420, storage costs in the sum of $1350, a doubling of the security deposit ($440 x 2 = $880), postage in the sum of $30, transportation and accommodation costs in the sum of $280 and $5000 for an illegal eviction.

The tenant testified that after she left she talked to the landlord who did not want her to leave. She felt concern for her safety because of the actions of the housekeep.er The Respondent advised her he was going to Great Britain for a period of time. This further increased her safety concerns. She also stated that it was her understanding the property was going to be converted to a Bed and Breakfast and the landlord's room was being taken over for that purpose.

Preliminary Matter:

The first issue to consider is whether the Tenant has provided proof that the landlord has been sufficiently served. She testified she mailed a copy of the letter demanding the return of her security deposit to the landlord by registered mail on February 21, 2018. She contacted the Post Office and was advised that the letter had not been delivered as it was unclaimed by the recipient. She testified she did a search of the Canada Post tracking service and it confirmed this information

She mailed the Application for Dispute Resolution/Notice of Hearing by registered mail to the respondent at the rental property on April 4, 2018. That document was not returned to her. She mailed the Amendment to the Application for Dispute Resolution on July 23, 2018 addressed to the respondent at the address and it was not returned.

> "Special rules for certain documents
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> 89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:
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> (a) by leaving a copy with the person;
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> (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
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> (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
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> (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
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> (e) as ordered by the director under section 71 (1) [director's orders: delivery and service of documents].

The Act provides that an Application for Dispute Resolution is deemed received five days after mailing by registered mail,

Policy Guideline 12 dealing with service includes the following:

> "Where a document is served by Registered Mail, the refusal of the party to accept or pick up the Registered Mail, does not override the deeming provision. Where the Registered Mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.
>
> ….

The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done. For example, the Supreme Court found in Hughes v. Pavlovic, 2011 BCSC 990 that the deeming provisions ought not to apply in that case because Canada Post was on strike, therefore unable to deliver Registered Mail.

15. PROOF OF SERVICE

Proof of service by Registered Mail should include the original Canada Post Registered Mail receipt containing the date of service, the address of service, and that the address of service was the person's residence at the time of service, or the landlord's place of conducting business as a landlord at the time of service as well as a copy of the printed tracking report.

The registered mail receipt provided by the Tenant is confusing as it gives a Box number and it gives an address.

While the Tenant was on-line I conducted a search of the Canada Post tracking service. That indicates that 3 registered mailings were unclaimed and were returned to the sender. There is a further notation on the search “Item arrived at the Undeliverable Mail Office. Please contact Cust Service.” The tenant did not provide a copy of the Canada Post search as evidence for the hearing.

The Supreme Court of British Columbia considered the issue of service by registered mail in the case Atchison v. British Columbia (Residential Tenancy Act, Dispute Resolution Officers), 2008 BCSC 1015 (CanLII), <http://canlii.ca/t/2016s>, retrieved on 2018-09-27 and cited with approval the decision of Charbonneau J in Hegeman v Carter, 2008 NWTSC 24.

> [15] The parties have not referred me to any British Columbia authorities directly on point. However, in ***Hegeman v. Carter***, 2008 NWTSC 24 (CanLII), Charbonneau J. considered this issue in connection with s. 71(2) of the North West Territories' ***Residential Tenancies Act***, R.S.N.W.T. 1988, c. 8 (Supp.), which has a similar deeming provision. That section provides:
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> > 71(2) A notice, process or document sent by registered mail shall be deemed to have been served on the 7th day after the date of mailing.

[16] Charbonneau J. concluded at paras. 27-29 that in enacting that deeming provision, the legislature must have intended to create a rebuttable presumption rather than a conclusive one, since otherwise the provision would have the potential of infringing the rules of natural justice in a context where the observance of the rules of natural justice is clearly required:

> [27] I find it difficult to accept that the Legislature could have intended the rules of natural justice to be followed by a Rental Officer during a hearing, while at the same time potentially eliminating, through a conclusive presumption of notice, one of the most fundamental rules of natural justice, namely, the right for all parties to be heard.
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> [28] Service, after all, is a means to an end. The point of service is ensuring that people whose rights may be affected by a proceeding are aware of it. Section 77 of the *Act* requires that parties be notified when a hearing is to be held. It would seem that the legislative intent is that those whose rights will potentially be affected be aware that a hearing has been scheduled. This suggests, contrary to what the Attorney General argues, that the Legislature did not intend to eliminate that aspect of natural justice from these types of proceedings.
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> [29] For those reasons, I conclude that Subsection 71(2) creates a rebuttable presumption of notice, and not a conclusive one.

[17] I respectfully agree with that reasoning and conclude that the presumption in s. 90(a) of British Columbia's ***Residential Tenancy Act*** is rebuttable on proper evidence. That leaves open the question of what evidence may be sufficient to rebut the presumption.

After carefully considering all of the evidence I determined the Tenant failed to prove that the Application for Dispute Resolution/Notice of Hearing and the Amended Application for Dispute Resolution have been sufficiently served on the respondent for the following reasons:

a. In both cases the registered mail was not claimed by the respondent and there is no reason to believe that he is aware of these proceedings.
b. The Act provides that an Application is deemed received 5 days after mailing. However, this is a rebuttable presumption. I determined the deeming provisions have been rebutted for the reasons set out below.

c. The Registered mail receipt is confusing. It gives a box number and a civic address. The registered mail tracking information provides “Item arrived at the Undeliverable Mail Office. Please contact Cust Service.
d. The tenant failed to prove the Landlord lives at the address the documents were mailed to. Her evidence suggests he lives elsewhere. She testified he was spending time between the rental property and Vancouver. She further testified his bedroom was being converted to a bed and breakfast operation.
e. Similarly, there is insufficient evidence for the arbitrator to conclude that the documents were mailed to the address which he carries on business as a landlord as it appears from the Tenant’s evidence that the property is no longer being rented but has been converted to a bed and breakfast.
f. The Policy Guidelines provide that a party cannot avoid service by refusing to claim their registered mail. However, there is insufficient evidence to establish that the respondent refused to pick up his mail. This evidence might have been available to the applicant had she picked up her documents and there was a stamp on it from Canada Post indicating it was refused. I determined a more likely conclusion is that he is unaware of these proceedings.
g. The tenant testified the respondent is a solicitor. If so it should not be difficult to obtain an address for him.

As a result I ordered that the application be dismissed with liberty to re-apply as the Tenant failed to prove service on the Respondent.

A second issue is apparent on the face of this application. Section 4 of the Residential Tenancy Act includes the following:

> What this Act does not apply to
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> 4 This Act does not apply to
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> > (c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

The Applicant testified the Respondent advised her that he is the owner of the accommodation. She rented a room but shared bathroom and kitchen facilities with the owner and other roommates. The agreement used indicates that it is a ROOMER

LICENCE AGREEMENT and that the room is not rented under the Residential Tenancy Act.

I determined it was not appropriate to make a determination on the merits as to whether the Residential Tenancy Act applies as there may be evidence that I am not aware of. While the Tenant has the right to re-apply she is encouraged to first obtain legal advice to determine whether a Residential Tenancy Act applies and whether an arbitrator has jurisdiction.

Conclusion:

In summary **I order the application dismissed with liberty to reapply**. I make no findings on the merits of the matter. Liberty to reapply is not an extension of any applicable limitation period.

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: September 27, 2018

Residential Tenancy Branch