



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT FFT

Introduction

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

- a monetary order for compensation for money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

KH, counsel for the landlord, represented the landlord in this hearing. Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord confirmed receipt of the tenant's application for dispute resolution ('application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenant's application.

Preliminary Issue: Landlord's Evidence

The landlord's counsel confirmed that the tenant was served with the landlord's evidentiary materials by way of registered mail on May 8, 2019. The landlord provided documentary evidence, including a tracking number, to support the service of these materials on the tenant. In accordance with sections 88 and 90 of the *Act*, I find the tenant deemed served with these evidentiary materials on May 13, 2019, five days after mailing.

The tenant testified in the hearing that the landlord did not serve their evidentiary materials within the timelines required by RTB Rules of Procedure. Rule 3.15 of the RTB's Rules of Procedure establishes that "the respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible.

Subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing". I note the landlord's evidentiary materials were deemed to be received on May 13, 2019, 7 clear days before the hearing date. As this evidence was served within the timelines prescribed by Rule 3.15 of the Rules, the landlord's evidence was admitted.

Preliminary Issue – Tenant's Late Evidence

The landlord's counsel confirmed receipt of the tenant's evidentiary materials, but requested the exclusion of the tenant's late evidence, which was received by the tenant on May 16, 2019 by email. Counsel indicated that her client has not had a chance to review these materials as the evidentiary materials were not served within the timelines required by RTB Rules, nor was this evidence served in a manner required by the *Act*.

The tenant admitted that the evidence was submitted late, but testified that this was due to the delay in receiving the landlord's evidentiary materials.

Rule 3.14 of the RTB's Rules of Procedure establishes that a respondent must receive evidence from the applicant not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, the last day for the tenant to file and serve evidence as part of their application was May 6, 2019.

This evidence was not served within the timelines prescribed by rule 3.14 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, counsel for the landlord submitted that the respondent's evidentiary materials were served to the tenant on time, and as the landlord has not had an opportunity to review the late evidence submitted by the tenant, the admission of this evidence would be prejudicial to the respondent. As stated above, I find that the landlord had submitted and served their evidentiary materials in accordance with *Act* and RTB Rules. The tenant, however, failed to submit their evidence within the required timelines, and in the manner required by the *Act*. On this basis I find that there is undue prejudice by admitting the tenant's late evidence, as the evidence was emailed to the landlord four days before the hearing date. As the landlord was not served with

these evidentiary materials in accordance with section 88 of the *Act and RTB Rules*, the tenant's late evidence was excluded.

Preliminary Issue: Tenant's Adjournment Request

The tenant made an application requesting an adjournment of this hearing as he wanted more time to serve his entire evidence package on the landlord. Counsel for the landlord opposed the adjournment as they were ready to proceed.

The tenant submitted that he felt his evidence is important as it contained his response to the landlord's submissions and evidentiary materials. Counsel for the landlord submitted that the tenant had not established how this late evidence was material to the proceedings, and why the tenant could not provide oral submissions.

In deciding whether the landlord's adjournment application would be granted, I considered the following criteria established in Rule 7.9 of the *RTB Rules of Procedure*, which includes the following provisions:

Without restricting the authority of the arbitrator to consider the other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- *the oral or written submissions of the parties;*
- *the likelihood of the adjournment resulting in a resolution;*
- *the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and*
- *whether the adjournment is required to provide a fair opportunity for a party to be heard; and*
- *the possible prejudice to each party.*

I find that the tenant applicant had ample time to prepare for this hearing, and the tenant failed to establish how this adjournment request was due to issues beyond his control. I find that the tenant failed to properly serve his evidentiary package on time. I find that any further delays would be prejudicial to the landlord as the landlord was ready to proceed. Furthermore, I am not satisfied that the tenant had established why an adjournment was necessary for both parties to be heard.

The request for an adjournment was not granted. The hearing proceeded.

The tenant inquired about the rules regarding the recording of proceedings. All parties were informed of the Rule 6.11 as set out below.

6.11 Recording prohibited

Persons are prohibited from recording dispute resolution hearings, except as allowed by Rule 6.12. Prohibited recording includes any audio, photographic, video or digital recording.

Issues(s) to be Decided

Is the tenant entitled to a monetary order for compensation for money owed under the *Act*, regulation, or tenancy agreement?

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

Background and Evidence

This month-to-month tenancy began on May 1, 2013, and ended on November 2017 after the tenant was served with a 2 Month Notice for Landlord's Use dated October 18, 2017. Rent was set at \$5,000.00 per month, and the tenant is requesting compensation in the equivalent of 12 month's rent for the landlord's failure to comply with the *Act*.

The landlord stated on the 2 Month Notice the following reason for ending the tenancy: "All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a closer family member intends in good faith to occupy the rental unit". A copy of the 2 Month Notice was included by both parties.

The tenant testified that he believes the landlord has not fulfilled their obligations to occupy the rental unit as stated on the 2 Month Notice. The tenant testified that he had made efforts to obtain confirmation or proof from the concierge and property management, but due to privacy rules he was unable to obtain information such as FOB access records.

The tenant believes that the unit is unoccupied, and has spoken to neighbours, strata president, and concierge who corroborate this belief. The tenant testified that he has requested that the landlord provide proof of occupancy, such as FOB data, but the landlord has failed to do so. The tenant requested that an order be made for the landlord to provide this information.

Counsel for the landlord provided a copy of the document titled "Tenant Occupied Property – Buyers Notice to Seller for Vacant Possession". Counsel submitted that the landlord has fulfilled their obligations under the *Act*, and that the tenant has not produced any evidence in support of their claims. Counsel submitted that the tenant's application is based purely on conjecture and hearsay, and does not sufficiently support that the landlord has failed to comply with the *Act*.

Analysis

Section 51(2) of the *Act* reads in part as follows:

51(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the

amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

(a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

(b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from

(a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or

(b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

The *Residential Tenancy Act* was amended on May 17, 2018, including Section 51(2) of the *Act* relating to a tenant's compensation.

The Tenancy Statutes Amendment Act (TSAA) sets out when the amendments to the *Act* take place. Under the TSAA notices issued under section 49 of the *Act* that were received by the Tenant before Midnight on May 16, 2018 fall under the old legislation. The new legislation applies to any Notices under s 49 of the *Act* received by the Tenant after 00:00:01 am on May 17, 2018.

The old legislation allowed for double the monthly rent as compensation for the landlord's failure to comply with section 49 of the *Act*. As stated above, the date the tenant receives the 2 Month Notice determines whether the tenant may be entitled to compensation under the old or new legislation. As the tenant was served the 2 Month Notice on October 18, 2017, I find that the 2 Month Notice falls under the old legislation, and I will consider the tenant's application accordingly.

The tenant testified that he had made several attempts to obtain supporting documentation in support of his claim, but was unable to do so due to privacy laws.

Section 5.3 of the RTB Rules of Procedure states the following:

5.3 Application for a summons

On the written request of a party or on an arbitrator's own initiative, the arbitrator may issue a summons requiring a person to attend a dispute resolution proceeding or produce evidence. A summons is only issued in cases where the evidence is necessary, appropriate and relevant. A summons will not be issued if a witness agrees to attend or agrees to provide the requested evidence.

A request to issue a summons must be submitted, in writing, to the Residential Tenancy Branch directly or through a Service BC Office, and must:

- state the name and address of the witness;*
- provide the reason the witness is required to attend and give evidence;*
- describe efforts made to have the witness attend the hearing;*
- describe the documents or other things, if any, which are required for the hearing; and*
- provide the reason why such documents or other things are relevant.*

Rule 5.4 clarifies when a summons may be made:

5.4 When a request for a summons may be made

A written request for a summons should be made as soon as possible before the time and date scheduled for a dispute resolution hearing.

In circumstances where a party could not reasonably make their application before a hearing, the arbitrator will consider a request for a summons made at the hearing.

Although the tenant referenced requests made to produce documentation, and testified to parties who could confirm his testimony, the tenant did not call any of these witnesses to testify in this hearing, nor has the tenant made any formal requests for a summons as allowed under sections 5.3 and 5.3 of the RTB Rules of Procedure.

I have considered the testimony and evidentiary materials of both parties, and while the tenant questioned whether the landlord or a close family member has indeed occupied the rental unit, the tenant's evidence does not sufficiently demonstrate that the landlord has failed to fulfill their obligations under the Act. The landlord's testimony is that the unit has not be re-rented or sold, and that the rental unit remains the primary residence of the landlord. As stated above, the tenant did not call on any witnesses in this hearing, nor did he provide documentation that sufficiently supports his beliefs. As the landlord disputed the tenant's testimony, and in the absence of sufficient supporting evidence that contradicts the landlord's testimony and statements, I am dismissing the tenant's application without leave to reapply.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the tenant was not successful

with his application, I find that the tenant is not entitled to recover the \$100.00 filing fee paid for this application. The tenant must bear the cost of this filing fee.

Conclusion

The tenant's entire 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: May 21, 2019

Residential Tenancy Branch