Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding COMMUNITY BUILDERS GROUP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR-DR, MNRL-S

Introduction

On April 17, 2019, an adjudicator appointed pursuant to the *Residential Tenancy Act* (the *Act*) issued an Interim Decision regarding the landlord's application using the direct request process for the following:

- an Order of Possession for unpaid rent pursuant to section 55; and
- a monetary order for unpaid rent pursuant to section 67.

The Adjudicator was not satisfied that the landlord had adequately addressed whether this matter fell under the jurisdiction of the *Act*. The Adjudicator noted that a jurisdictional determination of this type could not be undertaken in the context of the landlord's application by way of the ex parte hearing provided pursuant to the Residential Tenancy Branch's direct request procedure. The Adjudicator adjourned the landlord's application to a participatory hearing by an arbitrator. I have subsequently been delegated responsibility pursuant to the *Act* to convene the participatory hearing to consider the landlord's application.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 9:54 a.m. in order to enable the tenant to call into this teleconference hearing scheduled for 9:30 a.m. The landlord's two representatives attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. During the hearing, I also confirmed from the online teleconference system that the landlord's two representatives and I were the only ones who had called into this teleconference.

The landlord entered into written evidence a copy of a witnessed Proof of Service document attesting to the landlord's posting of the 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) on the tenant's door on April 2, 2019. Based on this

undisputed written evidence and Landlord TB's (the landlord's) sworn testimony, I find that the tenant was deemed served with this Notice in accordance with sections 88 and 90 of the *Act* on April 5, 2019, the third day after its posting on the tenant's door.

The landlord gave sworn testimony and written evidence that they sent the tenant a copy of the tenant's dispute resolution hearing package, including the Notice of Hearing to the tenant by registered mail on April 26, 2019 and May 17, 2019. The landlord testified that their written evidence was also sent to the tenant by registered mail. The landlord entered into written evidence copies of the Canada Post Tracking Number and Customer Receipt to confirm these mailings. The landlord testified that the tenant did not pick up these registered mailings. Based on this undisputed evidence, I find that the tenant was deemed served with this material in accordance with sections 88, 89 and 90 of the *Act* on the fifth day after their registered mailing.

Issues(s) to be Decided

Does this application fall within the jurisdiction of the *Act*? Is the landlord entitled to an Order of Possession for unpaid rent? Is the landlord entitled to a monetary award for unpaid rent?

Preliminary Issue- Jurisdiction Pursuant to the *Act*

At the commencement of this hearing, the landlord testified that the landlord had chosen to issue the 10 Day Notice and apply for dispute resolution out of respect for two previous decisions issued by Arbitrators appointed pursuant to the *Ac*t involving this tenant. The landlord provided the RTB File Numbers for those decisions (see above). The landlord testified that on both of those occasions involving tenancies by the tenant with the landlord, the landlord had maintained that the relationship between the parties was one of transitional housing, which does not fall within the jurisdiction of the *Act*. As on both occasions, the Arbitrators appointed determined that the relationship between the parties was not transitional housing, but a tenancy established pursuant to the *Act,* the Arbitrators accepted jurisdiction of the applications and made substantive findings with respect to the applications before them.

As the landlord considered the relationship to be essentially the same as was in place when these previous hearings were held in 2015 and 2017, the landlord accepted that the relationship between the parties constituted a residential tenancy for the purposes of the *Act*. The landlord noted that the tenant had maintained on those previous occasions

that this was indeed a residential tenancy that fell within the purview of the *Act*, and not transitional housing as had previously been claimed by the landlord.

Preliminary Issue- Analysis of Jurisdiction Pursuant to the *Act*

Section 4(f) of the *Act* establishes that "living accommodation provided for emergency shelter or transitional housing" does not fall within the jurisdiction of the *Act*.

As was noted in the 2017 decision referenced above, section 1 of the *Residential Tenancy Regulation* reads in part as follows:

> *(2) For the purposes of section 4 (f) of the Act [what the Act does not apply to],* ***"transitional housing"*** *means living accommodation that is provided*
>
> *(a) on a temporary basis,*
>
> *(b) by a person or organization that receives funding from a local government or the government of British Columbia or of Canada for the purpose of providing that accommodation, and*
>
> *(c) together with programs intended to assist tenants to become better able to live independently....*

In addition, Residential Tenancy Branch Policy Guideline 46 provides guidance to arbitrators that the living accommodation must meet all of the criteria in the definition of “transitional housing “under section 1 of the *Regulation* in order to be excluded from jurisdictional consideration pursuant to section 4 of the *Act,* even if a transitional housing agreement has been signed. In this case, the agreement signed by the parties specifically noted the following:

...I understand that this building is operated under the guidelines of the WL Housing Program with a continuum of transitional housing flow that is not governed by the Residential Tenancy Act. I agree to live in this building under the terms of this tenancy agreement which begins on the day of January 16, 2015...

Although the parties signed this agreement, section 5 of the *Act* establishes that their agreeing to these terms is not determinative as to whether this tenancy falls outside the jurisdiction of the *Act*. Section 5 reads as follows:

This Act cannot be avoided

> ***5*** *(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.*

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

The landlord was correct in asserting that the tenant maintained at both of the previous hearings that this tenancy fell within the jurisdiction of the *Act*, even though the tenant had signed the agreement that this was transitional housing and was not covered by the *Act.* At the 2017 hearing, the tenant was assisted by Legal Advocates who assisted the tenant with this position.

In the 2017 decision, the Arbitrator who heard the tenant's application noted the following:

*...The parties provided the tenant has been residing in their accommodation for 2 years. Neither party presented evidence of an end date to the residency. The landlord provided evidence they offer residents various supports which they claim are intended to assist independence. The landlord advanced 2 letters from the City of ** addressing the City's involvement with the residential property and the landlord by way of agreements as well as their support for the intended purpose of the living accommodation. The City's documents state the City owns the residential property of the living accommodation, which in turn is leased to the landlord of this matter. The City's documents also state they fund the program expenses of an agency that partners with the City and the landlord, to provide support services to the residents of the residential property.*

I found the tenant's 2 year residency combined with the absence of an end date does not reasonably meet the definition of 'temporary'. I accepted that the landlord has certain agreement(s) and a lease with the City. However, I found that the landlord failed to provide sufficient evidence that as landlord they are receiving funding from the City for the purpose of providing the living accommodation. I determined the landlord's living accommodation does not meet the test established by Section 1 of the Regulation and as such that its living accommodation is not exempt from the Residential Tenancy Act. Therefore the tenant's application advanced on the merits...

In considering the application before me, I should first note that despite determinations by previous Arbitrators, I am not bound by precedent by their findings with respect to this jurisdictional question. Circumstances may very well have changed since those hearings occurred, which could have a bearing on my determination of my jurisdiction in this matter.

In this case, circumstances have changed to the extent that this tenancy has been allowed to continue an additional two plus years, without any action having been taken by the landlord (or the City) that owns this building to have the tenant transition to some other type of housing. At this hearing, the landlord testified that the plan is for residents in this type of transitional housing to find more permanent accommodations after they have stayed in this facility between six months and two years. However, the landlord said that the tenant has not co-operated with the landlord's offers to assist the tenant in finding alternative accommodation because the tenant seems to consider their current residence as their permanent home. Although a range of services are provided to residents, including the tenant, these services for counselling are not mandatory, and the tenant has not availed themselves of those opportunities.

Based on the undisputed evidence before me, I find that there is even more grounds to consider that the agreement between the tenant and the landlord is not transitional housing than was the case in either 2015 or 2017. The passage of time has allowed the tenant to remain in the rental unit for over four years, which is clearly beyond a reasonable definition of "transitional housing" as set out in section 1 of the *Regulation*. As such, I conclude that this is a residential tenancy and one which is not excluded from my jurisdiction by section 4(f)of the *Act*. As I do have jurisdiction to consider this application, I set out the details of the landlord's application and my findings below.

Background and Evidence

This tenancy began on January 16, 2015. Monthly rent is set at $375.00, payable in advance on the first of each month. The landlord continues to hold the tenant's $187.50 security deposit paid when this tenancy began.

The landlord's 10 Day Notice identified $375.00 as owing for April 2019 rent as of April 2, 2019, the date the 10 Day Notice was posted on the tenant's door.

The landlord's application for a monetary award of $750.00 was for unpaid rent that the landlord anticipated would be owing for April and May 2019. At the hearing, the landlord testified that the tenant did eventually pay the $375.00 owing from April 2019, although this payment was 56 days late. The landlord said that this payment was accepted for use and occupancy only and not to extend this tenancy. The landlord testified that rent for May and June 2019 remains owing, a total of $750.00. The landlord testified that the landlord has a lengthy waiting list to obtain housing in this building and that they anticipated that they would be able to find someone able to move into the tenant's suite by mid-June 2019.

Analysis

Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent." Section 46(1) of the *Act* establishes how a landlord may end a tenancy for unpaid rent "by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice."

Section 46 (4) (b) of the *Act* provides that upon receipt of a 10 Day Notice to end tenancy the tenant may, within five days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. I find that the tenant has failed to file an application for dispute resolution within the five days of service granted under section 46 (4) of the *Act*. Accordingly, I find that the tenant is conclusively presumed under section 46 (5) of the *Act* to have accepted that the tenancy ended on the corrected effective date of the 10 Day Notice, that being April 15, 2019.

Section 46(2) of the *Act* requires that "a notice under this section must comply with section 52 *[form and content of notice to end tenancy]*. I am satisfied that the landlord's 10 Day Notice entered into written evidence was on the proper RTB form and complied with the content requirements of section 52 of the *Act*. For these reasons, I find that the landlord is entitled to a 2 day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

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 bears the burden of proof. The claimant 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 claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant has failed to pay rent that had become owing for May and June 2019.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

In this case, I find that the tenant has failed to pay rent totalling $750.00 for May and June 2019, which the tenant would have known was due on the first of each of those months. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

As the landlord has testified that they anticipate being able to rent the tenant's rental suite to another tenant by mid-June 2019, I consider that the landlord is in a position to mitigate at least one-half of the rent that the tenant owes for June 2019. On this basis, I issue a monetary award of $562.50 in the landlord's favour for the recovery of unpaid rent owing in this tenancy. In the event that the tenant does not vacate the rental unit in sufficient time to enable the landlord to find a replacement tenant by mid-June 2019, the landlord is at liberty to reapply for an additional monetary award from the tenant.

Although the landlord's application does not seek to retain the tenant's security deposit, using the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the tenant's security deposit plus applicable interest in partial satisfaction of the monetary award. No interest is payable over this period.

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant(s). Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover unpaid rent owing from this tenancy less the value of the security deposit, which I allow the landlord to retain:

Item	**Amount**
Unpaid May 2019 Rent	$375.00
Unpaid June 2019 Rent (1st half only)	187.50
Less Security Deposit	-187.50
Total Monetary Order	**$375.00**

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: June 06, 2019

Residential Tenancy Branch