Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW HEARING DECISION

Dispute Codes

For the landlord: MNRL, FFL
For the tenant: MNDCT, RPP

Introduction

This review hearing was ordered pursuant to decision issued on October 4, 2019 in response to an Application for Review Consideration filed by the tenant and to resolve cross applications filed by the parties.

The landlord had made an application for a monetary order for unpaid rent in the amount of $35,000.00 on September 6, 2018 and the tenant made an application for return of personal property and a monetary order for damages or loss under the Act, regulations or tenancy agreement in the amount of $35,000.00 on October 27, 2018. The two applications were joined and set for hearing on January 8, 2019 with a different Arbitrator. On April 5, 2019 that Arbitrator issued a decision providing the following findings, in part: ”I find that the matters before me are linked substantially to a matter that is before the Supreme Court.” a ““I find the matters before me are within the exclusive jurisdiction of the Supreme Court of British Columbia. Accordingly, I decline jurisdiction to consider these matters pursuant to section 58(2)(c) of the *Act.”*

The landlord had petitioned the Supreme Court of British Columbia (SCBC) to have the Applications for Dispute Resolution heard by the court and consolidated with another action the landlord made with respect to trespass and theft of property from another living unit on the property by the tenant. The parties appeared or were represented in the SCBC on May 2, 2019, June 4, 2019 and August 1, 2019. In a decision issued on August 1, 2019 Madam Justice Warren declined to consolidate the petition and the action and found that neither of the disputes before the Residential Tenancy Branch exceeded $35,000.00. The landlord’s petition to have the disputes heard by the court

were dismissed and the court concluded the disputes were not matters substantially lined to a matter before the Supreme Court.

The tenant filed an Application for Review Consideration on October 3, 2019 seeking a review hearing based on new and relevant evidence, namely the SCBC decision of August 1, 2019. In a decision dated October 4, 2019, the reviewing Arbitrator concluded the tenant's Application for Review Consideration pertained to both of the Applications for Dispute Resolution and ordered the following: "I order that a new hearing of the original application take place. The decision issued on April 5, 2019 is suspended until that hearing is completed."

The review hearing was scheduled for December 10, 2019, before me, and all parties appeared, and the landlord was also represented by legal counsel.

Preliminary and Procedural Matters

1. Service of the Notice of review hearing and the Review Consideration Decision

In the review consideration decision of October 4, 2019, the reviewing Arbitrator ordered the tenant to serve the landlord with notice of the review hearing, as follows:

> **Notices of the time and date of the hearing are included with this Review Consideration Decision for the review applicant to serve to the review respondent within 3 days of receipt of this Decision.** The review applicant must also serve a copy of this Decision to the other party. At the new hearing, the review applicant will be required to demonstrate how the documents outlined above have been served to the other party.

At the commencement of the review hearing, I explored service of the Notice of Hearing and the Review Consideration Decision upon the landlord.

The tenant testified that she had knowledge that the landlord was going to be away on a cruise between the dates of October 7, 2019 through October 22, 2019 because the landlord is her former spouse's mother and the grandmother to two of her children. As such, the tenant determined that it was unlikely the landlord would receive registered mail before it would be returned to sender. The tenant decided to send the Notice of Hearing and Review Consideration Decision to the landlord's legal counsel, who has represented the landlord during multiple appearances, on October 5, 2019. She sent a follow up email to the landlord's legal counsel on October 15, 2019 in an attempt to

confirm he received the documents and he responded on that same date that he had. The tenant also testified that she sent a copy of the Notice of Hearing and the Review Consideration Decision to the landlord's agent (referred to by initials TGF) on October 8, 2019 but the email was returned so the tenant re-sent the email to TGF using a different email address.

The landlord's legal counsel confirmed that he received the Notice of Hearing and Review Consideration Decision via email and that he shared it with his client, the landlord (referred to by initials MG). The landlord's legal counsel stated his client was willing to proceed with the review hearing and accept service by email to her legal counsel.

Given the landlord's willingness to be deemed sufficiently served with notification of the review hearing, I deemed MG sufficiently served pursuant to the authority afforded me under section 71 of the Act.

2. Naming of landlord(s) on tenant's Application for Dispute Resolution and service upon LG

In filing the landlord's application, only one landlord was identified, MG. In filing of the tenant's application, she named MG as the landlord along with MG's son, referred to by initials LG. I heard that LG and the tenant were in a personal relationship that yielded two children.

The landlord's legal counsel pointed out that he represents MG but that he does not represent LG.

I note that LG was not named as a party in the original decision of April 5, 2019.

The tenant did not indicate that she served LG with the Notice of Hearing or the Review Consideration Decision at any time or in any way. Since LG was not served and there was no concession with respect to service upon LG, I did not deem him sufficiently served and I have excluded him as a named party to these disputes.

As for the presence of LG during the hearing, the tenant questioned whether he should be treated as a witness and excluded until called to testify. The tenant stated that she is uncertain as to who the registered owner of the rental unit was, but that LG likely held a "beneficial ownership" of the house even if his mother, MG, was the registered owner.

The landlord's legal counsel indicated that it would be the landlord's position that LG was acting as agent for the landlord for a limited period of time, from May 1, 2014 until May 2015 when those duties were taken over by TGF. Counsel recognized that position may be challenged by the tenant, but counsel was agreeable to excluding LG until called to testify. I requested that LG be taken out of the office where the landlord, the landlord's agent TGF, and landlord's legal counsel were located and asked to wait in a separate waiting area. This was done without any objection.

Although I have excluded LG as a named party to these disputes because he was not served it is important to reflect that I have made no determination as to whether he is/was a "landlord", as defined under the Act, with respect to this tenancy and that issue may need to be determined in a future hearing.

3. Should the decision of April 5, 2019 be confirmed, varied or set aside?

Since the decision of April 5, 2019 indicates the applications were substantially linked to a matter before the SCBC but the SCBC has held that the matters are not substantially linked and dismissed the petition to have the applications heard in court, I find it appropriate to set aside the decision of April 5, 2019 and I order that it is replaced by this decision.

4. Service of original proceeding packages and evidence

As this review hearing is a new hearing set with a different Arbitrator than whom presided over the original hearing, and I have set aside the original decision of April 5, 2019, I am not bound by any decisions made by the original Arbitrator, including decision made on service of the hearing documents and evidence and another other procedural matter he may have considered and decided upon. Accordingly, I proceeded to explore service of the original hearing documents and evidence upon each other. Below, I have summarized what was presented to me.

The landlord's application was filed on September 6, 2018 and a proceeding package was generated by the Residential Tenancy Branch on September 11, 2018. In the details of dispute that appear on the landlord's Application for Dispute Resolution, the landlord makes a claim of $35,000.00 and provided a calculation of rents owed in the sum of $41,260.00 for the period of March 2015 through September 2018. The landlord's proceeding package was served to the tenant's mother in person in September 2018.

The landlord subsequently prepared a Monetary Order worksheet indicating a request for a monetary order in the sum of $49,393.00 for rent and other amounts related to costs to evict the tenant and recover the value of furniture sold by the tenant. The Monetary Order worksheet, along with exhibits A through M were served to the tenant's mother, in person, on December 21, 2019. Along with these documents, the landlord had also prepared a document that was described as "Details of What Happened - This is an explanation of what happened and makes reference to the Exhibits/Evidence that pertain to each point" when it was uploaded to the Residential Tenancy Branch service portal.

As for serving the tenant's mother, I heard from the tenant that she did live with her mother after she was evicted but that when she found her own accommodation, she did not give the landlord any other service address. The tenant acknowledged receiving the above described documents from her mother but pointed out that had the landlord sent her registered mail she would have picked up the registered mail herself.

As for the tenant's application made on October 27, 2018, a proceeding package was generated on October 29, 2018. The tenant sought return of personal property, which she listed in the details of dispute in the Application for Dispute Resolution itself. The tenant also requested monetary compensation of $35,000.00 and indicated in the details of dispute that the claim pertained to three issues: loss of quiet enjoyment, termination of a service or facility, and paying for utilities for a separate tenanted basement suite located at the property; however, the details did not provide any calculations or time periods and the tenant did not provide a Monetary Order worksheet with the proceeding package. Rather, the proceeding package was accompanied by exhibits pertaining to the missing personal property. The tenant's proceeding package was sent to the landlord via registered mail on November 1, 2018 and received on November 5, 2018.

The tenant prepared a Monetary Order worksheet dated December 18, 2019. The tenant's monetary order worksheet, and additional evidence marked exhibits H through W were served by posting the documents on the landlord's door on December 18, 2018.

The landlord then served the tenant's mother with a response and rebuttal evidence on December 27, 2018.

Based on what I heard concerning service of documents, I informed the parties that I was satisfied the tenant had sufficiently set out and provided enough particulars and

evidence with her Application for Dispute Resolution concerning her request for return of personal property that I would proceed to hear that matter.

5. Providing full particulars and setting out the claim

As for the parties' monetary claims, I expressed reservation that the claims were sufficiently set out and served in accordance with the Act and Rules of Procedure and that I would reserve my decision as to whether I would proceed to hear the monetary claims. The landlord's legal counsel submitted that both parties may have made errors in setting out their claims and serving their documents but that the errors are not necessarily fatal and are curable. I informed the parties that if I were to decline to hear the monetary claims, they would be dismissed with leave to reapply. The landlord's legal counsel requested an adjournment rather than a dismissal.

Upon further consideration, I find it appropriate to dismiss the monetary claims with leave to reapply. I make this decision considering the following.

Section 59(2) of the Act provides than an Application for Dispute Resolution must, in part:

> (b) include full particulars of the dispute that is to be the subject of the dispute resolution proceedings
>
> [My emphasis underlined]

Rule 2.5 of the Rules of Procedure provide that a monetary claim must be accompanied by a detailed calculation and all evidence that is available at the time of filing; and, Rule 3.1 provides that all of the same documents filed are served upon the other party.

The requirements of section 59(1)(b) and the Rules of Procedure were developed in keeping with the principles of natural justice.

The tenant did not provide any detailed calculation with her Application for Dispute Resolution and she did not provide any reason for her failure to do so. Rather, the tenant waited until December 18, 2018 to prepare such a calculation and serve it and she served it in a manner that does not comply with the Act and very close to the originally scheduled hearing date of January 8, 2019. The Monetary Order worksheet ought to have accompanied the proceeding package and, as such, ought to have been served upon the landlord in person or by registered mail, not by posting on the landlord's door. Aside from the lack of a detailed calculation, the tenant did not provide

sufficient particulars that gave rise to her claims for compensation for the three issues she identified until December 18, 2019. Again, these details ought to have been served with the Application for Dispute Resolution and by personal service or registered mail well in advance of the hearing.

As for the landlord's monetary claim, it was not served upon the tenant in one of the permissible ways. An Application for Dispute Resolution that pertains to a monetary claim must be served upon the respondent in person or by registered mail. Serving the tenant's mother is not sufficient service and the landlord did not provide a reason why did not serve the tenant in person or by registered mail. Also, I find it is not clear as to what the landlord is claiming and whether she is seeking to amend her claim. The landlord originally filed an application indicating she was seeking unpaid rent or recovery of a "subsidy" and she did provide a calculation in the details of dispute, but there is very scant submission concerning the nature of the "subsidy" by the tenant or its loss. Rather, the landlord did not elaborate until she provided the "Details of what happened" on December 21, 2018 which is also very close to the originally scheduled hearing date. Again, these details should have been provided with the proceeding package. The landlord also provided a Monetary Order worksheet on December 21, 2018 that ought to have been served with the proceeding package and if the landlord sought to amend the claim it had to be served with an Amendment to an Application for Dispute Resolution to the tenant in person or by registered mail.

Although I have the authority to deem a party sufficiently served and the late service of requirement documents may be cured by way of an adjournment if more time is required, I am more trouble by the lack of particulars and evidence concerning efforts to mitigate damages or loss, if any.

Upon review of the parties' submissions, it is obvious that they made efforts to try to prove the other one breached the Act, regulations or tenancy agreement. However, proving a breach is only one component of the test for damages. Monetary awards are provided under section 7 and 67 of the Act and as described in Residential Tenancy Branch Policy Guideline 16: Compensation for Damage or Loss, an applicant must be prepared to provide all of the following to an Arbitrator:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and

- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

[my emphasis underlined]

In the details provided by the landlord, the landlord submitted that the tenant was notified of the loss of the "subsidy" in March 2015 and April 2015 yet the landlord did not move to end the tenancy for unpaid rent for three years, in June 2018 when a 10 Day Notice to End Tenancy for Unpaid Rent was served, yet, in doing that she did not indicate the tenancy was ending for the unpaid "subsidy". As for the tenant's claims, the largest component of her monetary claim concerns the loss of quiet enjoyment over a long period of time as well: November 2014 through December 2017 yet she does not make it clear how or if she took reasonable action to minimize her losses. Neither party had filed an Application for Dispute Resolution with the Residential Tenancy Branch prior to the issuance of the 10 Day Notice. Rather, in the absence of particulars concerning mitigation efforts, it would appear the parties permitted their purported claims to grow over time and then when they were embroiled in a nasty family dispute they made these applications against the other.

While the parties may have intended to provide details concerning mitigation efforts orally during their testimony, I am of the view that would prejudicial without advanced disclosure to the other party especially considering the large sums being claimed.

Having heard the tenant and LG were in a relationship, and the landlord is LG's mother, and the parties were involved in a nasty family dispute, it would appear to me that the parties' were eager to launch their large monetary claims against each other without taking the due care and attention required of them to comply with section 59 of the Act and Rules of Procedure and I am of the view that to adjourn the proceedings to deal with their monetary claims would arise from the intentional actions or neglect of the parties.

I must consider certain factors in deciding whether to adjourn a proceeding, or not, as provided under Rule 7.9 of the Rules of Procedure. Rule 7.9 provides:

> **7.9 Criteria for granting an adjournment**
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> Without restricting the authority of the arbitrator to consider 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;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party

[My emphasis underlined]

For all of the reasons provided above, I decline to accept the parties' respective monetary claims as provided under section 59(5) of the Act and I decline to grant any adjournment to cure the deficiencies in their applications. Section 59(5) provides that:

> (5) The director may refuse to accept an application for dispute resolution if
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> (a) in the director's opinion, the application does not disclose a dispute that may be determined under this Part,
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> (b) the applicant owes outstanding fees or administrative penalty amounts under this Act to the government, or
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> (c) the application does not comply with subsection (2).

Issue(s) to Determine

Has the tenant established that the landlord has/had her personal property and it is appropriate to order the landlord to return her personal property?

Background and Evidence

It was undisputed that the parties executed a written a tenancy agreement for a month to month tenancy that started on May 1, 2014.

A hearing was held on August 20, 2018 in response to the tenant's application to cancel a 10 Day Notice to End Tenancy for Unpaid Rent dated June 18 ,2019. The Arbitrator presiding over that proceeding dismissed the tenant's application and on August 20, 2019 the Arbitrator provided the landlord with an Order of Possession effective two days after service. On September 11, 2018 a Court bailiff executed a Writ of Possession at the rental unit.

The tenant submitted that the Court Bailiff had removed her possessions from the rental unit and changed the locks when she was out. The tenant's possessions, for the most part, were taken to a storage facility under the direction of the Court Bailiff and the tenant subsequently retrieved those possessions. However, the tenant has submitted that there were a few items in the rental unit that belonged to her that the bailiff did not remove. The tenant testified that she saw the possessions through the windows of the rental unit, and she saw them in photographs posted online when the property was listed for sale.

In filing her application, the tenant identified the following items as being left in the rental unit and not returned to her: "3 wall shelves, wall mirror, 5 curtains, fireplace screen, telus modem".

It was undisputed that the tenant contacted the landlord's agent, TGF, via email, in an attempt to retrieve her personal items and the landlord's agent did not take steps to return the property to the tenant.

The landlord's agent TGF acknowledged receiving the tenant's email, among many. In not dealing with the tenant's request for return of possessions, TGF explained that there was a nasty family dispute underway at the time. TGF indicated that she now regrets not taking action with respect to returning the items to the tenant.

As for the location of the items currently, the landlord's legal counsel submitted that his client does not know the whereabout of the items. It was acknowledged that the property was sold after the tenancy ended and the items may have been left in the house when it was transferred to the new owner, but the landlord could not say for certain what happened to the items.

In the landlord's written response, the landlord acknowledged the following items may have belonged to the tenant and were not returned to her: three small wall shelves, a small picture, one bedroom curtain, and a mirror in bedroom.

In the landlord's written response, the landlord disputed that the master bedroom curtains and the fireplace screen belonged to the tenant on the basis they were originally purchased by LG; however, during the hearing, the landlord's agent TGF acknowledged that it was not upon the landlord to make a determination as to ownership of property acquired while the tenant and LG were in a relationship and the possessions remained in the rental unit after the relationship ended while the rental unit

that was occupied by the tenant. As such, the landlord was willing to concede during the hearing, that the remaining two items ought to have been returned to the tenant.

Analysis

Where a tenancy has ended and the tenant remains in possession of the rental unit, the landlord's remedy is to obtain an Order of Possession, which the landlord did. Where a tenant does not vacate a rental unit despite service of an Order of Possession, the landlord's remedy is to obtain a Writ of Possession from he SCBC and have the Writ executed by a court bailiff, which the landlord did in this case. The bailiff has the authority of the court to remove and seize the tenant's personal property in the rental unit and there is a process for the tenant to retrieve the personal property through the bailiff. In this case, the tenant acknowledged that she retrieved the items seized by the bailiff and this dispute concerns the few items that were not removed form the rental unit by the bailiff.

Section 65(1) of the Act provides that the Director may make various orders, including:

Director's orders: breach of Act, regulations or tenancy agreement

65 (1)Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:

> (e) that personal property seized or received by a landlord contrary to this Act or a tenancy agreement must be returned

In this case, the landlord had a court order and the court bailiff lawfully took possession of the rental unit and the majority of the tenant's personal possessions; however, the court bailiff did not remove all of the possessions in the unit and they remained in the unit for some time, while the landlord had possession of the rental unit. The tenant put the landlord on notice that she sought return of items not removed by the bailiff, through the landlord's agent, as acknowledged by the landlord's agent TGF. Procedurally, the landlord may have contacted the bailiff to have the bailiff come remove those items, or the landlord ought to have returned them to the tenant since the landlord does not have the right to seize or hold the tenant's personal property.

The tenant made a list of items she claims belonged to her and were left tin the rental unit and the landlord conceded that those were items were not returned to the tenant and that it was not upon the landlord to make a determination as to whether those items belonged to the tenant or LG as a result of their personal relationship.

Had the landlord retained possession of the subject items, I would have ordered their return to the tenant under section 65(1)(e); however, since the landlord has stated she does not have the possessions and does not know of their whereabouts, I find such an order would be ineffective and I do not issue such an order. Accordingly, I find the tenant's remedy is to seek compensation for loss of those items from the landlord.

Conclusion

The decision of April 5, 2019 is set aside and replaced by this decision.

The parties' respective monetary claims were not sufficiently set out and served and they are both dismissed with leave to reapply.

I have found the landlord unlawfully retained possession of items belonging to the tenant when possession of the rental unit was regained; however, I have not issued an order for their return since the landlord no longer has the items. Rather, I have found the tenant's remedy for loss of the items is monetary. The tenant is at liberty to make a monetary claim against the landlord for loss of the items by making another Application for Dispute Resolution.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: December 17, 2019

Residential Tenancy Branch