



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WESTSHORE ESTATES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, MT, LAT, MNDCT, FFT OLC, RP, PSF and LRE

Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution, filed on December 17, 2019, wherein the Tenants sought the following relief:

- an order canceling a 10 Day Notice to End Tenancy issued on * (the "Notice")
- more time to make an application to cancel the Notice;
- a Monetary Order for damage or loss;
- an order that the Tenant be permitted to change the locks on the rental unit; or their guests have access to the rental unit;
- an Order that the Landlord
 - comply with the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, or the tenancy agreement;
 - provide services or facilities required by law;
 - make repairs to the rental unit;
 - be restricted from entering the rental unit;
- recovery of the filing fee.

The hearing was conducted by teleconference at 11:00 a.m. on January 21, 2020. Both parties called into the hearing and were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form and make submissions to me.

Preliminary Matter

Hearings before the Residential Tenancy Branch are governed by the *Residential Tenancy Branch Rules of Procedure*. At all times an Arbitrator is guided by *Rule 1.1*

which provides that Arbitrators must ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants.

Residential Tenancy Branch Rule of Procedure 2.3 provides that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Hearings before the Residential Tenancy Branch are scheduled on a priority basis. Time sensitive matters such as a tenant's request for emergency repairs or the validity of a notice to end tenancy are given priority over monetary claims.

It is my determination that the priority claim before me is the validity of the Notice. I also find that this claim is not sufficiently related to the Tenant's monetary claim or the Tenant's claims for Orders with respect to the landlord; accordingly, I exercise my discretion and dismiss these claims with leave to reapply.

For reasons which will be further detailed, matters which relate to the continued tenancy are no longer relevant; accordingly, those claims are dismissed without leave to reapply.

Issues to be Decided

1. Should the Tenant be granted an extension of time to apply to dispute the Notice pursuant to section 66 of the *Residential Tenancy Act*?
2. Should the Notice be cancelled?
3. Is the Tenant entitled to recover the filing fee?

Background and Evidence

The Tenant applies for more time to dispute the Notice to End Tenancy.

The Notice was issued on December 3, 2019 and had an effective date of December 14, 2019.

The Tenants applied to dispute the Notice on December 17, 2019.

The Landlord testified that the Tenants moved into the rental unit in August 24, 2019. Monthly rent was \$1,100.00 for a one bedroom plus den rental unit. The Tenants paid \$550.00 as a security deposit.

The tenancy was on a month to month basis with a maximum occupancy date of June 2020. The parties signed a tenancy agreement which purported to designate this tenancy as a "Vacation Rental".

The Tenants failed to pay the December rent, following which the Landlord issued the Notice.

The Tenants failed to pay the outstanding rent.

Introduced in evidence was a copy of text communication dated December 10, 2019, between the Landlord and the Tenant, C.S., in which the Tenant wrote that he was withholding rent due to ant issues at the rental unit.

In support of their claim the Tenant C.S. testified as follows.

In terms of why they applied late for dispute resolution, C.S. testified that they did not pay the outstanding rent as he claimed they had an agreement with the Landlord's spouse that they had 10 days in which to pay the rent. C.S. further stated that he did not know the Landlord's spouse's name, nor was he there for this conversation. C.S. said that when they tried to pay the rent, on December 11 and 12th, the Landlord refused payment.

C.S. stated that they did not pay the January rent as they were withholding rent until the Landlord dealt with the ant issue.

C.S. also stated that they did not believe the Landlord properly served the Notice on them as she has a friend do so.

Analysis

Section 4 of the *Residential Tenancy Act* provides that the Branch lacks jurisdiction over vacation rentals.

In the case before me, the parties entered into an agreement titled “Vacation Rental Agreement”. Pursuant to this agreement the tenancy was on a month to month basis ending before June 2020.

While the agreement was called a vacation rental, that is not conclusive.

As provided for in *Residential Tenancy Branch Policy Guideline 9*, if there is exclusive possession of the rental unit for a term and rent is paid, there is a presumption that a tenancy has been created.

Similarly, *Guideline 27* provides that the *Act* may apply to vacation accommodation where the anticipated term of the rental is not short term, the tenants have exclusive possession of the accommodation, and the accommodation is the primary and permanent residence of the tenants.

In the case before me, while the Landlord clearly wanted to ensure the Tenants vacated by June 20, 2020, I find a tenancy was created. The evidence before me indicates the Tenants had exclusive occupancy of the rental unit. Further the rental unit was the Tenants’ primary and permanent residence, not temporary accommodation while they were vacationing. Further, the rental unit was rented on a month to month basis, commencing August 24, 2019 to no later than June 30, 2020, a potential term of approximately ten months.

I therefore find I have jurisdiction to consider this dispute.

A Landlord may not contract out of the *Act*. Recent changes to the *Act* limit move out clauses in fixed term tenancies. As a tenancy has been created, the Landlord must end the tenancy in accordance with the *Act*.

The Landlord issued the Notice pursuant to section 46 of the *Act*; the relevant portions of that section provide as follows:

Landlord's notice: non-payment of rent

46 (1) 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 is not earlier than 10 days after the date the tenant receives the notice.

...

- (4) Within 5 days after receiving a notice under this section, the tenant may
 - (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
 - (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
 - (b) must vacate the rental unit to which the notice relates by that date

I accept the Landlord's testimony that the Notice was personally served on the Tenants on December 3, 2019. As such, the Tenants had five days in which to pay the outstanding rent or apply for dispute resolution. As December 8 was a Sunday, the Tenants had until December 9, 2019. The Tenants applied for dispute resolution on December 17, 2019 which is outside the time to apply as provided above.

During the hearing the Tenant stated that his father, J.S., spoke to the Landlord's spouse and they reached an agreement with the Landlord that they did not have to pay rent until 10 days after service. He further stated that when they attempted to pay the Landlord, she refused his payment.

On the first page of the Notice, the Tenants are informed they must respond to the Notice as follows:

Tenant: You may be EVICTED if you do not respond to this Notice.

You have five (5) days to pay the rent and utilities (if applicable) to the landlord
Or file an Application for Dispute Resolution with the Residential Tenancy Branch.

The second page of the Notice provides the following additional information:

**If within 5 days you do not pay the rent and utilities (if applicable) or
Make an application for dispute resolution, the landlord can apply for dispute
resolution
For an order of possession through the Direct Request process.**

INFORMATION FOR TENANTS

- You have the right to dispute this Notice within 5 days after you receive it, by filing an Application for Dispute Resolution at the Residential Tenancy Branch. An arbitrator may extend your time to file an Application, but only if he or she accepts your proof that you had a serious and compelling reason for not filing the Application on time.
- If you do not file an Application for Dispute Resolution within 5 days, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the date set out on page 1 of this Notice (you can move out sooner). If you do not file the Application or move out, your landlord can apply for an Order of Possession.

Note: The date a person receives documents is what is used to calculate the time to respond; the deeming provisions do not give you extra time to respond.

The Tenant alleged his father (the other named Tenant, J.S.) and the Landlord's spouse reached an agreement regarding the payment of rent. Neither J.S. nor the Landlord's spouse were present during the hearing to speak to this alleged agreement; as such, the only evidence I had of this was the Tenant's testimony as to what he says his father told him. The Landlord denied any such agreement existed.

In any event, the Tenants request for more time pursuant to section 66 must be dismissed pursuant to section 66(3). Section 66 of the *Act* provides me authority to extend and change a time limit imposed by the *Act* and reads as follows:

66 (1) The director may extend a time limit established by this Act only in exceptional circumstances, other than as provided by section 59 (3) [*starting proceedings*] or 81 (4) [*decision on application for review*].

(2) Despite subsection (1), the director may extend the time limit established by section 46 (4) (a) [*landlord's notice: non-payment of rent*] for a tenant to pay overdue rent only in one of the following circumstances:

(a) the extension is agreed to by the landlord;

(b) the tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an order of the director.

(3)The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.

As noted in section 66(3), the time limit to make an application for dispute resolution *cannot* be extended past the effective date of the Notice. In this case, the effective date of the Notice was December 14, 2019, as such I am prohibited by operation of section 66(3) from granting the Tenants' request for more time to allow them to apply on December 17, 2019. There is no discretion in section 66(3).

I therefore dismiss the Tenants' request for more time to make their Application for Dispute Resolution.

As the Tenants' request for more time has been denied, they have failed to apply for Dispute Resolution as required by section 46. Consequently, and by operation of section 46(5), the Tenants are conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice and must vacate the rental unit.

I also wish to point out that even in the event I was able to consider the Tenants' request for more time, I would have denied their request. An extension of time will only be granted if the party has proof that an exceptional circumstance occurred that prohibited them from filing their application within the statutory timeframe.

Residential Tenancy Policy Guideline 36 sets out the following factors to consider when an application for more time is requested and requires the applicant to show that:

- did not willfully fail to comply with the time limit, and that the applicant's conduct did not cause or contribute to their failure to meet the time limit;
- had a bona fide intent to comply with the time limit, and took reasonable and appropriate steps to comply with it; **and**
- brought forward their application as soon as was practical, under the circumstances.

The evidence before me, and in particular the text communication between the parties, indicates the Tenants were withholding rent as a means to compel the Landlord to deal with ants in the rental unit.

As discussed during the hearing the Tenant must pay rent when rent is due; this requirement is set forth in section 26 of the *Act* which reads as follows:

Rules about payment and non-payment of rent

26 (1)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.

As noted during the hearing, there are only four occasions, permitted under the *Residential Tenancy Act*, where a tenant has the right to withhold rent:

1. When the Landlord accepts a security deposit over and above the allowable amount (section 19(2));
2. When the Landlord accepts rent over and above the allowable amount (section 43(5));
3. When an Arbitrator authorizes a Tenant to withhold rent (section 72(2)(a)); and,
4. When the Tenant makes emergency repairs under the circumstances prescribed in section 33 of the *Act*

Withholding rent as a means to compel the Landlord to address ants in the rental unit does not meet the narrow circumstances provided above. In the case before me I find the Tenants had no such legal authority to withhold rent.

In all the circumstances, I dismiss the Tenants' claim for an Order canceling the Notice.

I have reviewed the Notice and find it complies with section 52 of the *Act*. Accordingly, the Landlord is granted an Order of Possession pursuant to section 55. The Order must be served on the Tenants and may be filed and enforced in the B.C. Supreme Court.

Conclusion

The Tenants' claim for more time to make an application to dispute the Notice pursuant to section 66 of the *Act* is dismissed without leave to reapply.

The Tenants' request for an Order canceling the Notice is dismissed without leave to reapply.

The Tenants' claim for recovery of the filing fee is dismissed without leave to reapply.

The Tenants' monetary claim is dismissed with leave to reapply.

As the tenancy is ending, the balance of the Tenants' claims for the following:

- an order that the Tenant be permitted to change the locks on the rental unit; or their guests have access to the rental unit;
- an Order that the Landlord

- comply with the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, or the tenancy agreement;
- provide services or facilities required by law;
- make repairs to the rental unit; and
- be restricted from entering the rental unit

are 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: January 22, 2020

Residential Tenancy Branch