



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on March 23, 2020 (the “Application”). The Tenant disputed a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated February 10, 2020 (the “Notice”).

The Tenant appeared at the hearing. The Agent appeared at the hearing for the Landlord. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

The Agent confirmed that the correct Landlord name is as shown on the written tenancy agreement submitted which is reflected in the style of cause.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the documentary evidence submitted and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

I note that the Tenant was disruptive during the last part of the hearing and, pursuant to rule 6.10 of the Rules of Procedure (the “Rules”), had to be told several times to stop interrupting.

Issues to be Decided

1. Should the Notice be cancelled?
2. If the Notice is not cancelled, should the Landlord be issued an Order of Possession based on the Notice?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started April 01, 2015 and was for a fixed term ending September 30, 2015. The tenancy then became a month-to-month tenancy. Rent at the start of the tenancy was \$1,350.00 per month due on the first day of each month.

A co-tenant is named on the tenancy agreement. The Tenant advised that the co-tenant vacated in October.

The Agent testified that rent is currently \$1,439.00 and that a Notice of Rent Increase was sent to the Tenant for this. The Tenant testified that rent is currently \$1,404.00 and that he did not receive a Notice of Rent Increase.

The Notice states that the Tenant failed to pay \$1,140.86 in rent that was due March 01, 2020. It is addressed to the Tenant and refers to the rental unit. It is signed and dated by the Agent. It has an effective date of March 25, 2020. The date of the Notice is February 10, 2020. The Agent confirmed this was a mistake and should have said March 10, 2020.

The Agent testified that the Notice was sent to the Tenant by registered mail March 10, 2020. The Agent provided Tracking Number 1.

The Tenant could not recall when he received the Notice. The Tenant testified about being away and having three days to respond to the Notice because it was sent by registered mail and he was not home. I looked Tracking Number 1 up on the Canada Post website which shows the Notice was delivered March 23, 2020. The Tenant did not dispute this date. The Canada Post website shows notice cards were left in relation to the package March 11, 2020 and March 18, 2020.

The Tenant's submissions about being away were not clear and I asked the Tenant to set out in detail why the registered mail package was not picked up earlier. The Tenant

then said it was because he had lost his identification and the post office would not let him pick the mail up without identification. The Tenant testified that his entire wallet had been stolen. I asked the Tenant how he picked the mail up on March 23, 2020 and the Tenant testified that he showed the post office his bank information on his phone which they said they would accept. I asked the Tenant why he had not done this earlier and he testified that he did not think about it.

The Agent testified that the rent ledger submitted is correct and the Tenant owed \$1,140.86 in outstanding rent as of March 10, 2020 when the Notice was issued.

The Agent testified that the Tenant made the following payments since being issued the Notice:

- \$400.00 March 30, 2020
- \$1,100.00 March 30, 2020
- \$300.00 April 03, 2020
- \$1,100.00 May 01, 2020

The Agent testified that all of the above payments were made by cheque.

The Tenant testified that he has overpaid rent and no rent was outstanding when the Notice was issued. The Tenant relied on a document he submitted with his own notations on it. The Tenant was unable to answer questions about the document or explain the notations on it during the hearing.

The Tenant testified that \$1,100.00 is paid directly from a ministry to the Landlord each month. The Tenant testified that he pays the remainder of rent by money order.

The Tenant testified that he has made three or four payments since being issued the Notice. The Tenant could not outline when these payments were made or the amount of the payments. The Tenant could not confirm what is written on "Exhibit F" of his evidence in relation to this because he did not have "Exhibit F" with him during the hearing.

The Application states that the Tenant has been short on rent for months and paid \$400.00 on March 12, 2020.

The Tenant submitted a letter he sent to the Landlord which indicates he paid \$400.00 on March 23, 2020. The letter refers to back rent that is due.

In reply, the Agent testified that no rent was paid in February and this is where rent payments started being behind. The Agent testified that the Tenant received a 10 Day Notice in February and March. The Agent testified that she believes the rent cheques for \$1,100.00 come directly from the ministry.

Analysis

Section 26(1) of the *Act* requires a tenant to pay rent when it is due under the tenancy agreement unless the tenant has a right to withhold rent under the *Act*.

Section 46 of the *Act* allows a landlord to end a tenancy when a tenant fails to pay rent. The relevant portions of section 46 state:

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.

(2) A notice under this section must comply with section 52...

(3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(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.

Section 55(1) of the *Act* requires an arbitrator to issue an Order of Possession when a tenant has disputed a notice to end tenancy and the application is dismissed or the notice is upheld. The notice must comply with section 52 of the *Act*.

There is no issue that rent is due on the first day of each month.

The parties disagreed about what rent is currently. The Tenant testified that it is \$1,404.00. The Agent testified that it is \$1,439.00 due to a rent increase. The Agent testified that a Notice of Rent Increase was served on the Tenant. The Tenant denied this.

The Landlord did not submit a copy of a Notice of Rent Increase or evidence that it was served on the Tenant. In the absence of such evidence, I am not satisfied rent is \$1,439.00 and accept rent is \$1,404.00.

The Tenant did not take the position that he had authority under the *Act* to withhold rent. The Tenant took the position that there was no outstanding rent when the Notice was issued and that the rent ledger is wrong.

Given the Tenant's position, I am satisfied the Tenant owed \$1,404.00 in rent each month by the first day of each month under section 26(1) of the *Act* and that section 46(3) of the *Act* does not apply.

The issues noted on the rent ledger by the Tenant are as follows:

- He was never paid out \$150.00 on July 02, 2015 as noted on the rent ledger
- There is a payment made December 19, 2018 missing
- A question about why the ministry paid \$1,089.14 and not \$1,100.00 on July 25, 2019
- There is a payment made February 19, 2020 missing
- No rent increase to \$1,439.00

From the Tenant's notations on the rent ledger, it appears that his position is that he paid the following after the Notice was issued:

- \$400.00 March 23, 2020
- \$1,100.00 March 25, 2020
- \$300.00 April 03, 2020

In general, I find the rent ledger to be reliable evidence. It is detailed with amounts charged, paid and outstanding. It dates back to the start of the tenancy. I am satisfied it is an accurate record for the most part.

I am not satisfied based on the rent ledger alone that the Landlord paid the Tenant \$150.00 on July 02, 2015. The Tenant disputes this in his notations. The Landlord could have produced further evidence such as a copy of the cheque or evidence it was deposited by the Tenant. The Landlord did not do so. In the absence of further evidence on this point, I am not satisfied the Tenant was paid the \$150.00.

I do not accept that the rent ledger is missing a payment made December 19, 2018 or February 19, 2020 based on the Tenant's notations alone. The Tenant did not provide further testimony on this at the hearing. The Tenant should have some documentation of these payments if they were made. The Tenant has not submitted such documentation. In the absence of further evidence, I am satisfied based on the rent ledger that further payments were not made.

The notation about why the ministry paid \$1,089.14 versus \$1,100.00 is not sufficient to overcome the evidence of the rent ledger. The Tenant did not provide further testimony on this point such as whether he followed up with the ministry and what the outcome of any follow up was. The Tenant did not submit documentation showing the notation of \$1,089.14 is wrong. I accept that \$1,089.14 is correct.

Therefore, the two issues raised by the Tenant that I accept are that the Tenant was not paid out \$150.00 in 2015 and rent is \$1,404.00 not \$1,439.00. Other than these two issues, I accept that the rent ledger is correct. Considering these two issues, I am satisfied \$745.86 in rent was outstanding when the Notice was issued.

Given rent was outstanding, the Landlord was entitled to serve the Tenant with the Notice pursuant to section 46(1) of the *Act*.

I am satisfied based on the testimony of the parties that the Notice was served on the Tenant by registered mail. I am satisfied based on the testimony of the Agent, Tracking Number 1 and the Canada Post website information that the Notice was sent March 10, 2020. I am satisfied based on the Canada Post website information that notice cards were left in relation to the package March 11, 2020 and March 18, 2020. I am satisfied the Notice was served in accordance with section 88(c) of the *Act*.

Section 90(a) of the *Act* states:

90 A document given or served in accordance with section 88...or 89..., unless earlier received, is deemed to be received as follows:

(a) if given or served by mail, on the 5th day after it is mailed...

Policy Guideline 12 deals with service and states in part:

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.

In the event of disagreement between the parties about the date a document was served and the date it was received, an arbitrator may hear evidence from both parties and make a finding of when service was effected.

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.

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. For example, if a party claimed to be away on vacation at the time of service, the arbitrator would expect to see evidence to prove that claim, such as airplane tickets, accommodation receipts or a travel itinerary. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

(emphasis added)

In my view, parties wishing to rebut the presumption set out in section 90(a) of the *Act* must provide sufficient evidence showing the reason they did not pick up the registered mail earlier. Here, the Tenant testified that he was away and that he had lost his identification so could not pick up the registered mail earlier. The Tenant did not submit documentary evidence to support either of these reasons, other than his own written

statements. I do not find the Tenant's testimony and written statements alone sufficient to rebut the presumption set out in section 90(a) of the *Act*. In the absence of further evidence to support the Tenant's position, I am not satisfied the Tenant could not have picked the registered mail up earlier. I am not satisfied the deeming provision has been rebutted. I find the Tenant is deemed to have received the Notice March 15, 2020.

Upon a review of the Notice, I find it complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*. I do not find that the incorrect date on the Notice affects the validity of the Notice because it does include a date as required and it is clear from the rest of the Notice that the date should have been March not February.

The Tenant had five days from March 15, 2020 to pay or dispute the Notice under section 46(4) of the *Act*.

The Tenant did not dispute the Notice until March 23, 2020.

I am not satisfied based on the evidence provided that the Tenant paid the outstanding rent by March 20, 2020. I am not satisfied the Tenant paid any of the outstanding rent by March 20, 2020. The only reference in the materials to the Tenant paying rent prior to March 20, 2020 is in the Application where the Tenant states he paid some of the outstanding rent March 12, 2020. The Tenant did not provide testimony about this during the hearing. This does not appear to accord with the Tenant's notations on the rent ledger.

In the circumstances, I am not satisfied the Tenant paid the outstanding rent in full or disputed the Notice by March 20, 2020 as required. I find the Tenant is conclusively presumed under section 46(4) of the *Act* to have accepted that the tenancy ended March 25, 2020, the effective date of the Notice. The Tenant was required to vacate the rental unit by March 25, 2020.

Given the above, the Tenant's Application is dismissed.

The Landlord is entitled to an Order of Possession pursuant to section 55(1) of the *Act* and is issued an Order of Possession effective two days after service on the Tenant.

Conclusion

The Landlord is entitled to an Order of Possession effective two days after service on the Tenant. This Order must be served on the Tenant. If the Tenant does not comply with this Order, it may be filed in the Supreme Court and enforced as an order of that court **SUBJECT TO THE MINISTERIAL ORDER REFERRED TO ON THE LAST PAGE OF THIS DECISION.**

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: May 20, 2020

Residential Tenancy Branch