Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR-DR, OPRM-DR, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the "Application") that was filed by the Landlords under the *Residential Tenancy Act* (the "*Act*"), seeking:

- An Order of Possession for an undisputed 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice");
- Compensation for unpaid rent; and
- Recovery of the filing fee;

The hearing was convened by telephone conference call and was attended by the Landlord L.S., the agent for the former landlord, B.A.S., and Legal Counsel for the Landlords, as well as the Tenant F.S., who was also acting as an agent for the Tenant B.S. All testimony provided was affirmed. The Tenant F.S. confirmed that both they and the Tenant B.S. received the Notice of Dispute Resolution Proceeding Package, including a copy of the Application, notice of the hearing, and the documentary evidence before me from the Landlords. As a result, I have accepted the Landlords' documentary evidence for consideration in compliance with the *Act* and the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"). The Tenant F.S. stated that neither they, nor the Tenant B.S. submitted any evidence to the Residential Tenancy Branch (the "Branch") or served any evidence on the Landlords in relation to this hearing.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure; however, I refer only to the relevant facts, evidence, and issues in this decision.

At the request of the Tenant F.S., copies of the decision will be emailed to them at the email address provided in the hearing. At the Request of the Landlord L.S., copies of the decision and any orders issued in favor of the Landlords will be emailed to their Legal Counsel at the email address provided for them on the Application.

Preliminary Matters

Jurisdiction

During the hearing the parties agreed that a previous decision had been rendered in relation to jurisdiction for this tenancy and Legal Counsel for the applicants provided me with the file number, which I have noted on the style of cause page for this decision.

In that decision rendered on January 6, 2020, the arbitrator stated that the owner of the property was deceased and that there was no written tenancy agreement. The arbitrator stated that the executor who appeared at the hearing on behalf of the landlord, was unsure of the details of any tenancy agreement in place, including whether a security or pet damage deposit were paid and what amount of rent was due each month. As a result, that arbitrator found that there was insufficient evidence before them that the parties had a valid tenancy agreement in place or that any agreement constituted a tenancy under the *Act*. As a result, they declined jurisdiction to hear and decide the matter.

Legal Counsel for the applicants stated that the executors have since obtained a copy of the written tenancy agreement and have proof that the person who signed the tenancy agreement as the landlord, B.A.S., was authorised to act on behalf of the property owner and that the applicants qualify as landlords under the *Act*. As a result, they argued that I have jurisdiction to hear this matter, despite the previous decision.

The respondent F.S. stated that they were confused by this Application, as they believed that the matter of jurisdiction had been resolved in the previous decision.

The principle of res judicata states that a matter that has been adjudicated by a competent court may not be pursued further by the same parties. In general, this means that once something has been judged on its merits by the appropriate authority, any judgements are final and binding and that it is not open to the parties to re-argue the merits of the case. Although a previous arbitrator has already rendered a decision in relation to jurisdiction for these parties, I find it of particular importance to note that the arbitrator did not state, as a finding of fact, that there is no tenancy in place under the *Act*. Instead what the arbitrator found was that they did not have sufficient evidence before them to determine that a tenancy under the *Act* exists. I find that this is an important distinction for the arbitrator to have drawn and based on the specific wording of the arbitrator in their decision, I find that it was open to the parties to return to the Branch with additional evidence relating to jurisdiction, in order to satisfy an arbitrator

that a tenancy under the *Act* exists. As a result, I find that the applicants were not barred from filing the Application based on the principle of res judicata. Having made this finding, I will now turn my mind to the evidence before me relating to the tenancy.

In the hearing all parties agreed that the previous owner of the property was R.S., the father of the applicants and the respondent F.S. and the grandfather of the respondent B.S. There was also no disagreement that a written tenancy agreement exists and that it was signed by B.A.S. as the landlord and F.S. and B.S. as the tenants. The applicants and their Legal Counsel have submitted significant documentary evidence for my review in support of their position that a tenancy under the *Act* exists, including a copy of a written tenancy agreement, a copy of a State of Title Certificate listing the applicants as the current owners of the rental unit as executors of the Estate of R.S., a copy of a Last Will and Testament (the "Will") listing the applicants as co-executors of the estate of R.S., and an order from the Supreme Court of British Columbia stating that B.A.S., the person listed as the landlord on the tenancy agreement, was authorised to act as committee for R.S. and their estate.

There was no disagreement that at the time the tenancy agreement was entered into, R.S. was the owner of the property. The order from the Supreme Court of British Columbia states that a hearing took place on August 30, 2017, wherein B.A.S. was authorised to act as committee for R.S. and their estate and the decision from the court is stamped September 15, 2017. Although the tenancy agreement in the documentary evidence before me states that the tenancy began on September 9, 2017, and was signed by B.A.S. on September 9, 2017 and the respondents on September 11, 2017, I read the decision from the court to mean that B.A.S. was authorised to act as committee for the property owner, R.S., effective the date of the hearing, August 30, 2017. As a result, I find that B.A.S. was authorised to act as an agent for the property owner at the time the tenancy agreement was entered into. Further to this, the Tenants did not present any evidence that B.A.S. was not an authorized agent for the property owner or that the tenancy agreement in the documentary evidence before me was in any other way invalid.

Although the Application listed the rental unit as the address for one of the applicants, G.S., in the hearing all parties confirmed that this was a clerical error and that the none of the applicants reside in the rental unit with the Tenants.

Based on the above, I am satisfied that a tenancy agreement under the *Act* existed and that this tenancy is not excluded under section 4 of the *Act*.

During the hearing I had concerns, which I made clear to the parties, that the Branch *may* not have jurisdiction to proceed against the respondent F.S., as F.S. stated that they believe that they may have some ownership interest in the property as a result of their fathers Will. Legal Counsel for the applicants argued that the will is clear that F.S. has no ownership interest in the property and that their only interest is in the residue of the estate. Legal Counsel for the Landlords pointed to section 3A of the Will and argued that it clearly states that the executors of the Will, who are the current owners of the property according to State of Title Certificate submitted for my consideration, and the applicants in this matter, have ownership of the rental unit and absolute discretion to deal with the rental unit as they see fit, including selling it and dispersing of any proceeds in accordance with the Will, or retaining it in its current state, for any amount of time they see fit. Legal Counsel for the applicants argued that if the rental unit is sold, F.S. *may* be entitled to a portion of the proceeds, should there be any, in accordance with the Will, after any debts of the estate have been paid, but that F.S. has no current ownership interest in the property. As a result, Legal Counsel for the Landlords argued that I have jurisdiction to hear and decide this matter against both parties named as respondents in the Application.

I have reviewed the State of Title Certificate from the Land Title Office provided by the applicants, which I find lists the applicants P.S., L.S, and G.S., as the current owners of the rental unit, as executors of the Will of R.S. I have also reviewed the Will and I agree with Legal Counsel for the applicants that the Will does not convey any current ownership interest on the Tenant F.S. Further to this, I note that the Tenant F.S. did not provide any evidence or testimony that they contest the Will as written or that they have commenced any action in the BC Supreme Court in relation to the Will or any ownership interest in the property, should it exist. As a result, of the above, I am satisfied that the Tenant F.S. does not have any ownership interest in the rental unit and that this Application is not substantially liked to a matter that is before the Supreme Court pursuant to section 58 (2) (c) of the *Act*.

Based on the above, I am satisfied that I have jurisdiction to hear and decide this matter against both parties listed as respondents in the Application. As a result, the hearing proceeded against both respondents, who are therefore referred to throughout the decision as the Tenants. The Applicants have similarly been referred to as the Landlords throughout the decision.

Amendment

The Landlord L.S. and Legal Counsel for the Landlords stated that no rent has been paid since the Application was filed and that additional rent in the amount of $1,000.00 per month is now owed for March, April, and May of 2020. As a result, they sought to amend the Application in the hearing to increase the monetary claim amount for outstanding rent to $9,000.00

Rule 4.2 of the Rules of Procedure states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing and that if an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

The parties agreed in the hearing that no rent has been paid since the Application was filed. Pursuant to Rule 4.2 of the Rules of Procedure, I therefore amend the Application to increase the monetary amount sought by the Landlords for outstanding rent to $9,000.00.

Issue(s) to be Decided

Are the Landlords entitled to an Order of Possession pursuant to sections 46 (5) and 55 (2) (b) of the *Act*?

Are the Landlords entitled to $9,000.00 in unpaid rent pursuant to sections 26 and 67 of the *Act*?

Are the Landlords entitled to recovery of the $100.00 filing fee pursuant to section 72 of the *Act*?

Background and Evidence

There was no dispute between the parties that a six month fixed-term tenancy agreement began between B.A.S., who I have already found was an authorised agent for the property owner, and the Tenants F.S. and B.S., on September 9, 2017, and that rent in the amount of $1,000.00 was due on the first day of the month under the tenancy agreement.

The parties agreed that no rent has been paid for the following months:

- September 2019;
- October 2019;
- November 2019;
- December 2019;
- January 2020;
- February 2020;
- March 2020;
- April 2020; and
- May 2020

Although the Tenant F.S. agreed that $8,000.00 in rent is owed for October 1, 2019 – May 31, 2020, they stated that no rent was due for September 2019 as they received a Two Month Notice to End Tenancy for Landlord's Use of Property in July 2019, paid full rent for July and August 2019, and were never provided with one month's compensation as required by the *Act*. The Landlord and Legal Counsel for the Landlord agreed that a Two Month Notice was served in July 2019 but argued that the Tenants were not entitled to compensation as they did not vacate the rental unit in compliance with the Two Month Notice and the tenancy did not end as a result of the Two Month Notice. While the Tenant agreed that neither they nor the Tenant B.S. vacated the rental unit in compliance with the Two Month Notice, they stated that the *Act* is clear that if a tenant is served with a Two Month Notice, which they were, they are entitled to one month's compensation.

The Landlord and their Legal Counsel stated that as rent for 6 months was outstanding, a 10 Day Notice was served on the Tenants by registered mail and provided me with the registered mail tracking number. Tracking for the registered mail shows that it was received February 11, 2020, and although F.S. stated that they were not residing in the rental unit at that time, as they moved out in December of 2019 or January of 2020, the Tenant B.S. received the 10 Day Notice and passed it on to them.

The 10 Day Notice in the documentary evidence before me is in writing, is signed and dated February 7, 2020, has an effective date of February 22, 2020, lists the address for the rental unit, and states that as of February 1, 2020, the Tenants owed $6,000.00 in outstanding rent. The 10 Day Notice is also in the approved form.

The parties agreed that no amount has been paid towards the outstanding rent listed on the 10 Day Notice and that neither Tenant has filed an application with the Branch seeking to dispute the 10 Day Notice. As a result, the Landlord sought an Order of

Possession for the rental unit. In the hearing the Landlord agreed to receive an Order of Possession for May 30, 2020, should one be granted.

Although the Tenant F.S. stated they do not reside in the rental unit and agreed that a large amount of outstanding rent is owed, they stated that they still have some possessions at the property and that their son, B.S. simply has not moved out as they have nowhere to go and are on a limited income.

Analysis

Section 26 (1) of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the *Act*, the regulations or the tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent.

In the hearing the parties agreed that rent in the amount of $1,000.00 is due on the first day of each month and that no rent has been paid for the period of September 1, 2019 – May 31, 2020. Although the Tenant argued that they were entitled to withhold September 2019 rent due to service of a Two Month Notice in July 2019, I do not agree. While the parties agree that a Two Month Notice was served in July 2019, the Tenants never vacated the rental unit in compliance with the Two Month Notice. Although the Tenant stated that the requirement for compensation is contingent only upon service of the Two Month Notice, not compliance with it, I do not agree. Section 51 (1) of the *Act* specifically ties the provision of the one month's compensation to the effective date of the Two Month Notice, which I find implies that the legislature intended the compensation to be provided only to tenants whose tenancy ended as a result of the Two Month Notice. If this were not the case, the legislature could simply have stated that tenants who are served with a Two Month Notice are entitled to One Month's Compensation, without tying it to the effectiveness of the notice in any way.

Further to this, section 51(1.1) of the *Act* goes on to say that tenants may withhold the last month's rent as compensation under 51 (1), which further suggests that the compensation is tied to the ending of the tenancy as a result of the Two Month Notice, not simply service of the notice itself. I find that it is not reasonable to conclude, on a thorough reading of the related sections of the *Act* as a whole, that the Tenant's interpretation of the *Act* is correct and that tenants are to receive compensation simply for being served with a Two Month Notice, regardless of whether the notice is valid or they vacate the rental unit as a result of the notice. As a result, I dismiss the Tenant's

argument that they were entitled to withhold any amount of rent as a result of being served with the Two Month Notice.

Based on the above, I find that the Tenants were obligated to pay rent on time and in full for the period of September 1, 2019 – May 31, 2020. As the parties were in agreement that no rent has been paid for this period, I find that the Landlords are entitled to the $9,000.00 sought for unpaid rent. Although the Tenant F.S. stated that they have not resided in the property for some time, they acknowledged that they have possession on the property and Residential Tenancy Policy Guideline 13 states that co-tenants under the same tenancy agreement are jointly and severally responsible for payment of rent when it is due and are usually jointly and severally liable for any debts or damages relating to the tenancy, unless the tenancy agreement states otherwise. As a result, I find that both Tenants are responsible for the above noted outstanding rent amount.

The Landlord and their Legal Counsel stated that the10 Day Notice was served on the Tenants by registered mail at the rental unit and provided me with the registered mail tracking number. Tracking for the registered mail shows that it was received February 11, 2020, and although F.S. stated that they were not residing in the rental unit at that time, as they moved out in December of 2019 or January of 2020, the Tenant B.S. received the 10 Day Notice and passed it on to them. As a result, I find that the Tenants were served with the 10 Day Notice on February 11, 2020, the date it was received by registered mail.

In the hearing the Tenant acknowledged that neither they nor the Tenant B.S. paid any portion of the rent listed on the 10 Day Notice or filed an Application for Dispute Resolution with the Branch seeking to dispute the 10 Day Notice. Section 46 (5) of the *Act* states that 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 is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.

Based on the above, I find that the Tenants were conclusively presumed to have accepted the 10 Day Notice and were therefore required to vacate the rental unit by the effective date, February 22, 2020, and that the Landlords are therefore entitled to an Order of Possession for the rental unit. As the effective date has passed, and the Landlords expressed willingness to allow the Tenant(s) to remain in the rental unit until

May 30, 2020, the Order of Possession will be effective at **1:00 P.M. on May 30, 2020, after service of the Order on the Tenants.**

As the Landlords were successful in their Application, I award them recovery of the $100.00 filing fee pursuant to section 72 of the *Act*. Pursuant to section 67 of the Act, the Landlords are therefore entitled to a Monetary Order in the amount of $9,100.00.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the Landlords effective at **1:00 P.M. (Pacific Standard Time) on May 30, 2020, after service of this Order** on the Tenants. The Landlords are provided with this Order in the above terms and the Tenants must be served with this Order as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to section 67 of the *Act*, I grant the Landlords a Monetary Order in the amount of $9,100.00. The Landlords are provided with this Order in the above terms and the Tenants must be served with this Order as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order 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: May 14, 2020

Residential Tenancy Branch