



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") for an order of possession of the rental unit for the Tenant; and to recover the \$100.00 cost of his Application filing fee.

The Tenant, the Landlord, the Landlord's wife, V.H., and the Landlord's daughter, T.F., appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process. During the hearing the Tenant and the Landlord were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

In the hearing, the Landlord confirmed that he received the Tenant's Application, Notice of Hearing, and documentary evidence and that he had time to review it. The Landlord said he sent his documentary evidence to the Tenant and the RTB via courier, rather than via registered mail through Canada Post. However, the Landlord said he also taped these documents to the door of the rental unit, although, he acknowledged that the Tenant was no longer living there at that time, as the Landlord had changed the locks. The Landlord said he emailed the Tenant to let him know that there were documents for him with the courier and taped to the rental unit door. The Tenant said he obtained these documents the day before the hearing, but that he did not have sufficient opportunity to review them.

I advised the Landlord that his submissions were not before me, but I allowed him to upload the documents to the RTB site, subsequent to the hearing, since they had been served on the Tenant, although late.

Preliminary and Procedural Matters

The Parties provided their email addresses in the hearing and confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing.

At the outset of the hearing, I asked the Parties for the spelling of their names, and the Landlord corrected the spelling of his name from how the Tenant had identified him in the Application. The Landlord advised me of the proper spelling, so I amended his name in the Application, pursuant to section 64(3)(c) and Rule 4.2.

Issue(s) to be Decided

- Is the Tenant entitled to an order of possession under the Act?
- Is the Tenant entitled to recovery of the \$100.00 Application filing fee?

Background and Evidence

The Parties agreed that the periodic tenancy began on August 1, 2017, with a monthly rent of \$3,000.00, due on the first day of each month. The Parties agreed that the Tenant paid the Landlord a security deposit of \$1,500.00, and no pet damage deposit. The Landlord said he does not have the security deposit any more, because he used it to pay for a shortfall in rent.

The Tenant said that he has been homeless for a month, after the Landlord changed the locks of the rental unit on July 31, 2020, when the Tenant was at the hospital with his wife. The Tenant said that on July 23, 2020, the Landlord served him with a 60 Day Notice to End Tenancy for Landlord's Use, and a 30 Day Notice to End Tenancy for Cause. The Tenant said that seven days later, the Landlord locked him out of the rental unit by changing the locks without advising the Tenant or providing copies of the new keys.

The Landlord said that he has had a number of conversations with the Tenant about ending the tenancy. He said:

Finally, he agreed that they would go on July 31. You have emails and texts that

he agreed to move out and had already moved his belongings....The upstairs was completely empty of personal belongings on July 31. He had already moved out, and he changed his mind at the last minute. He's trying to extort the amount of rent he didn't pay during Covid. He agreed in writing to move out, which he has done.

The Tenant said:

Re furniture. Even in their docs, it shows furniture upstairs. The patio was full of furniture. You said I left it completely empty. There are \$700.00 of my wife's medications in the fridge, there is frozen food – not just condiments. Even their own pictures show frozen food.

They're trying to scare me into leaving. He also took it upon himself to contact my employer. He told me that 'you're not getting away with anything, [K.]. I have a friend at the MLA's office, at the RTB, and at the police department.' He even said he knew Hells Angels.

The Tenant submitted a copy of a letter he said he sent to the Landlord via registered mail on July 25, 2020, which included the following:

This letter is a formal request you stop the intimidation, and inform you the mutual agreement to end tenancy has not been agreed to and we will not be leaving on July 31, 2020, as you requested.

The Tenant submitted a copy of the One Month Notice to End Tenancy for Cause, dated July 23, 2020 ("One Month Notice"). The Landlord had stated on this form that the effective vacancy date was July 31, 2020, and he wrote: "As Tenant confirmed in writing". The vacancy date is inconsistent with the requirements of the Act; however, it is automatically corrected by section 53 of the Act to be August 31, 2020.

The One Month Notice indicates that it was served on the Tenant on July 23, 2020, but the second page on which a landlord is to set out the grounds of the notice has been folded over, so I cannot see the Landlord's grounds for serving the One Month Notice.

The Tenant also submitted a copy of the Two Month Notice to End Tenancy for Landlord's Use dated July 23, 2020 ("Two Month Notice"). The Two Month Notice gives the effective vacancy date of July 31, 2020, which again is inconsistent with the Act, and is automatically corrected by section 53 of the Act to be September 30, 2020.

The Landlord submitted documents setting out his position in this matter. This included a statement: “The respondent can prove that the tenant AGREED IN WRITING to move out by July 31, 2020 latest. See email on June 20, 2020 (page (8) and texts on July 7, 8, 9 and 18 2020 (page 19 & 21).” [emphasis in original]

Page 8 of the Landlord’s first submission contains an email from the Landlord to the Tenant, in which the Landlord advises the Tenant of the Landlord’s financial situation, as affected by the Tenant’s outstanding rent owing to the Landlord. There is nothing in this email from the Tenant about moving out on July 31, 2020.

On pages 19 through 22, the Landlord has submitted discussions between the Parties via text messaging. I could not read the Landlord’s texts, which were in green, but since his point was that the Tenant agreed in (text) writing to the end of the tenancy, I infer that it is the Tenant’s texts that support the Landlord’s position.

The Tenant’s texts address his time at the hospital with his wife, more than the ongoing tenancy. The last text on pages 21 and 22 seems relevant. In this text the Tenant states:

July 21, 2020
[Landlords]

It is not our desire to cause either of you any hardship, however, the position you have put us in during this pandemic is certainly a hardship on us. After our conversation yesterday, I called BC residential tenancy branch and explained our circumstances in their entirety. The agreement you asked me to sign is the same one you sent by mail as it has been used for quit [sic] some time. The top portion of the form is simply an explanation [of] the possible repercussions of agreeing to the form.

I took the time to explain to the tenancy branch the circumstances that we find ourselves in and I was informed that if it is not mutually agreeable then a signature is not required and you would be able to serve us with a proper notice to end tenancy at the appropriate time and with the appropriate notice.

[B.] I think we both know that moving during a pandemic with a terminally ill wife is a real hardship. My wife is unable to help in the moving process at all and is required to self-isolate, as the chemotherapy has compromised her immune system to the point it is considered critical. I know you . . . [portion not provided]

...allow us to make just the one move to a new home.

As discussed earlier, if this is not agreeable we would be willing to vacate the home on July 31, 2020 at noon without proper notice to end tenancy. We would leave the lower level completely furnished. If you choose the later [sic], we would leave and there would be no financial obligations by either party.

I would be more than [sic] happy to discuss this with you.

Regards,

[K.]

There were a number of indecipherable texts from the Landlord that followed, and then the following text from the Tenant:

July 30, 2020

[Landlord]

The notice taped to the door is not considered a legal notice and we will not be moving out as you have directed. I am sure you already know that, but have decided to try to bully your way into the home. You do have the right to conduct a monthly inspection and I am sure you will take the opportunity tomorrow to do that.

You do not however, have the legal right to do anything other than [sic] a monthly inspection. I have spoken with the BC landlord and tenancy branch and will follow their advice and rules. I am assuming that you have respect for the laws and will do the same. If you deviate from the rules as set out by BC landlord and tenancy, I will be forced to file the appropriate paperwork and take whatever means necessary to make sure you comply with the law.

This could have been dealt with in a much easier manner if you were truthful and willing to discuss this in a civil manner. We will not be at home tomorrow at noon as we are at the hospital. Please lock all the doors when you are done.

Regards,

[Tenant]

The Landlord said that the Tenant had abandoned the property by July 31, 2020, when the Landlord did an inspection and changed the locks. The Landlord submitted a number of photographs showing that the upstairs portion of the rental unit was mostly empty of furniture, of clothes in closets, and of drawer and cupboard contents.

The Landlord's photographs revealed that the downstairs portion of the residential property had furnishings throughout. One of the beds in this portion of the house was unmade. Also, the Landlord's photographs show that there were a number of items on shelves and on the floor of the garage. The Landlord acknowledged that there were items in the upstairs refrigerator and freezer, although he labelled these as "only condiments" and "freezer food was old, April." He indicated that "...all freezer items were moved into the downstairs freezer for safe keeping." In the later photographs of the two-car garage, the Landlord indicated that he had moved the Tenant's belongings to the garage. It appears that this garage was almost full of furniture, plants, garbage bags of items, and miscellaneous other items set aside there.

I asked the Parties for any last statements at the end of the hearing. The Landlord said the following:

[My wife] and I have serious financial issues with this house. We are hoping this judgment will show he is responsible for \$6,000.00+ in rent and \$1,500.00+ in utilities, There's well over \$12,000.00 owing for this tenancy. We expect a prompt payment plan with . . . if this judgment does not go favourably for us, we will appeal to [Judicial Review]. There's no reason for any family to go into receivership or bankruptcy for unpaid rent. You know you never got an eviction from me. You have taken this and twisted it. I am very displeased and surprised.

The Tenant said:

The problem is he served me with a notice, and seven days later, while I was at the hospital, he said the locks were changed, and he said we abandoned the place. All our belongings are there, and the fridge is full of food. Our clothes were there; my wife's medication was there. To say it was abandoned is not accurate, and he knows it. There's two complete bedrooms full of furniture, and furniture in the living room; the kitchen is full of furniture. My wife's medications were there, which had to be replaced. It's obvious that this is a misrepresentation.

See the photographs showing you the fridge full of food, showing the upstairs patio with all the furniture. . . . To say we abandoned the house - that's factually

misleading. I told him we would not be leaving. I posted a letter on the door before I went to the hospital. We must give them access of the home to look at it.

The Landlord's daughter said:

The bottom line: he agreed to move out prior to the July 22 visit. That visit confirmed that he had moved out. As for July 31, he was long gone; he had moved out. I called the police just to keep the peace. . . .

All of his things were moved out on the 31st. He had moved. His stuff was out already.

After our visit on July 22, I felt threatened. It was clear . . . he said he didn't take the furniture, because 'I'm not moving out', but he changed the agreement. So we served the notices. We served eviction notices on July 23, and changed the locks seven days later to secure the property.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

For a party to end a tenancy under the Act, section 44 sets out the following requirements:

How a tenancy ends

44 (1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

(i) section 45 [*tenant's notice*];

(i.1) section 45.1 [*tenant's notice: family violence or long-term care*];

(ii) section 46 [*landlord's notice: non-payment of rent*];

(iii) section 47 [*landlord's notice: cause*];

(iv) section 48 [*landlord's notice: end of employment*];

(v) section 49 [*landlord's notice: landlord's use of property*];

(vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];

- (vii) section 50 [*tenant may end tenancy early*];
- (b) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
- (c) the landlord and tenant agree in writing to end the tenancy;
- (d) the tenant vacates or abandons the rental unit;
- (e) the tenancy agreement is frustrated;
- (f) the director orders that the tenancy is ended;
- (g) the tenancy agreement is a sublease agreement.

On March 25, 2020, the Provincial Government issued a media release indicating that there would be a moratorium on evictions in British Columbia, as a result of the Covid-19 pandemic. Further, the COVID-19 (*Residential Tenancy Act* and *Manufactured Home Park Tenancy Act*) (No. 2) Regulation ("C19 Tenancy Regulation"), made under the *Emergency Program Act* and the *COVID-19 Related Measures Act*, is relevant in this proceeding. Section 7 of the C19 Tenancy Regulation states:

Notices to end tenancy

7 (1) As an exception to sections 44 (1) (a) (iii) and 47 (1) [*landlord's notice: cause*] of the *Residential Tenancy Act* and any other provision of the *Residential Tenancy Act* and the Residential Tenancy Regulation, a landlord must not give a tenant notice to end a tenancy under section 47 (1) of the *Residential Tenancy Act* in respect of a reason that relates to the affected rent being unpaid, including one or more of the following reasons:

- (a) one or more payments of the affected rent are late;
- (b) the lawful right or interest of the landlord is the right or interest to receive the affected rent;
- (c) the affected rent being unpaid is what put the landlord's property at significant risk;
- (d) the material term with which the tenant failed to comply is the payment of the affected rent;
- (e) the order of the director with which the tenant has not complied is a monetary order for the affected rent.

(2) For certainty, the payments in subsection (1) (a) of this section do not include an instalment to be paid under a repayment plan.

The C19 Tenancy Regulation provides that a landlord must not give a tenant a One Month Notice to End Tenancy for Cause under section 47 of the Act in respect of a reason that relates to affected rent being unpaid, including one or more of the following reasons:

- One or more payments of the affected rent are late. For example, if the tenancy agreement stipulates that rent is due on the first of each month, and the tenant paid their rent late for the months of April, May, June and July 2020, the landlord cannot end the tenancy for late payment of rent during those months. A landlord can, however, give a notice to end tenancy for cause if the tenant is repeatedly late in making installment payments under a repayment plan or prior agreement.
- The tenant has jeopardized a lawful right or interest of the landlord and the lawful right or interest of the landlord is the right or interest to receive the affected rent.
- The tenant put the landlord's property at significant risk by not paying the affected rent.
- The tenant breached a material term of the tenancy agreement and the material term is the payment of the affected rent.
- The tenant has not complied with an order of the director, and that order is a monetary order for the affected rent.

A One Month Notice to End Tenancy that is given for one of these reasons or otherwise is related to affected rent being unpaid is of no effect. An Order of Possession will not be granted to a landlord in these circumstances.

I find it clear from the Landlord's evidence before me that he wanted the Tenant out of the rental unit, because of the ongoing cost of the Tenant's failure to pay full rent when due.

I find that the Notices to End Tenancy that the Landlord served on the Tenant on July 23, 2020, were not valid, further to the moratorium on evictions in British Columbia. This is supported by the Covid-19 Regulation that was enacted prior to the hearing.

In terms of the Landlord's claim that the Tenant had abandoned the residential property, I find this to be inconsistent with the Landlord's own photographs of the furnishings left in the lower portion of the rental unit, the patio furniture left on the upper balcony, the food left in the upper level refrigerator and freezer, and the possessions left in the

garage. Further, when moved from the rental unit, these possessions almost filled a two-car garage. I find this further defies the claim that the rental unit was abandoned by the Tenants. In addition, the undisputed evidence before me is that the Tenant left a notice on the front door of the rental unit when he and his wife left to go to the hospital, confirming that they had not, in fact, moved out, nor that they intended to do so. Further, I find that while a text message may help determine a party's intention at one point in time, I find that it does not equate to a Mutual Agreement to End the Tenancy form.

I find the Landlord having changed the locks to the rental unit, while the Tenant and his wife were at the hospital is unconscionable. The Landlord is cautioned to learn and follow his obligations under the Act for any future tenancy matters. If ever in doubt, a call to the RTB to speak with an information officer would assist.

Section 54 of the Act states that a tenant may apply for an order of possession, if the tenant, under the terms of a tenancy agreement, is entitled to occupy the rental unit, and has not been allowed to do so by the landlord. Section 54(2) states that the director may grant an order of possession to a tenant under this section before or after the date on which the tenant is entitled to occupy the rental unit under the tenancy agreement, and the order is effective on the date specified by the director.

In the case before me, I find that the Tenant submitted sufficient evidence establishing that he is entitled to the occupancy and possession of the rental unit in question. I find further that the evidence shows that the Landlord has not provided access to the rental unit, as agreed upon.

Accordingly, I Order the Landlord to provide the Tenant with immediate possession of the rental unit, including unfettered access to the residential property. I further grant the Tenant an Order of Possession for the rental unit, effective immediately. The Order of Possession is enclosed with the Tenant's Decision and must be served on the Landlord.

Given the Tenant's success in his Application, I also award him with recovery of the \$100.00 Application filing fee pursuant to section 72 of the Act. The Tenant is authorized to deduct \$100.00 from one future rent payment in full satisfaction of this award.

Conclusion

The Tenant is successful in his Application for an Order of Possession of the rental

unit. The Tenant submitted sufficient evidence establishing that he is entitled to the occupancy and possession of the rental unit.

The tenancy continues, and the Landlord is Ordered to immediately provide the Tenant with the rental unit keys and access to the rental unit.

The Landlord may only end the tenancy in accordance with the Act.

Should the Landlord refuse to grant access to the Tenant, the Tenant must serve the Landlord with the Order of Possession. The Order of Possession may be filed with the Supreme Court of British Columbia to be enforced as an Order of that Court.

The Tenant is also awarded recovery of the \$100.00 Application filing fee, pursuant to section 72 of the Act. The Tenant is authorized to deduct \$100.00 from one future rent payment in full satisfaction of this award.

The Decision will be emailed to both Parties and the Order of Possession will be emailed to the Tenant only for service on the Landlord.

The Parties are encouraged to review the Covid-19 Regulation on our website and call our office for details of developing a repayment plan for affected rent. The Tenant is cautioned that if he fails to pay one or more installments of a valid repayment plan, the Landlord may end the tenancy by giving the Tenant a 10 Day Notice to End Tenancy for Unpaid Rent.

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: September 1, 2020

Residential Tenancy Branch