



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Brown Brothers Agency and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR-MT, OLC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- more time to cancel a Notice to End Tenancy, pursuant to section 66;
- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent, pursuant to section 46; and
- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62.

The tenant and three agents of the landlord attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties agree that the landlord was served with the tenant's application for dispute resolution via registered mail. I find that the landlord was served in accordance with the *Act*.

I note that section 55 of the *Act* requires that when a tenant submits an application for dispute resolution (the "application") seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the application is dismissed or the landlord's notice to end tenancy is upheld and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Preliminary Issue- Service of Tenant's Evidence

The tenant testified that her evidence was served on the landlord in the same package as her application for dispute resolution. The landlord's agents testified that no evidence was included in the tenant's application for dispute resolution.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

The tenant bears the burden of proof to establish that her evidence was served on the landlord. As the landlord's agents denied receipt of the tenant's evidence, I find that the tenant has not proved service of that evidence, on a balance of probabilities.

Section 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the "Rules") states that evidence not submitted at the time of Application for Dispute Resolution that are intended to be relied on at the hearing must be received by the respondent not less than 14 days before the hearing. I find that since the tenant has not proved that the tenant's evidence was received by the landlord, the tenant's evidence is excluded from consideration.

The tenant did not dispute service of the landlord's evidence. I find that the landlord's evidence was sufficiently served, for the purposes of this *Act*, in accordance with section 71 of the *Act*.

Preliminary Issue- Severance

Residential Tenancy Branch Rule of Procedure 2.3 states 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.

It is my determination that the priority claim regarding the 10 Day Notices to End Tenancy for Unpaid Rent and the continuation of this tenancy are not sufficiently related

to the tenant's application for an Order for the landlord to comply with the *Act* to warrant that they be heard together. The parties were given a priority hearing date in order to address the question of the validity of the 10 Day Notices to End Tenancy for Unpaid Rent.

The tenant's other claim is unrelated in that the basis for it rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the 10 Day Notices to End Tenancy for Unpaid Rent. I exercise my discretion to dismiss the tenant's claim for an Order for the landlord to comply with the *Act*, with leave to reapply.

Issues to be Decided

1. Is the tenant entitled to more time to cancel a Notice to End Tenancy, pursuant to section 66 of the *Act*?
2. Is the tenant entitled to cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent, pursuant to section 46 of the *Act*?
3. If the tenant's application is dismissed or the landlord's Notice to End Tenancy is upheld, and the Notice to End Tenancy complies with the *Act*, is the landlord entitled to an Order of Possession, pursuant to section 55 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on April 1, 2020 and is currently ongoing. Monthly rent in the amount of \$1,175.00 is payable on the first day of each month. A security deposit of \$587.50 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The landlord's agents testified that the tenant has not paid any rent for the duration of this tenancy except for a BC rent subsidy in the amount of \$300.00, which was paid for five months. The tenant ledger entered into evidence shows that the \$300.00 payments

were received for five months from May to August 2020. The ledger, which shows payments from May to November 2020 shows that no other rent payments were received by the landlord.

The landlord testified that the first 10 Day Notice to End Tenancy for Nonpayment of Rent (the “First Notice”) was posted on the tenant’s door on September 15, 2020. A witnessed proof of service document confirming the above was entered into evidence. The First Notice was entered into evidence and has an effective date of September 28, 2020. The tenant testified that she received the First Notice sometime after that but could not recall when. The tenant testified that she did not file an application to dispute the First Notice within the proper time limit because she was away receiving chemotherapy treatment. While the tenant’s evidence was not considered, I note that it did not contain any proof of the above treatment, or proof of an inability to apply within the required timelines.

The landlord testified that the second 10 Day Notice to End Tenancy for Nonpayment of Rent (the “Second Notice”) was posted on the tenant’s door on October 2, 2020. A witnessed proof of service document confirming the above was entered into evidence. The Second Notice was entered into evidence and has an effective date of October 15, 2020. The tenant testified that she received the Second Notice on October 4, 2020.

The tenant applied for dispute resolution on October 5, 2020.

The tenant testified that the Ministry paid the landlord directly for her rent. The tenant testified that the September 2020 payment was cashed but something happened to the October and November payment, but she was not sure what. The tenant testified that she had not enquired about the December rent payment. The landlords’ agents testified that no rent payments have been received.

The landlord’s agents testified that they are seeking an Order of Possession, a Monetary Order for unpaid rent and authorization to retain the tenant’s security deposit.

Analysis

Section 66 of the *Act* states that an arbitrator may extend a time limit established by this Act only in exceptional circumstances. Policy Guideline 36 states:

The word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse. Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.

I find that the tenant has not proved that she was unable to apply to cancel the First 10 Day Notice within five days of its receipt due to exceptional circumstances as no proof of exceptional circumstances was entered or admitted into evidence. I dismiss the tenant's claim for more time to file for dispute resolution. I find that the tenant was deemed served with the First 10 Day Notice on September 18, 2020, three days after it was posted, in accordance with section 88 and 90 of the *Act* as the tenant acknowledges receipt but could not recall on what date.

Section 46(4) and (5) of the *Act* states:

- (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.

Based on the testimony of the landlords' agents and the tenant ledger entered into evidence, I find that the tenant failed to pay rent when it was due and failed to pay the outstanding rent within five days of receiving the First Notice. While it is possible that a mix up with the Ministry payments occurred, I accept the landlord's agents' testimony that rent was not paid to the landlord. The payment of rent is the tenant's responsibility, the tenant is responsible for ensuring their payments are properly set up and are reaching the landlord.

The tenant has not made application pursuant to section 46(4) of the *Act* or paid rent within five days of receiving the First Notice. In accordance with section 46(5) of the *Act*, the tenant's failure to take either of these actions within five days led to the end of this tenancy on the effective date of First Notice. I therefore dismiss the tenant's application to cancel the First 10 Day Notice.

I also note that section 46(1) of the *Act* states:

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.

Pursuant to section 46(1) of the *Act* and my above findings, I uphold the landlord's First Notice because the tenant did not pay rent when it was due or within five days of receiving the First Notice. On this basis, the tenant's application to cancel the First Notice is also dismissed.

Section 55 of the *Act* states that if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if:

- (a)the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
- (b)the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I find that since the First Notice complies with section 52 of the *Act* and the tenant's application to cancel the First Notice was dismissed, the landlord is entitled to a two-day Order of Possession.

As I have determined that this tenancy is ended based on the First Notice, I decline to consider the Second Notice.

In the hearing the landlord's agents sought a Monetary Order and authorization to retain the tenant's security deposit. I note that this is the tenant's application, and a monetary claim and a claim for authorization to retain the security deposit are not properly before me and therefore cannot be awarded at this time.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenant**. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: December 11, 2020

Residential Tenancy Branch