



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR
 OPU-DR, OPUM-DR, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was filed by the Tenants under the Residential Tenancy Act (the Act), on October 20, 2020, seeking:

- Cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice).

I note that section 55 of the Act requires that when a tenant submits an 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 and the landlord has issued a notice to end tenancy that is compliant with section 52 of the Act.

This hearing dealt with a Cross-Application for Dispute Resolution (the Cross-Application) that was filed by the previous owner/landlord (the Landlord) under the Act, on November 2, 2020, seeking:

- An Order of Possession for the rental unit based on the 10 Day Notice;
- Outstanding rent and utilities; and
- Recovery of the \$100.00 filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant G.T., an agent for the Tenants G.T. (the Agent), the former owner/landlord L.J. (the Landlord), Legal Counsel for the Landlord, and the process server who acted on behalf of the Landlord with regards to service of the 10 Day Notice, S.M. All testimony provided was affirmed. The parties acknowledged receipt of each other's Applications and the documentary evidence before me as well as the Notice of Hearing. As neither party raised concerns with regards to service or timelines of the above noted

documents, the hearing proceeded as scheduled and the documentary evidence before me from both parties was accepted for consideration. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email address confirmed in the hearing.

Preliminary Matters

Preliminary Matter #1

Although the Tenant and the Tenant's Agent, who is also their family member, argued that the Branch does not have jurisdiction to hear and decide the Applications, as the Tenants have an ownership interest in the property, I am not satisfied that this is the case.

Although the Tenants' Agent repeatedly claimed that there was a family agreement in place with the previous owners regarding ownership interest and that this is a family matter, neither the Tenant nor their Agent provided any documentary evidence to support their claim that the Tenants have an ownership interest in the property.

Legal Counsel for the Landlord stated that there is no ownership interest in the property on behalf the Tenants, as the property was sold by the Tenant S.T. in 2003 to the Landlord L.J., who is the spouse of S.T.'s brother J.T., and R.T., who is the son of L.J. and J.T. Neither the Tenant nor the Tenants' Agent disagreed that the Tenant S.T. sold the property to L.J. and R.T. in 2003 and Legal Counsel for the Landlord provided documents related to this sale, including but not limited to, the Contract of Purchase and Sale, Land Title transfer documents, an paperwork from legal counsel at the time of the sale.

Further to this, Legal Counsel for the L.J. stated that the property was subsequently sold by L.J. and R.T. to a new owner in December 2020 and that the current Owner (W.A.) is not related to the Tenants or the Agent. Legal Counsel for L.J. stated that the

new Owner was supposed to take possession of the property on December 1, 2020, as vacant possession of the property was a requirement of the Contract of Purchase and Sale, but that they have been unable to do so as the Tenants have not vacated the property. The Landlord and their Legal Counsel provided documents related to this sale, including but not limited to, a title search, the Contract of Purchase and Sale, and a written request by the Owner (purchaser) that the Landlord give the Tenants a Two Month Notice to End Tenancy for Landlord's Use of Property (a Two Month Notice).

Legal Counsel for L.J. stated that although L.J. was still the owner and landlord for the property at the time the Cross-Application was filled in relation to the 10 Day Notice, as ownership of the property has now transferred to the new Owner, L.J. has been authorized by the Owner to act as an agent on their behalf in terms of gaining possession of the rental unit. Legal Counsel for L.J. also stated that L.J. is currently required to pay the Owner \$2,000.00 per month that the Owners does not have vacant possession of the property. As there is no documentary or other evidence before me to the contrary, I accept that L.J. is acting as an agent for the Owner in relation to obtaining an Order of Possession for the rental unit. As L.J. was the landlord at the time the Application was filed and is acting as an agent for the new Owner in terms of the tenancy, I have referred to them as the Landlord throughout this decision.

Despite the above, the Tenants' Agent argued at the hearing that subsequent to the sale of the property by S.T. to L.J. and R.T., an agreement had been entered into between the Tenant S.T. and J.T, L.J.'s spouse and R.T.'s father, with regards to ownership interest in the property on behalf of S.T.

Legal Counsel for the Landlord stated that a previous arbitrator with the Branch declined jurisdiction in relation to this tenancy and these parties, as the matter of ownership interest in the property on behalf of the Tenants was before the BC Supreme Court. Legal Counsel provided me with a copy of this decision dated September 9, 2020. However, Legal Counsel for the Landlord stated that the matter before the Supreme Court of British Columbia was withdrawn by the Tenants and the Agent as it was without merit and therefore there is no ownership interest in the property on behalf of the Tenants or the Agent. Legal Counsel for the Landlord provided significant documentary evidence in support of this claim, including copies of court documents, affidavits, financial records, email correspondence and a copy of the certificate of discontinuance of proceeding for the matter filed by the Tenants (S.T. and G.T.) and their Agent (G.T.) in the Supreme Court of British Columbia against the Landlord (L.J.), their spouse (J.T.) and their son (R.T.), regarding ownership interest in the property.

Although the Tenants' Agent disagreed that the matter was withdrawn as there was no merit to the ownership interest claim, they acknowledged that the matter was none the less withdrawn.

Based on the above, I am not satisfied on a balance of probabilities that the Tenants have any ownership interest in the property or that the matters claimed in the Applications are substantially linked to a matter that is currently before the BC Supreme Court. A copy of a residential tenancy agreement, signed by the parties on May 12, 2006, was submitted for my review and consideration and the parties agreed at the hearing that this tenancy agreement was signed. The tenancy agreement lists L.J. as the landlord, and S.G. and G.T. as the tenants. The tenancy agreement states that the month to month tenancy commenced on June 1, 2006, that rent in the amount of \$1,200.00 is due in advance by the first day of each month and that a security deposit in the amount of \$600.00 was required.

Based on the above, I am satisfied that a residential tenancy to which the Act applies exists, which has not been excluded under section 4.

During the hearing the Tenants' Agent also argued that the tenancy agreement should not be considered valid as G.T. was under 19 when they entered into the tenancy agreement. Section 3 of the Act states that a person who has not reached 19 years of age may enter into a tenancy agreement or a service agreement, and the agreement and this Act and the regulations are enforceable by and against the person despite section 19 of the Infants Act. As a result, I find that G.T. is bound by the terms of the tenancy agreement, as well as the Act and the regulations, despite having been under the age of 19 when they entered into the tenancy agreement. In any event, even if I had found that the tenancy agreement, Act and regulations were not enforceable against G.T., which I have not found, the other Tenant, S.T. was not under the age of 19 and I therefore find that the tenancy agreement, the Act and the regulations would still have been enforceable against S.T.

Based on the above, I therefore find that a tenancy to which the Act applies exists, and I therefore accept jurisdiction to hear and decide the Applications before me from both parties.

Preliminary Matter #2

Although the parties engaged in lengthy settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I

proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the Branch) under Section 9.1(1) of the Act.

Preliminary Matter #3

During the hearing the Landlord and their Legal Counsel withdrew the Landlord's Application for outstanding utilities. The Application was amended accordingly, and the Landlord remains at liberty to reapply, should they wish to do so. This is not an extension of any statutory time period.

Preliminary Matter #4

The Landlord and their Legal Counsel stated that the amount of outstanding rent owed has increased since the date the Landlord's Cross-Application was filed, and therefore sought to amend the amount of outstanding rent owed at the hearing.

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.

The Application was therefore amended pursuant to rule 4.2 of the Rules of Procedure to include additional outstanding rent claimed by the Landlord to be owed by the Tenants since the date the Landlord's Cross-Application was filed.

Issue(s) to be Decided

Are the Tenants entitled to cancellation of the 10 Day Notice? If not, is the Landlord entitled to an Order of Possession pursuant to section 55 of the Act?

Is the Landlord entitled to recovery of outstanding rent and utilities?

Is the Landlord entitled to recovery of the \$100.00 filing fee?

Background and Evidence

A copy of a residential tenancy agreement, signed by the Landlord and the Tenants on May 12, 2006, was submitted for my review and consideration and the parties agreed at

the hearing that this tenancy agreement was signed. The tenancy agreement lists L.J. as the landlord, and S.G. and G.T. as the tenants. The tenancy agreement states that the month to month tenancy commenced on June 1, 2006, that rent in the amount of \$1,200.00 is due in advance by the first day of each month and that a security deposit in the amount of \$600.00 is required. It also states that the Tenants of the upper unit are responsible for 55% of the electric and gas bills and that the tenants of the lower unit are responsible for 45% of these same bills.

At the hearing the parties confirmed that the Tenants moved into the main/upper rental unit of the property as set out in the tenancy agreement and that the \$600.00 security deposit was paid. Legal Counsel for the Landlord stated that as rent has been increased in accordance with the Act several times since the start of the tenancy in 2006, rent is currently set at \$1,547.00 per month. Neither the Tenant nor their Agent disputed this testimony or argued that any of the Notice of Rent Increase were invalid. However, the Agent reiterated their belief that rent is not owed as there is no residential tenancy agreement in place to which the Act applies and argued that the Landlords still owe the Tenants money and therefore rent and utilities were not due.

Legal Counsel for the Landlord stated that although rent was paid reliably for 9 years, the payment of rent became problematic thereafter, ultimately resulting in the issuance of the 10 Day Notice on October 13, 2020. S.M., a process server, appeared at the hearing and provided affirmed testimony that a copy of the 10 Day Notice was personally served on the Tenants and the Agent on October 13, 2020, a subsequent copy of which was also sent to the Tenants by registered mail the same day. The registered mail tracking number was provided for my consideration, which has been recorded on the cover page of this decision.

Although the Agent for the Tenants acknowledged that the 10 Day Notice was personally served on October 13, 2020, they argued that they and the Tenants had concerns about validity of the 10 Day Notice personally served on October 13, 2020, as they did not know the identity of the person who served it. As a result, they argued that the service date for the 10 Day Notice should instead be calculated based on receipt of the 10 Day Notice by registered mail on October 16, 2020. When asked, the Agent acknowledged that neither they nor the Tenants took any action after the 10 Day Notice was personally served on October 13, 2020, to ascertain its validity from the Landlord, to confirm the identity of the person who served it, or to determine if this person was authorized by the Landlord to do so.

The 10 Day Notice in the documentary evidence before me is in writing on the approved form, is signed and dated October 13, 2020, has an effective date of October 28, 2020, and states that \$3,094.00 in outstanding rent was owed as of October 1, 2020. It also states that \$1,589.19 in outstanding utilities are owed as they were not paid after a written demand to pay them was served on September 2, 2020.

The Tenants filed their Application seeking cancellation of the 10 Day Notice on October 20, 2020, and at the hearing the Agent for the Tenants acknowledged that no amount of rent or utilities has been paid to the Landlord towards the outstanding amounts owed according to the 10 Day Notice. However, the Agent argued that no amounts are were owed or due as a result of ownership interest and money owed by the Landlord to the Tenants.

Legal Counsel for the Landlord stated that there is no ownership interest on the part of the Tenants and therefore rent was due in accordance with the tenancy agreement and most recent Notice of Rent Increase. While Legal Counsel for the Landlord agreed that a significant amount of money had previously been held in trust by the Landlord's spouse for S.T., they stated that this amount had been used by S.T. to pay rent and utilities, and that this money ran out in November of 2020.

As a result of the above, the Landlord sought an Order of Possession for the rental unit as soon as possible and recovery of \$7,735.00 in outstanding rent for September 1, 2020 – January 31, 2021, calculated at \$1,547.00 per month.

Although the Tenants and their Agent provided only a copy of the 10 Day Notice and an Xpresspost receipt for my review and consideration at the hearing, the Landlord and their Legal Counsel provided a significant amount of documentary evidence including but not limited to a copy of the written tenancy agreement, copies of Notices of rent Increases served on the Tenants, an accounting of previous money owed from the Landlord to the Tenant S.T. indicating that this money was exhausted as of November 2019, copies of utility bills and a demand letters for the payment of rent and utilities, the Contract of Purchase and sale for the sale of the property by S.T. to L.J. and R.T., a copy of the Landlord Title transfer documents between S.T. and L.J and R.T., the Contract of Purchase and Sale between L.J and R.T and the new Owner W.A., a Land Title Search for the property dated August 21, 2020, showing L.J. and R.T. as the only owners at that time, a copy of a previous RTB decision dated September 9, 2020, wherein another arbitrator declined jurisdiction because the matters were substantially linked to a matter that was before the Supreme Court of British Columbia, written notice from the Owner W.A. that they intend to occupy the property and therefore request that

the Landlord serve a Two Month Notice on the tenants of the property, a certificate of discontinuance of proceeding for the matter filed by the Tenants (S.T. and G.T.) and their Agent (G.T.) in the Supreme Court of British Columbia against the Landlord (L.J.), their spouse (J.T.) and their son (R.T.) regarding ownership interest in the property, copies of email correspondence, and an accounting of the payment of rent, or lack thereof, by the Tenants.

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. Based on the documentary evidence and affirmed testimony before me for consideration, I am satisfied that a tenancy under the Act exists between the Landlord and the tenants, as set out in the preliminary matters section of this decision, and that rent in the amount of \$1,547.00 is due by the first day of each month. I am also satisfied that rent has not been paid by the Tenants for September, October, November or December of 2020, or January of 2021, and that the Tenants did not have a right under the Act to withhold or deduct this rent.

Section 46(4) of the Act states that within 5 days after the date they were served with a Notice to End Tenancy under section 46, a tenant may pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution. Further to this, 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.

During the hearing the Tenants confirmed personal receipt of the 10 Day Notice on October 13, 2020, as a result, I find that the latest date upon which the Tenants could have filed their Application seeking cancellation of the 10 Day Notice was Monday October 19, 2020, as the 5th day after the date it was personally served on the Tenants was a Sunday, a day on which the Branch is not open. As a result, and pursuant to both the Interpretation Act and the Rules of Procedure, I find that the statutory time limit for filing the Application under section 46(4) was therefore extended until the next business day on which the Branch was open, Monday October 19, 2020.

Records at the Branch confirm that the Tenants' Application seeking cancellation of the 10 Day Notice was not filed until Tuesday October 20, 2020, as a result, I find that it

was not filed within the timeline set out under section 46(4) of the Act. Although the Tenant's Agent argued that the system let them apply, therefore the Application should be allowed, I disagree. The Act is clear about how and when an Application seeking cancellation of a 10 Day Notice issued pursuant to section 46 of the Act needs to be filed, and the consequences of failing to pay the amount of outstanding rent or utilities owed according to the 10 Day Notice or failing to file an Application seeking to dispute the 10 Day Notice, within the required time period.

Although section 66(1) of the Act allows me to extend a time limit established by the Act, it also states that I may do so only in exceptional circumstances. During the hearing the Tenants' Agent stated that they delayed filing the Application because they had concerns about the identity of the person who served the 10 Day Notice on them; However, when asked, they acknowledged that neither they, nor either of the Tenants made any effort to contact the Landlord to ascertain the validity of the 10 Day Notice served or to verify the identity of the person who personally served it. I do not find that the alleged concerns of the Tenants or their Agent regarding the identity of the person serving the 10 Day Notice qualifies as an exceptional reason for having not filed the Application within the prescribed period, especially given their acknowledgement that none of them took any action to ascertain the validity of the 10 Day Notice with the Landlord or to determine whether the person who served it was legitimately acting on behalf of the Landlord. Further to this, the Tenants did not seek as part of their Application, an extension to the time limit set out under section 46(4) of the Act. As a result of the above, I declined to grant the Tenants an extension to the legislative timeline for filing the Application seeking cancellation of the 10 Day Notice pursuant to section 66(1) of the Act .

Further to the above, the Tenant's Agent stated that as they received a second copy of the 10 Day Notice by registered mail on October 16, 2020, and as the Application was filed within 5 days after that date, it should be considered as filed on time. I disagree. The receipt of a duplicate copy of the 10 Day Notice by the Tenants and or their Agent by registered mail on October 16, 2020, does not change the fact that they were first served with this document in person on October 13, 2020. As a result, I find that the subsequent service of a duplicate copy of the 10 Day Notice on the Tenants does not extend the legislative time period set out under section 46(4) of the Act, and as a result, I find that the Tenants did not file their Application seeking cancellation of the 10 Day Notice within the required time period set out under section 46(4)(b) of the Act.

Having made this finding, I will now turn my mind to whether section 46(4)(a) of the Act applies. Although the Tenant's Agent argued in the hearing that no rent was owed at the

time the 10 Day Notice was served, this argument was primarily predicated on their position that the Tenant S.T. has an ownership interest in the property, an argument which I have already dismissed in the preliminary matters section of this decision. While the Tenants' Agent also argued that the accounting of money previously owed to the Tenant S.T. by the Landlord according to documents submitted for my review by the Landlord and their Legal Counsel is incomplete, and that money was still owed to the Tenant S.T. by the Landlord at the time the 10 Day Notice was served, no documentary evidence was submitted to support this testimony.

Contrary to this, the Landlord and their Legal Counsel submitted substantial documentation regarding their position that rent was owed as set out in the Background and Evidence section of this decision, including a copy of the Tenancy Agreement, Notices of Rent Increase, demand letters for the payment of rent and Utilities, and an accounting of rent owed and paid.

Based on the above, I am satisfied on a balance of probabilities that not less than \$3,094.00 in rent and \$1,589.19 in utilities were owed by the Tenants to the Landlord at the time the 10 Day Notice was served on October 13, 2020. As the Tenant and the Tenant's Agent acknowledged in the hearing that no amounts were paid to the Landlord after the 10 Day Notice was served on October 13, 2020, for either rent or utilities, I therefore find that conclusive presumption under section 46(5) of the Act applies and that the Tenants were conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, October 28, 2020, and were therefore required to vacate the rental unit by that date.

Based on the above, I therefore dismiss the Tenants' Application seeking cancellation of the 10 Day Notice without leave to reapply. As I find that the 10 Day Notice complies with section 52 of the Act, I therefore grant the Landlord, who I am satisfied is acting as an agent for the new Owner of the property in terms of obtaining vacant possession of the property as required by the Contract of Purchase and Sale, an Order of Possession for the rental unit effective two days after service, pursuant to section 55 of the Act.

I have already found above that the Tenants were conclusive presumed to have accepted the end date for the tenancy noted in the 10 Day Notice, October 28, 2020, and required to vacate the rental unit by that date. As a result, I find that the Tenants are currently overholding the rental unit. At the hearing the Landlord and their Legal Counsel sought recovery of \$7,735.00 in outstanding rent for September 2020 – January 2021, calculated at \$1,547.00 per month, however, I find that the Landlord is only entitled to outstanding rent between September 1, 2020, and November 30, 2020,

as the new Owner legally became the Landlord on December 1, 2020, the date of possession set out in the Contract of Purchase and Sale, and there is no documentary evidence or testimony before me that the Landlord or their Legal Counsel are acting on behalf of the new Owner with regards to the collection of rent. Further to this, Legal Counsel for the Landlord only stated in the hearing that the Landlord is acting as an agent for the Owner in relation to possession of the rental unit.

Based on the above, I therefore grant the Landlord only \$4,641.00 in outstanding rent for September 1, 2020 – November 30, 2020. The new Owner W.A. remains at liberty to seek recovery of any outstanding rent owed by the Tenants under the tenancy agreement thereafter, or to seek any loss of rent to which they believe they are entitled after the Tenants vacate the rental unit, should they wish to do so.

As the Landlord was successful in the majority of their Application, I also grant them recovery of the \$100.00 filing fee pursuant to section 72(1) of the Act.

Pursuant to section 67 of the Act, I therefore grant the Landlord a Monetary Order in the amount of \$4,741.00; \$4,641.00 in outstanding rent for September 1, 2020 – November 30, 2020, and \$100.00 for recovery of the filing fee. Pursuant to section 72(2)(b) of the Act, the Landlord is entitled to withhold the \$600.00 security deposit towards this amount, should it remain in their possession and should they wish to do so. If the Landlord still retains the \$600.00 security deposit in trust but chooses not to withhold it in relation to the above noted amount owed, it must be dealt with by the Landlord in accordance with the Act.

Conclusion

The Tenants Application seeking cancellation of the 10 Day Notice is dismissed without leave to reapply.

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlord L.J., as agent for the current Owner W.A., effective **two (2) days after service of this Order** on the Tenants. The Landlord is 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. The Tenants are cautioned that costs of such enforcement are recoverable from them by the Owner or by the Landlord who is acting on the Owners behalf.

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of **\$4,741.00**. The Landlord is 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. The Tenants are cautioned that costs of such enforcement may be recoverable from them by the Landlord.

If the Landlord chooses to withhold the \$600.00 security deposit, or any portion thereof, in partial repayment of this amount, only the remaining balance of the above noted amount owed is enforceable against the Tenants.

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: February 3, 2021

Residential Tenancy Branch