



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC-MT, OLC

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on January 11, 2021 (the "Application"). The Tenant applied to dispute a One Month Notice to End Tenancy for Cause dated December 28, 2020 (the "Notice"). The Tenant also sought an order that the Landlord comply with the Act, regulation and/or the tenancy agreement.

The Tenant appeared at the hearing with A.M. to assist. M.C. and C.N. appeared at the hearing for the Landlord.

C.N. advised of the correct Landlord name which is reflected in the style of cause.

Pursuant to rule 2.3 of the Rules of Procedure (the "Rules"), I advised the Tenant at the outset that I would consider the dispute of the Notice and dismiss the request for an order that the Landlord comply with the Act, regulation and/or the tenancy agreement as it is not sufficiently related to the dispute of the Notice. The request for an order that the Landlord comply with the Act, regulation and/or the tenancy agreement is dismissed with leave to re-apply. This does not extend any time limits set out in the *Residential Tenancy Act* (the "Act").

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence.

The Landlord's representatives confirmed receipt of the hearing package. They advised that they did not receive the Tenant's evidence; however, agreed this was a non-issue given the nature of the evidence submitted by the Tenant.

I note that the Tenant submitted the following documentary evidence:

- The Notice;
- A prior RTB decision between the parties on File Number 1;
- Section 28 of the *Act*; and
- The tenancy agreement between the parties.

The Tenant testified that they did not receive the Landlord's evidence. C.N. testified that the evidence was posted to the door of the rental unit February 22, 2021. M.C. testified that they observed service.

I was satisfied the Landlord's evidence was posted to the door of the rental unit February 22, 2021 given both C.N. and M.C. testified that this occurred. I found that the testimony of both C.N. and M.C. outweighed the testimony of the Tenant. I was satisfied the evidence was served in accordance with section 88(g) of the *Act*. Pursuant to section 90(c) of the *Act*, the Tenant is deemed to have received the evidence February 25, 2021. The Tenant can rebut the deeming provision; however, the Tenant is expected to provide compelling evidence to rebut the deeming provision. I was not satisfied the Tenant did provide compelling evidence to rebut the deeming provision.

Rule 3.15 of the Rules states:

The respondent must ensure evidence that the respondent intends to rely on at the hearing is **served on the applicant** and submitted to the Residential Tenancy Branch **as soon as possible**. Except for evidence related to an expedited hearing (see Rule 10), and subject to Rule 3.17, the respondent's evidence **must be received by the applicant** and the Residential Tenancy Branch **not less than seven days before the hearing**. (emphasis added)

The definition section of the Rules states:

Days...

c) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "**not less than**" a number of

days, weeks, months or years, **the first and last days must be excluded.** (emphasis added)

I found the Landlord served their evidence one day late and heard the parties on whether the evidence should be admitted or excluded pursuant to rule 3.17 of the Rules. C.N. testified that the evidence was served when it was for a number of reasons including the Landlord is under-staffed and C.N. only works three days a week. A.M. submitted that the evidence should be excluded if the Landlord missed the deadline for service.

I exclude the Landlord's evidence pursuant to rule 3.17 of the Rules. I do not find the reasons for the late service of evidence provided by C.N. sufficient to excuse the late service. I find it would be unfair to consider evidence the Tenant says they did not receive when I am not satisfied the Landlord complied with the Rules in relation to service of that evidence.

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

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?

Background and Evidence

The parties agreed the written tenancy agreement submitted is accurate. The tenancy started May 01, 2016 and is a month-to-month tenancy.

The Notice was submitted. The grounds for the Notice are:

1. Breach of a material term of the tenancy agreement **that was not corrected within a reasonable time after written notice to do so.** (emphasis added)

The Landlord's representatives testified that the Notice was posted to the door of the rental unit December 28, 2020. The Tenant testified that the Notice was received

January 11, 2021 and that it had been slipped under the door of the rental unit. C.N. disputed that the Tenant received the Notice January 11, 2021 and testified that the Notice was no longer on the door of the rental unit December 31, 2020.

C.N. testified as follows in relation to the grounds for the Notice. The Tenant is breaching term A.6 in Schedule A of the tenancy agreement. Term A.6 is a material term pursuant to term A.1 in Schedule A. The Tenant does not stay in the rental unit and is not using it as a home. The Tenant uses the rental unit as a mailing address. The parties had a verbal agreement that the Tenant would stay in the rental unit once per week, but the Tenant has not done so. The rental unit has been vacant since May of 2020. The Tenant has acknowledged they do not stay in the rental unit. The Tenant says they have concerns about the pandemic; however, the Landlord complies with the rules relating to the pandemic.

M.C. testified that the rental unit has been vacant all year long without being used by the Tenant. M.C. testified that the Tenant is not residing at the rental unit.

I read out the requirements for a breach letter in Policy Guideline 8 and asked C.N. if the Landlord provided the Tenant a breach letter. C.N. advised that the Landlord did not provide the Tenant a breach letter other than the prior eviction notice.

The Tenant acknowledged term A.6 in Schedule A of the tenancy agreement is a material term of the tenancy agreement.

A.M. testified as follows. There was a verbal agreement between the Tenant and Landlord but the parties disagree about whether the agreement was that the Tenant would stay in the rental unit once a week or check in once a week. A.M. understood the agreement to be that the Tenant would check in once a week, not that the Tenant would stay in the rental unit once a week. The Tenant feels unsafe at the rental unit due to the pandemic. The Tenant does not have another permanent address. The Landlord already issued the Tenant a notice to end tenancy on the same grounds and the notice was cancelled in File Number 1. The Tenant still goes to the rental unit and accesses the rental unit. The Tenant has not been absent from the rental unit for three months which is clear because the Tenant has had conversations with C.N.

The Tenant testified that they attend the rental unit every Friday.

In reply, C.N. testified that the Tenant's absence from the rental unit pre-dates the pandemic.

Analysis

The Notice was issued pursuant to section 47(1)(h) of the *Act* which states:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(h) the tenant

(i) has failed to comply with a material term, and

(ii) **has not corrected the situation within a reasonable time after the landlord gives written notice to do so;**

(emphasis added)

The Tenant had 10 days from receiving the Notice to dispute it pursuant to section 47(4) of the *Act*.

Although there was an issue between the parties about when the Notice was received, I find the Tenant disputed the Notice in time even accepting the Landlord's position. Accepting the Notice was posted to the door of the rental unit December 28, 2020 in accordance with section 88(g) of the *Act*, the Tenant is deemed to have received the Notice December 31, 2020 pursuant to section 90(c) of the *Act*. I acknowledge that the deeming provision can be rebutted if there is sufficient evidence that the Notice was received earlier; however, I do not find that there is sufficient evidence that the Notice was received earlier than December 31, 2020.

The Tenant had 10 days to dispute the Notice, until January 10, 2021. However, January 10, 2021 was a Sunday and therefore the Tenant had until Monday, January 11, 2021, to dispute the Notice pursuant to the definition of "days" in the Rules which states:

If the time for doing an act in a government office (such as the Residential Tenancy Branch or Service BC) falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.

I note that the Rules confirm that the above applies even if an act can be carried out using an online service.

The Application was filed January 11, 2021, within time.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules.

Policy Guideline 8 deals with material terms in a tenancy agreement and states:

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – **must inform the other party in writing:**

- that there is a problem;
- **that they believe the problem is a breach of a material term of the tenancy agreement;**
- **that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and**
- **that if the problem is not fixed by the deadline, the party will end the tenancy.**

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

(emphasis added)

The requirement that the Landlord advise the Tenant of a breach of a material term in writing prior to issuing a notice to end tenancy is set out in the Notice, the *Act* and Policy Guideline 8.

C.N. acknowledged that the Landlord did not provide the Tenant a breach letter as set out in Policy Guideline 8. C.N. referred to the prior notice to end tenancy issued to the Tenant. I do not have the prior notice to end tenancy before me. I do have the decision on File Number 1 before me. The prior notice to end tenancy was issued pursuant to section 49.1 of the *Act* on the basis that the Tenant does not qualify for the subsidized rental unit.

I am not satisfied a notice to end tenancy issued pursuant to section 49.1 of the *Act* is the equivalent of a breach letter as outlined in Policy Guideline 8 as I am not satisfied it meets the requirements of a breach letter.

In the circumstances, I am not satisfied the Landlord complied with Policy Guideline 8. The Landlord was not permitted to serve the Notice prior to providing a breach letter and therefore I cancel the Notice. The tenancy will continue until ended in accordance with the *Act*.

Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

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: March 09, 2021

Residential Tenancy Branch