Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Maple Rock Enterprises Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes ET, FFL

Introduction

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

- an emergency end to tenancy pursuant to section 56;
- authorization to recover the filing fee from the tenant, pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 9:46 a.m. in order to enable the tenant to call into this teleconference hearing scheduled for 9:30 a.m. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord's agent and I were the only ones who had called into this teleconference.

Preliminary Issue- Service

Section 89(2) of the *Act* states:

> (2)An application by a landlord under section 55 *[order of possession for the landlord]*, 56 *[application for order ending tenancy early]* or 56.1 *[order of possession: tenancy frustrated]* must be given to the tenant in one of the following ways:
>
> (a)by leaving a copy with the tenant;
>
> (b)by sending a copy by registered mail to the address at which the tenant resides;

(c)by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;
(d)by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;
(e)as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;
(f)by any other means of service provided for in the regulations.

Section 90(c) of the *Act* states:

90 A document given or served in accordance with section 88 *[how to give or serve documents generally]* or 89 *[special rules for certain documents]*, unless earlier received, is deemed to be received
(c)if given or served by attaching a copy of the document to a door or other place, on the third day after it is attached;

Residential Tenancy Branch Policy Guideline #12 states:

The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done. For example, the Supreme Court found in Hughes v. Pavlovic, 2011 BCSC 990 that the deeming provisions ought not to apply in that case because Canada Post was on strike, therefore unable to deliver Registered Mail.

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. For example, if a party claimed to be away on vacation at the time of service, the arbitrator would expect to see evidence to prove that claim, such as airplane tickets, accommodation receipts or a travel itinerary. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

The decision whether to make an order that a document has been sufficiently served in accordance with the Legislation or that a document not served in accordance with the Legislation is sufficiently given or served for the purposes of the Legislation is a decision for the arbitrator to make on the basis of all the evidence before them.

The landlord's agent testified that the tenant was hospitalized for psychiatric issues on May 12, 2021 and has not yet been released. The landlord's agent testified that this application for dispute resolution was posted on the tenant's door on June 2, 2021. A witnessed proof of service document stating same was entered into evidence.

I find that while this application for dispute resolution (the "application") was served on the tenant in accordance with section 89(2)(d) of the *Act*, the deeming provision in section 90(c) must be rebutted for fairness. Based on the landlord's agent's testimony, the tenant was in hospital when the application was served on the tenant and the tenant has not been released; therefore, the tenant has not received this application and has not had notice of this hearing. I find that it would be procedurally unfair to conduct this hearing in the absence of the tenant because the tenant has not received notice of this hearing due to the tenant's hospitalization. The landlord's application is therefore dismissed with leave to reapply.

In the hearing I notified the landlord's agent that the landlord may apply again but must be able to prove the tenant received the landlord's application for dispute resolution. I informed the landlord's agent that she may apply for substituted service and may call the Residential Tenancy Branch for more information regarding substituted service. I also advised the landlord's agent that I was concerned with the competency of the tenant and the tenant's ability to be served with legal documents. The landlord may consult a lawyer for legal advice regarding serving the tenant.

Conclusion

The landlord's application for dispute resolution is dismissed with leave to reapply.

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: June 21, 2021

Residential Tenancy Branch