Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, FFL
CNC, OLC, FFT

Introduction

This hearing originally convened on March 12, 2021 and was adjourned to June 10, 2021 in an Interim Decision dated March 12, 2021. This Decision should be read in conjunction with the March 12, 2021 Interim Decision.

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

- cancellation of the One Month Notice to End Tenancy, pursuant to section 47;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

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

- an Order of Possession for Cause, pursuant to sections 47 and 55; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

Both parties attended both hearings and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The tenant was represented by agent K.Y. and agent C.L. who attended both hearings and were affirmed. The landlord called witness S.K. and the tenant called witnesses B.G. and K.W., who were all affirmed.

Preliminary Issue- Service of Evidence

At the first hearing neither party brought forward evidentiary issues. At the end of the second hearing the landlord testified that she did not receive the tenant's evidence until two days before the first hearing and did not have time to review or respond to that evidence. Evidence was not permitted to be submitted after the first hearing.

Agent C.L. testified that she served the landlord on February 23, 2021 by slipping a usb stick with the tenant's evidence through the landlord's mail slot. The landlord testified that she received the usb stick less than 14 days before this hearing and was not comfortable accessing the tenant's evidence in this manner and requested a paper copy from the tenant's agent. The tenant's agents agree that the landlord requested a paper copy.

I asked Agent C.L. how and when the tenant's paper evidence was served on the landlord. Agent C.L. was not immediately certain, though later testified that she thinks she served the landlord on February 25, 2021 by slipping it through the mail slot. The landlord testified that she only received the paper evidence two days before the first hearing. The tenant did not enter any witnessed proof of service documents into evidence.

Section 3.10.5 of the Residential Tenancy Branch Rules of Procedure (the "*Rules"*) states:

> Before the hearing, a party providing digital evidence to the Residential Tenancy Branch directly or through a Service BC Office must confirm that the Residential Tenancy Branch has playback equipment or is otherwise able to gain access to the evidence.
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> If a party or the Residential Tenancy Branch is unable to access the digital evidence, the arbitrator may determine that the digital evidence will not be considered.
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> If a party asks another party about their ability to gain access to a particular format, device or platform, the other party must reply as soon as possible, and in any event so that all parties have seven days (or two days for an expedited hearing under Rule 10), with full access to the evidence and the party submitting and serving digital evidence can meet the requirements for filing and service established in Rules 3.1, 3.2, 3.14 and 3.15.

I find that pursuant to Rule 3.10.5, the tenant was required to ensure that the landlord had full access to the digital evidence so that the tenant could provide responding evidence in accordance with the timelines set out in Rule 3.15 (7 days before the hearing). I find that the tenant has not proved that the above timelines were met as no witnessed proof of service documents were entered into evidence and the landlord testified that she did not receive the evidence until two days before this hearing.

Section 3.14 of the *Rules* state that evidence should be served on the respondent at least 14 days before the hearing.

Section 3.11 the *Rules* state that if the arbitrator determines that a party unreasonably delayed the service of evidence, the arbitrator may refuse to consider the evidence.

In determining whether the delay of a party serving her evidence package on the other party qualifies as unreasonable delay I must determine if the acceptance of the evidence would unreasonably prejudice a party or result in a breach of the principles of natural justice and the right to a fair hearing. The principals of natural justice regarding the submission of evidence are based on two factors:

1. a party has the right to be informed of the case against them; and
2. a party has the right to reply to the claims being made against them.

I find that the tenant has not proved, on a balance of probabilities, that the tenant's evidence was served on the landlord as least 14 days before the first hearing. I found agent C.L.'s recollection of the date of service of the paper evidence to be unsure and no witnessed proof of service documents were entered into evidence.

I accept the landlord's testimony that she received the usb stick less than 14 days before the hearing and was not comfortable accessing the digital evidence. I accept the landlord's testimony that this was communicated to the tenant's agents. I accept the landlord's testimony that she received the tenant's evidence in paper format two days before this hearing and did not have an opportunity to review or respond to that evidence.

I exclude the tenant's evidence from consideration because the late evidence prevented the landlord from replying to the claims made against her.

Preliminary Issue- One Month Notice to End Tenancy for Cause

The landlord did not enter into evidence a copy of the One Month Notice to End Tenancy for Cause (the "One Month Notice"). The One Month Notice entered into evidence from the tenant is excluded from consideration.

I informed both parties that I required a copy of the One Month Notice in order to determine whether it complies with section 52 of the Act. This is a requirement in order to determine whether an order of possession can be issued, pursuant to section 55 of the Act. The landlord had ample time to submit the One Month Notice prior to the first hearing, as the landlord applied on January 2, 2021 and the first hearing was held on March 12, 2021.

I notified both parties that I could not adjudicate a One Month Notice that is not before me. I notified both parties that the landlord's application for an order of possession for cause was dismissed without leave to reapply. I informed both parties that the tenant's application to cancel the One Month Notice was dismissed without leave to reapply.

Issues

1. Is the tenant entitled to an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62 of the *Act*?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
3. Is the landlord entitled to recover the filing fee for this application from the tenant, pursuant to section 72 of the *Act*?

Background/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 March 8, 2018 and is currently ongoing. A security deposit of $750.00 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 subject rental property is a house with an upper and lower suite. The tenant lives in the lower suite and other tenants live in the upper suite.

Both parties agree that they have signed several tenancy agreements and that most of the tenancy agreements were for fixed terms requiring the tenant to vacate the subject rental property at the end of the fixed term. Both parties agree that the reason to vacate stated on most of the tenancy agreements was “as per 13.1”.

In the second hearing the landlord testified that she never had any intention of moving into the subject rental property. The landlord testified that she adds in the section 13.1 vacate clause in all of her rentals, in case she wants to move in.

Agent K.Y. submitted that the landlord used the mandatory vacate clauses to force the tenant to sign new tenancy agreements and increase the rent over and above the amount allowed by the *Act.*

Agent K.Y. provided lengthy submissions on why the tenancy agreements signed after the initial tenancy agreement should be found to be invalid; however, I note that the tenant’s application was not to dispute a rent increase or seek monetary compensation for rent paid due to an improper rent increase. As such this decision will only look at whether or not the tenant is entitled to an Order for the landlord to comply with the *Act and* will not address a disputation of rent increases.

The tenant testified that the landlord has served with tenant with Notices of Rent Increases seeking to raise the tenant’s rent over the limit allowed by the *Act* and *Regulation.* The landlord testified that the rent increases over the allowable limit were agreed by the parties. The tenant’s evidence in this regard was excluded from consideration. The only evidence submitted by the landlord was a tenancy agreement.

Analysis

Section 62(3) of the *Act* states:

> The director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

Section 13.1 of the *Regulation* states:

> **13.1** (1)In this section, "close family member" has the same meaning as in section 49 (1) of the Act.
> (2)For the purposes of section 97 (2) (a.1) of the Act *[prescribing circumstances when landlord may include term requiring tenant to vacate]*, the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that
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> (a)the landlord is an individual, and
>
> (b)that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

I accept the landlord's testimony that at the time the tenancy agreements were entered into, she had no intention of moving into the subject rental property. I find that the landlord did not intend in good faith at the time the tenancy agreements were entered into, to occupy the rental unit at the end of the term. I therefore find that the landlord was not permitted to utilize the vacate clause in the tenancy agreement. Pursuant to section 62(3) of the *Act,* I Order the landlord to comply with section *13.1* of the *Regulation* and only utilize a vacate clause if at the time the tenancy agreement is entered into, the landlord intends in good faith to occupy the rental unit at the end of the term.

Section 22 of the *Act* states:

> **22** (1)In this section, "inflation rate" means the 12 month average percent change in the all-items Consumer Price Index for British Columbia ending in the July that is most recently available for the calendar year for which a rent increase takes effect.
> (2)For the purposes of section 43 (1) (a) of the Act, in relation to a rent increase with an effective date on or before December 31, 2018, a landlord may impose a rent increase that is no greater than the amount calculated as follows:
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> percentage amount = inflation rate + 2%.

(3)For the purposes of section 43 (1) (a) of the Act, in relation to a rent increase with an effective date on or after January 1, 2019, a landlord may impose a rent increase that is no greater than the amount calculated as follows:

percentage amount = inflation rate.

(4)If a landlord has

(a)given notice under section 42 of the Act for a rent increase with an effective date on or after January 1, 2019 before subsection (3) comes into force, and

(b)included in the notice a rent increase in an amount calculated in accordance with subsection (2) of this section,

the landlord must give a second notice, before the effective date in the notice described in paragraph (a), of the rent increase in an amount calculated in accordance with subsection (3) of this section.

(5)For certainty, the notice period in section 42 (2) of the Act does not apply to the second notice required under subsection (4) of this section.

I find that I do not have enough evidence before me to determine if the landlord has breached section 22 of the *Act* as no rent increases and correspondence regarding the rent increases were accepted for consideration.

As the landlord was not successful in this application for dispute resolution, I find that the landlord is not entitled to recover the $100.00 filing fee from the tenant, pursuant to section 72 of the *Act.*

As the tenant was successful in this application for dispute resolution, I find that the tenant is entitled to recover the $100.00 filing fee from the landlord, pursuant to section 72 of the *Act.*

Section 72(2) of the *Act* states that if the director orders a landlord to make a payment to the tenant, the amount may be deducted from any rent due to the landlord. I find that the tenant is entitled to deduct $100.00, on one occasion, from rent due to the landlord.

Conclusion

The landlord's application for dispute resolution is dismissed without leave to reapply.

The tenant's application to cancel the One Month Notice is dismissed without leave to reapply.

Pursuant to section 62(3) of the *Act,* I Order the landlord to comply with section *13.1* of the *Regulation* and only utilize a vacate clause if at the time the tenancy agreement is entered into, the landlord intends in good faith to occupy the rental unit at the end of the term.

The tenant is entitled on one occasion to deduct $100.00 from rent.

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 10, 2021

Residential Tenancy Branch