



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

For the tenant: CNR-MT, FF

For the landlord: OPR-DR, MNR-DR, FF

Introduction

This hearing was convened as the result of the cross applications of the parties for dispute resolution seeking remedy under the Residential Tenancy Act (Act).

The tenant CKL applied for the following:

- an order cancelling the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (Notice) issued by the landlord;
- an order extending the time to file an application disputing the Notice issued by the landlord; and
- to recover the cost of the filing fee

The landlord DW applied for the following:

- an order of possession of the rental unit pursuant to a Notice served to the tenant;
- a monetary order for unpaid rent; and
- to recover the cost of the filing fee.

The listed parties attended the hearing, the hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process.

The parties were informed that recording of the dispute resolution hearing is prohibited under the Residential Tenancy Branch (RTB) Rules of Procedure (Rules) Rule 6.11. In addition, all parties affirmed they were not recording the hearing. The parties did not have any questions about my direction pursuant to Rule 6.11.

Both parties confirmed receiving the other's evidence and applications in advance of the hearing, presenting no objection to the same. I find the tenants' and the landlords' applications and evidence sufficiently served, in accordance with the Act.

Thereafter all parties were provided the opportunity to present their evidence orally, refer to relevant evidence submitted prior to the hearing, respond to the other's evidence, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the Rules. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Words utilizing the singular shall also include the plural and vice versa where the context requires.

Preliminary and Procedural Matters-

In the tenant's application, only CKL was listed as a tenant/applicant and DW and JYL were listed as the landlords/respondents.

In the landlord's application, only DW was listed as landlord/applicant and both CKL and GZ were listed as tenants/respondents.

For this reason, I have listed the parties named on the respective applications separately on the style of cause page of this Decision.

As another issue, I must also consider whether I have jurisdiction to decide these dispute. This issue will be dealt with in this Decision.

Issue(s) to be Decided

Is the tenant entitled to an order extending the time to file an application disputing the Notice issued by the landlord and to cancellation of the Notice?

Is the landlord entitled to an order of possession of the rental unit and a monetary order for unpaid monthly rent?

Is either party entitled to recovery of their filing fee?

Background and Evidence

In these matters, the evidence presented shows that CKL and GZ are sub-tenants to JYL, who is the tenant of the owner, DW, whose residence is in another country.

Counsel for DW submitted affidavits from DW and JYL. DW states that they entered into a tenancy agreement with JYL in or about March 2019, for a monthly rent of \$2,500. Thereafter, JYL indicated they could not afford the monthly rent and required a roommate. Then JYL indicated they wanted to terminate the tenancy agreement and find new tenants for the landlord, which was agreed. JYL then misrepresented themselves by creating a fake account and began communicating with the landlord as the new tenants, CKL and GZ (sub-tenants). The landlord then entered into a tenancy agreement supposedly with the sub-tenants, but who, in reality, turned out to be JYL instead again misrepresenting themselves as the sub-tenants.

The landlord indicated that there was yet another tenancy agreement between the sub-tenants here and DW and JYL, by JYL misrepresenting themselves as DW as a co-landlord. The landlord indicated they did not know anything about this tenancy agreement (called a "2021 Sublet Agreement") either, which was filed in evidence, showing a start date of January through December, 2021.

The landlord indicated that they discovered the misrepresentation from JYL in March 2021, when the sub-tenants stopped paying rent to JYL. The landlord indicated they have not received any rent from the either JYL or the sub-tenants since February 2021.

Through their affidavit, the landlord and counsel at the hearing said they were willing to ratify the 2021 Sublet Agreement if the sub-tenants paid the monthly rent to them. To date, they have not received any monthly rent since February 2021, either from YJL or the sub-tenants.

Counsel submitted an Affidavit from JYL, who confirmed that they misrepresented both themselves and the landlord/owner in these matters. JYL acknowledged they neither had the landlord's approval nor were they acting as an agent who would be able to sign a tenancy agreement with anyone.

JYL also confirmed that the sub-tenants had been living in the rental unit since January 2020, paying them rent, and lied to the owner about the sub-tenants' occupancy. JYL informed the landlord of their subterfuge when the sub-tenants stopped paying rent in February 2021.

JYL indicated that they explained the situation to the sub-tenants and that the landlord was willing to recognize the 2021 Sublet Agreement and allow them to stay there provided the sub-tenants pay the overdue rent and utilities going forward.

The tenant confirmed that they have not paid any monthly rent or utilities to their landlord, JYL, since February 2021, or the owner/landlord, DW, at all. The tenant submitted that they were waiting for their landlord, JYL, to correct the noise issues they began experiencing in November 2020, which caused a loss of their quiet enjoyment. The tenant submitted that they have now learned that JYL was a tenant of the owner, and said they would be willing to pay rent to DW, beginning in August 2021. Despite their willingness to do so, they have not paid any rent to DW.

Filed in evidence was a copy of the Notice. The Notice listed CKL and GZ as tenants and DW as landlord. Additionally, DW and JYL were listed as landlords at the bottom of the form and it was dated June 8, 2021, for an effective move-out date of June 18, 2021. The Notice listed unpaid monthly rent of \$10,500 owed as of June 6, 2021.

Filed in evidence was a proof of service of the Notice, which showed it was served to the sub-tenants on June 8, 2021, by attaching it to their door. JYL served the Notice.

The tenant confirmed receiving the Notice on June 9, 2021. The records show that the tenant initially filed their application in dispute of the Notice on June 18, 2021, but did not complete the application process until June 25, 2021, when the filing fee was paid.

The tenant submitted they waited to file their application until they could resolve the issue about their quiet enjoyment with their landlord, JYL.

Analysis

Based on the documentary and oral evidence provided, and on a balance of probabilities, I find the following.

Tenant's application –

Section 46 of the Act authorizes a landlord to seek an end of a tenancy if rent is unpaid on any day after the day it is due, by giving a tenant notice to end tenancy that complies with section 52 of the Act.

The Act states that the tenant has the right to dispute the Notice within 5 days of receiving the notice. This may be done by filing an application for dispute resolution at the Residential Tenancy Branch (RTB) online, in person at any Service BC Office or by going to the RTB office in Burnaby in dispute of the Notice.

The Notice also explains that if the tenant does not pay the rent or file an application to dispute the Notice within the required time limit, then the tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the rental unit by the effective date of the Notice.

On the basis of the tenant's own application, supported by the landlord's evidence, I find that the tenant was served and received the 10 Day Notice, dated June 8, 2021, on June 9, 2021. Therefore, the tenant had until June 14, 2021, to file her application and they did not make their application until June 25, 2021, the date the filing fee was paid. Rule 2.6 states that an application is considered to have been made when it has been submitted and the fee paid.

As their application was made more than 5 days after they received the Notice, I find that the tenant did not file their application to dispute the Notice within the timeline established by section 46(4) of the Act.

Section 66(1) of the Act authorizes me to extend the time limit established by the Act. Section 66(3) states that I may not extend the time beyond the effective date of the Notice. In this case, the corrected effective date of the Notice was June 19, 2021, as the tenant confirmed receiving the Notice on June 9, 2021.

As the tenant made their application on June 25, 2021, it was beyond the corrected effective date. I therefore dismiss the tenant's application for more time to apply to cancel the Notice.

Due to the above, I find the tenant was conclusively presumed to have accepted that the tenancy ended on June 19, the corrected effective date of the Notice and I therefore **dismiss** the tenant's application seeking cancellation of the 10 Day Notice, without leave to reapply.

In reviewing the Notice, I find it was on the RTB approved form with content meeting the statutory requirements under section 52 the Act.

I find that the landlord is entitled to and I grant an order of possession for the rental unit effective 2 days after it has been served on the tenant, pursuant to section 55(1)(b) of the Act. I order the tenancy ended on June 19, 2021.

As the tenant named both DW and JYL as landlords on their application and as JYL listed their name and served the Notice, I find it appropriate to list both DW and JYL as landlords on the order of possession of the rental unit. Either party may seek to enforce the order of possession and the order applies to the tenant and all other occupants in the rental unit.

The order of possession is included with the landlord's Decision and must be served on the tenant to be enforceable. Should the tenant fail to vacate the rental unit, the order may be filed in the Supreme Court of British Columbia for enforcement as an order of that Court.

The tenant is cautioned that costs of such enforcement, **such as bailiff fees**, are recoverable from the tenant.

I will consider section 55 (1.1) of the Act within consideration of the landlord's application.

Landlord's application –

In determining whether there is a tenancy between DW and CKL and GZ, Tenancy Policy Guideline 9 provides information. A tenancy agreement under the Act is an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

Further, under a tenancy agreement, a tenant is granted exclusive possession of the rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if:

- the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and
- **the tenant pays a fixed amount for rent.**

Other factors that may distinguish a tenancy agreement from a licence to occupy include:

- **payment of a security deposit;**
- the parties have a family or personal relationship, and occupancy is given because of generosity rather than business considerations.

[My emphasis]

An arbitrator will weigh all the factors for and against finding that a tenancy exists.

In this case, the undisputed evidence is that CKL and GZ have never paid rent to DW and did not pay a security deposit. DW said they would ratify the subtenant agreement if CKL and GZ paid rent, and because they never have, I conclude the subtenant agreement was never ratified. I additionally find insufficient evidence that a consensus was ever reached between these parties that a tenancy agreement was contemplated or agreed upon.

For the above reasons, I therefore find that the DW and CKL and GZ have not entered into a tenant-landlord relationship.

As a result, I find I do not have authority to resolve this dispute due to lack of jurisdiction and I decline to accept jurisdiction to consider the landlord's application.

In considering whether to grant DW a monetary order pursuant to the dismissal of the tenant's application, under section 55(1.1), if I dismiss a tenant's application in dispute of a Notice, I must grant an order requiring the payment of the unpaid rent.

In this case, I decline to do so as the landlord DW applied against only the sub-tenants, CKL and GZ, not against JYL, and only CKL made their application in dispute of the Notice.

As I have found the evidence shows that there was no landlord-tenant relationship between DW and CKL and GZ, the respondents in the landlord's application, I find I have no authority to order CKL or GZ to pay rent to DW.

As to any remaining issues, monetary or otherwise, the parties may have against each other, they are at liberty to seek the appropriate legal remedy to any and all disputes.

Conclusion

The tenant's application is dismissed, without leave to reapply.

Due to the dismissal of the tenant's application, the landlord DW and the tenant's landlord, JYL, are granted an order of possession of the rental unit, effective 2 days after service on the sub-tenants.

I have declined to accept jurisdiction to decide the landlord's application, as I determined there was no landlord-tenant relationship between the parties.

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: October 20, 2021

Residential Tenancy Branch