



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT, FFT

Introduction

This proceeding was scheduled as an expedited hearing in response to the tenant's application for an Order of Possession for the rental unit.

The tenant and his lawyer appeared for the hearing and one of the named respondents (referred to by initials AO) appeared. The parties were affirmed and ordered to not make an unofficial recording of the proceeding.

Preliminary and Procedural Matters

1. Service of hearing materials

The tenant testified that he sent his proceeding package to the named respondents via registered mail although he did not know the date and he did not have the registered mail receipt(s) before him.

Respondent AO stated she received the tenant's proceeding package by registered mail but that it did not include any evidence.

The tenant stated that he thought he had included his evidence in the package sent to AO. I asked AO to describe the documents in the package she received from the tenant. AO did so, in detail, and I was satisfied she was in receipt of the proceeding package only.

I was not provided any evidence as to whether the other named respondent was served with a proceeding package and I excluded him as a named party to this dispute.

2. Request for adjournment

The tenant's lawyer requested an adjournment, stating their law firm had only recently been contacted by the tenant, they were still working out the retainer, and they had not received all the relevant documents from the tenant.

I declined to grant an adjournment due to the tenant's failure to obtain legal representation in a timely manner.

3. Naming of landlord and remedy sought

AO stated that she is the former director of the corporate landlord and effective August 31, 2021 the shares to the corporate landlord were sold and she is no longer the director or agent for the corporate landlord. AO submitted that she cannot give the tenant possession of the rental unit as she no longer has authority or ability to do so.

I noted that the first page of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("10 Day Notice") that had been uploaded to the Residential Tenancy Branch system by the tenant identified the landlord as being the corporate landlord. The 10 Day Notice was signed by AO as landlord's agent. I also noted that included in the documents uploaded by the tenant was a letter dated August 10, 2021 whereby the letterhead identified the corporate landlord and the letter is signed by AO as "owner". In the letter, AO states that there will be a new owner of the property by the end of August 2021.

The tenant and his lawyer did not refute that ownership and management of the property has changed hands. AO informed the tenant and his lawyer as to the identity of the property management company that took over management of the property. The tenant and/or his lawyer indicated they were aware of the name of the current property management company. The tenant's lawyer stated that they had made attempts to contact the current agents for the landlord without success.

In light of the above, I was of the view that the named landlord, AO, is a former agent for the corporate landlord and it would be inappropriate to issue an Order of Possession against AO as it would be unenforceable. This application was filed by the tenant on September 1, 2021 and I find the tenant was already on notice that ownership of the property had changed. As such, I find it was inappropriate for the tenant to name AO in seeking an Order of Possession.

The tenant's lawyer requested the application be amended to correctly name the corporate landlord and adjourned to serve the landlord using its current service address.

Residential Tenancy Branch 43: *Naming parties* provides, in part:

It is up to the applicant to ensure that a party is properly named to ensure an enforceable order. Where the business is not properly named, for example Garden Apartments (only), the director may dismiss the application with leave to reapply unless the other party is present and consents to an amendment, or the director may issue the order using the name set out in the application.

I declined to amend the application as there was no current representation for the corporate landlord at the hearing to consent to the amendment. However, I dismiss the tenant's application for an Order of Possession with leave to reapply against the correct party.

The tenant's lawyer pointed out that in dismissing this application, the tenant would be outside of the time limit for disputing the 10 Day Notice. I noted that the remedy sought by the tenant was an Order of Possession and not the dispute of a 10 Day Notice. The tenant and his lawyer confirmed that the tenant's intention in filing this application was to dispute the 10 Day Notice and seek an Order of Possession of the rental unit as he has been locked out.

4. Amending application to dispute 10 Day Notice

AO acknowledged that she had issued a 10 Day notice to the tenant on August 16, 2021 when she was still an agent for the landlord. Although the tenant applied for an Order of Possession, the details of dispute appearing on the Application for Dispute Resolution indicate the issue pertains to payment of rent for August 2021 and the landlord's position that it was unpaid. The details of dispute state:

Applicant's dispute description

Landlord was Pd. Rent for Aug 1 /'21. They used Rent money for another issue + then said I didn't pay Rent for Aug. 1./'21. Rent check cleared on Aug.6/21. will pay partial amount of balance for carpeting/disputing this issue, the amount See paper application.

Given the details of dispute there were included in the proceeding package served upon AO, I was of the view it was reasonable for AO to anticipate this proceeding would deal with the issue of unpaid rent for August 2021.

Since AO issued the 10 Day Notice, and the matter identified on the Application pertains to rent for August 2021, when AO was the landlord's agent, I informed the parties that I was prepared to make a decision as to whether issuance of the 10 Day Notice was lawful. Accordingly, I amended the application to reflect the tenant was seeking to dispute the 10 Day Notice issued by AO on August 16, 2021.

Considering AO stated she had not received the tenant's evidence package; I took verbal testimony from both parties. I compared the party's statements to the documentary evidence uploaded by the tenant with a view to determining the accuracy of their respective testimony and read aloud content of the documentation for AO's benefit. I offered to adjourn the hearing and order service of the tenant's documents to AO if she was of the view she was prejudiced. AO stated it was unnecessary to adjourn and order service of the tenant's evidence to her.

Issue(s) to be Decided

1. Did the tenant dispute the 10 Day Notice within the time limit or doing so?
2. Was rent unpaid for August 2021?
3. Was the landlord in a position not issue a 10 Day notice to End Tenancy for Unpaid Rent or Utilities on August 16, 2021 and is it effective?

Background and Evidence

The landlord's former agent AO issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities to the tenant dated August 16, 2021. The stated effective date reads August 30, 2021.

AO testified that she posted the 10 Day Notice to the rental unit door on August 16, 2021 despite coming to the conclusion the tenant had abandoned the rental unit. AO testified that she inspected the unit on August 16, 2021 and following that inspection she concluded the tenant had abandoned the rental unit as there were only a few possessions remaining in the unit, such as a mattress and toiletries in the bathroom. Since a tenancy ends when a tenant abandons a rental unit, I asked AO why she would issue a 10 Day Notice if she had already concluded the tenancy ended by way of the

tenant's abandonment of the unit. AO responded that the incoming owners/property manager asked her to serve the 10 Day Notice.

AO testified that despite her conclusion that the rental unit had been abandoned and serving the 10 Day Notice on August 16, 2021 she did not take possession of the rental unit prior to turning the property over to the new owners/property manager. AO testified that she merely left the rental unit as it was, including the few possessions of the tenant that were in the rental unit, and she gave possession of the entire property over to the new owners/property manager on August 31, 2021.

The tenant submitted that he received the 10 Day Notice at the very end of August 2021 or early September 2021 when he went to the rental unit. He found various documents on the door but the locks had been changed, thus resulting in filing this Application for Dispute Resolution.

The tenant explained that he did not ordinarily reside in the rental unit a cleaning service attended his unit in May or June 2021 but that he had not abandoned unit, he still had possessions in the unit such as his bed, chair, TV and amps, and he had been paying rent for the unit, including the month of August 2021.

AO confirmed that the tenant did not ordinarily reside in the rental unit since May 2021 or June 2021 but that the tenant retained possession of the rental unit and he was also renting a storage locker in the building.

As for rent for August 2021, the tenant submitted that he paid the landlord \$1215.00 on August 1, 2021 by way of a cheque and the cheque cleared his bank account on August 6, 2021. The tenant further submitted that the memo line on the cheque stated it was for rent. The tenant provided his bank statement showing \$1215.00 was withdrawn as an "official cheque" on July 28, 2021.

I noted that included in the tenant's uploads was a ledger prepared by the landlord for the period of January 1, 2021 through August 9, 2021. The ledger shows the monthly rent for the rental unit was \$1193.00 and a storage fee of \$20.00 was charged. The ledger also shows that on August 5, 2021 the landlord recorded payment of \$1215.00 as "August rent".

AO did not deny that the tenant paid \$1215.00 in early August 2021; however, she decided to apply that payment to carpet replacement she had charged the tenant. The landlord's ledger shows that the landlord inserted a charge of \$1195.80 on June 29,

2021 for carpet replacement. AO stated that the tenant had agreed to pay this amount. AO stated that she informed the tenant in the letter of August 10, 2021 that she would apply the \$1215.00 toward carpet replacement and she would issue a 10 Day Notice for unpaid rent unless he paid another \$1193.80 and she did not receive a response from him.

The tenant wrote on the August 10, 2021 letter that he received it August 30, 2021 which is the same date he received the 10 Day Notice. The tenant denied that he agreed to pay that amount for carpet replacement. The tenant indicated he had been willing to pay a portion of the charge but he did not agree to the amount charged against his ledger.

Analysis

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement. Where a tenant does not pay the rent that is due, section 46 of the Act provides that the landlord may serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. A tenant in receipt of a 10 Day Notice has five days to pay the outstanding rent to nullify the 10 Day Notice or the tenant has five days to dispute the 10 Day Notice by filing an Application for Dispute Resolution.

In this case, AO testified she posted the 10 Day Notice on the rental unit door on August 16, 2021 at the request of the incoming owners/property manager, even though she considered the unit abandoned as of that date. The tenant testified he had not abandoned the unit and he did not receive the 10 Day Notice until the end of August 2021 or early September 2021. I note that on the 10 Day Notice the tenant submitted he wrote that he received it on August 30, 2021.

Where a document is posted to a rental unit door, section 90 of the Act provides that it is "deemed to be received" three days after attaching the document to the door. However, the deeming provision of section 90 has been found to be a rebuttable presumption by The Supreme Court of British Columbia. As provided in Residential Tenancy Branch Policy Guideline 12: *Service provisions*, the deemed receipt provisions are generally used in the absence of evidence of the date documents were actually received. In this case, I have unrefuted testimony of the tenant that he found the 10 Day Notice on the door at the end of August 2021 and the tenant's written submission that it was received on August 30, 2021. Having heard consistent testimony from both the tenant and AO that the tenant was not ordinarily residing at the rental unit, I find it reasonable that a significant amount of time passed after the 10 Day Notice was posted

until it was actually received by the tenant. Therefore, I find on a balance of probabilities that the tenant received the 10 Day Notice on August 30, 2021 and I find the tenant filed this Application for Dispute Resolution within five days of receiving it.

One of the grounds for disputing a 10 Day Notice is where the tenant has actually paid the rent. In this case, it was undisputed that the tenant gave the landlord a cheque for \$1215.00 in early August 2021 and the cheque indicated the payment was for rent. The amount paid is also consistent with previous monthly payments made by the tenant, according to the landlord's ledger. Further, the landlord had recorded the payment of \$1215.00 as being rent received for August 2021, on August 5, 2021.

It appears the landlord subsequently decided to reallocate the payment to be applied to a charge for carpet replacement. The landlord stated the tenant agreed to pay for the carpet replacement; however, the tenant disputed that he had agreed to pay the amount charged and that the cheque was for rent. Considering the cheque given to the landlord statement the payment was for rent and in the absence of the tenant's agreement to have the cheque applied to the carpet replacement charge, I find the landlord made a unilateral decision to reallocate the payment.

Where a party presents payment and expressly indicates the payment is for a certain thing, the recipient does not have the unilateral right to decide to apply the payment to something else and then hold the payor in default for the thing they had actually presented payment for. Therefore, I find the landlord misappropriated the payment and rent had in fact been paid for August 2021.

In light of the above, I find the landlord did not have a basis for issuing a 10 Day Notice for unpaid rent on August 16, 2021 as rent had been paid.

Section 46 of the Act only permits a landlord to serve the tenant with a 10 Day Notice for unpaid rent or utilities. Had the landlord intended to charge and collect a carpet repayment amount from the tenant, the landlord's remedy was to seek a Monetary Order against the tenant. The landlord's remedy is not to take a rent payment, apply the rent payment to something else and then issue a 10 Day Notice for unpaid rent. In doing what the landlord did, which was misappropriation of a rent payment, the landlord in essence tried to evict a tenant for non-payment of an amount other than rent or utilities by way of a 10 Day Notice, which is not permissible. Should the landlord seek to recover damages or loss with respect to carpet replacement the landlord still has the right to do so by seeking a Monetary Order under its own Application for Dispute Resolution.

Conclusion

The tenant's request for an Order of Possession is dismissed with leave to reapply against the correctly named landlord.

The 10 Day Notice issued on August 16, 2021 by the landlord's former agent and named respondent was without basis as rent had been paid prior to the issuance of the 10 Day Notice. Accordingly, the 10 Day Notice is of no force or effect.

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 06, 2021

Residential Tenancy Branch