Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Sylton Holding & Management Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes
Landlord: OPN, FFL
Landlord: OPR, MNRL-S, OPR, FFL
Tenant: CNR

Introduction

This hearing dealt with two landlord Applications for Dispute Resolution seeking an order of possession and a monetary order. These Applications were crossed with the tenant's Application for Dispute Resolution seeking to a cancel a notice to end tenancy.

The hearing was conducted via teleconference and was attended by the landlord's agent, legal counsel and the tenant, her advocate and witness.

Neither party identified any issues related to the receipt and/or service of each others' Applications or evidence, with one exception. The landlord confirmed that in support of their Applications they provided the tenant, by registered mail and email to her advocate, and the Residential Tenancy Branch (RTB) on December 10, 2021 (11 days before this hearing).

Residential Tenancy Branch Rule of Procedure 3.14 states documentary and digital evidence that is intended to be relied upon at the hearing must be received by the respondent and the RTB not less than 14 days before the hearing.

Rule 3.6 also states that all evidence must be relevant to the claims being made in the Application. The rule goes on to say that the arbitrator has the discretion to decide whether evidence is or is not relevant to the issued identified in the application and may declined to consider evidence that they determine is not relevant.

In addition, Rule 3.11 states that evidence must be served and submitted as soon as reasonably possible. If the arbitrator determines that a party unreasonably delayed the service of evidence the arbitrator may refuse to consider the evidence.

The landlord explained that they served the evidence to the tenant as soon as they received permission from the authour(s) of the correspondence that they could be used as evidence. I note that for each piece of correspondence the landlord has redacted all identifying information of the authour(s). The landlord submitted that the authour(s)

were willing to have the landlord provide their complaint letters but that they did not want their contact information known.

The landlord explained that the permission to use the correspondence was requested of the authour(s) on December 8, 2021. When asked as to why the permission was sought only in December and not earlier (the landlord's initial Application was made in August and their second Application was made in September), counsel indicated that the landlord had only retained counsel on December 8, 2021.

I had reviewed the evidence submitted on December 10, 2021 and note that, with the exception of one piece, all correspondence relates to events after both subject notices to end tenancy were issued and not related to the issues of unpaid rent or the purported tenant's notice to end tenancy.

After consideration of the landlord's submissions, I find that the landlord provided no specific reason why it took them from August (or even September) 2021 to obtain legal counsel to represent them or why they did not seek permission from the authour(s) prior to obtaining legal counsel. As such, I find the landlord has unreasonably delayed the submission of this evidence and provided it to both the tenant and the RTB with less that 14 days remaining until the hearing; contrary to the requirements set forth in Rules of Procedure 3.14 and 3.11.

In addition, I find the content and material covered in the majority of the correspondence is unrelated to the issues under dispute and therefore are not relevant to these proceedings as required under Rule of Procedure 3.6.

For these reasons, I advised the parties that I would not consider the landlord's evidence submitted to the RTB on December 10, 2021, with the exception of one piece of correspondence. The piece I have considered is an email dated September 5, 2021 to the landlord's agents regarding events related to the service of the 10 Day Notice to End Tenancy.

I find that this evidence does have relevance to the outcome of this hearing and that despite the late service the tenant had submitted a competent response to the issues related to this email and was prepared to address the issue in the hearing. However, I advised both parties that because the contact information of the correspondent has been redacted and the authour of the email did not attend the hearing as a witness for the landlord I would not attribute much significance or weight to the email.

At the outset of the hearing, I advised the landlord that, despite their request to recover the filing fee for both of their Applications, I would only consider their request for one filing fee as the landlord could have chosen to amend their original Application at no cost as opposed to submitting a new Application for Dispute Resolution. I find it would be unfair to the tenant, if unsuccessful in her Application, to pay for both of the

landlord's Applications when the cost incurred for their second Application was unnecessary.

In addition, the landlord had originally sought a monetary order for rent for the month of September only, they now sought to amend their application to seek compensation for unpaid rent for the months of September, October, November, and December 2021.

Residential Tenancy Branch Rule of Procedure 4 outlines the requirements for considering amendments to an Application for Dispute Resolution.

Rule 4.1 states that an applicant may amend a claim by completing an Amendment to an Application for Dispute Resolution form and filing the completed Amendment to an Application for Dispute Resolution form and supporting evidence with the Residential Tenancy Branch or through a Service BC Office. It goes on say an amendment may add to, alter or remove claims made in the original application.

Rule 4.2 stipulates that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

As the landlord's request for amendment is solely related to the current amount of rent outstanding and is based on the fact that the landlord applied in September 2021 for this application and had to wait for the hearing to be conducted in December 2021, I find that the landlord's request for amendment is allowed pursuant to Rule of Procedure 4.2 and I allow the landlord to increase value of their claim from $1,000.00 to $3,500.00.

During the hearing, the landlord indicated that he was still holding the rent cheque for the month of August 2021 and the tenant indicated that her financial support was willing to pay the current outstanding rent for the months of September, October, November and December 2021. In both cases the parties were waiting for the outcome of this hearing to see if they should follow through with these.

I advised the landlord that regardless of the outcome of the hearing that he should negotiate the current cheque he has for the month of August 2021. I further advised the tenant that she could arrange the payment of any and all outstanding rent to the landlord without the need to wait for this hearing to conclude.

I made this advice based on the tenant having occupancy of the rental unit for the above noted periods and the requirement for a tenant to pay rent when it is due under the tenancy agreement as required under Section 26. I have not considered, as it was not before me in the tenant's Application, whether or not she may be entitled to any compensation for any of the landlord's actions in regard to the events described in this

decision. The tenant remains at liberty to seek such compensation, if she so feels it may be warranted under a separate and future Application for Dispute Resolution.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a 10 Day Notice to End Tenancy for Unpaid Rent, pursuant to Sections 46 of the *Act.*

It must also be decided if the landlord is entitled to an order of possession for unpaid rent or based on a tenant's notice to end tenancy; to a monetary order for unpaid rent; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 45, 46, 55, 67, and 72 of the *Act.*

Background and Evidence

The tenant submitted into evidence a copy of a tenancy agreement signed by the parties on November 15, 2004 for a 1-year fixed term tenancy beginning on December 1, 2004 that converted to a month-to-month tenancy on December 1, 2005 for a monthly rent of $720.00 due on the first day of each month with a security deposit of $360.00 paid. The landlord testified the current rent is $1,000.00, the tenant did not dispute this amount.

The landlord submitted into evidence the following relevant documents:

- A text message from the tenant dated July 18, 2021 at 5:14 a.m. that states: "Becky My stove doesn't work so I moved it out to hallway I am moving July 31st as I have new warm place Please accept this as notice As I know you will be happy about this Cheers Jem I will mail you the keys after the 31st You can renovate it and rent for more and have your baby in peace I don't want a new stove while I am here as fine without J" [reproduced as written];
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated September 2, 2021 with an effective vacancy date of September 13, 2021 citing the tenant had failed to pay rent in the amount of $1,000.00 due on September 1, 2021. The notice also indicates that it was served to the tenant by registered mail and by attaching it to the door or other conspicuous place where the tenant resides; and
- A copy of a Proof of Service document confirming the posting on the rental unit door with a witness and a copy of receipts for registered mail service.

The parties agree the landlord has received only one payment in the amount of $500.00 from the tenant or her funding providers since the Notice to End Tenancy was issued. The landlord issued a receipt for use and occupancy only.

The landlord first seeks an order of possession based on the text message the tenant sent to the landlord on July 18, 2021 as they submit this is a Notice to End Tenancy pursuant to Section 45 of the *Act* and that it complies with the requirements set forth in Section 52 which sets out the form and content requirements for a notice to end tenancy.

The landlord provided the following testimony: "The landlord submits that although the text message sent by the Tenant to end her tenancy does not fit all the criteria in Section 52 of the RTA, the text message was in writing, was signed by the tenant, and stated the effective date of the notice." The landlord went on to submit that the tenant had communicated with the landlord almost exclusively by text message and it was the tenant's preferred method of communication.

The tenant submitted that she later contacted the landlord and advised that the text message was not a notice to end tenancy. The tenant and her witness submitted that in mid August 2021, the tenant's funding source was contacted by the landlord who told them that the tenancy was ended and despite the funding source's request to continue the tenancy, the landlord held the position the tenancy was over and as such the funding source stopped paying the tenants rent.

The landlord submits, in the alternative, if the tenant's notice to end tenancy is found to not be valid then the landlord was correct to expect the payment of rent for the months that the tenant continues to have possession of the rental unit and when they did not receive payment for the month of September, they issued the 10 Day Notice to End Tenancy for Unpaid Rent.

In support of her position the tenant referenced the responses provided by her funding source to her advocate to specific questions in an email dated October 28, 2021 as follows:

1) What, if any, actions by the landlord caused you to stop paying the rent?
   I was advised by her SIL outreach worker, Emma Cook, that the landlord contacted her on August 11th and stated that ChSt gave her notice on July 18th to end tenancy on July 31st, 2021. The landlord sent a copy of an email to Emma, which is attached. As a result, MPA stopped paying rent in full for ChSt for September 1st, 2021.
2) Did you attempt to advocates on Cheryl's behalf to have the tenancy continue?
   I requested that her outreach worker contact the landlord to advocate for ChST to keep her apartment as it was apparent ChSt was psychiatrically unwell when she gave notice and was subsequently hospitalized. The landlord would not agree to this.
3) If the Cheryl is successful at the hearing on December 21st, is it possible for her to be reinstated into your program so she would be able to make rent going forward?

> Yes this is a possibility. We have contacted MHSUSH (mental health and substance use supported housing) as they do all or our referrals and requested they have an OT complete an assessment on ChSt to see her suitability for the SIL program. MPA would then pay her rent for September – December and reinstate her into the SIL program with a subsidy and outreach worker.

The landlord submitted that the 10 Day Notice to End Tenancy for Unpaid Rent was posted on the rental unit door and sent by registered mail to the tenant at the rental unit on September 2, 2021. The landlord stated, when he asked why he used an address that he knew that tenant did not have access to during the relevant times, that he used this address as it was the only address he had for the tenant.

During this time, a number of events were overtaking the tenant, in regard to her mental health. These events included hospitalization from July 20, 2021 to August 6, 2021 and between September 6, 2021 and October 7, 2021. In the months of August and September, the tenant could not find her keys to the residential property, rental unit and mailbox. Despite repeated attempts by the tenant and her advocates, including the tenant's mother, the landlord refused to provide keys to the tenant to access either her mail or her rental unit.

The landlord held during the month of August 2021 that the tenant did not have the right to return to the property as she was no longer a tenant. Despite this claim the landlord never considered the tenant's possessions abandoned as allowed for in the regulation. The regulation allows for the landlord to remove the possessions and put them in storage and then dispose of them if unclaimed.

I also note that from the evidence submitted on December 10, 2021 I did allow that I would consider the email dated September 5, 2021. While this email has had the complainant's identifiers removed I note that this email was made in response to the landlord's email of August 23, 2021 addressed to all of the occupants of the residential property.

In the August 23, 2021 email to the occupant who responded on September 5, 2021 (and all other occupants of the residential property), the landlord wrote the tenant provided notice to end her tenancy effective July 31, 2021 and that they believed the tenant had left the city "abandoning the unit on or about July 31, 2021". It goes on to say that the tenant is "no longer considered a tenant"; that the police attended and removed the tenant from the building on August 23, 2021; and that the police advised the landlord to inform all of the other occupants to "NOT PROVIDE BUILDING ACCESS TO ANYONE OTHER THAN YOUR INVITED GUESTS"; and specifically that if the other occupants encounter this tenant in the building or on the property they are to contact the police using 911 and report the situation and that they should report all encounters to the landlord.

The September 5, 2021 email response from the unnamed source states, among other things: "…..I didn't open the door to see which of us she was addressing and called the police. They came and explained the eviction notice on her door and got her out of the building….."

As a result, the landlord submits that the tenant received the 10 Day Notice to End Tenancy for Unpaid Rent on September 5, 2021 and since the tenant did not submit her Application for Dispute Resolution seeking to cancel the Notice until well after the 5-day allowable period she is conclusively presumed to have accepted the end of the tenancy and she must vacate the rental unit.

The tenant submitted that she had no recollection of getting or even seeing the 10 Day Notice on September 5, 2021 but rather she did not receive it until she was given a day pass from the hospital on September 28, 2021 when she returned to the residential property and saw the registered mail final notice outside of her mailbox. She stated she immediately went to the nearby post office and obtained the notice. I note the tenant's Application was received by the RTB on October 1, 2021.

Analysis

Section 45(1) of the *Act* allows a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice, and
(b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

A notice to end tenancy given under Section 45 must comply with Section 52 of the *Act*.

Section 52 of the *Act* requires that in order to be effective, a notice to end a tenancy must be in writing and must, when provided by a tenant:

(a) be signed and dated by tenant giving the notice,
(b) give the address of the rental unit, and
(c) state the effective date of the notice.

From the submissions of the landlord I concur that the tenant's notice to end tenancy does not comply with the form and content requirements set forth in Section 52. Specifically, I find that the address of the rental unit is not provided. The landlord made no argument regarding this point.

In addition, I am not satisfied that the tenant's text message can be considered signed. While I agree a text message can be considered a written notice, I do not accept that by the tenant putting "J" or "Jem" at the bottom of the text message she has "signed" the

message. The tenancy agreement and Application for Tenancy both contain the tenant's signature and neither show the use of a "J" or "Jem" in it.

For these reasons, I find that the tenant's notice to end tenancy was not a valid notice to end tenancy and the tenancy did not end on July 31, 2021 as purported by the landlord.

Further, as the landlord is a property manager for a corporate landlord, I find the landlord knew or should have known that a tenant cannot give a notice to end tenancy any earlier than one month after the date the landlord receives the notice. So even if the landlord thought this was a valid Notice to End Tenancy, the effective date of the end of the tenancy would have automatically been changed to August 31, 2021, pursuant to Section 53 of the *Act*.

Despite this, the landlord insisted the tenancy ended on July 31, 2021 and failed to provide the tenant with replacement keys in the month of August 2021 when he was approached by the tenant and/or her advocates. Furthermore, I find the landlord took deliberate, active and very public steps, by enlisting all other occupants of the residential property, to ensure the tenant could not return to the residential property.

Section 46 allows a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice. However, a notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this *Act* to deduct from rent.

In addition, within 5 days after receiving a notice under this section, the tenant may pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an Application for Dispute Resolution.

The section goes on to say that if a tenant who has received a notice under this section does not pay the rent or dispute the notice, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date.

Section 88 of the *Act* states all documents, other than those referred to in section 89 [special rules for certain documents], that are required or permitted under the *Act* to be given to or served on a person must be given or served in one of the following ways:

(a) by leaving a copy with the person;
(b) if the person is a landlord, by leaving a copy with an agent of the landlord;
(c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
(d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;

(e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
(f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
(g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
(h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
(i) as ordered by the director under section 71 (1) [director's orders: delivery and service of documents];
(j) by any other means of service provided for in the regulations.

Section 43 of the Residential Tenancy Regulation states for the purposes of section 88 (j) of the *Act*, the documents described in section 88 of the *Act* may be given to or served on a person by emailing a copy to an email address provided as an address for service by the person.

So, in the case before me the landlord had only the following options:

- To give the Notice to the tenant directly;
- By sending it by mail or registered mail to **the address at which the tenant resides**;
- By sending it by mail or registered mail to **a forwarding address provided by the tenant**;
- by leaving a copy at the person's **residence with an adult who apparently resides with the tenant**;
- by leaving a copy in a mailbox or mail slot for **the address at which the tenant resides**;
- by attaching a copy to a door or other conspicuous place at **the address at which the tenant resides;**
- by transmitting a copy to a fax number provided as an address for service by the tenant; or
- by emailing a copy to an email address **provided as an address for service by the tenant.**

The landlord chose to serve the 10 Day Notice to End Tenancy for Unpaid Rent by posting it on a rental unit door and by registered mail to an address that he was actively not allowing the tenant to live in or have access to. Despite the landlord's testimony that he did not know where she was residing and since the tenant had not provided a forwarding address; fax number or email address that could be used as a service address the only option available to the landlord was to serve the tenant with the notice in person.

The landlord did not do so. Rather, the landlord served it to an address from which they knew the tenant could not receive it. As such, regardless of any other testimony, I find the landlord failed to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent, in accordance with the *Act*.

However, I accept the tenant did receive the 10 Day Notice, despite the inappropriate service by the landlord. I accept the tenant's submissions that she did not receive it on September 5, 2021, as purported by the landlord through the email coming from an unidentified source (the email of September 5, 2021). I prefer the tenant's submissions that as a result of not having access to the residential property she was unable to receive the 10 Day Notice until September 28, 2021.

In addition, the email that was sent by the unidentified person did not observe the tenant receiving the notice but rather wrote: "They came and explained the eviction notice on her door and got her out of the building". As such, I find there is insufficient evidence to establish the tenant actually received the Notice on September 5, 2021.

As the tenant submitted her application on October 1, 2021, I find the tenant has submitted her Application for Dispute Resolution seeking to cancel the 10 Day Notice within the allowed 5-day requirement after receipt and as such is not conclusively presumed to have accepted the end of the tenancy.

Section 26 (1) of the *Act* requires a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the *Act*, the regulations or the tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent. Subsection (2) requires a landlord must provide a tenant with a receipt for rent paid in cash.

Section 26 (3) goes on to say whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not

(a) seize any personal property of the tenant, or
(b) **prevent or interfere with the tenant's access to the tenant's personal property**. [emphasis added]

In addition Subsection (4) states that Subsection (3) (a) does not apply if

(a) the landlord has a court order authorizing the action, or
(b) the tenant has abandoned the rental unit and the landlord complies with the regulations.

Section 30(1)(a) of the *Act* also prohibits a landlord from unreasonably restricting access to residential property by the tenant of a rental unit that is part of the residential property

While I agree with the landlord's submissions that the landlord may never have specifically stated to the tenant's funding source that rent should not be paid, I find it is very clear the intention of the landlord was to advise the funding source that the tenancy had ended. I am satisfied that a funding source would implicitly take that to mean that the payment of rent was no longer required.

In addition, I find the aggressive manner in which the landlord prevented the tenant from access to the residential property during the month of August was contrary to their obligations under Section 30(1)(a) of the *Act* and restricting the tenant's access in September was contrary to Section 26(3)(b).

To be clear I find the aggressive manner noted above to include the landlord's refusal to provide the tenant with replacement keys to the property and actively seeking to have other occupants call police to have her physically removed from the property when they had received rent for the month of August and while there were ongoing communications from both the tenant; her mother; and her advocates trying to access the property.

I find that if it weren't for these actions perpetrated by the landlord, the funding source would have continued to pay rent and as such, I find it was the landlord who refused rent for the month of September 2021. Therefore, pursuant to Section 62(2) and Section 46(1) I find there was rent owing to the landlord on the date that the 10 Day Notice to End Tenancy was issued (September 2, 2021).

As a result, I find the landlord was not allowed to issue a 10 Day Notice to End Tenancy for Unpaid Rent and I order that it be cancelled.

However, I find that as of the date of this hearing and the fact that the tenant has continually occupied, through her possessions, the rental unit she does owe the landlord rent for the months of September, October, November and December less the amount she has already paid. Therefore, I find the landlord is entitled to a monetary order in the amount of $3,500.00 as claimed.

Again, I have not considered any compensation for a reduced rent to the tenant for the landlords refusal to provide replacement keys and/or access for the months of August and September 2021.

Conclusion

Based on the above, I dismiss portions of the landlord's Applications for Dispute Resolution seeking orders of possession and grant the tenant's application to cancel the 10 Day Notice to End Tenancy for Unpaid Rent issued on September 2, 2021.

I find the landlord is entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **$3,500.00** comprised of rent owed. This order

must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court. However, I note that should the tenant's funding provider have provided payment as directed in the hearing in the amount of $3,500.00 then the above monetary order has been satisfied.

I dismiss the landlord's application for recovery of the filing fee for either one of their applications. In the first instance, as noted above, I dismiss the claim for the second application as the landlord could have amended their original application. In the second instance, I dismiss the claim I find the landlord was unsuccessful in their first application, seeking the order of possession based on the tenant's text message.

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: December 23, 2021

Residential Tenancy Branch