Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DOLE ENTERPRISES LTD and [tenant name suppressed to protect privac

DECISION

Dispute Codes Landlord: OPC, FFL
Tenant: CNC, OLC, FFT

Introduction

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

- 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.

The tenant filed an amendment on September 7, 2021 seeking to cancel a One Month Notice to End Tenancy dated September 2, 2021 (the "One Month Notice").

The tenant filed an amendment on December 22, 2021, 12 clear days before this hearing, seeking:

- compensation for monetary loss or other money owed, and
- compensation for the cost of emergency repairs made during the tenancy.

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.

The tenant and the landlord's agent (the "agent") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The tenant called his mother "A.R." as a witness. Witness A.R. provided affirmed testimony.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

The tenant confirmed his email address for service of this decision. The agent requested the decision be made available for pick up.

Preliminary Issue- Service

The tenant testified that the original application for dispute resolution was served on the landlord by putting it through the landlord's office mail slot on September 13, 2021. The agent testified that she found the tenant's application for dispute resolution on the office floor on September 13, 2021.

The tenant testified that the September 7, 2021 amendment was served on the landlord by putting it through the landlord's office mail slot on September 7, 2021. The agent testified that she found the tenant's application for dispute resolution on the office floor on September 8, 2021.

The tenant testified that the December 22, 2021 amendment was served on the landlord by putting it through the landlord's office mail slot on December 22, 2021. The agent testified that the tenant's December 22, 2021 amendment was not received.

The agent submitted that all of the tenant's claims should be dismissed because the tenant did not serve the landlord in accordance with section 89 of the *Act.* I find that while the tenant's application for dispute resolution and September 7, 2021 amendment were not served in accordance with section 89 of the *Act*¸ they were sufficiently served, for the purposes of the *Act,* pursuant to section 71 of the *Act*, because the agent confirmed receipt of the above documents on or around the date they were served. I find that the landlord was not prejudiced by the tenant's method of service because the landlord received the documents and was able to review and respond to them. I therefore decline to dismiss the tenant's claims found in the original application and the September 7, 2021 amendment.

Section 4.3 and 4.6 of the Residential Tenancy Branch Rules of Procedure (the "Rules") state:

4.3 Time limits for amending an application
Amended applications and supporting evidence should be submitted to the Residential Tenancy Branch directly or through a Service BC Office as soon as possible and in any event early enough to allow the applicant to comply with Rule 4.6.

4.6 Serving an Amendment to an Application for Dispute Resolution
As soon as possible, copies of the Amendment to an Application for Dispute Resolution form and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by section 89 of the Residential Tenancy Act or section 82 of the Manufactured Home Park Tenancy Act and these Rules of Procedure. The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution form and supporting evidence as required by the Act and these Rules of Procedure. In any event, a copy of the amended application and supporting evidence should be served on the respondents as soon as possible and must be received by the respondent(s) not less than 14 days before the hearing. See also Rule 3 [Serving the application and submitting and exchanging evidence].

I find that the tenant's December 22, 2021 amendment was filed and served on the landlord less than 14 days before this hearing, contrary to section 4.6 of the Rules. The December 22, 2021 amendment is therefore dismissed with leave to reapply.

The agent testified that the tenant was served with the landlord's application for dispute resolution via registered mail on October 8, 2021. A registered mail receipt stating same was entered into evidence. The registered mail customer receipt stating the tenant's name and address was also entered into evidence. The agent testified that the registered mail was unclaimed and returned to sender. The tenant testified that he did not receive the landlord's application for dispute resolution.

Based on the agent's testimony and the registered mail receipt and customer receipt entered into evidence, I find that the landlord served the tenant in accordance with section 89 of the *Act.* Pursuant to section 90 of the *Act*, I find that the tenant was deemed served with the landlord's application on October 13, 2021, five days after its registered mailing. The failure of the tenant to pick up the registered mail does not relive the tenant of the section 90 deeming provisions.

The tenant testified that his evidence was served on the landlord by putting it through the landlord's office mail slot on December 23, 2021. The agent testified that she found the tenant's evidence on the office floor on December 24, 2021. I find that the tenant's evidence was sufficiently served on the landlord, for the purposes of the *Act,* pursuant to section 71 of the *Act* on December 24, 2021 because the agent confirmed receipt on that date.

The agent testified that the landlord's evidence was served on the tenant via registered mail on November 28, 2021. A registered mail receipt stating same was entered into evidence. The registered mail customer receipt stating the tenant's name and address was also entered into evidence. The agent testified that the registered mail was unclaimed and returned to sender. The tenant testified that he did not receive the landlord's evidence.

Based on the agent's testimony and the registered mail receipt and customer receipt entered into evidence, I find that the landlord served the tenant in accordance with section 88 of the *Act.* Pursuant to section 90 of the *Act*, I find that the tenant was deemed served with the landlord's evidence on December 03, 2021, five days after its registered mailing. The failure of the tenant to pick up the registered mail does not relive the tenant of the section 90 deeming provisions.

Preliminary Issue- Amendment

Both parties agree that the tenant's application for dispute resolution did not include "LTD." on the landlord's name. The agent testified that the correct legal name of the landlord ends in "LTD." Pursuant to section 64 of the *Act*, I amend the tenant's application to include "LTD." at the end of the landlord's name. The tenant agreed to the above amendment. The agent did not object to the above amendment.

Both parties agreed to the suite number of the subject rental property. The tenant's application for dispute resolution did not contain the suite number of the subject rental property. Pursuant to section 64 of the *Act,* I amend the tenant's application for dispute resolution to contain the suite number of the subject rental property.

Preliminary Issue- Severance

Rule 6.2 states:

> …If a party has applied to cancel a Notice to End Tenancy or is seeking an order of possession, the arbitrator may decline to hear other claims that have been included in the application and the arbitrator may dismiss such matters with or without leave to reapply.

Pursuant to the above I dismiss the tenant's application for an Order for the landlord to comply with the *Act*, with leave to reapply.

Issues to be Decided

1. Is the tenant entitled to cancel the One Month Notice, pursuant to section 47 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 an Order of Possession for Cause, pursuant to sections 47 and 55 of the *Act*?
4. Is the landlord entitled to recover the filing fee for this application from the tenant, pursuant to section 72 of the *Act*?

Background and 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 agent's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on March 16, 2020 and is currently ongoing. Monthly rent in the amount of $1,035.00 is payable on the first day of each month. A security deposit of $500.00 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.

Both parties agree that the agent served the tenant with the One Month Notice by leaving a copy in the tenant's mailbox on September 3, 2021. The tenant testified that he received the One Month Notice on September 3, 2021.

The One Month Notice was entered into evidence and states the following reasons for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has:
  - put the landlord's property at significant risk.
- Breach of material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;
- Tenant has assigned or sublet the rental unit/site without the landlord's written consent.

The Detail of Cause section of the One Month Notice states:

> On August 8, 2021 the tenant [name redacted for privacy] requested an extra key to our building. He was told 'no' visitors are not issued key's- visitors can stay for a max. 14 days in a calendar year. We had already seen the visitor for a few days prior. On Aug 18, 2021 we issued a breach letter. Followed by an inspection of [the subject rental property] on August 27, 2021 to make sure the visitor had moved out. Nor the tenant nor the visitor were home. However we noticed the visitor coming and going to our building every day on August 28-29-30 & 31st 2021 parking her car in close proximity to our building [vehicle specifics redacted for privacy].

The tenant testified that his mother's apartment building burned down on August 3, 2021 and that his 72-year-old mother was left homeless with only the clothes on her back. The tenant testified that he allowed his mother to stay with him starting on August 4, 2021 and allowed her to stay at his home until she found a new place to live. The tenant testified that his mother found a new apartment to move into for September 2021, and that his mother was permitted to move in a few days earlier than September 1, 2021. The tenant's mother, witness A.R., testified to same. The tenant entered into evidence a news article detailing the blaze.

The agent testified that the tenant breached section 19 of the tenancy agreement by allowing witness A.R. to reside at the subject rental property for more than 14 days.

Section 19 of the tenancy agreement states:

> **Additional Occupants.** Only persons listed in Clause 1,2, or 3 may occupy the rental unit or residential property. Any other person who, without the landlord's written permission, occupies or resides in the rental unit or on the residential property for more than 14 cumulative days in a calendar year will be doing so contrary to this Agreement. The tenant must apply in writing to the landlord if the tenant wishes a person not named in Clause 1, 2, or 3 to become an occupant or co-tenant. Failure to obtain the landlord's written permission is a breach of a material term of this Agreement.

The tenancy agreement only lists the tenant in Clauses 1-3.

Both parties agree that on or around August 8, 2021 the tenant asked the agent for an extra key to the subject rental building and that this request was denied. The tenant testified that on August 8, 2021 he told the agent about the fire at his mother's apartment building. The agent denied that the tenant told him about the fire or why he was seeking an extra key.

Both parties agree that on August 18, 2021 the agent posted a "Breach Letter" on the tenant's door which states:

> As the landlord of the premises noted above, I wish to notify you that Clause 1 of our Residential Tenancy Agreement stipulates you are the only TENANT residing in the above premises and clause 2 does not contain any authorization for additional occupants. These are MATERIAL TERMS of the agreement we have with each other.
>
> It has come to our attention you have allowed an additional person to occupy the premises without permission. Clause 13 of our agreement specifically states:
>
> > "When a person not listed in paragraph 2 above, who resides in the rental unit for a period in excess of two weeks in any calendar year they will be considered to be occupying the premises contrary to this Agreement and without the right or permission of the landlord. This person shall be considered a trespasser. A tenant anticipating an additional person to occupy the rental unit, must promptly apply in writing for permission from the landlord for such person to become an approved occupant. Failure to apply and obtain the necessary approval of the landlord in writing is in breach of a material term of this Agreement. The landlord may at his option give notice to the tenant to immediately correct the breach. If the

> tenant fails to correct the breach within a reasonable time after having been given written notice by the landlord, the landlord has the right to end the tenancy."
>
> We hereby give you notice to immediately correct the breach by having the additional occupant move from the rental premises.
>
> Failure to do so within 5 days of receiving this letter will result in a one (1) month Notice to End A Residential Tenancy being served on yourself pursuant to section 47(1)(h) of the Residential Tenancy Act, SBC 2002, Chapter 78.

Section 13 of the tenancy agreement entered into evidence and signed by the parties is different that what is quoted in the above Breach Letter. Section 13 of the tenancy agreement states:

> **UTILITIES PAYMENT.** Utilities that are not paid to the landlord or included in the rent must be arranged for and the account maintained current by the tenant. The discontinuation of any utilities resulting from the tenant cancelling or failing to maintain current payments is a breach of a material term of this Agreement. The landlord may issue a 10 day Notice to End Tenancy for Unpaid Rent or Utilities if any utilities payable to the landlord remain unpaid more than 30 days after the tenant receives written demand for payment.

Both parties agree that a letter explaining why the breach letter was served on the tenant was posted on the door on August 20, 2021.

The tenant testified that due to the above letters his mother spent two nights in a hotel room. The tenant entered into evidence an invoice from a hotel for check in August 25 and check out on August 27, 2021. The tenant and witness A.R. testified that at this point A.R. found out that she was able to move into another apartment a ½ block away. The tenant and witness A.R. testified that witness A.R. spent the next night with another relative. The tenant testified that he allowed his mother to spend one or two more nights at the subject rental property before she moved into her new apartment.

Both parties agree that the tenant was served with a notice to enter the premises and that the agent inspected the subject rental property on August 27, 2021.

Both parties agree that the landlord served the tenant with a caution notice on August 31, 2021 which states:

> Visitor has moved back into [the subject rental property] August 28, 2021. You are in breach again see section 19. Your visitor has keys to our building without [the landlord's] written permission see section 21. We have tried to contact you without success. We regard [the subject rental property] as being sublet without permission. Section 20.

The August 27, 2021 caution notice states that the tenant breached section 47(1)(d)(iii), section 47(1)(h) and section 47(1)(i) of the *Act.*

The tenant testified that he never gave his mother a copy of the building key as he only had one copy. The tenant testified that while his mother stayed with him, he let her in and out of the apartment building. Witness A.R. testified to same.

Both parties agree that on August 31, 2021 the agent and witness A.R. had words in the lobby on witness A.R.'s exit from the building. Both parties agree that the agent asked witness A.R. when the tenant would be home and that witness A.R. told her that she did not know. Witness A.R. testified that the agent responded, "You must know, as you are living there". Witness A.R. testified that she then informed the agent that she had already moved out and was living ½ block away. The agent testified that she does not know if the tenant moved out of the subject rental property.

Both parties agree that on September 3, 2021, in addition to the One Month Notice, the agent served the tenant with another letter titled "Another Breach of Material Terms of Tenancy". The letter states:

> On August 31, 2021 our building manager caught the Lady you had staying in your suite for over two weeks inside our building, in the front lobby. She was asked where you were and said you were not home.
>
> **Section 22 of your Tenancy Agreement states:**
> *"The door to the rental unit must be kept closed, and in the tenants absence, locked. The tenancy may not install, change or alter a lock or security device, such as dead bolt, door chain, or alarm system,* ***or make extra keys to the rental unit or residential property without the landlord's written consent. Entry by any person to the residential property or rental unit by unauthorized possession of a key is a material term of this Agreement.***

> Since this person gained access to the building and your suite while you were not home, We have to assume you have given them keys to enter both. [The landlord] has not given you permission to copy our building keys or give your set of keys out so other can access the building unsupervised.
>
> Since the individual caught int eh building was also subject of a breach letter to you just last month for overstaying as a guest, finding them in the building again tells us that you only temporarily moved them out to avoid eviction for having guests overstaying.
>
> This letter is accompanied by a notice to end tenancy.

The tenant testified that his mother came over for a visit on August 31, 2021 and he let her into the subject rental property. The tenant testified that he had to go and house sit and that his mother stayed at the subject rental property after he left. The tenant testified that he did not make any extra keys. The agent testified that witness A.R. must have had high security keys which is unacceptable or must have left the tenant's apartment unlocked which is a security risk.

Analysis

Based on the testimony of both parties I find that the One Month Notice was served on the tenant on September 3, 2021 in accordance with section 88 of the *Act.*

Based on the testimony of the tenant and witness A.R. I find that witness A.R. is the tenant's 72-year-old mother. Based on the testimony of the tenant, witness A.R. and the news article entered into evidence, I find that witness A.R.'s apartment burned down and that the tenant allowed her to reside at the subject rental property for approximately 3-3.5 weeks in August of 2021 while she looked for alternative accomodation. I accept the testimony of witness A.R. and the tenant that the tenant moved out of the subject rental property by August 31, 2021.

Section 47(1)(h) of the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

Residential Tenancy Policy Guideline #8 states in part:

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof.

I find that the August 18, 2021 Breach Letter is void and of no force or effect because it states that the tenant has breached a section of the tenancy agreement which does not exist. The August 18, 2021 Breach Letter states that the tenant breached section 13 of the tenancy agreement regarding additional occupants; however, section 13 of the tenancy agreements actually regards the payment of utilities. In addition, the quoted section of the tenancy agreement regarding additional occupants which the landlord alleges the tenant breached, is different than section 19 of the tenancy agreement which deals with additional occupants. I find that the landlord cannot rely on a breach letter as a basis to end a tenancy when that breach letter did not properly notify the tenant of the terms of the tenancy agreement the landlord alleged the tenant breached. I find that the landlord is not entitled to an Order of Possession pursuant to section 47(1)(h) of the *Act.*

I find that had the August 18, 2021 breach letter have correctly named the section of the tenancy agreement which the landlord is alleging was breached, the landlord did not provide a reasonable amount of time for the tenant to correct the breach. I find that given the circumstances surrounding the tenant's elderly mother's short-term stay, five days was not enough time for the alleged breach to have been rectified. As stated in Policy Guideline #8, the landlord was required to have provided a reasonable deadline for the alleged breach to have been corrected. I find that five days to move out the tenant's elderly mother, whose home and belongings were destroyed in a fire, was not enough time.

I find that the August 27, 2021 caution notice does not provide a deadline for the alleged breach of section 19 of the tenancy agreement to be fixed. Therefore, the August 27, 2021 caution letter does not meet the requirements of a breach letter to end a tenancy as set out in Policy Guideline #8.

I find the letter titled “Another Breach of Material Terms of Tenancy” does not provide a deadline for the alleged breach of section 22 of the tenancy agreement to be fixed. Therefore, pursuant to Residential Tenancy Policy Guideline #8, the “Another Breach of Material Terms of Tenancy” letter cannot be relied on to end a tenancy under section 47(1)(h) of the *Act.*

Section 47(1)(d)(iii) of the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has put the landlord's property at significant risk.

I accept the tenant’s testimony that he did not give witness A.R. his key to the subject rental building. I find that whether the tenant left his unit open or gave his mother his spare key, either action did not put the landlord’s property at significant risk. The subject rental building key was not duplicated or given out, and even if it had been, I find the tenant’s elderly mother did not pose a significant risk to the landlord’s property, nor did her possession of any building keys. I find that even if the landlord’s allegations are true, they are not significant enough to end a tenancy under section 47(1)(d)(iii) of the *Act.*

Section 47(1)(i) of the *Act* states:

> **47** (1)A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
>
> > (i)the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*;

Residential Tenancy Branch Policy Guideline #19 (PG#19) states:

> Assignment is the act of permanently transferring a tenant’s rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord….
>
> When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-

> tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant….

Based on the testimony of both parties, I find that the tenant did not move out of the subject rental property but allowed his mother to live with him. As stated in PG #19, because the tenant did not move out, this is not a true sublet or an assignment and is therefore not grounds for eviction under section 47(1)(i) of the *Act.*

I find that since the landlord has not proved any of the grounds stated on the One Month Notice to end the tenancy, the One Month Notice is cancelled and of no force or effect. As the landlord was not successful in this application for dispute resolution, I find that the landlord is not entitled to recover the filing fee for this application, 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 is dismissed without leave to reapply.

The One Month Notice is cancelled and of no force or effect.

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

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: January 04, 2022

Residential Tenancy Branch