Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT, FFT

Introduction

The Applicant seeks an order for possession as a tenant pursuant to s. 54 of the *Residential Tenancy Act* (the "*Act*"). The Applicant also seeks the return of her filing fee pursuant to s. 72 of the *Act*.

R.C. appeared as the Applicant. H.H. appeared as the Respondent.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties inquired whether the recordings would be accessible. I advised that the process for obtaining the recordings could be obtained from the Residential Tenancy Branch and cautioned the parties that the use and distribution of the recordings is restricted.

The Applicant advised that she served the Respondent with the Notice of Dispute Resolution and her evidence by way of registered mail sent on April 20, 2022. The Respondent acknowledges receipt of the Applicant's application materials. I find that pursuant to s. 71(2) of the *Act* that the Applicant's application materials were sufficiently served on the Respondent by virtue of its acknowledged receipt.

The Respondent advised that she served her response evidence on the Applicant by way of registered mail sent on April 28, 2022. The Respondent indicates that the registered mail was sent to the Applicant's listed address for service in the Notice of Dispute Resolution, which is the address for the disputed rental unit. The Applicant

denies receiving the Respondent's evidence. The disputed rental unit is in the same residential property that the Respondent resides, which is a singled detached home. The Applicant and the Respondent both confirmed that the Applicant does not live within the disputed rental unit or at the residential property.

The Respondent raised the argument that she did not have the Applicant's mailing address as none was ever provided to her. I take the Respondent's point with respect to the issue of service under the circumstances. As will be described in further detail below, the present claim is raised within the context of a family law dispute that is before the court. The Respondent is the Applicant's former mother-in-law. The Respondent's evidence was described as being related to the Applicant's alleged cocaine use and mental health issues.

I find that the Respondent's evidence was not properly served on the Applicant. The Respondent ought to have reasonably known that the Applicant was not residing at the address in which the registered mail had been sent as it was same address in which she lives. I note that Rule 3.6 of the Rules of Procedure states that all evidence must be relevant to the claim. I further find that the Respondent's evidence with respect to cocaine use and mental health issues are not relevant to the Applicant's claim for an order for possession as a tenant with right to occupy a rental unit. The parties' interpersonal conflict and personal accusations are not relevant to the Applicant's claim under s. 54 of the *Act*.

Preliminary Issue – Amending the Style of Cause

The Applicant listed her two minor children as tenants within her application. The point with respect to two of the listed parties being minors was raised by the Respondent and confirmed by the Applicant. I advised at the hearing that if there is a tenancy, the minor children are not tenants as their capacity to contract is constrained by virtue of their age and their dependency on their guardians.

Pursuant to Rule 4.2 of the Rules of Procedure, I amend the application to remove the minor children from the style of cause.

Preliminary Issue - Jurisdiction

The Respondent raised the argument that the Residential Tenancy Branch does not have jurisdiction to adjudicate the dispute. The question of jurisdiction is raised on two

grounds: the first that the rental unit was not separate from the living area of the house where the Respondent resides and the second that the dispute relates to a family property division claim before the BC Supreme Court.

The parties advised that the Applicant separated from the Respondent's son some time ago. The Applicant and the son resided in at the residential property since 2018.

In the Applicant's telling, she and her former partner rented a suite in the residential property from her mother-in-law. The suite was described as a separate unit with its own kitchen. The Applicant advises that the suite was connected to the main part of the house, though there was a door between the spaces that could be locked from the Respondent's side of the house.

The Respondent indicates that there was no landlord-tenant relationship as she let her the Applicant and her son reside at her house due to the familial connection. She says that her grandchildren moved freely about the house and that she often took care of them at the request of the Applicant. The Respondent says she would enter the disputed rental unit. According to the Respondent, the larger family would often share meals together. The Applicant disputed this characterization, emphasizing the separate nature of the rental unit and that meals were not shared. The Applicant insinuated that the Respondent would come and go into the rental unit as she pleased without the Applicant's permission.

The Respondent says that rent was to be paid in the amount of $900.00 per month. However, rent often went unpaid and when it was paid it was in the amount of $450.00. The Applicant did not dispute the Respondent's evidence with respect to rent payments. The parties confirm there is no written tenancy agreement. No security deposit appears to have been paid.

The Applicant emphasized that she was in the process of moving out of the residential property when an argument took place between her and the Respondent. The Applicant says that the locks have been changed, thereby preventing her from retrieving her personal belongings. The Applicant advises that she does not wish to have possession of the rental unit, only the return of her personal belongings.

The Respondent denies changing the locks and further indicates that the personal property is subject to family property division claims before the BC Supreme Court. She

further indicates that some of the furniture within the residential property belongs to her and cannot be taken by Applicant or her son.

Policy Guideline #9 provides guidance with respect to tenancies and licences to occupy. It states the following with respect to these types of arrangements:

> Under a tenancy agreement, the tenant has exclusive possession of the site or 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.

Under the circumstances, I find that it is more likely than not that the Applicant did not have exclusive possession of the purported rental unit, nor was there a fixed amount of rent that was paid. The familial component of this dispute would lead me to conclude that it is far more likely that the parties moved freely throughout the house. I accept the Respondent's evidence that she cared for her grandchildren and shared meals with the larger family. The Applicant confirmed that the Respondent would enter and leave the purported rental unit, which is not consistent with a tenant's right to the exclusive occupation a rental unit.

Further, rent that had been set out appears to have never been paid in the full amount and that the Respondent accepted rent of $450.00, which was not consistent with the amount to be paid of $900.00. No security deposit appears to have been paid. I find that the Respondent permitted the occupation by the Applicant based on generosity rather business considerations.

Accordingly, I find that I do not have jurisdiction to determine this dispute as it appears there was a licence to occupy based on the familial connection between the parties. Further, as set out under s. 4 of the *Act*, the *Act* does not apply to living accommodations in which a tenant and a landlord share bathroom or kitchen facilities. The parties appear to have shared the residential property as an extended family dwelling.

As I found I do not have jurisdiction, I need not consider the potential application of s. 58(2) that the dispute is substantially linked to a matter that is before the Supreme Court.

I would add that if I am incorrect with respect to the question of jurisdiction, I would have dismissed the application without leave to reapply in any event. The Applicant admits she does not wish to occupy the rental unit, only the return of her personal property. The application is improperly pled. Section 54 of the *Act* clearly applies to claims where a tenant seeks possession of a rental unit in which they are entitled to occupy under a tenancy agreement. The Applicant admits she does not want to occupy the rental unit. Therefore, her claim for return of her property, if it was to be made, would have to be advanced under another section of the *Act*.

As made clear by Rule 2.2 of the Rules of Procedure, a claim is limited to what is stated in an application and the ability to amend the application is constrained by Rule 10.7 of the Rules of Procedure. Given this was an expedited hearing, it would not be proper to file under s. 54 to obtain an earlier hearing date and then seek alternate relief at the hearing through amendment. Policy Guideline #51 cautions against such “queue jumping”.

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: May 04, 2022

Residential Tenancy Branch