Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #910066575: CNR-MT, OLC
File #310066266: MNR-DR, OPR-DR, FFL

Introduction

The Tenant applies for the following relief under the *Residential Tenancy Act* (the "*Act*"):

- An order pursuant to s. 46 to cancel a 10-Day Notice to End Tenancy signed on March 7, 2022 (the "10-Day Notice");
- An order pursuant to s. 66 for more time to dispute the 10-Day Notice; and
- An order pursuant to s. 62 that the Landlord comply with the *Act*, Regulations, and/or the tenancy agreement.

The Landlord files a cross-application, naming two tenants, seeking the following under the *Act*:

- An order for possession pursuant to s. 55 after issuing the 10-Day Notice;
- An monetary order for unpaid rent pursuant to s. 67; and
- Return of their filing fee pursuant to s. 72.

The Landlord's application was filed as a direct request but was scheduled for a participatory hearing due the Tenant's application.

B.A. appeared as the Tenant. Z.A. appeared as the Landlord. The Landlord was represented by his son, T.A., as his agent.

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 Landlord's agent advised that the Tenant was served with the 10-Day Notice by having it posted to his door on March 7, 2022. The Tenant acknowledges receiving the 10-Day Notice on March 7, 2022. I find that the Landlord served the 10-Day Notice in accordance with s. 88 of the *Act* and was received by the Tenant on March 7, 2022 as acknowledged by him at the hearing.

The Tenant advises that he served the Landlord his application in March 2022. The Landlord acknowledges receipt of the Tenant's application. Pursuant to s. 71(2) of the *Act*, I find that the Landlord was sufficiently served with the Tenant's application materials as they acknowledged received by the Landlord at the hearing.

The Landlord's agent advised that the Landlord's application and evidence were served in March 2022. The Tenant denies receiving the Landlord's application. The agent emphasized that his father served the application materials on the Tenant's wife. The agent admitted that the Landlord did not provide proof of service for the application to the Residential Tenancy Branch.

Rule 3.5 of the Rules of Procedure requires applicants to be prepared to demonstrate service of their application at the hearing. In this instance, I have conflicting affirmed testimony without proof of service provided by the Landlord. I am unable to find that the Landlord's application was served on the Tenant. Accordingly, I dismiss the Landlord's application with leave to reapply except for his claim for the return of his filing fee, which will be dismissed without leave to reapply. The Landlord shall bear the cost for his application as he failed to demonstrate it was served.

The hearing proceeded strictly on the basis of the Tenant's application.

Issues to be Decided

1) Should the 10-Day Notice be cancelled?
2) Is the Landlord entitled to an order for possession under s. 55(1)?
3) Is the Landlord entitled to an order for unpaid rent under s. 55(1.1)?
4) Should the Landlord be ordered to comply with the *Act*, Regulations, and/or the tenancy agreement?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on August 1, 2017.
- Rent of $1,000.00 was due on the first day of each month.
- The Landlord holds a security deposit of $300.00 in trust for the Tenant.

No copy of a written tenancy agreement was put into evidence.

The Landlord's agent indicates that the 10-Day Notice was served on the Tenant as he had failed to pay rent on March 1, 2022. The Landlord's agent further advised that the Tenant did not pay rent on April 1, 2022, May 1, 2022, or June 1, 2022.

A copy of the 10-Day Notice was put into evidence by the Tenant in his application.

The Tenant acknowledged that he did not pay rent on March 1, 2022. He stated that he had an injury while working in January 2022 and that he had not yet received his worker's compensation benefits such that he could not pay rent on March 1, 2022. The Tenant says that the Landlord cut off heat and access to the dryer after rent was not paid on March 1, 2022. The Tenant further advised that he has sorted his finances and that he has rent to be paid to the Landlord but that he has refused to do so as the services have not been returned. The Landlord's agent denies service to the heat was cut off.

I asked the Tenant why he is seeking more time to dispute the 10-Day Notice. The Tenant says that he filed on time and provided no submissions to explain why he is seeking more time to dispute the notice other than to repeat that faced finance issues in the spring of 2022. The Tenant's application does not state why he is seeking more time to dispute the 10-Day Notice other than to state "Because I did pay the rent so two months they told me to apply sick benefit."

The parties confirmed the Tenant continues to reside within the rental unit.

The parties had some disagreement with respect to a conflict between the Landlord and the Tenant, in particular an incident that was said to have occurred in June 2022 was discussed. The personal dispute and the allegations arising from the incident are not relevant to the present application, which pertains strictly to issue of unpaid rent.

Analysis

The Tenant seeks to dispute the 10-Day Notice and more time to do so.

Pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant.

When a 10-Day notice to end tenancy issued under s. 46 of the *Act* is received by a tenant, a tenant must, within 5-days, either pay the overdue rent or dispute the notice with the Residential Tenancy Branch. This is made clear at the very top of the 10-Day Notice to End Tenancy, which states:

> **HOW TO DISPUTE THIS NOTICE**
>
> You have **5 days** to pay rent and/or utilities to the landlord or file an Application for Dispute Resolution with the Residential Tenancy Branch online, in person at any Service BC Office or by going to the Residential Tenancy Branch Office at #400 - 5021 Kingsway in Burnaby. If you do not apply within the required time limit, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the effective date of this Notice.

The Tenant in this case acknowledges receiving the 10-Day Notice on March 7, 2022. Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Tenant filed his application on March 14, 2022, which is outside the 5-day window permitted to him under s. 46(4) of the *Act*. The Tenant acknowledges that he did not and has not pay rent for March 2022.

The Tenant has filed for more time to dispute the 10-Day Notice under s. 66 of the *Act*. Pursuant to s. 66 of the *Act*, the director may extend a time limit established under the *Act* only under exceptional circumstances. The extension cannot be granted if the application is made after the effective date in the notice has passed. Policy Guideline #36 provides the following guidance with respect to “exceptional circumstances”:

The word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.

Some examples of what might not be considered "exceptional" circumstances include:

- the party who applied late for arbitration was not feeling well
- the party did not know the applicable law or procedure
- the party was not paying attention to the correct procedure
- the party changed his or her mind about filing an application for arbitration
- the party relied on incorrect information from a friend or relative

…

The criteria which would be considered by an arbitrator in making a determination as to whether or not there were exceptional circumstances include:

- the party did not wilfully fail to comply with the relevant time limit
- the party had a bona fide intent to comply with the relevant time limit
- reasonable and appropriate steps were taken to comply with the relevant time limit
- the failure to meet the relevant time limit was not caused or contributed to by the conduct of the party
- the party has filed an application which indicates there is merit to the claim
- the party has brought the application as soon as practical under the circumstances

The Tenant in this case made no substantive submissions on why there were exceptional circumstances that prevented him from filing his application within 5 days of receiving the 10-Day Notice. The Tenant made a general comment with respect to his finances. However, I note that the Tenant applied for a fee waiver. Therefore, even if impecuniosity were a barrier to filing, that was not present here.

I find that the Tenant has failed to show that exceptional circumstances are present such that the 5-day dispute period imposed by s. 46(4) ought to be extended. His application under s. 66 for more time to dispute the 10-Day Notice is dismissed.

Given this, s. 46(5) comes into effect and the Tenant is conclusively presumed to have accepted the end of the tenancy and ought to have vacated the rental unit on the effective date. In this case, the effective date is corrected by s. 53 of the *Act* and is March 17, 2022, which is 10 days after the 10-Day Notice was received.

To be clear, even had the conclusive presumption not applied, I would have found that the 10-Day Notice was properly issued on the basis that the Tenant acknowledges he did not pay rent on March 1, 2022. Pursuant to s. 26(1) of the *Act*, a tenant must pay rent when it is due whether or not the landlord complies with the *Act*, the Regulations, or the tenancy agreement unless the *Act* grants the tenant the right to deduct all or a portion of the rent. The *Act* proscribes a set of limited circumstances in which monies claimed by the Tenant can be deducted from rent, which include:

1. Where a tenant has paid a security deposit or pet damage deposit above that allowed by s. 19(1), then the amount that was overpaid may be deducted from rent (see s. 19(2)).
2. The reimbursement of costs borne by a tenant for emergency repairs after the process contemplated by s. 33(5) have been followed (see s. 33(8)).
3. Where a landlord collects rent following a rent increase that does not comply with the amount proscribed by the regulations, then the tenant may deduct the overpayment from rent (see s. 43(5)).
4. As ordered by the Director pursuant to ss. 65 and 72.

None of the circumstances listed above are applicable. The Tenant says he was short of money on March 1, 2022. That is not a justifiable reason for not paying rent. The Tenant alleges heat was cut off. I make no findings on whether that is true. However, I note that even if it were, the Tenant would not be permitted to withhold rent under the *Act* on that basis alone.

As the Tenant is conclusively presumed to have accepted the end of the tenancy, I dismiss his application to cancel the 10-Day Notice. Section 55(1) provides that where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with s. 52, then I must grant the landlord an order for possession. In this instance, I find that the 10-Day Notice does comply with s. 52. Therefore, I find that the Landlord is entitled to an order for possession.

Pursuant to s. 55(1.1) of the *Act*, if a tenant's application to cancel a notice to end tenancy for unpaid rent is dismissed and the notice complies with the formal

requirements of s. 52, then the Director must grant an order for unpaid rent. In accordance with Policy Guideline 3, an order for unpaid rent is limited to rent owed during the tenancy and does not include compensation for an overholding tenant.

Where a tenant is conclusive presumed to have accepted the end of the tenancy pursuant to s. 46(5) of the *Act*, the tenancy therefore ends on the effective date in the notice to end tenancy. In this case, that is March 17, 2022. Only rent owed up until this point constitutes unpaid rent and I cannot order compensation for rent from tenant that is overholding. The Landlord must file a separate application for that relief.

Accordingly, pursuant to s. 55(1.1), I order that the Tenant pay $1,000.00 to the Landlord in unpaid rent.

Conclusion

The Tenant is conclusively presumed to have accepted the end of the tenancy. His application to cancel the 10-Day Notice is dismissed without leave to reapply.

As the tenancy is over, the Tenant's application under s. 62 of the *Act* is dismissed without leave to reapply.

The Landlord is entitled to an order for possession pursuant to s. 55(1) of the *Act*. The Tenant shall provide vacant possession of the rental unit to the Landlord within **two (2) days** of receiving the order for possession.

The Landlord is entitled to an order for unpaid rent pursuant to s. 55(1.1) of the *Act*. The Tenant shall pay **$1,000.00** to the Landlord for unpaid rent.

It is the Landlord's obligation to serve the order for possession and monetary order on the Tenant.

If the Tenant does not comply with the order for possession, it may be filed by the Landlord with the Supreme Court of British Columbia and enforced as an order of that Court.

If the Tenant does not comply with the monetary order, it may be filed by the Landlord with the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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: June 30, 2022

Residential Tenancy Branch