Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, FFT

Introduction

The Tenants apply for the following relief under the *Residential Tenancy Act* (the "*Act*"):

- An order for compensation pursuant to s. 51 equivalent to 12 times monthly rent; and
- Return of their filing fee pursuant to s. 72.

E.J. and T.J. appeared as the Tenants. J.K. appeared as the Landlord.

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.

Service of the Application Materials

The Tenants obtained a substitutional service order on December 17, 2021 permitting them to serve the Landlord by way of email. At the hearing, the Tenants indicate that they served the Landlord with the Notice of Dispute Resolution and their evidence by way of email sent on May 11, 2022.

The Landlord denies receiving the Tenants' application materials and indicates he received notice of the hearing directly from the Residential Tenancy Branch by way of reminder email he received on May 31, 2022. The Landlord stated he was not prepared to proceed given the lack of notice. The Landlord confirmed the email address in the substitutional service order is his current email.

The substitutional service decision of December 17, 2021 states the following:

> I order the tenant to provide proof of service of the e-mail which may include a print-out of the sent item, a confirmation of delivery receipt, or other documentation to confirm the tenant has served the landlord in accordance with this order. If possible, the tenant should provide a read receipt confirming the e-mail was opened and viewed by the landlord.

The Tenants did not provide proof of that the email was sent, nor did they provide proof in the form of a read receipt in advance of the participatory hearing. The Tenants insisted that the evidence was served when and further indicated that they have a read receipt for the email. Again, that was not provided to the Residential Tenancy Branch. I was told that the application materials were sent to the Landlord's former mailing address, though these were returned to the Tenants.

I enquired why there was a delay between the substitutional service order of December 17, 2021 and service on May 11, 2022. The Tenants advised that they did not receive the decision until January 2022 and had subsequent issues getting an email where they could get a read receipt. They further mentioned that there were issues with compressing their evidence into the email.

The Tenants know where the Landlord works based on the substitutional service decision. Section 89 of the *Act* permits personal service, among other methods. It is entirely unclear to me why they would not have attempted other forms of service once registered mail was no longer open to them.

Rule 3.5 of the Rules of Procedure requires applicants to demonstrate service of their application materials at the hearing. Service is a fundamental component of ensuring a procedurally fair process as it provides respondents the opportunity to know the case against them.

In the absence of direct evidence proving service, I am left with the affirmed testimony of the Tenants and the Landlord, both of which are equally probable. However, it is the Tenants burden to show the application materials were served. Given the conflicting testimony, I am unable to find that the Tenants served their application materials.

Policy Guideline #12 provides guidance with respect to the service provisions of the *Act*. It indicates that when a party has not been served, the matter may be adjourned or dismissed with or without leave to reapply.

I concluded the hearing advising that I had not decided on whether the matter would be adjourned or dismissed. I am cognizant that the tenancy in this matter ended in November 2019, thus there may be a limitation issue with the Tenant's claim if the matter is dismissed. The Tenants asked that I adjourn the matter. The Landlord advised that the standard course for the Residential Tenancy Branch when these situations occur is for the matter to be dismissed.

There are two issues I have with the present impasse. The first is that the Tenants did not follow the substitutional service decision and failed to provide proof of service in advance of the participatory hearing. The second is that the Notice of Dispute Resolution is what is at issue, which sets out the basic framework of the claim. Its service is fundamental to ensuring a procedurally fair process.

The Tenants filed their application on November 14, 2021. They obtained a substitutional service order on December 17, 2021. They only served their evidence via email on May 11, 2022. For reasons I do not understand, the Tenants did not follow the clear order made of them in the substitutional service decision to provide proof of service. Despite the significant time since the application and the substitutional service order, the Tenants have failed to demonstrate service of the Notice of Dispute Resolution, which sets out the four corners of their claim.

I find that the Tenants failed to demonstrate service of their application materials. The Landlord is correct that the standard course when an applicant fails to demonstrate service is to dismiss the application. It would be inappropriate to adjourn the matter to provide additional time for the Tenants to serve their application given the significant amount of time they have already had to undertake service. The Tenants must bear the consequences of failing to serve their application despite having ample time and opportunity to do so.

Accordingly, I dismiss the Tenants' claim under s. 51 of the *Act* with leave to reapply. I find that the Tenants shall bear the cost of their application as they failed to demonstrate it had been served. Their claim under s. 72 of the *Act* is dismissed without leave to reapply.

I have considered the potential impact of the limitations period. I make no findings on whether s. 60 of the *Act* may apply to the Tenants claim given the dismissal. However, I do not find that the potential impact of s. 60 to be relevant to my determination on dismissing the claim rather than adjourning it. If s. 60 does apply, it would be a direct consequence of the Tenants conduct in delaying their application and their present failure to demonstrate service of their application. In other words, whatever prejudice that may result from the dismissal is a consequence of the Tenants own conduct.

No findings of fact or law are made with respect to the substantive aspects of the Tenants' claim. This dismissal does not extend any time limitation that may apply under the *Act*.

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 15, 2022

Residential Tenancy Branch