



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPC, FFL**

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for possession under a One Month Notice to End Tenancy for Cause ("One Month Notice") pursuant to sections 47 and 55;
- Authorization to recover the filing fee for this application pursuant to section 72.

The landlord attended with the agent SS ("the landlord"). The tenant attended.

The parties were given the opportunity to present evidence, call witnesses and provide testimony. The hearing process was explained and the parties were given an opportunity to ask questions which I answered.

The tenant acknowledged receipt of the Notice of Hearing on April 26, 2022.

1. Preliminary Issue – Service by Landlord of Evidence

The landlord testified they served their evidence package by posting it to the tenant's door on August 20, 2022, three days before the hearing.

The Act requires that both the parties must serve documents and evidence as soon as possible and in accordance with the Rules of Procedure. An arbitrator may dismiss the claim or choose to not consider documents that have been served late or improperly.

Rules 3.14 and 3.17 state:

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing. In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

Rule 3.17

3.17 Consideration of new and relevant evidence

Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5 [Documents that must be submitted with an Application for Dispute Resolution], 3.1, 3.2, 3.10.5, 3.14 3.15, and 10 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not

unreasonably prejudice one party or result in a breach of the principles of natural justice.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

Both parties were heard regarding the late served evidence. The landlord proffered no reason for the late service. The tenant objected to the landlord's evidence being submitted because of the late service.

Further to the submissions, the Act and the Rules, I decline to accept the landlord's late served evidence as failing to meet the criteria established above. I find the acceptance of late evidence would unreasonably prejudice the tenant or result in a breach of the principles of natural justice.

The landlord raised no issues with respect to the tenant's evidence. I find the tenant's evidence was served in compliance with the Act.

2. Preliminary Issue – One Month Notice

This is an application by a landlord for an Order of Possession pursuant to a One Month Notice dated February 2, 2022 with an effective date of March 31, 2022. The reason for the issuance is the repeated late payment of rent by the tenant.

The landlord testified they posted the One Month Notice to the tenant's door on February 2, 2022. They submitted a Proof of Service in the RTB form which was filed on April 24, 2022. The Proof of Service attached a copy of the Notice and stated service was affected by posting to the tenant's door that same day.

The Proof of Service form includes a section to be completed by a witness to the service. The witness form was signed by "SBains" who check marked the section stating the landlord left a copy with the tenant or with an adult who apparently lives with the tenant. The landlord testified S.Bains is his wife. She was not called as a witness. The landlord stated the Notice is in error by stating the tenant was

personally served when service was carried out by posting. The landlord asserted he had nevertheless properly served the tenant by posting.

The tenant denied receipt of the One Month Notice. She testified that she never received the Notice on February 2, 2022 or at any time. The tenant testified she first saw the Notice in the landlord's evidence which was served upon her three days before the hearing as attached to the Proof of Service.

The parties agreed this is the second hearing between them in a year. The number of the first dispute, which occurred in December 2021, appears on the first page. The landlord's Two Month Notice to End Tenancy for Landlord's Use was dismissed at that time.

The tenant testified that the landlord is attempting to evict her for unfair and false reasons. The tenant opined that market rent for the unit is twice what she is paying and the landlord wants her out to raise the rent.

The landlord denied the tenant's assertions and claimed they are entitled to an Order of Possession.

Section 88 states how documents are to be served:

88 All documents, other than those referred to in section 89 [special rules for certain documents], that are required or permitted under this 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) [...]

(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;

Policy Guideline 12 – Service states the purpose of serving documents is to notify the parties named in the dispute of matters relating to the Act, the tenancy agreement or a dispute resolution proceeding. Another purpose of providing the documents is to allow the other party to prepare their response for the hearing and gather documents they may need to serve and submit as evidence in support of their position.

The landlord acknowledged the Proof of Service form is in error in stating the tenant was personally served. The landlord provided disputed testimony of posting the document to the tenant's door.

Section 90 sets out “deemed receipt” provision and states that documents that are posted to a door are deemed to have been received three days late.

In the event of disagreement between the parties about the date a document was served and the date it was received, an arbitrator may hear evidence from both parties and make a finding of when service was effected.

The Policy Guideline states:

The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done. For example, the Supreme Court found in *Hughes v. Pavlovic*, 2011 BCSC 990 that the deeming provisions ought not to apply in that case because Canada Post was on strike, therefore unable to deliver Registered Mail.

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. For example, if a party claimed to be away on vacation at the time of service, the arbitrator would expect to see evidence to prove that claim, such as airplane tickets, accommodation receipts or a travel itinerary. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

The decision whether to make an order that a document has been

sufficiently served in accordance with the Legislation¹² or that a document not served in accordance with the Legislation is sufficiently given or served for the purposes of the Legislation¹³ is a decision for the arbitrator to make on the basis of all the evidence before them.

(footnotes not included above)

Given the conflicting testimony, I have considered credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

In this case, the landlord's testimony was not supported by the witness to the service of the Notice who did not appear and who signed an incorrect form. The evidence of the tenant is consistent with the acknowledgment by the landlord of late service and noncompliance with Rules. I find the tenant's evidence to be the more credible in the circumstances. I accept the tenant's evidence that she was not served with the One Month Notice.

In conclusion, I have considered all the evidence. As the landlord has submitted no supporting evidence to his testimony he posted to documents to the tenant's door on February 2, 2022, conflicting testimony being provided by the tenant, I find the landlord has not met the requirement under section 89 regarding service

and the deeming provision is rebutted. I find the tenant was not served as required under the Act.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession.

Background and Evidence

The parties agreed the monthly tenancy began on January 1, 2017. Current rent is \$1,450.00. The tenant provided a security deposit of \$700.00 at the beginning of the tenancy. The landlord submitted a copy of the agreement.

The landlord testified he served a One Month Notice by posting to the tenant's door on February 2, 2022. As stated earlier, the tenant has denied receipt.

The landlord alleged the tenant was late three times in paying rent in the last year. The tenant acknowledged one such instance and denied the other two saying the bank transfer was made by her on the first of the month though not received by the landlord until the following day.

The landlord requested an Order of Possession and reimbursement of the filing fee.

The tenant requested the application be dismissed without leave to reapply.

Analysis

For the One Month Notice to be effective, the landlord must have served the tenant:

47. (2) A notice under this section must end the tenancy effective on a date that is

(a) not earlier than one month after the date the notice is received, and

(b) 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.

I have found the One Month Notice was not received by the tenant, the tenant has rebutted the deemed receipt provisions, and the landlord failed to comply with sections 88 and 89.

As the tenant was not served with the One Month Notice, the application for an Order of Possession under the Notice is dismissed without leave to reapply.

Conclusion

The application is dismissed without leave to reapply.

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: August 23, 2022

Residential Tenancy Branch