



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("Act") for:

- cancellation of the landlords' One Month Notice to End Tenancy for Cause, dated May 18, 2022 ("1 Month Notice"), pursuant to section 47.

The tenant did not attend this hearing, which lasted approximately 17 minutes. Landlord MH ("landlord") attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The landlords' caretaker witness called into this hearing at 11:03 a.m., and he was immediately excluded from the outset. At the end of this hearing, the landlord affirmed that he did not want to recall the witness to testify.

This hearing began at 11:00 a.m. and ended at 11:17 a.m. I monitored the teleconference line throughout this hearing. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord, the landlords' witness, and I were the only people who called into this teleconference.

The landlord confirmed his name and spelling. He stated that he is a property manager for the landlord company ("owner") named in this application and that he had permission to speak on its behalf (collectively "landlords"). He said that the owner owns the rental unit, and he provided the rental unit address. He provided his email address for me to send this decision to the landlords after the hearing.

Rule 6.11 of the Residential Tenancy Branch (“RTB”) *Rules of Procedure* (“*Rules*”) does not permit recordings of any RTB hearings by any participants. At the outset of this hearing, the landlord affirmed, under oath, that he would not record this hearing.

I explained the hearing process to the landlord. He had an opportunity to ask questions. He did not make any adjournment or accommodation requests.

The landlord confirmed receipt of the tenant’s application for dispute resolution hearing package. In accordance with section 89 of the *Act*, I find that the landlords were duly served with the tenant’s application.

The landlord stated that the tenant was served with the landlords’ first evidence package on August 22, 2022, by way of registered mail, to the rental unit where the tenant is still residing. The landlords provided a Canada Post receipt, and the landlord verbally confirmed the tracking number during this hearing. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlords’ first evidence package on August 27, 2022, five days after its registered mailing.

The landlord stated that the tenant was served with the landlords’ second evidence package on September 19, 2022, by way of posting to the tenant’s rental unit door where the tenant is still residing. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlords’ second evidence package on September 22, 2022, three days after its posting.

The landlord did not state how or when the landlords’ 1 Month Notice was served to the tenant. In this application, the tenant claimed that he received the 1 Month Notice on May 18, 2022, by way of posting to his rental unit door. In accordance with section 88 of the *Act*, I find that the tenant was duly served with the landlords’ 1 Month Notice on May 18, 2022.

Pursuant to section 64(3)(c) of the *Act*, I amend the tenant’s application to include the tenant’s full first and middle legal names and to add the owner as a landlord-respondent party. The landlord consented to these amendments during this hearing. I find no prejudice to the tenant in making these amendments.

Preliminary Issue – Dismissal of Tenant’s Application

Rule 7.3 of the Residential Tenancy Branch (“RTB”) *Rules of Procedure* provides as follows:

7.3 Consequences of not attending the hearing: If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

In the absence of any appearance by the tenant, I order the tenant's application dismissed without leave to reapply.

Pursuant to section 55 of the *Act*, if I dismiss the tenant's application to cancel a 1 Month Notice, the landlords are entitled to an order of possession if the notice meets the requirements of section 52 of the *Act*.

Issues to be Decided

Should the landlords' 1 Month Notice be cancelled? If not, are the landlords entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the landlord, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

The landlord testified regarding the following facts. This tenancy began on June 30, 2014. Monthly rent in the current amount of \$390.13 is payable on the first day of each month. A security deposit of \$187.50 was paid by the tenant and the landlords continue to retain this deposit. A written tenancy agreement was signed by both parties. The tenant continues to reside in the rental unit.

The landlord confirmed that the landlords seek an order of possession based on the 1 Month Notice. Both parties provided a copy of the 1 Month Notice for this hearing. The landlord stated that the effective move-out date on the notice is June 30, 2022, and the reason indicated is:

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The landlord testified regarding the following facts. There were photographs provided to the RTB from two inspections. Nothing was done in the rental unit to clean. He personally saw the tenant walk out of the rental unit with a cigarette lit in one hand. The landlord's caretaker saw the tenant on multiple occasions. The landlord stands behind all other evidence submitted, as it is accurate. The landlord does not wish to recall his caretaker witness because he will only reaffirm all of the evidence submitted by the landlords.

Analysis

Burden of Proof

According to subsection 47(4) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within ten days after the date the tenant received the notice.

The tenant received the notice on May 18, 2022 and filed his application to dispute it on May 30, 2022. Since the tenant received the notice on May 18, 2022, the 10-day deadline to dispute it was May 28, 2022, a Saturday when the RTB offices were closed. The tenant filed his application on May 30, 2022, a Monday, which is the next business day when the RTB offices reopened. Therefore, I find that the tenant was within the 10-day time limit to dispute the 1 Month Notice.

Accordingly, the burden shifts to the landlords to prove the reason on the 1 Month Notice. Section 47(1)(h) of the *Act* states that landlords may only end a tenancy if the tenant has failed to comply with a material term and has not corrected the situation within a reasonable time after written notice to do so.

The landlord confirmed receipt of the tenant's application, including a four-page document entitled "Notice of Dispute Resolution Proceeding" ("NODRP"). The NODRP contains the phone number and access code to call into both hearings, and states the following at the top of page 2, in part (emphasis in original):

The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.

- *It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.*

- *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.*
- *Parties (or agents) must participate in the hearing at the date and time assigned.*
- *The hearing will continue even if one participant or a representative does not attend.*
- *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

The following RTB *Rules of Procedure* state, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

This hearing lasted 17 minutes total, and only the landlord attended this hearing, not the tenant. The landlord had ample time and multiple opportunities to present his submissions and evidence. During this hearing, I repeatedly asked the landlord if he had any other submissions and evidence to present, and if he wanted to recall his witness but the landlord repeatedly declined.

The landlord did not sufficiently review or explain any of the landlords' documents submitted as evidence for this hearing. He simply mentioned the existence of photographs and other documents submitted but he did not explain them in specific or sufficient detail during this hearing, including page numbers, provisions, details, or other such information.

Findings

Residential Tenancy Policy Guideline 8 defines material terms:

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

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. A party might not be found in breach of a material term if unaware of the problem.

The landlord did not provide sufficient testimony of what “material” term in the tenancy agreement, that the tenant breached. He did not refer to the tenancy agreement at all

during this hearing. He did not indicate whether any provisions were material to the tenancy agreement and if so, how and why they were material. He did not provide sufficient evidence of written notices provided by the landlords and the tenant's failure to correct same within a reasonable period.

For the above reasons and on a balance of probabilities, I find that the landlords provided insufficient evidence that the tenant failed to comply with a material term that was not corrected within a reasonable time after written notice to do so. I find that the landlords failed to meet the onus of proof, as outlined in Residential Tenancy Policy Guideline 8, above. Therefore, I find that the landlords did not issue the 1 Month Notice for a valid reason.

The landlords are not entitled to an order of possession. The landlords' 1 Month Notice, dated May 18, 2022, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

Conclusion

The tenant's application is dismissed without leave to reapply.

The landlords are not entitled to an order of possession.

The landlords' 1 Month Notice, dated May 18, 2022, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with 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: October 11, 2022

Residential Tenancy Branch