Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, FFT

Introduction

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

- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Tenant I.T, counsel for the landlord, the landlord's resident caretaker (the "caretaker"), the caretaker's interpreter and the landlord's property manager (the "manager") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000."

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

Tenant I.T. testified that the landlord was served with the tenants' application for dispute resolution via registered mail on July 16, 2022. A registered mail receipt for same was

entered into evidence. The manager testified that the above package was received on July 19, 2022. I find that the landlord was served with this application for dispute resolution on July 19, 2022, in accordance with section 89 of the *Act.*

The manager testified that the landlord's evidence was posted on the tenants' door on November 7, 2022. Tenant I.T. testified that the landlord's evidence was received on November 7, 2022. I find that the tenants were served with the landlord's evidence on November 7, 2022 in accordance with section 88 of the *Act.*

Tenant I.T. testified that he served the landlord with the tenants' evidence via email at 11:50 p.m. on November 3, 2022. The manager testified that the tenants' evidence was received on November 4, 2022; however only some of the evidence attached to the email was viewable, and all of the audio and video files were not accessible.

Counsel submitted that the parties did not have an email service agreement and that the landlord informed the tenants via email on November 4, 2022 that email service was not accepted. The above email was entered into evidence.

Tenant I.T. testified that he had an email service agreement with the landlord. Tenant I.T. testified that on March 28, 2022 the landlord sent all tenants at the subject rental building a memo which he took as permission to serve via email.

The March 28, 2022 letter from the landlord states:

> We all know we must change some of our habits/routines to attempt to reduce greenhouse gas emissions, reduce fossil fuel usage, and reduce use of our natural resources. At [property management company], we are as conscious and concerned of this fact as we hope you are - and small steps are as important as big ones.
>
> In early 2021, recognizing this fact, the BC government authorized service of tenancy related documents by email, provided only that the respective landlords and/or residents agree in advance to accept this service method. We ask you to help us with this small step by also agreeing to accept documents by email.
>
> **Please fill out the attached Email Service Agreement and return via email to [redacted for privacy].** ALL Tenants named on the Tenancy Agreement should fill out and sign (the same copy) Email Service Agreement so that each tenant in

> the suite receives documents by email. Occupants residing in the suite who are not named on the Tenancy Agreement do not need to sign the Email Service Agreement.
>
> Be assured we will retain your address confidentially and use if for no other purpose than communication with you or service of documents. If your email address changes, please notify our office and we will send you a new Email Service Agreement to sign.
>
> Thanks for helping us help our planet.

Both parties agree that the tenants did not fill out and sign the Email Service Agreement. Counsel submitted that the landlord did not provide the tenant with written authorization to serve via email.

Section 88 of the *Act* sets out the approved methods of service for documents other than applications for dispute resolution, as follows:

> **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)if the person is a landlord, by leaving a copy with an agent of the landlord;
>
> (c)by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
>
> (d)if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
>
> (e)by leaving a copy at the person's residence with an adult who apparently resides with the person;
>
> (f)by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

> (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;
> (h)by transmitting a copy to a fax number provided as an address for service by the person to be served;
> (i)as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;
> (j)by any other means of service provided for in the regulations.

Section 43(1) of the Regulation to the Residential Tenancy Act states:

> For the purposes of section 88 (j) *[how to give or serve documents generally]* of the Act, the documents described in section 88 of the Act may be given to or served on a person by emailing a copy to an email address provided as an address for service by the person.

Residential Tenancy Guideline #12 states:

> To serve documents by email, the party being served must have provided an email address specifically for the purposes of being served documents. If there is any doubt about whether an email address has been given for the purposes of giving or serving documents, an alternate form of service should be used, or an order for substituted service obtained.

I find that the March 28, 2022 memo requested the tenants to provide written authorization for the landlord to serve the tenants via email, but did not provide the tenants with an email address specifically for the purpose of serving documents on the landlord. I find that the tenants were not permitted to serve the landlord via email as no email service agreement was signed by the landlord.

In addition to my above findings, I find that the tenants' evidence, the portion that was viewable, was not received by the landlord until Nov 4, 2022, which is only 13 clear days before this hearing. I find that the manager's testimony regarding the receipt of some evidence on November 4, 2022 bears an air or reality considering that tenant I.T. testified that the email attempting to serve the tenants' evidence was sent just 10 minutes before November 4, 2022.

Rule 3.14 of the Residential Tenancy Branch Rules of Procedure (the "*Rules"*) states that evidence must be received by the respondent and the Residential Tenancy Branch directly not less than 14 days before the hearing.

As stated in Rule 3.14 of the Rules, the evidence must be received by the respondent not less than 14 days before ethe hearing; thus, the date the email was received is the date used to determine if service complies with the Rules of Procedure, not the date the email was sent.

Both parties agree that the November 3, 2022 email purported to serve on the landlord over 200 pages of evidence. Counsel submitted that the landlord has not had a full opportunity to review and respond to the tenants' evidence and has as of yet not been able to open all of the tenants' evidence.

I find that since the tenants' evidence was not served in accordance with section 88 of the *Act,* was received by the landlord less than 14 clear days before the hearing, and was not fully viewable by the landlord, the tenants' evidence is excluded from consideration.

I find that the landlord has a right to be informed of the case against them and has a right to reply to the claims being made against them. I find that the failure of the tenants to service in accordance with the *Act* and the Rules of Procedure significantly prejudiced the landlord's ability to know and respond to the claims made against them. I find that it would be procedurally unfair to consider the tenants' late evidence.

Preliminary Issue- Amendment

On November 4, 2022, 13 clear days before this hearing, the tenants uploaded RTB Form 42T -Tenant Request to Amend a Dispute Resolution Application (the "amendment"), into evidence on the Residential Tenancy Dispute Management system.

The amendment was not submitted and filed with the Residential Tenancy Branch. The amendment sought to add a $27,840.00 claim to the tenants' application for an Order for the landlord to comply with the *Act.*

Rule 4.1 of the Residential Tenancy Branch Rules of Procedure states:

4.1 Amending an Application for Dispute Resolution

An applicant may amend a claim by:

- completing an Amendment to an Application for Dispute Resolution form; and
- filing the completed Amendment to an Application for Dispute Resolution form and supporting evidence on the Dispute Access site or with the Residential Tenancy Branch directly or through a Service BC Office.

An amendment may add to, alter or remove claims made in the original application.

As stated in Rule 2.3 [Related issues], unrelated claims contained in an application may be dismissed with or without leave to reapply.

See also Rule 3 [Serving the application and submitting and exchanging evidence]. Amendments to applications for expedited hearings may only be made at the hearing. See Rule 10.7 [Amending an application for an expedited hearing].

To be clear, uploading a document into evidence is not the same as filing a document with the Residential Tenancy Branch. A document uploaded into evidence is not considered to have been filed with the Residential Tenancy Branch.

I find that the amendment was not filed with the Residential Tenancy Branch in accordance with Rule 4.1 of the *Act.* As the amendment was not filed in accordance with Rule 4.1, I decline to accept the tenants' amendment for determination in this application for dispute resolution.

I also note that had the amendment been filed with the Residential Tenancy Branch, rather than uploaded as evidence, on November 4, 2022, it would be too late to be considered, pursuant to Rule 4.6 of the Rules of Procedure.

Tenant I.T. testified that the amendment was served on the landlords in the 11:50 p.m. November 3, 2022 evidence service email discussed earlier in this decision. As previously noted, the November 3, 2022 email was received by the landlord on November 4, 2022 and was thus served late. As found earlier in this decision, the late service prejudices the landlord and it would be procedurally unfair to hear the amended claim. Pursuant to my above findings, I decline to consider the amendment in this application for dispute resolution.

Rule 4.2 of the Residential Tenancy Branch Rules of Procedure states:

> **4.2 Amending an application at the hearing**
> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

I find that changing an application for dispute resolution from an application for the landlord to comply with the *Act* to a nearly $28,000.00 monetary claim would significantly alter the nature of the application for dispute resolution.

I find that the landlord could not reasonably have anticipated that less than 14 clear days before the hearing the tenants would attempt to seek $28,000.00 when their previous application did not contain any monetary claim. I find that it would be unreasonable to amend this claim in the hearing because the landlord would be significantly prejudiced as the landlord would not have had a reasonable amount of time to respond to the new claim. I decline to amend the tenants' application in the hearing.

Issues to be Decided

1. Are the tenants entitled to an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background and Evidence

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

Both parties agreed to the following facts. This tenancy began on February 15, 2015 and is currently ongoing. Monthly rent in the amount of $1,227.00 is payable on the first day of each month. A security deposit of $532.50 was paid by the tenants to the

landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Tenant I.T. testified that he was not able to set out him claim because his evidence was excluded from consideration. I informed tenant I.T. that he was permitted to provided testimony which is admissible evidence and that I would consider his testimony in rendering my decision. Tenant I.T. declined to present his claim.

I informed tenant I.T. that if he declined to present his claim, I would dismiss his application without leave to reapply because the burden of proof rests with the tenants and that failure to present their claim would result in a finding that the tenants have not met the required burden of proof. Tenant I.T. again declined to present his claim.

Tenant I.T. requested that his application be dismissed with leave to reapply. Counsel objected to the above request.

Analysis

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

I find that the tenants have not proved their claims as tenant I.T. declined to make submissions and declined to set out the tenants' claims. The tenants' claims are therefore dismissed without leave to reapply.

I decline to grant leave to reapply because tenant I.T. refused to make submissions in this hearing and because the exclusion of the tenants' evidence resulted from the tenants' failure to serve the landlord in a timely manner in accordance with section 88 of the *Act* and the Rules of Procedure. I find that it would be inappropriate to allow the tenants a second opportunity to file their claims when the tenants refused to set out their claims in this hearing.

Conclusion

The tenants' 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: November 23, 2022

Residential Tenancy Branch