



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL

Introduction

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

- an order of possession pursuant to section 55.

The original hearing of this application was held on November 15, 2022 at 11:00 a.m. (the "Original Hearing") and lasted approximately 15 minutes. The Tenant spoke very limited English and appeared to only be able to identify himself. I adjourned the hearing and issued an interim decision (the "Interim Decision") dated November 18, 2022. In the Interim Decision, I requested the Tenant obtain the services of a translator who was fluent in both languages.

The Landlord (HYZ), the Landlord's wife (SFW), and the Landlord's son (MZ), the Tenant (ZFL) and the Tenant's translator (KC) attended the hearing. The Landlord's son (MZ) represented the Landlord (the "Landlord"). The Tenant's translator (KC) translated and spoke on behalf of the Tenant (ZFL) (the "Tenant"). Both parties were given a full opportunity to be heard, to present sworn testimony, to make submissions, and to call witnesses.

I advised the parties of Rule 6.11 of the Rules of Procedure (the "Rules") which prohibit the parties from recording the hearing. I further advised that the hearing was recorded automatically by Residential Tenancy Branch (the "RTB").

The MZ testified he delivered the NDR by posting the Notice on the Tenant's door on July 14, 2022 at 7:30 p.m., witnessed by HYZ. KC confirmed the Tenant received the Notice on July 14, 2022. I find the Tenant was served with the NDR in accordance with sections 88, 89, and 90 of the Act.

The Tenant submitted a written statement to the RTB. The Tenant did not give the Landlord a copy of the written statement submitted to the RTB. I advised the parties that the statement could be read into evidence at the hearing.

Preliminary Issue: Prior Hearing

The Landlord filed a previous Application for Dispute Resolution on March 3, 2022 seeking an order of possession and the filing fee. The matter proceeded by way of a hearing. The Landlord attended; the Tenant did not attend. The Landlord testified that he did not receive the Notice of Dispute Resolution (the "NDR") that was sent by email to the Landlord on March 10, 2022 and, therefore, did not provide the Tenant with the NDR as required pursuant to Rule 3.1. In a

June 17, 2022 decision, the arbitrator dismissed the Landlord's Application with leave to re-apply. The Landlord reapplied for dispute resolution on June 29, 2022.

Issues to be Decided

Is the Landlord entitled to:

- 1) an order of possession?

If the Landlord fails in his application, is the Tenants entitled to:

- 1) an order cancelling the Notice?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into an oral month to month tenancy agreement starting April 30, 2019. Monthly rent is \$1100.00 and is payable on the first of each month. The Tenant paid the Landlord a security deposit of \$550.00. The Landlord still retains this deposit. The Landlord and Tenant did not do a written move in condition inspection. The Tenant walked through and provided verbal confirmation that the rental unit was fine, prior to the start of tenancy.

MZ testified that he served the Tenant with the Two Month Notice on December 21, 2021. The effective date of the Notice was February 28, 2022. MZ served the Tenant in person. The Tenant took the Notice inside the rental unit, and a few minutes after opened the door and tore up the Notice, scattering the Notice throughout the backyard.

MZ provided a copy of the Two Month Notice that states it was issued because the Landlord's daughter will be moving into the rental unit. The Tenant did not move out of the rental unit on the effective date of the Notice, and after failing conversations with the Tenant, the Landlord applied for an order of possession for this Two Month Notice once on March 3, 2022 and subsequently on June 29, 2022.

MZ testified that the Landlord offered the Tenant one-month rent free as required by the Act but the Tenant refused and continued to pay the rent.

KC testified that the Tenant tore up the Notice because he did not want to move. The Tenant states he refused to move. The Tenant states that he has not received one-month rent free and confirmed that he has continued to pay rent. The Tenant states that the Landlord is "lying" about his daughter residing in the rental unit.

When asked, the Tenant confirmed he did not file a separate application to dispute the Two Month Notice. The Tenant stated that he thought that submitting the written letter in response to the Landlord's application was sufficient.

Analysis

In this case, the Landlord issued the Two Month Notice for landlord's use of property on December 29, 2021 and handed the Notice to the Tenant directly. The Tenant acknowledged receipt of the Two Month Notice on December 29, 2021.

Section 49(9) of the Act stipulates that a tenant is conclusively presumed to have accepted that a tenancy ends on the effective date of the Notice received pursuant to s. 49 of the Act and that the tenant must vacate the rental unit by that date unless the tenant disputes the notice within fifteen (15) days of receiving it.

Section 49(9)

49(9) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant

- (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
- (b) must vacate the rental unit by that date.

A conclusive presumption is one in which the proof of certain facts make the existence of the assumed facts beyond dispute. The presumption cannot be rebutted or contradicted by evidence to the contrary. It is important to note that the conclusive presumption set out in s. 49(9) of the Act ***is not that the Landlord has lawful grounds to end the tenancy; rather, it is a conclusive presumption that the tenant has accepted that the tenancy is ending on the effective date of the Notice.***

Prior to deciding if the conclusive presumption applies, I must turn my mind to the form and content of the Two Month Notice signed and dated December 29, 2021. To be of force and effect, the Two Months' Notice must meet the formal requirements of s. 52 of the Act.

52 In order to be effective, a notice to end a tenancy must be in writing and must

- a. be signed and dated by the landlord or tenant giving notice
- b. give the address of the rental unit
- c. state the effective date of the notice,
- d. except for a notice under section 45(1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
 - (d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
- e. when given by a landlord, be in the approved form.

I reviewed the Two Months' Notice issued by the Landlord and find the Notice does not meet the form and content required pursuant to s. 52 of the Act. I note the address of the rental unit is incomplete.

There are multiple units at that street address. The Notice does not identify which rental unit the Notice is intended for.

The Landlord's application for an Order of Possession is dismissed, without leave to reapply. The Landlord is free to re-issue a new Notice with the required information. The Two Month Notice issued on December 21, 2021 is cancelled and of no force and effect. The Tenancy shall continue until ended in accordance with the Act.

Conclusion

The Landlord's application is dismissed without leave to reapply. The Notice is of no force and effect.

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: December 14, 2022

Residential Tenancy Branch