Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL OLC RP FFT

Introduction

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

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (" 2 Month Notice"), pursuant to section 49;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make repairs to the rental unit pursuant to section 33; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to call witnesses, and to make submissions.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties were also clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's application. In accordance with section 89 of the *Act*, I find that the landlord duly served with the tenant's application. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

Preliminary Issue: Service of the 2 Month Notice to End Tenancy

While the tenant acknowledged receipt of the 2 Month Notice to End Tenancy dated June 28, 2022, the tenant testified that they had only received the first two pages of the four page document, which the tenant received by email on June 28, 2022. The landlord testified that they did send all four pages by registered mail to the tenant, but only sent the two pages by email as they were out of town. The landlord testified that the tenant failed to pick up the package containing the four pages. The landlord submitted proof of service in their evidentiary materials which shows that the landlord had sent the registered mail package on July 23, 2022, but despite a notice card being left on July 25, 2022, the tenant failed to pick up the package. The tenant disputed the 2 Month Notice on July 6, 2022, after receiving the two pages by email.

RTB Policy Guideline #12 addresses service of documents, and the deeming provisions. (Emphasis in bold added by myself).

S. 71 (2)(b) gives an arbitrator the authority to order that a document has been sufficiently served for the purposes of the Act on a date the arbitrator specifies, upon consideration of procedural fairness and prejudice to the affected party.

For example, an arbitrator may consider evidence from the party serving the documents that proves the date of service (such as an email from the party served with the documents referring to the material that was served or a registered mail tracking document confirming delivery on a specified date). The arbitrator may then determine that the date of service is the date the evidence proves service (e.g., the email or tracking document dated April 11th) and is earlier than the deeming provisions (e.g., documents deemed received on April 14th). An arbitrator may also consider an acknowledgement of service by the party receiving the documents; the arbitrator may then determine that the date of service is the date the party acknowledges receipt of service and is earlier than the deeming provisions.

Where a document is served by Registered Mail or Express Post, with signature option, the refusal of the party to accept or pick up the item, does not override the deeming provision. Where the Registered Mail or Express Post, with signature option, is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

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

Based on the evidence and testimony before me, I find that the landlord had attempted to serve the tenant through more than one method that is recognized under the *Act.* As acknowledged by the tenant, they received only two of the four pages of the 2 Month Notice by way of email. The landlord testified that the tenant was sent all four pages on July 23, 2022, which the tenant failed to pickup. I note that as shown as by the tenant's own evidence submitted for this hearing, the tenant was aware on June 30, 2022 that the landlord was obligated to serve the tenant with all four pages. I find that the landlord attempted to serve all four pages to the tenant by way of registered mail on July 23, 2022, but the tenant did not pick up this package. I am satisfied that the landlord provided proof of service to support that that they did send the tenant the package. The tenant did not provide clear evidence about why they did not pick up this package. As noted in Policy Guideline #12, as emphasized above, 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".*** In accordance with sections 88 and 90 of the *Act,* the tenant is deemed served with 2 Month Notice on July 28, 2022, 5 days after mailing. I find the landlord's evidence to be credible, and supported in evidence. On the other hand, the tenant failed to provide clear evidence in their rebuttal of the deeming provision. I find that the tenant failed to pick up the package, which contained all four pages of the 2 Month Notice, despite the fact that the tenant was aware that the landlord was attempting to serve them all four pages as required. I note that pages 3 and 4 of the 2 Month Notice are the standard forms that are included with all 2 Month Notices, and do not contain additional or different information that that is normally provided as part of the 2 Month Notice.

I am not only satisfied that the landlord had properly served the tenant in accordance with section 88 of the *Act*, I find that the tenant failed to provide a reasonable rebuttal and associated evidence for why they did not, or could not, pick up this package. I do not find that there is prejudice to the tenant by a finding that the tenant was deemed served with the 2 Month Notice. I find that the tenant not only was in receipt of the first two pages, the tenant was also aware on June 30, 2022 that there were two additional pages that normally accompany the first two. Accordingly, I find the tenant deemed served with all four pages of the 2 Month Notice on July 28, 2022, 5 days after the landlord sent the package by registered mail.

Issues(s) to be Decided

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to an order for the landlord to comply with the *Act?*

Is the tenant entitled to an order requiring the landlord to make repairs to the rental unit?

Is the tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

Both parties submitted a copy of the written tenancy agreement which states that this fixed-term tenancy began on September 2, 2021, and was to end on August 31, 2022. The tenancy continued on a month-to-month basis, with monthly rent set at $3,800.00, payable on the first of the month. The tenant argued that the parties had a verbal agreement for a fixed term of two years, which the landlord disputes.

The landlord issued the 2 Month Notice dated June 28, 2022, with an effective move-out date of August 31, 2022 for the following reason:

- The rental unit will be occupied by the landlord or the landlord's spouse.

The landlord provided the following background for why they had decided to issue the 2 Month Notice. The landlord provide an affidavit in their evidentiary materials, which stated that they currently reside in the other suite in the home, which is only a 1

bedroom suite. The landlord testified that the area is small, and contains a living room and small den. The landlord testified that there is no dining area. The landlord testified that they have three adult children, and that the landlord wished to have them over with their respective spouses and children more frequently. The landlord testified that the current space is insufficient for that purpose. The landlord also wrote that “there is a very high likelihood that my son who is 42 years old may be moving back to Canada to live with me, and the Secondary Suite does not have enough space for him and his spouse to do so”. The landlord testified that they were almost 70 and need their kids to visit.

The tenant is disputing the 2 Month Notice as they do not believe that the landlord issued the 2 Month Notice in good faith. The tenant testified that the landlord had discussed increasing the rent, and signing a new tenancy agreement, and two weeks after this discussion, the landlord served the tenant with the 2 Month Notice. The landlord disputes that this is the case, and argued that they had never increased the rent during this tenancy, or discussed doing so.

The tenant also filed this application as they feel the landlord failed to perform repairs as required. During the hearing, the tenant acknowledged that the landlord did attempt to repair the stairs, but the repairs are inadequate.

Analysis

I note that although the tenant referenced a verbal agreement for a two year fixed-term tenancy, in light of the evidence before me, I find that the tenancy is a one year fixed-term tenancy that reverted to a month-to-month tenancy after August 31, 2022. The landlord therefore had the right to serve the tenant with a 2 Month Notice for an effective date after the end of the fixed term.

Subsection 49(3) of the *Act* sets out that a landlord may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

Residential Tenancy Policy Guideline 2: Good Faith Requirement When Ending a Tenancy states:

> *“If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch*

may consider motive when determining whether to uphold a Notice to End Tenancy.

If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate that they do not have an ulterior motive for ending the tenancy."

Although the landlord stated that they had issued the 2 Month Notice in order to allow for more frequent visits by their children and family members, I find that the tenant had raised doubt as to the true intent of the landlord in issuing the 2 Month Notice. The burden, therefore, shifts to the landlord to establish that they do not have any other purpose to ending this tenancy.

I note that second reason provided by the landlord, pertaining to the possibility of their 42 year old son moving back to Canada, and with the landlord, does not sufficiently support that the landlord requires the larger space. As noted in the landlord's own evidence, this move is not confirmed. No specific dates or plans were provided for this possible move, and accordingly, I do not find this reason is sufficient for ending this tenancy.

The main reason provided by the landlord is the fact that the landlord's current space is small, and is insufficient for hosting frequent visits by the landlord's adult children and their respective families. While I appreciate that the landlord did provide an explanation, I find that this explanation lacked specific details such as the actual layout and square footage of both suites, as well as why the landlord would need to permanently end the tenant's tenancy in order to host their family. The landlord did not call these parties as witnesses to testify, or be cross-examined, nor did the landlord provide more detail such as where the children currently reside, and why alternatives such as hotels for the visiting families could not be an option.

Furthermore, although the landlord disputes entering into any discussions about raising the rent, I find that the tenant did raise the question of good faith. In this case, the tenant provided evidence to support that in February of 2022, the tenant requested repairs, which the tenant argued were not addressed properly by the landlord. The issue of repairs was raised in this same application, which the tenant argues has not been properly addressed by the landlord.

I find that the landlord has not met their burden of proof to show that the 2 Month Notice was issued in good faith. I find that the testimony of both parties during the hearing as well as the evidence presented raised questions about the landlord's good faith, and the sworn affidavit and evidence provided by the landlord does not sufficiently satisfy me that the true reason for ending this tenancy is for the landlord to reclaim a larger living space in order to host visits by their family.

Accordingly, I allow the tenant's application to cancel the 2 Month Notice. The landlord's 2 Month Notice, dated June 28, 2022, is hereby cancelled and is of no force and effect. This tenancy is to continue until it is ended in accordance with the *Act*.

The tenant also applied for an order for the landlord to comply with the *Act*, and to perform repairs. In light of the disputed evidence before me, I am not satisfied that the tenant has established what specific repairs remain unaddressed. However, I remind the landlord of their obligations under section 32 of the *Act* as stated below:

Landlord and tenant obligations to repair and maintain

> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
>
> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

The tenant is at liberty to reapply under section 32 of the *Act* if the landlord fails to comply with the *Act* or tenancy agreement.

As this application had merit, I allow the tenant to recover the filing fee for this application.

Conclusion

The tenant's application to cancel the landlord's 2 Month Notice is allowed. The Landlord's 2 Month Notice, dated June 28, 2022, is cancelled and is of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I issue a $100.00 Monetary Order in favour of the tenant for recovery of the filing fee. I allow the tenant to implement the above monetary award by reducing future monthly rent payments until the amount is recovered in full. In the event that this is not a

feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of $100.00, and the landlord(s) must be served with **this Order** as soon as possible.

The remainder of the tenant's application is dismissed with 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: December 28, 2022

Residential Tenancy Branch