Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC FFT**

Introduction

This hearing was convened by way of conference call in response to an application for dispute resolution ("Application") filed by the Tenant pursuant to the *Residential Tenancy Act* (the "Act") in which the Tenant seeks:

- an order cancelling a One Month Notice to End Tenancy for Cause dated July 5, 2022 ("1 Month Notice") pursuant to section 47; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

The Landlord and the Tenant attended the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure.*. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The Tenant stated she served the Notice of Dispute Resolution Proceeding and some of her evidence ("NDRP Package") on the Landlord by registered mail on August 11, 2022. The Tenant provided the Canada Post tracking number for service of the NDRP Package on the Landlord. I find the NDRP Package was served on the Landlord in accordance with the provisions of sections 88 and 89 of the Act.

The Tenant stated she served additional evidence on the Landlord by registered mail on November 18, 2022. The Tenant provided the Canada Post tracking number for service of the additional evidence on the Landlord. I find the additional evidence was served on the Landlord in accordance with the provisions of section 88 of the Act.

The Tenant stated she served additional evidence on the Landlord by registered mail on November 22, 2022. The Tenant provided the Canada Post tracking number for service of the additional evidence on the Landlord. I find the additional evidence was served on the Landlord in accordance with the provisions of section 88 of the Act.

The Landlord stated he served evidence on the Tenant by registered mail but he could not recall the date of posting. The Tenant acknowledged she received the Landlord's evidence by registered mail on November 18, 2022. I find the Landlord's evidence was served on the Tenant pursuant to the provisions of section 88 of the Act.

Issues to be Decided

- Is the Tenant entitled to cancellation of the 1 Month Notice?
- Is the Tenant entitled to recover the filing fee for the Application from the Landlord?
- If the Tenant is not entitled to cancellation of the 1 Month Notice, is the Landlord entitled to an Order of Possession pursuant to section 55(1) of the Act?

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 Application and my findings are set out below.

The Landlord submitted into evidence a copy of the tenancy agreement ("Tenancy Agreement") dated May 10, 2019 between the Landlord and Tenant. The Tenancy Agreement states the tenancy commenced on May 15, 2019, on a month-to-month basis, with rent of $1,700.00 payable on the 1st day of each month. The Tenant was required to pay a security deposit of $850.00 upon signing the tenancy agreement. The parties agreed the current rent is $1,770.36 per month. The Landlord stated the Tenant paid the security deposit and that he is holding it in trust for the Tenant. Based on the foregoing, I find there is a tenancy between the parties and that I have jurisdiction to hear the Application.

The Tenant submitted into evidence a copy of the 1 Month Notice. The Landlord stated the 1 Month Notice was served on the Tenant by registered mail on July 6, 2022. The Landlord provided the Canada Post tracking number for service of the 1 Month Notice on the Tenant. I find the 1 Month Notice was served on the Tenant in accordance with the provisions of section 88 of the Act. The Tenant stated she did not make the

Application until July 25, 2025 because she was out of town and did not pick up at the registered mail package containing the 1 Month Notice until July 25, 2022.

The 1 Month Notice stated the causes for ending the tenancy were:

- Tenant or person permitted on the property by the tenant
  - seriously jeopardized the health or safety or lawful right of another occupant or the landlord
  - put the landlord's property at significant risk
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so

The details of the causes for ending the tenancy, attached to the 1 Month Notice in letter format, stated the pool was a violation of the Landlord's insurance policy and provided particulars of correspondence between the Landlord and his insurer and between the Landlord and the Tenant regarding the pool. I find the 1 Month Notice and attachment to it provide sufficient details of the reasons the Landlord is seeking to end the tenancy.

The Landlord stated the terms of the Tenancy Agreement state in part:

> […]
> **Pool & Sprinkler System:** No pool larger than a child's wading pool is allowed, (max 10" high). (Where the tenant has children under the age of 3). Where a child's wading pool is erected, it must be emptied on a daily basis. The tenant assumes all risks associated with the use of any pools erected, and indemnifies the landlord and or its agents/representatives, from any legal lability, associated with the use and operation thereof.
> […]
> A breach of this Tenancy Agreement by the Tenant may give the Landlord the right to terminate the tenancy in accordance with the Act and thus regain vacant possession of the premises.
> […]

The Landlord stated he drove by the rental unit and saw the Tenant had erected a pool outside the rental unit. The Landlord submitted into evidence a picture of an inflatable ring-pool. The Landlord pointed out that there was an object floating in the pool at the time the photograph was taken by him that clearly shows the water level is higher than 0.6 metres, being 10". The Landlord stated that, as the water in the pool exceeded 10"

in depth, the Tenant breached a material term of the Tenancy Agreement as to the type and height of a child's wading pool that the Tenant was permitted to erect on the residential property. The Landlord submitted into evidence a letter ("First Letter") dated June 28, 2022 in which he requested the Tenant to empty the pool on a daily basis. The Landlord stated he contacted his insurance agent and was told by them that the insurance on the renal unit would lapse unless the pool was removed immediately. The Landlord submitted into evidence a copy of an email dated June 29, 2022 ("Insurance Email") from his insurance agent that stated in part:

> Further to our conversation today, I have forwarded the letter to your Insurance Company regarding the pool at [address of rental unit].
>
> They have responded and advised that due to liability concerns as well as an attractive nuisance being in the front yard and not fence, they do require that the pool be removed immediately. If the pool is not removed in 30 days or sooner they will need to come off risk and will not be able to insure the Strata building any longer.
>
> They have advised that it most likely not in compliance with local by-laws which would then result in the homeowner (yourself) being held responsible. They have suggested to check your local by-laws to ensure compliance if there will be a pool on the property.

The Landlord submitted into evidence a letter ("Second Letter") dated June 29, 2022 that he stated he served on the Tenant by registered mail and email. In the Second Letter, the Landlord retracted the request he made to the Tenant in the First Letter and stated he was informed by his insurer that the pool violated the terms and conditions of his insurance policy. A copy of the Insurance Email was attached to the Second Letter. The Second Letter also stated the Tenant was in violation of the municipal bylaws and demanded the Tenant to take down the pool immediately within 24 hours.

The Landlord stated the Tenant did not take down the pool and that he made a complaint to the municipality. The Landlord stated the municipal bylaws require pools that are located in front yards to be fenced and gated so that the public does not have access to the pool. The Landlord stated the area around the pool was not fully fenced nor was it gated. The Landlord stated a bylaw officer visited the residential premises on July 11, 2022 and the pool was still in place. The Landlord stated he did another drive by of the residential property on July 12, 2022 and observed the pool was removed.

The Tenant stated that, when she received the Second Letter, she sent an email on June 30, 2022 to the Landlord in which she demanded the Landlord retract the Second Letter and reinstate the First Letter. The Tenant submitted into evidence a copy of her email dated June 30, 2022 to the Landlord to corroborate her testimony. The Tenant stated the water in the pool was less than 10" and that it was drained every night. The Tenant submitted a picture of the pool with a tape measure to indicate the water level was not higher than 10" high. The Tenant stated the air conditioning was not working and she requested the Landlord give permission for her to keep the pool until the end of the summer. When I noted that it appeared it would take a lengthy period of time to drain and fill the pool because of its size, the Tenant avoided addressing my observation. Instead, the Tenant stated she just wanted information from the Landlord but he did not respond to her email of June 30, 2022. The Tenant initially stated the pool was dismantled when the bylaw officer attended at the residential property. The Tenant acknowledged a bylaw officer visited the residential property on July 11, 2022. The Tenant stated the bylaw officer left her with "information".

The Tenant argued that, as the municipal bylaws prevented her from having a pool without fencing and a gate, the term in the tenancy agreement regarding the pool was unenforceable by the Landlord since the term stated that she could not have a pool that was not over 10" high. The Tenant stated she contacted the Landlord's insurer and when she told them about the pool, the agent laughed. The Tenant stated the agent told her she would forward the information to her supervisor but the Tenant never heard back from them. The Tenant did not submit any evidence to corroborate her testimony on her call to the insurance agent. The Tenant stated the pool was never left unattended. The Tenant stated the Landlord's demand for the pool to be dismantled within 24 hours was unreasonable because she did not receive the Second Letter by registered mail until much later.

The Landlord stated the Second Letter was served on the Tenant by registered mail and email on June 29, 2022. The Landlord referred to the Tenant's email dated June 30, 2022, already submitted into evidence by the Tenant, in which the Tenant acknowledged receipt of the Second Letter and demanding that the Landlord retract it. The Landlord stated that, contrary to the Tenant's testimony, the Tenant did not dismantle the swimming pool before the bylaw officer went to the residential property on July 11, 2022. The Landlord submitted into evidence a copy of the report that documented a bylaw officer attended at the residential property on July 11, 2022 and observed a kiddy pool. The report also noted the officer did a drive by the next day on July 12, 2022 and noted the pool was now drained, collapsed and stored by front wall of house.

Analysis

Subsections 41(1)(d)(ii), 41(1)(d)(iii) and 41(1)(h) and sections 47(2) through 47(5) of the Act state:

47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

[…]

(d) the tenant or a person permitted on the residential property by the tenant has

[…]

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or

(iii) put the landlord's property at significant risk;

[…]

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

[…]

(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.

(3) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.

(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) 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.

The 1 Month Notice was served on the Tenant by registered mail on July 5, 2022. Pursuant to section 90 of the Act, the Tenant was deemed to have received the 1 Month Notice on July 10, 2022. Pursuant to section 47(4) of the Act, the Tenant had until July 20, 2022, to make an application for dispute resolution to dispute the 1 Month Notice. The records of the Residential Tenancy Branch disclose the Tenant made her application on July 25, 2022. Accordingly, the Tenant did not make the Application within the 10-day dispute period required by section 47(4) of the Act.

Residential Tenancy Policy Guideline 36 ("PG 36") provides guidance on when an arbitrator may extend or modify a time limit established by the Act. PG 36 states, in part:

> **Exceptional Circumstances**
>
> The word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse *Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.*
>
> Some examples of what might not be considered "exceptional" circumstances include:
>
> • the party who applied late for arbitration was not feeling well
> • the party did not know the applicable law or procedure
> • the party was not paying attention to the correct procedure
> • the party changed his or her mind about filing an application for arbitration
> • the party relied on incorrect information from a friend or relative
>
> Following is an example of what could be considered "exceptional" circumstances, depending on the facts presented at the hearing:
>
> • the party was in the hospital at all material times
>
> The evidence which could be presented to show the party could not meet the time limit due to being in the hospital could be a letter, on hospital letterhead, stating the dates during which the party was hospitalized and indicating that the party's condition prevented their contacting another person to act on their behalf.
>
> The criteria which would be considered by an arbitrator in making a determination as to whether or not there were exceptional circumstances include:
>
> • the party did not wilfully fail to comply with the relevant time limit
> • the party had a bona fide intent to comply with the relevant time limit
> • reasonable and appropriate steps were taken to comply with the relevant time limit

- the failure to meet the relevant time limit was not caused or contributed to by the conduct of the party
- the party has filed an application which indicates there is merit to the claim
- the party has brought the application as soon as practical under the circumstances

Notice to End

Application for Arbitration Filed After Effective Date

An arbitrator may not extend the time limit to apply for arbitration to dispute a Notice to End if that application for arbitration was filed after the effective date of the Notice to End.

For example, if a Notice to End has an effective date of 31 January and the tenant applies to dispute said Notice to End on 1 February, an arbitrator has no jurisdiction to hear the matter ***even where the tenant can establish grounds that there were exceptional circumstances.*** In other words, once the effective date of the Notice to End has passed, there can be no extension of time to file for arbitration.
[…]

[emphasis in italics added]

The Tenant stated she did not receive the 1 Month Notice by registered mail until July 25, 2022 because she was out of town, being prior to the effective date of the 1 Month Notice on August 31, 2022. The Tenant did not submit any evidence whatsoever to support the truthfulness of her testimony that there were exceptional circumstances as required by PG 36. As such, I find the Tenant has not established there was exceptional circumstances for her failure to make the Application within the 10-day dispute period provided by section 47(4) of the Act. Based on the foregoing, I dismiss the Application in its entirety. Notwithstanding I have dismissed the Application, the Landlord is nevertheless required to demonstrate, on a balance of probabilities, that the 1 Month was given for a valid reason.

The Landlord stated he drove by the rental unit and saw the Tenant had erected a pool outside the rental unit. The Landlord submitted into evidence a picture of an inflatable ring-pool to corroborate his testimony. The Landlord noted there was an object floating on top of the water in the pool that clearly showed the water level was higher than 10” or 0.6 metres. The Landlord stated that, as the water in the pool exceed 10” in depth, the Tenant breached a material term of the Tenancy Agreement that specified the type and height of pool that was permitted on the residential property. I have carefully viewed the photo submitted by the Landlord and the water level in the photo appears to be well

above 10’ from the ground. Although the Tenant submitted two photos of the pool with a ruler in it which indicates the water level at 10”, the two pictures do not show the inside of the pool at the same time the photos were taken. As a result, I am unable to determine how full the pool was at the time the Tenant’s two photos were taken. As such, I prefer the Landlord’s photo to the Tenant’s photos and I find, on a balance of probabilities, that the height of the water in the pool at the time the Landlord took his photo exceed ed10” in height.

The Landlord submitted the First Letter in which he requested the Tenant to empty the pool on a daily basis. The Landlord stated that, after he sent the First Letter, he contacted his insurance agent and was told by them that the insurance on the renal unit would lapse unless the issue was resolved immediately. The Landlord submitted the Second Letter into evidence and stated he served it on the Tenant by registered mail and email. The Second Letter retracted the First Letter and stated the pool violated the terms and conditions of the Landlord’s insurance policy. The Landlord provided a copy of the Insurance Email with the Second Letter. The Second Letter also stated the Tenant was in violation of the municipal bylaws and demanded the Tenant to take down the pool immediately within 24 hours.

The Landlord stated the municipal bylaws require pools, that are located in front yards, to be fenced and gated so that the public would not have access to the pool. The Landlord stated the area around the pool was not fully fenced nor was it gated. The Landlord stated the Tenant did not take down the pool and he made a complaint to the municipality. The Landlord stated a bylaw officer visited the residential premises on July 11, 2022. The Landlord stated he did a drive by of the residential property on July 12, 2022 and observed the pool had been removed. The report of he bylaw officer who attended the property also noted the pool was removed on July 12, 2022.

Instead of dismantling the pool as requested by the Landlord, the Tenant sent the Landlord an email dated June 30, 2022 in which she stated she received the Second Letter and demanded the Landlord retract the Second Letter and reinstate the First Letter. The Tenant stated the water in the pool was less than 10” and that it was drained every night. When I noted that it appeared that it would take a lengthy period of time to drain and fill the pool because of its large size, the Tenant avoided addressing my observation. The Tenant initially stated the pool was dismantled before the bylaw officer attended at the residential property. The Tenant acknowledged a bylaw officer visited the residential property on July 11, 2022. The Tenant later acknowledged she drained and removed the pool after the bylaw officer visited the residential property.

The Tenant stated that, as the municipal bylaw prevented her from having a pool, the term in the tenancy agreement should not apply since it contravened the municipal bylaws. I find the Tenant's argument to be disingenuous. Regardless of whether the municipal bylaw required fencing and a gate around pools located in front yards, the Tenant nevertheless was in breach of the material term that restricted the size and type of pool permitted by the terms of the Tenancy Agreement. The Tenant clearly read the Insurance Email because she stated she contacted the Landlord's insurer and when she told them about the pool, the agent laughed. The Tenant stated the agent told her she would forward the information to her supervisor but the Tenant never heard back from them.

The Tenant stated the pool was never left unattended. However, in the picture of the pool submitted by the Landlord, there is no evidence that anyone was in attendance at the pool other than for the Landlord. The Tenant stated the Landlord's demand that the pool be dismantled within 24 hours was unreasonable because she did not receive the Second Letter by registered mail until much later. However, in the Tenant's email dated June 30, 2022, already submitted into evidence by the Landlord, the Tenant acknowledged receipt of the Second Letter and demanded the Landlord retract it. The Landlord submitted into evidence a copy of the report of the bylaw officer who visited the residential property on July 11, 2022 in which the officer observed a kiddy pool. The report also noted the officer did a drive by the next day on July 12, 2022 and noted the pool was already drained, collapsed and stored by front wall of house. As such, I find the Tenant was in receipt of the Second Letter on June 30, 2022 and that the Tenant had until midnight on July 1, 2022 to correct the breach under the Tenancy Agreement. I find, on a balance of probabilities, that the Tenant refused or neglected to correct the breach of the Tenancy Agreement by midnight on July 31, 2022 and that the pool remained in place until July 12, 2022.

The Tenant stated it was unreasonable for the Landlord to give her only 24 hours to remove the pool. However, the Tenant stated she filled and emptied the pool on a daily basis. As such, I find emptying the pool within 24 hours of the receipt of the Second Letter by email was not an unreasonable period of time for the Tenant to correct the breach of the Tenancy Agreement. I also note that, as the pool was located in front of the building without fencing, it posed a serious hazard to young children. Considering the significant risk the pool posed to children as well as the exposure of liability of the Landlord, I find the demand by the Landlord that the Tenant dismantle the pool within 24 hours was reasonable.

Residential Tenancy Policy Guideline 8 (“PG 8”) provides guidance on unconscionable and materials terms. PG 8 states in part:

> **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 Tenancy Agreement clearly stated the type, size and maximum water height that the Tenant could use on the residential property and preamble to the term was bolded. I find the specificity of the term, as well as the Landlord's potential exposure to third party liability should there be a breach of that term, were indicative of the importance of the term in the overall scheme of the Tenancy Agreement. As such, I find the provision regarding the type of pool was a material term of the Tenancy Agreement. The Tenant acknowledged that, although she received the Second Letter, she did not remedy the material breach of the Tenancy Agreement by removing the pool within 24 hours of receiving the Second Letter by email on June 30, 2022. I find the Tenant accepted the risk of the consequences to the tenancy when she refused, or neglected, to remove the pool by the time requested by the Landlord. Based on the foregoing, I find the Landlord has proven, on a balance of probabilities, cause for ending the tenancy pursuant to subsection 47(1)(h) of the Act.

I also find the Tenant's continued refusal to dismantle the pool after she was provided with a copy of the Insurance Email seriously jeopardized a lawful right of the Landlord to maintain insurance coverage on the residential property. As such, I find the Tenant also breached subsection 47(1)(d)(ii) of the Act.

Based on the foregoing, I find the Landlord has demonstrated, on a balance of probabilities, that the 1 Month Notice was issued for valid reasons. As I have found the Tenant breached subsection 47(1)(d)(ii) and section 47(1)(h) of the Act, it is unnecessary for me to consider whether the Tenant breached subsection 47(1)(d)(iii) of the Act.

Section 55(1) of the Act states:

> **Order of possession for the landlord**
>
> **55**(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
>
> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I have reviewed the 1 Month Notice and find it complies with the form and content requirements of section 52 of the Act. Section 55(1) of the Act provides that, where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with section 52 of the Act, then I must grant the landlord an Order of Possession. As such, pursuant to section 55(1) of the Act, I must grant the Landlord an Order of Possession of the rental unit. The Landlord acknowledged the Tenant paid the rent for December 2022. As such, pursuant to section 68(2)(a), I find the tenancy ends at 1:00 pm on December 31, 2022.

Conclusion

The Application is dismissed without leave to reapply.

The Tenant is ordered to deliver vacant possession of the rental unit to the Landlord by 1:00 pm on December 31, 2022, after being served with a copy of this decision and attached Order of Possession by the Landlord. This Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

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 29, 2022

Residential Tenancy Branch