



Dispute Resolution Services

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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 Tenants pursuant to the *Residential Tenancy Act* (the “Act”). The Tenants applied for the following:

- an order cancelling a One Month Notice to End Tenancy for Cause dated July 26, 2022 (“1 Month Notice”); and
- authorization to recover the filing fee for the Application from the Landlords.

One of the two Landlords (“SS1”) and one of the two Tenants (“HH”) 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* (“RoP”). The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

HH stated the Tenants served the Notice of Dispute Resolution Proceeding (“NDRP”) on each of the Landlords by registered mail but she could not recall the date of mailing or provide the Canada Post tracking numbers. SS1 acknowledged the Landlords received the NDRP Packages. I find that each of the Landlords was served with the NDRP pursuant to the provisions of section 89 of the Act.

HH admitted the Tenants did not serve the Landlords with any evidence for this proceeding.

Preliminary Matter – Service of Landlords' Evidence on Tenants

SS1 stated the Landlords served their evidence on the Tenants' door on November 15, 2022. HH stated she flew out to San Francisco and did not receive the Landlords' evidence until November 20, 2022.

Rule 3.15 of the RoP states:

3.15 Respondent's evidence provided in single package

Where possible, copies of all of the respondent's available evidence should be submitted to the Residential Tenancy Branch online through the Dispute Access Site or directly to the Residential Tenancy Branch Office or through a Service BC Office. The respondent's evidence should be served on the other party in a single complete package.

The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Except for evidence related to an expedited hearing (see Rule 10), and subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

See also Rules 3.7 and 3.10.

Section 90 of the Act states:

- 90 A document given or served in accordance with section 88 *[how to give or serve documents generally]* or 89 *[special rules for certain documents]*, unless earlier received, is deemed to be received as follows:
- (a) if given or served by mail, on the fifth day after it is mailed;
 - (b) if given or served by fax, on the third day after it is faxed;
 - (c) if given or served by attaching a copy of the document to a door or other place, on the third day after it is attached;
 - (d) if given or served by leaving a copy of the document in a mailbox or mail slot, on the third day after it is left.

The RoP defines “Days” as follows:

Days:

- a) If the time for doing an act in relation to a Dispute Resolution proceeding falls or expires on a holiday, the time is extended to the next day that is not a holiday.
- b) If the time for doing an act in a government office (such as the Residential Tenancy Branch or Service BC) falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.
- c) *In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.*
- d) In the calculation of time not referred to in subsection (c), the first day must be excluded and the last day included.

[emphasis in italics added]

Pursuant to section 90 of the Act, the Landlords’ evidence was deemed to have been received by the Tenants on November 18, 2022. As such, after accounting for deemed service of the Landlord’s evidence on the Tenants on November 18, 2022, and after excluding the first and last day after deemed service of the evidence on the Tenants, I find the Landlords’ evidence was not served on the Tenants at least seven days before this hearing as required by Rule 3.15 of the RoP.

The Tenants failed did not submit a copy of the 1 Month Notice to the Residential Tenancy Branch (“RTB”) as required by Rule 3.1. Rule 3.1 of the RoP states:

3.1 Documents that must be served with the Notice of Dispute Resolution Proceeding Package

The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

- a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;
- b) the Respondent Instructions for Dispute Resolution;

- c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and
- d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [*Documents that must be submitted with an Application for Dispute Resolution*].

See Rule 10 for documents that must be served with the Notice of Dispute Resolution Proceeding Package for an Expedited Hearing and the timeframe for doing so.

As I require a copy of the 1 Month Notice to adjudicate the Application, I will admit the copy of the 1 Month Notice submitted by the Landlords to the RTB. However, I find the remainder of the Landlords' evidence to be inadmissible for this proceeding as service of the evidence was not made by the Landlords on the Tenants at least 7 days before the hearing as required by Rule 3.15 of the RoP.

Issues to be Decided

- Are the Tenants entitled to cancellation of the 1 Month Notice?
- Are the Tenants entitled to recover the filing fee for the Application from the Landlords?
- If the Tenants are not entitled to cancellation of the 1 Month Notice, are the Landlords entitled to an Order of Possession pursuant to section 55(1) of the Act?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Application and my findings are set out below.

The parties agreed the tenancy commenced on May 2, 2020, with a fixed term ending October 31, 2020, with rent of \$3,000.00 payable on the 1st day of each month. The rental unit is partially furnished. The Tenants were required to pay a security deposit of \$2,000.00 by May 2, 2021. SS1 stated the Tenants paid the security deposit and that the Landlords were holding it in trust for the Tenants.

SS1 stated the Landlords served the 1 Month Notice on the Tenants' door on July 26, 2022. HH acknowledged the Tenants received the 1 Month Notice. I find the 1 Month Notice was served on the Tenants pursuant to section 88 of the Act.

The 1 Month Notice stated the reason for ending the tenancy was the Tenants were repeatedly late paying the rent. The details of the events for cause for ending the tenancy were:

Rent has been late repeatedly.

A 10 Day Notice to end tenancy for unpaid rent issued on October 02, 2021 was delivered.

2. A 10 Day Notice to end tenancy for unpaid rent issued Nov 02, 2021 was delivered.

3. Rent was late June 2022 & July 2022. Both months rent was received on the 2nd day of the month.

There is a history of late rent.

SS1 stated the dates the five rental payments were due and the dates on which the Tenants paid the rent for those due dates were as follows:

Date	Rent	Payment	Number of Days Late
July 1, 2021	\$3,000.00	July 2, 2021	1 Day
October 1, 2021	\$3,000.00	October 2, 2021	1 Day
November 1, 2021	\$3,000.00	November 2, 2021	1 Day
June 1, 2022	\$3,000.00	June 2, 2022	1 Day
July 1, 2022	\$3,000.00	July 2, 2022	1 Day

SS1 stated the Landlords served the Tenants with a Ten Day Notice for Unpaid Rent and/or Utilities dated October 2, 2021 disclosing the Tenants had rental arrears of \$1,600.00 as of October 1, 2021. SS1 stated the Landlords served the Tenants with another Ten Day Notice for Unpaid Rent and/or Utilities dated November 2, 2021 disclosing the Tenants had rental arrears of \$1,600.00 as of November 1, 2021. As set out in the table above, the rent payment due on October 1, 2021 was paid on October 2, 2021 and the rent payment due on November 1, 2021 was paid on November 2, 2021.

HH admitted the Tenants were one day late paying the rent due on October 1, 2021 and one day late paying the rent due on November 1, 2021 but denied the Tenants were late paying the rent on the other dates claimed by SS1.

Analysis

Rule 6.6 of the RoP states:

6.6 The standard of proof and onus of proof

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. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Based on Rule 6.6, the Landlords have the onus to prove they are entitled to end the tenancy pursuant to the 1 Month Notice on a balance of probabilities.

Subsections 47(1)(b), 47(1)(c), 47(1)(d) and 47(1)(e)(ii) and section 47(4) state:

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

[...]

(b) the tenant is repeatedly late paying rent;

[...]

(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.

SS1 stated the Landlords served the 1 Month Notice on the Tenant's door on July 26, 2022. HH acknowledged the Tenants received the 10 Day Notice. Pursuant to section 90 of the Act, the Tenants were deemed to have received the 1 Month Notice on July 29, 2022, being three days after the 1 Month Notice was served on the Tenants' door. Pursuant to section 47(4) of the Act, the Tenants had 10 days, or until August 8, 2022, to make an application for dispute resolution to dispute the 1 Month Notice. The records of the RTB indicate the Tenants made the Application on August 5, 2022. As such, I find the Tenants made the Application within the 10-day dispute period required by section 47(4) of the Act.

Section 26(1) of the Act states:

- 26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Section 26(1) of the Act makes it clear that payment of rent when it is due is a material term of a tenancy is mandatory unless the tenant has a right under the Act to deduct all or a portion of the rent.

Residential Tenancy Policy Guideline 38 (“PG 38”) provides guidance on when a landlord may end a tenancy when a tenant is repeatedly late paying the rent. PG 38 states in part:

Three late payments are the minimum number sufficient to justify a notice under these provisions.

It does not matter whether the late payments were consecutive or whether one or more rent payments have been made on time between the late payments.

However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late.

SS1 stated the Landlords served the Tenants with a Ten Day Notice for Unpaid Rent and/or Utilities dated October 2, 2021 disclosing the Tenants had rental arrears of \$1,600.00 as of October 1, 2021. SS1 stated the Landlords served the Tenants with another Ten Day Notice for Unpaid Rent and/or Utilities dated November 2, 2021 disclosing the Tenants had rental arrears of \$1,600.00 as of November 1, 2021.

- 46(1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
- (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

- (4) Within 5 days after receiving a notice under this section, the tenant may
 - (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.

SS1 stated the rent due for October 1, 2021 was paid on October 2, 2021 and the rent due for November 1, 2021 was paid on November 2, 2021. As the Tenants paid the rental arrears for October 2021 and November 2021 within the 5-day dispute period provided for by section 46(4)(a), the two Ten Day Notices had no effect other than to document the rent payments due on October 1 and November 1, 2022 were not paid on the due date.

SS1 stated the Tenants were late paying the rent on five occasions in 2021 and 2022. However, SS1 did not provide any evidence, such as rent payment receipts, banks transfers, e-transfers, cancelled cheques or other evidence of payment of the rent, to corroborate his testimony that the Tenants made at least three late rent payments. HH admitted the Tenants were late paying the rent for October 1 and November 1, 2021. As there is only evidence that the two of the rent payments were late, I find the Landlords have not proven, on a balance of probabilities, that the Tenants were late on at least three occasions as required by PG 38. As such, I find the Landlords have not proven cause to end the tenancy pursuant to section 47(1)(b) of the Act. Based on the foregoing, I order the 1 Month Notice to be cancelled and of no force or effect. The tenancy continues until ended in accordance with the provisions of the Act.

As the Tenants have been successful in the Application, I grant the Tenants recovery of the filing fee of \$100.00 pursuant to subsection 72(1) of the Act. Pursuant section 72(2)(a) of the Act, the Tenants are allowed to enforce this order by deducting \$100.00 from the next month's rent, notifying the Landlords when this deduction is made. The Landlords may not serve the Tenants with a 10 Day Notice to End Tenancy for Unpaid Rent when this deduction is made by the Tenants.

The Tenants are warned that further late payments of rent to the Landlord may have dire consequences.

Conclusion

The 1 Month Notice is cancelled and of no force or effect. The tenancy continues until ended in accordance with the provisions of the Act.

The Tenants are ordered to deduct \$100.00 from next month's rent in satisfaction of their monetary award for recovery of the filing fee.

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 12, 2022

Residential Tenancy Branch