



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC OLC 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 June 30, 2022 (“1 Month Notice”) pursuant to section 47;
- an order for the Landlord to comply with the Act, *Residential Tenancy Regulations* (“Regulations”) pursuant to section 62; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

The original hearing of the Application was held on December 2, 2022 (“Original Hearing”). The Landlord’s agent (“PW”) and the Tenant attended the Original 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.

At the Original Hearing, the Tenant stated he served the Notice of Dispute Resolution Proceeding on the Landlord by Xpresspost in late July 2022 but he could not provide the tracking number for the package. PW stated the Landlord did not receive the Xpresspost package. The Tenant stated that, when he was told the Landlord did not receive the Xpresspost package, he sent the NDRP to the Landlord by text message about one month after he sent the Xpresspost package. PW admitted the Landlord received the NDRP from the Tenant by a text message. As such, I find the NDRP Package was sufficiently served with the NDRP pursuant to section 71(2)(b) of the Act.

At the Original Hearing, issues arose as to whether the Tenant's evidence was served on the Landlord. Pursuant to Rule 7.8 of the RoP, I adjourned the Original Hearing and issued a decision dated December 3, 2022 ("Interim Decision"). The Interim Decision stated the Tenant was to re-reserve the evidence he submitted to the Residential Tenancy Branch ("RTB") for the Original Hearing on the Landlord. The Interim Decision also allowed the Landlord to serve on the Tenant, and submit to the RTB, any evidence she thought was relevant to respond to the Tenant's Application and evidence. The Interim Decision and Notices of Dispute Resolution for the adjourned hearing, scheduled for January 5, 2023 ("Adjourned Hearing"), were served on the parties by the RTB.

PW and the Tenant attended the Adjourned Hearing and they were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. A witness ("EK") was called during the Adjourned Hearing to provide testimony on behalf of the Landlord.

Preliminary Matter – Service of Tenant's Evidence on Landlord

The records of the RTB indicate the Tenant submitted evidence to the RTB for the hearing. However, after hearing the testimony of the parties at the Original Hearing, it was not clear to me whether the Tenant served his evidence on the Landlord.

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

Based on the testimony of the parties, I was unable to determine whether the Tenant complied with the requirements of Rule 3.14 of the RoP. As noted above, I adjourned the Original Hearing and ordered the Tenant to re-reserve his evidence on the Landlord before the Adjourned Hearing. The Tenant submitted into evidence a Canada Post receipt, with tracking stub, dated December 15, 2022, for re-service of his evidence on the Landlord. I find the Landlord was served with the Tenant's evidence in accordance with the provisions of section 88 of the Act.

Preliminary Matter – Service of Landlord’s Evidence on Tenant

The Landlord submitted a copy of the 1 Month Notice to the RTB. However, PW did not provide any testimony on how the Landlord’s evidence was served on the Tenant for the Original Hearing.

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing. In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

As the Landlord did not establish, on a balance of probabilities, that she served the Tenant with her evidence, I find she did not comply with Rule 3.14 of RoP. As noted above, I adjourned the Original Hearing and allowed the Landlord to serve any evidence on the Tenant, that she thought was relevant to respond to the Tenant’s evidence, prior to the Adjourned Hearing. The records of the RTB do not disclose the Landlord submitted any evidence for the Adjourned Hearing.

Preliminary Matter – Severance and Dismissal of Tenant’s Claim

At the outset of the Original Hearing, I observed the Application included a claim for an order that the Landlord comply with the Act, Regulations or tenancy agreement (“Tenant’s Other Claim”).

Rule 2.3 of the Rules states:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Where a claim or claims in an application are not sufficiently related, I may dismiss one or more of those claims in the application that are unrelated. Hearings before the RTB are generally scheduled for one hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

This hearing was scheduled for one hour. At the outset of the hearing, I advised the parties the primary issues in the Application were whether the tenancy would continue or end based on the 1 Month Notice and whether the Tenant was entitled to recover the filing fee for the Application from the Landlord. Accordingly, I find the Tenant's Other Claim was not sufficiently related to the primary issues of whether the 2 Month Notice would be cancelled and whether the Tenant was entitled to recover the filing fee for the Application. Based on the above, I will dismiss the Tenant's Other Claim, with or without leave, depending upon whether I cancel the 1 Month Notice.

Issues to be Decided

- Is the Tenant entitled to cancellation of the 10 Day 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 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 September 1, 2022, with a fixed term ending February 28, 2021, with rent of \$680.00 payable on the 1st day of each month. The Tenant stated the rental unit consists of one bedroom and that he shares the kitchen and bathroom facilities with three other tenants ("Other Tenants") in the residential premises ("Premises"). PO stated the Tenant paid a security deposit of \$340.00 and that the Landlord was still holding it in trust for the Tenant. At the Original Hearing, PO acknowledged the Tenant paid the rent for December 2022. At the Adjourned Hearing, PO acknowledged the Tenant paid the rent for January 2023. Based on the testimony of the parties, I find there is a residential tenancy between the Landlord and Tenant and that I have jurisdiction to hear the Application.

The Landlord stated the 1 Month Notice was served on the Tenant's door on June 30, 2022. The Tenant acknowledged receipt of the 1 Month Notice on his door. I find the 1 Month Notice was served on the Tenant in accordance with the provisions of section 88 of the Act.

A copy of the 1 Month Notice was submitted into evidence. The 1 Month Notice stated the reason for ending the tenancy was:

- Tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord

The details of the cause for ending the tenancy stated in the 1 Month Notice were:

- spilling milk inside fridge over other tenants food and damaging others food
- pissing over toilet and floor
- walking inside with muddy construction shoes
- cooking and not cleaning after, crumbs and spills, caused rat infestation
- using oven not cleaning causing fire hazard
- never took out trash or recycling
- doesn't dispose of his garbage or recycling properly
- smokes weed at door, smoke smell comes inside

PO stated the Landlord visits the Premises every one to two weeks. PO Stated that, on one occasion, the Landlord removed the Tenant's dirty shoes from the floor in the kitchen and placed them outside and, on another occasion, the Landlord saw the Tenant smoking on the patio deck.

EK stated he is one of the Other Tenants and has been living in the Premises since about the same time as the Tenant, being around two years. EK stated the Tenant is disturbing and being disrespectful to the Other Tenants. EK stated two tenants of the Premises got fed up and moved out several months ago. EK stated the Tenant is a weed addict and he smokes on a 24/7 basis. EK stated the Tenant opens the sliding door to the Premises, takes one step out, to smoke tobacco or cannabis and the smoke comes into the Common Areas and Other Tenants' units in the Premises. EK stated the Tenant also smokes in his bedroom before the Tenant goes to his construction job at 4:30 am in the morning. EK stated none of the Other Tenants smoke and the Tenant's smoke in the Premises disturbs all the Other Tenants. EK stated the Tenant's butts pile

up in an ashtray on the patio deck and the Tenant expects the Other Tenants to clean the ashtray. EK stated the Tenant leaves burning butts on the wooden deck.

EK stated the Other Tenants share cleaning responsibilities of the Common Areas. EK stated the Tenant rarely takes out the trash and recycling and when he does, he reverses them and EK must sort them out later. EK stated the Tenant spills things in the refrigerator and does not clean it up. EK stated the Other Tenants must clean up the Tenant's messes and that the other Tenants, on some occasions, have been required to dispose of their own refrigerated food because of the Tenant's carelessness. EK stated he sweeps and mops the floors and the Tenant will come into the Premises with muddy construction boots and leave dirt everywhere. EK stated there was a rat infestation in the kitchen at one point because the Tenant did not clean up food spills and droppings. EK stated the Tenant did not clean up an oven and it eventually caught fire and is no longer working. EK stated the Tenant never cleans the bathroom or shower. EK stated that, after the Tenant received the 1 Month Notice from the Landlord, the Tenant cleaned up the Common Areas and took photographs to submit to the RTB for this proceeding.

The Tenant denied the accusations made by PW and EK. The Tenant stated he cleans the Common Areas and submitted photographs of various parts of the Common Areas, including the bathroom and kitchen, to corroborate his testimony. The Tenant stated he is a good person and he accused the Landlord and Other Tenants of wanting him out of the rental unit. The Tenant stated he purchased his own refrigerator so that he does not need to use the one in the kitchen of the Premises. The Tenant admitted he smokes outside.

Analysis

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 this case, the onus is the Landlord to establish on a balance of probabilities that it is entitled to an order for an early end of the tenancy.

Section 32(2) and subsections 47(1)(d)(ii) and sections 47(2) through 47(5) of the Act state:

- 32(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.
- 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
 - [...]
- (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's door on June 30, 2022. Pursuant to section 90 of the Act, the Tenant was deemed to have received the 1 Month Notice on July 3, 2022. Pursuant to section 47(4) of the Act, the Tenant had until July 13, 2022, being the expiry of the 10-day dispute period, to make an application for dispute resolution to dispute the 1 Month Notice. The records of the RTB disclose the Tenant's Application was made on July 9, 2022. As such, the Application was made within the 10-day dispute period required by section 47(4) of the Act.

PO stated the Landlord visits the Premises every one to two weeks. PO Stated that, on one occasion the Landlord removed the Tenant's dirty shoes from the floor in the kitchen and placed them outside and, on another occasion, saw the Tenant smoking on the patio deck. EK stated the Tenant is disturbing and being disrespectful to the Other Tenants. EK stated two tenants of the Premises got fed up and moved out several months ago. EK stated the Tenant is a weed addict and smokes on a 24/7 basis. EK stated the Tenant opens the sliding door to the Common Areas and takes one step out to smoke and the smoke comes into the Common Areas and Other Tenants' units in the Premises. EK stated the Tenant also smokes in his bedroom before he leaves for work in the morning. EK stated the smell of smoke throughout the Premises disturbs the Other Tenants. EK stated that, although the Other Tenants participate in cleaning the Common Areas, the Tenant does not. EK testified to a variety of failures on the part of the Tenant to clean the Common Areas and that, on some occasions, the Other Tenants been required to dispose of their own refrigerated food out because of the Tenant's carelessness. EK stated the Tenant never cleans the bathroom or shower. EK stated that, after the Tenant received the 1 Month Notice from the Landlord, the Tenant cleaned up the Common Areas and took photographs to submit to the RTB for this proceeding.

The Tenant denied the accusations made by PW and EK. The Tenant stated he is a good person and accused them of wanting him out of the rental unit. The Tenant stated he purchased his own refrigerator so that he does not have to use the one in the common kitchen. The Tenant admitted he smokes outside.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chomy* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

I note that subsection 47(1)(d)(ii) uses the adjective “seriously” as part of the cause stated in this subsection. This means a landlord must prove the activity, behavior or misconduct of the tenant must be sufficient to warrant an eviction of the Tenant pursuant to subsection 47(1)(d)(ii).

In this case, I find the testimony of both the Tenant and EK to be equally plausible. The limited testimony of PW does not, in my opinion, provide any assistance to determining whether more weight should be placed on the testimony the Tenant or more weight on the testimony of EK. The Tenant submitted photographs of the Common Areas showing a reasonable standard of cleanliness. The Landlord did not submit any photographs, videos, witness statements or other evidence to corroborate her assertion that the Tenant has seriously jeopardized the health or safety or a lawful right or interest of the other tenants. It appears there may be issues between Tenant and EK respecting the division of duties between the Tenant and the Other Tenants to maintain the Common Areas. However, based on the testimony and evidence before me, I am unable to determine whether the Tenant has *seriously* jeopardized the health or safety or lawful right of the Other Tenants. Furthermore, PO did not testify to, or provide any evidence, that the Landlord has served the Tenant with a written warning that the Tenant is to comply with the requirements of the Act and is not to smoke in or near the Premises. As such, I find the Landlord has not proven, on a balance of probabilities, that the Tenant has breached section 41(1)(d)(ii) of the Act. Based on the foregoing, I order the 1 Month Notice to be cancelled. The tenancy will continue until it is lawfully ended in accordance with the provisions of the Act.

As the Tenant has been successful in the Application, I grant the Tenant 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 Tenant is allowed to enforce this order by deducting \$100.00 from the next month’s rent, notifying the Landlord when this deduction is made. The Landlord may not serve the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent when this deduction is made by the Tenant.

As I have cancelled the 1 Month Notice, I dismiss the Tenant’s Other Claim with leave to reapply. The Tenant has the option of making a new application for dispute resolution to make the Tenant’s Other Claim.

As noted above, section 32(2) requires that a tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. I also note that, regardless of whether a tenancy agreement contains, or do not contain, a prohibition against smoking in or on the residential premises, smoking tobacco or cannabis products in the a tenant's rental unit or common areas of the residential property or anywhere that allows smoke to enter the common areas or other units of the residential property may be considered to significantly interfere with, or unreasonably disturb, another occupant of the residential property in breach of section 47(1)(d)(i) of the Act. The Tenant is warned that, if he does not comply with the provisions of the tenancy agreement and the Act, dire consequences may result if the Tenant is served with another One Month Notice to End Tenancy for Cause and the Landlord is better prepared to show cause to end the tenancy at a dispute resolution proceeding before the RTB.

Conclusion

The 1 Month Notice is cancelled. The tenancy will continue until it is lawfully ended in accordance with the provisions of the Act.

The Tenant is ordered to deduct \$100.00 from next month's rent in satisfaction of his monetary award for recovery of the filing fee for the Application.

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: January 8, 2023

Residential Tenancy Branch