



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL, FFL
 CNC, OLC, FFL

Introduction

This was a cross application hearing that dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for Landlord's Use of Property, pursuant to sections 49 and 55; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

The tenant originally filed an application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46; and
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62.

On January 17, 2023 the tenant amended the above claim to remove the claim for cancellation of the 10 Day Notice to End Tenancy and added a claim for cancellation of a One Month Notice to End Tenancy for Cause, pursuant to section 47.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord was represented by agents J.G. and A.G. The landlord called witness Q.H. who was excluded from the entire hearing except when he was called to provide testimony. The tenant was given an opportunity to cross examine the landlord's witness.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

The landlord confirmed their email address for service of this Decision. The tenant will be served with this Decision at his home address.

Preliminary Issue- Service

Agent A.G. testified that the tenant was served with the landlord's application for dispute resolution and evidence via registered mail on September 29, 2022. In the hearing agent A.G. provided the Canada Post tracking number for the above mailing which is located on the cover page of this decision.

Agent A.G. testified that the above package was returned to sender because it was unclaimed. Agent A.G. testified that the above package was then posted on the tenant's door on January 5, 2023.

The tenant testified that he did not receive the landlord's application for dispute resolution and evidence via registered mail and did not receive a Canada Post pick up slip for same. The tenant testified that he received the landlord's application for dispute resolution and evidence via posting but did not recall on what date.

The tenant testified that his mail is delivered to the upstairs unit and that an agent of the landlord leaves his mail by his door. The tenant testified that some of his mail has been returned to sender. The tenant testified somebody sent his pension check back to the government and he does not know why. The tenant testified that he receives his mail from an agent of the landlord when he pays rent or when an agent puts his mail by his door.

The landlord testified that his agent, Q.H., attends the upper unit of the subject rental property and checks for mails and delivers same to the tenant once every five days to one week. The landlord testified that all of the tenant's mail is delivered to him.

Q.H. testified that he was given instructions to pick up the tenant's mail from the upper suite and deliver it to the tenant once each week, which he did. Q.H. testified that he leaves the tenant's mail at the front door or in a box left by the tenant that says, "put mail here". The tenant confirmed the existence of the above described box. Q.H. testified that he has never taken any of the tenant's mail.

Based on agent A.G.'s testimony and the registered mail tracking number entered into evidence, I find, on a balance of probabilities, that the landlord served the tenant with

the landlord's evidence and application for dispute resolution via registered mail on September 29, 2022.

Based on the landlord's testimony which was supported by the independent testimony of H.Q., I find that the tenant's mail was delivered to the tenant once per week. Pursuant to section 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's application for dispute resolution and evidence, five days after it's registered mailing, on October 4, 2022.

Based on the testimony of both parties, I find that the tenant was deemed served with the above documents three days after they were posted on the tenant's door, that being January 8, 2023. I find that the tenant was aware of the claims made by the landlord and had time to respond to those claims. I find that the tenant is not prejudiced by the landlord's claims being heard on their merits.

The tenant testified that he served the landlord with his application for dispute resolution and evidence via registered mail at the deadline. The tenant did not know on what date the above documents were mailed. The tenant entered into evidence a registered mail receipt dated January 7, 2023.

Agent A.G. testified that on January 18, 2023 the landlord received, via registered mail, photographs of the upstairs unit and two amendment requests, but did not receive the Notice of Dispute Resolution Proceeding. Agent A.G. testified that she contacted the RTB on January 12, 2023 and requested a copy of the Notice of Dispute Resolution Proceeding, which was provided. The RTB Dispute Management System confirms that agent A.G. called on January 12, 2023 and reported that the Notice of Dispute Resolution Proceeding was not served on the landlord. A courtesy copy was provided.

I asked the tenant when and how the amendments were served on the landlord. The tenant did not understand the question which was rephrased but the tenant was not able to provide an answer. The tenant appeared uncertain as to what documents were served on the landlord and when they were served. I found the tenant's testimony on service to be confused and of little assistance.

Rule 3.1 of the Residential Tenancy Branch Rules of Procedure (the "Rules") states:

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].

Based on the testimony of agent A.G. and the corroborating evidence found in the RTB Dispute Management System, I find that the tenant failed to serve the documents set out in Rule 3.1 of the Residential Tenancy Branch Rules of Procedure, namely the Notice of Dispute Resolution Proceeding. I therefore dismiss the tenant's application with leave to reapply. I note that the tenant's application for dispute resolution deals with matters separate and apart from the landlord's application for dispute resolution. The findings made on the landlord's application are not altered by the dismissal of the tenant's application for dispute resolution.

Preliminary Issue- Amendment

In the hearing the tenant testified to the spelling of his middle name which is different than the spelling in the landlord's application for dispute resolution. Pursuant to section 64 of the *Act*, I remove the mis-spelled middle name of the tenant from the landlord's application for dispute resolution.

Issues to be Decided

1. Is the landlord entitled to an Order of Possession for Landlord's Use of Property, pursuant to sections 49 and 55 of the *Act*?
2. Is the landlord entitled to recover the filing fee for this application from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agree that this tenancy agreement originated between the tenant and the previous owner of the subject rental property. The tenant testified that the previous owner died, and his kids sold the subject rental property to the landlord.

Agent A.G. testified that the landlord became the owner of the subject rental property in July of 2020. Agent A.G. testified that the landlord asked the seller to serve the tenant with a Two Month Notice for Landlord's Use of Property (the "Notice").

The landlord entered into evidence a document titled "Tenant Occupied Property – Buyers Notice to Seller for Vacant Possession" which states:

WHEREAS:

- A. The undersigned (the "Buyer(s)") and the Seller(s) have entered into the Contract of Purchase and Sale dated June 08, 2022 in respect of the purchase and sale of the above-noted Property (the "Purchase Agreement").
- B. All conditions on which the purchase and sale of the Property under the Purchase Agreement depend have been satisfied or waived in accordance with the Purchase Agreement.
- C. The Property is currently rented to tenant(s).
- D. The Buyer(s) (or one or more of the spouse, children, and parents of the Buyer(s) or, in the case of a family corporation (as defined in the *Residential Tenancy Act*), voting shareholders of the Buyer(s)) intend in good faith to occupy the Property.

NOW THEREFORE in accordance with Section 49 of the *Residential Tenancy Act*, the Buyer(s) hereby request that the Seller(s), as landlord, give notice (the "Tenant Notice") to the tenant(s) of the Property pursuant to the *Residential Tenancy Act* terminating the tenancy and requiring the tenant(s) to vacate the Property by 1:00 pm on September 01, 2022.

For the purpose of giving the Tenant Notice under Section 49 of the *Residential Tenancy Act*, the Buyer(s) address is: [REDACTED] and the Buyer(s) hereby consent to the Seller(s) including the Buyer(s) name(s) and such address on the Tenant Notice for the purpose of Section 49(7) of the *Residential Tenancy Act*.

Executed by the Buyer(s) this 21 day of June, 2022.

The buyer listed on the above document is the landlord.

Both parties agree that the tenant was personally served with the Notice on June 22, 2022. The Notice was entered into evidence, is signed by the executor of the estate of the previous owner, is dated June 22, 2022, gives the address of the rental unit, states that the effect date of the notice is September 1, 2022, is in the approved form, #RTB-32, and states that all the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit.

The tenant did not file an application for dispute resolution to dispute the Notice. The tenant testified that after the Notice was served agent A.G. sent him a letter telling him how to pay rent to the new landlord.

Agent A.G. testified that once the landlord became the owner of the subject rental property he did not receive rent money from the tenant and so she sent him a letter telling how to pay his rent to the landlord. Agent A.G. testified that the tenant was sent rent receipts for use and occupancy only from September 2022 onwards. The landlord entered into evidence a use and occupancy receipt for September 2022's rent. Agent A.G. testified that the above receipt was sent to the tenant via registered mail. A registered mail receipt dated 2, 2022 was entered into evidence. The tenant testified that he did not receive the September 2022 rent receipt until it was posted on his door as evidence for this dispute.

Analysis

Based on the testimony of both parties and the evidence provided, I find that service of the Notice was effected on the tenant on June 22, 2022, in accordance with section 88 of the *Act*.

Section 49(8) and section 49(9) state that if a tenant who has received a Two Month Notice to End Tenancy for Landlord's Use of Property does not make an application for dispute resolution within 15 days after the date the tenant receives the notice, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date.

In this case, the tenant did not dispute the Notice within 15 days of receiving it. I find that, pursuant to section 49(9) of the *Act*, the tenant's failure to file to dispute the Notice

within 15 days of receiving the Notice led to the end of this tenancy on the effective date of the notice.

I find that in accepting rent for the months of July and August 2022 the landlord did not reinstate the tenancy agreement as rent for those months was due. I find that use and occupancy fees for September 2022 forward were due and payable by the tenant. I find that the landlord served the tenant with rent receipts clearly indicating that the rent collect was for use and occupancy and therefore the acceptance of that rent did not reinstate the tenancy agreement.

I find that the tenant was sufficiently served with the September 2022 use and occupancy receipt on September 7, 2022, five days after its mailing, in accordance with section 88 of the *Act*. In making the above finding, I rely on my earlier findings on the tenant's receipt of mail from the landlord's agent on a weekly basis.

Section 55(2)(b) of the *Act* states:

(2)A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

(b)a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;

Section 55(4)(a) of the *Act* states:

(4)In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 [*Resolving Disputes*],

(a)grant an order of possession,

Pursuant to sections 55(2)(b) and section 55(4)(a) of the *Act*, I find that the landlord is entitled to a 2-day Order of Possession. The landlord will be given a formal Order of Possession which must be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenant, pursuant to section 72 of the *Act*.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenant**. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a Monetary Order to the landlord in the amount of \$100.00.

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court 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: February 06, 2023

Residential Tenancy Branch