Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPB, FFL
Tenant: CNC, DRI, OLC, FFT

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 in accordance with a vacate clause at the end of a fixed term tenancy, pursuant to section 55(2)(c); and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

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

- cancellation of the One Month Notice to End Tenancy (the "One Month Notice"), pursuant to section 47;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62;
- disputation of a rent increase, pursuant to section 43; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant, the tenant's wife and the landlord 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 tenant and the tenant's wife alleged that the person who called into the hearing and testified that he is the landlord, is not actually the landlord, but is the landlord's friend. The tenant did not present any evidence to support the above claim. The landlord testified that he is the landlord named in these applications for dispute resolution and

not a friend of the landlord. The landlord testified that the tenants were just trying to throw a wrench in the proceedings.

The tenant and the tenant's wife's above submissions were not substantiated by any evidence other than their testimony. I find that the landlord would not receive any advantage by having someone attend and pretend to be him as the landlord could have legitimately named a friend as an agent to appear on his behalf. I accept the landlord's affirmed testimony that he is the landlord named in this application for dispute resolution.

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.

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue – Service

Both parties agreed that they were each served with the other's application for dispute resolution and evidence via registered mail. I find that both parties were served with the above documents in accordance with sections 88 and 89 of the *Act.*

Preliminary Issue- Severance

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claims regarding the One Month Notice and the vacate clause in the tenancy agreement are not sufficiently related to any of the tenant's other claims to warrant that they be heard together.

The tenant's other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the One Month Notice and the vacate clause in the

tenancy agreement. I exercise my discretion to dismiss, with leave to reapply, the tenant's claims for:

- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to section 62; and
- disputation of a rent increase, pursuant to section 43.

Issues to be Decided

1. Is the landlord entitled to an Order of Possession pursuant to a vacate clause at the end of a fixed term tenancy agreement, pursuant to section 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*?
3. Is the tenant entitled to cancellation of the One Month Notice, pursuant to section 47 of the *Act*?
4. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Evidence/Analysis

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 the landlord, the tenant and the tenant's wife entered into a tenancy agreement (the "First Agreement") with the following terms:

- Tenancy created by this agreement starts on 20 AUG 2020 and is for a fixed term ending on 30 AUG 2021.
- At the end of this time, the tenancy will continue on a month-to-month basis, or another fixed length of time, unless the tenant gives notice to end tenancy at least one clear month before the end of the term.
- The tenant will pay the rent of $1400 each month to the landlord on the first day of the rental period which falls on the 01 day of each month.
- The tenant is required to pay a security deposit of $700 by 20 AUG 2020.
- The tenant is required to pay a pet damage deposit of $700 by 20 AUG 2020.

The First Agreement was entered into evidence and was signed by both parties.

The landlord testified that he and the tenant entered into a new tenancy agreement (the "Second Agreement") at the end of the fixed term set out in the First Agreement. The Second Agreement was entered into evidence and states the following terms:

- Tenancy created by this agreement starts on 30 AUG 2021 and is for a fixed term ending on 31 DEC 2022.
- At the end of this time, the tenancy is ended and the tenant must vacate the rental unit. This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation, or if this is a sublease agreement as defined in the Act. Reasons tenant must vacate: OWNER OCCUPANCY.
- The tenant will pay the rent of $1450 each month to the landlord on the first day of the rental period which falls on the 01 day of each month.
- The tenant is required to pay a security deposit of $1400 by 31 AUG 2021.

The tenant and the landlord initialled the vacate clause outlined in the second bullet point above (the "Vacate Clause"). The Second Agreement is dated August 30, 2021 and is signed by the landlord and the tenant. The landlord testified that he plans on moving into the subject rental property and that he is seeking an Order of Possession, pursuant to the Vacate Clause in the Second Agreement.

The tenant testified that he signed the Second Agreement in December of 2022 because the landlord told him that he needed an updated tenancy agreement for mortgage related purposes. No documentary evidence to support the alleged request for same from the landlord was entered into evidence. The tenant testified that he did not know that the landlord would change the terms in the Second Agreement regarding the end of the tenancy.

The tenant and the tenant's wife testified that in January of 2023 the landlord asked them to increase the rent to $1850.00 per month and they refused. The tenant entered into evidence the following text messages from the tenant to the landlord dated January 13, 2023:

- Tenant: Hi we agree to increase the rent to 1500 as per regulations. Increase to 1850 is quite a lot
- Tenant: [Name redacted] can you bring photocopy of our contract as well

The tenant testified that if he didn't sign the Second Agreement in December 2022 then why was he asking for a copy in January 2023?

I don't find the tenant's above testimony to be a persuasive argument because there are any number of reasons why the tenant would ask for a copy of the tenancy agreement in January of 2023. I don't find the timing of the request to be determinative on the date the Second Agreement was signed.

The tenant and the tenant's wife testified that in November of 2021 the landlord verbally asked the tenant to increase rent to $1450.00 and that the tenant agreed to that charge starting February 2022, which was three months after the landlord asked, as required for notices of rent increase. The tenant testified that no written notice of rent increase was provided. This landlord testified that the rent increase was agreed at the time the Second Agreement was signed, that being August 30, 2021.

The tenant entered into evidence bank records from the tenant and the tenant's wife which show the following rent payments made to the landlord on the following dates:

Date	**Tenant**	**Tenant's Wife**
August 4, 2021	$400.00	$1000.00
January 2, 2022	$700.00	$700.00
February 2, 2022	$725.00	$725.00

The tenant and the tenant's wife testified that had the Second Agreement been signed in August of 2021 then the tenants would have paid the landlord $1,450.00 in August and January of 2022, not $1,400.00. The landlord testified that he didn't notice that the tenant underpaid him for rent in January 2022 until this dispute. The landlord testified that since the rent comes from different accounts after the first of the month, it is not always easy to see if payments are incorrect and that he trusted the tenant to pay the correct amount of rent.

I find that the bank records are unhelpful as they do not encompass the entire period from August 2021 to February 2022. I find that the curated snapshot of rent payments provided by the tenant does not prove what rent was paid from August 2021 to February 2022 but what rent was paid in August 2021, January 2022 and February 2022.

I find that the tenants paid $1,400.00 for August 2021's rent as stated in the First Agreement. I note that the term of the Second Agreement did not start until August 31,

2021 and so it would not be expected for the tenants to pay $1450.00 for August 2021's rent. The tenants did not submit their bank records for September to December 2021 so I am not able to determine what was paid for rent for those months.

The January 2022 records show that rent of $1400.00 was paid and $1450.00 was paid for February 2023. I am not able to determine if $1400.00 was paid each month or if only January 2022's rent from the period of September 2021 to January 2022 was paid in the amount of $1400.00. I am not able to determine if rent for January 2022 was an anomaly. I find it highly questionable that the entire period of rent records were not provided.

I find that the tenant's incomplete snapshot of rent payments and text message evidence is not sufficient to contradict the signed Second Agreement which clearly states, next to the tenant's signature, that the date of signing was August 30, 2021.

Based on the landlord's testimony that he witnessed the tenant initial the Vacate Clause, the presence of the tenant's initials next to the Vacate Clause and the fact that the above testimony was not disputed by the tenant, I find that the tenant initialled the Vacate Clause in the Second Agreement.

The tenant alleged the landlord changed the security deposit section of the Second Agreement after he signed it. The tenant testified that the Second Agreement originally stated that the tenant paid a security deposit of $700.00 and before signing the Second Agreement he had the landlord cross out the $700.00 amount and hand write in $1,400.00, which is the total amount of deposits paid to the landlord pursuant to the Frist Agreement. The Second Agreement entered into evidence does not have any hand notations and only has $1400.00 typed in for the amount of the security deposit. The landlord disputed the above and testified that the Second Agreement always said $1,400.00.

I find that the tenant has not provided any documentary evidence to support the above testimony, and in any event, since the amount of the security deposit listed in the Second Agreement was the amount agreed to by the tenant, the agreed upon terms have not changed. I find that the amount of the security deposit is separate and apart from the Vacate Clause which the tenant did not allege was altered in any way.

The tenant testified that if the landlord increased the rent to $1,450.00 in August of 2021 then the landlord would also have increased the amount of the required security deposit, which was not done on the Second Agreement.

The above argument is not born out in practice. It is common for landlords to keep the deposit amount the same even when rent is increased. I find that the fact that the total amount of all deposits was not increased in the Second Agreement does not lend credence to the argument that the Second Agreement was not signed in August 2021.

The tenant and the tenant's wife testified that the Second Agreement should have listed both the tenant and the tenant's wife as tenants, but did not. The landlord testified that the Second Agreement was made only with the tenant. I find that the landlord and the tenant were free to contract as they wished, and by the terms stated in the Second Agreement, they elected to make the Second Agreement between the tenant and the landlord alone. If the tenant did not agree to the change in the parties to the tenancy agreement, the tenant should not have signed the Second Agreement.

Section 97(2)(a.1) and section 97(a.2) of the *Act* state:

> 97(2)Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
>
> (a.1) prescribing the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term;
>
> (a.2) prescribing the minimum period of time for which a circumstance prescribed under paragraph (a.1) must be satisfied;

Section 13.1 of the Residential Tenancy Act Regulations states:

> **13.1** (1)In this section, **"close family member"** has the same meaning as in section 49 (1) of the Act.
>
> (2)For the purposes of section 97 (2) (a.1) of the Act *[prescribing circumstances when landlord may include term requiring tenant to vacate]*, a circumstance in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate the rental unit at the end of the term is that the landlord is an

individual who, or whose close family member, will occupy the rental unit at the end of the term.

(3)For the purposes of section 97 (2) (a.2) *[prescribing period of time for which a circumstance prescribed under paragraph (a.1) must be satisfied]* of the Act, the period of time for which the circumstance prescribed under paragraph (a.1) *[prescribing circumstances when landlord may include term requiring tenant to vacate]* must be satisfied is 6 months.

Residential Tenancy Branch Policy Guideline #30 states that:

> A vacate clause is a clause that a landlord can include in a fixed term tenancy agreement requiring a tenant to vacate the rental unit at the end of the fixed term. It can only be included in a fixed term tenancy in the following circumstances:
>
> • the landlord is an individual who, or whose close family member, will occupy the rental unit at the end of the term, or
>
> • the tenancy agreement is a sublease agreement.
>
> ….
>
> <u>The reason for including a vacate clause must be indicated on the tenancy agreement and both parties must have their initials next to this term for it to be enforceable.</u> The tenant must move out on the date the tenancy ends. The landlord does not need to give a notice to end tenancy or pay one months' rent as compensation as required when ending a tenancy under section 49.

I find that because the tenant signed the Second Agreement and initialed the Vacate Clause, the tenant is bound by its terms. If the tenant did not agree with the Vacate Clause, he should not have initialled it and signed the Second Agreement. Failure to read what he signed does not relieve the tenant of his contractual obligations under the Second Agreement.

I find that the Second Agreement is the prevailing tenancy agreement and thus only the tenant is currently a tenant. In the tenant's application for dispute resolution the tenant and the tenant's wife were named as tenants. As I have determined that the tenant's wife was not a party to the Second Agreement, I find that she does not have standing as a tenant in this proceeding. As such, pursuant to section 64 of the *Act*, I amend the tenant's application for dispute resolution to remove his wife as a tenant in that application.

It was undisputed that the landlord is the owner of the subject rental property. Pursuant to section 13.1 of the *Regulation* I find that the landlord was permitted to have the Vacate Clause in the Second Agreement. I note that there is no good faith requirement for a vacate clause in section 13.1 of the *Regulation* and so the timing of the request for a rent increase in January of 2023 is not relevant in this dispute.

Pursuant to Residential Tenancy Policy Guideline #30, the tenant "must move out" on the day the tenancy ends if the reason for including a vacate clause is indicated on the tenancy agreement and both parties have their initials next to this term. The reason for the Vacate Clause "OWNER OCCUPANCY" was clearly set out in the Vacate Clause. I find pursuant to the Vacate Clause the tenant and all occupants were required to move out on the date the fixed term tenancy set out in the Second Agreement ended, that being December 31, 2022.

Section 55(2)(c) 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:
>
> > (c)the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;

The landlord is an individual who is seeking to occupy the subject rental property. The tenant initialled the Vacate Clause and signed the Second Agreement. I find that pursuant to section 55(2)(c), section 97 of the *Act,* section 13.1 of the Regulations and Residential Tenancy Policy Guideline 30, the landlord is entitled to an Order of Possession.

As I have determined that the landlord is entitled to an Order of Possession pursuant to the Vacate Clause in the Second Agreement, I decline to determine if the landlord is entitled to an Order of Possession based on the One Month Notice and I decline to determine if the tenant is entitled to cancellation of the One Month Notice as the point is moot because I have already ended the tenancy. The tenant's application is therefore dismissed without leave to reapply.

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.*

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain $100.00 from the tenant's security deposit.

Conclusion

Pursuant to section 55(2)(c) of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenant**. Should the tenant and all other occupants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

The landlord is entitled to retain $100.00 from the tenant's security deposit.

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: April 05, 2023

Residential Tenancy Branch