



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes

File #910103321: CNR-MT, LRE, OLC

File #910104046: OPR-DR, MNR-DR, FFL

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- an order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed on March 2, 2023 (the “10-Day Notice”) and an order pursuant to s. 66 for more time to do so;
- an order pursuant to s. 70 restricting the Landlord’s right of entry; and
- an order pursuant to s. 62 that the landlord comply with the Act, Regulations, and/or the tenancy agreement.

The Landlord files his own application seeking the following relief under the *Act*:

- an order of possession pursuant to s. 55 after issuing the 10-Day Notice;
- a monetary order pursuant to s. 67 for unpaid rent; and
- return of the filing fee pursuant to s. 72.

The Landlord’s application was filed as a direct request but was scheduled for a participatory hearing in light of the Tenant’s application.

I.T. appeared as the Tenant. The Tenant was joined by her son, W.K., who assisted her in her submissions. The Tenant also had the assistance of an advocate C.M.. R.F. appeared as the Landlord and was joined by his spouse, C.F..

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing.

I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Tenant advised having served the Landlord with her application and evidence on April 9, 2023. The Landlord acknowledges its receipt, though raised issue with respect to late service of the application. Rule 3.1 of the Rules of Procedure specifies that applicants are to serve the Notice of Dispute Resolution on the named respondents within three days of receiving it from the Residential Tenancy Branch. In this instance, the Tenant's Notice of Dispute Resolution was generated on March 20, 2023.

Though I accept that the Landlord was served late, I find that there is little prejudice in proceeding with the hearing and the Tenant's application. The Landlord acknowledges receiving notice and his own application deals with the same issue raised by the Tenant's, being the enforceability of the 10-Day Notice. I find that the Tenant's application materials were served in accordance with the *Act*.

The Landlord advised having served his application and evidence by way of registered mail sent on March 22, 2023. The Landlord provides a copy of registered mail receipt as proof of service. The Tenant at first denied receipt of the Landlord's application materials, though later confirmed receiving a package that was not opened. I am told by the Tenant's son that there was no return address such that they were unsure who it was from.

Pursuant to s. 90 of the *Act*, a document may be deemed received after the passage of time depending on the method of service. When a document is sent via registered mail, it is deemed received five days after it was sent. Policy Guideline #12 provides guidance with respect to the service provisions of the *Act*, specifying that s. 90 of the *Act* forms an evidentiary presumption of service that can be rebutted when fairness requires it.

In this instance, I find that failing to open a package that you retrieved is insufficient to displace the presumption of service formed by s. 90 of the *Act*. Indeed, Policy Guideline #12 provides example that wilful failure to retrieve or accept registered mail does not override the deeming provisions of the *Act*. Accordingly, I find that the Landlord served his application and evidence via registered mail on March 22, 2023 in accordance with s. 89 of the *Act*. Pursuant to s. 90 of the *Act*, I deem that the Tenant received the Landlord's application materials on March 27, 2023.

Preliminary Issue – Tenant's Claims

Rule 2.3 of the Rules of Procedure requires claims in an application to be related to one another. Where they are not sufficiently related, I may dismiss portions of the application that are unrelated. Hearings before the Residential Tenancy Branch are generally scheduled for one-hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

In this instance, the main issue in dispute is whether the 10-Day Notice is enforceable. The Tenant's other claims, being restrictions on entry and an order the Landlord comply, are only relevant should the tenancy continue. If the 10-Day Notice is upheld, these claims would be moot.

I find that the Tenant's claims under ss. 70 (restricting the Landlord's right of entry) and 62 (order that the Landlord comply with the Act, Regulations, and/or the tenancy agreement) of the *Act* are not sufficiently related to whether the 10-Day Notice is enforceable. These two claims are hereby dismissed. Should the tenancy continue, they will be dismissed with leave to reapply. If the tenancy comes to an end, they will be dismissed without leave to reapply.

The hearing proceeded strictly on the issues of the enforceability of the 10-Day Notice.

Preliminary Issue – Naming of the Landlord

Review of the notices filed by the parties show that in its own application, the Landlord names itself as a corporate entity. The Tenant names the Landlord as R.F.. Review of the tenancy agreement shows that R.F. names himself as the Landlord, though the signature line shows the corporate entity rather than R.F.. The 10-Day Notice similarly lists R.F. and the corporate entity as the Landlord.

I enquired with the Landlord who the Landlord was. R.F. confirmed that he and his wife own the corporate entity which in turn owns the residential property. I note that s. 1 of the *Act* does not limit the definition of Landlord to the owner of the property and includes agents acting on the owner's behalf.

In this instance, I accept that the Landlord are R.F. and C.F. as listed in the tenancy agreement. I accept they act as agents for the owner and qualify as a Landlord under the *Act*. Accordingly, I have amended the Landlord's application such that R.F. is

named as the Landlord, which corresponds with the naming in the tenancy agreement and the Tenant's application.

Issues to be Decided

- 1) Should the Tenant be granted more time to dispute the 10-Day Notice? If so, should the 10-Day Notice be cancelled?
- 2) If the 10-Day Notice is upheld, is the Landlord entitled to order of possession and order for unpaid rent?
- 3) Is the Landlord entitled to his filing fee?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on August 1, 2022.
- Rent of \$2,050.00 is due on the first of each month.
- A security deposit of \$1,025.00 was paid by the Tenant.

A copy of the tenancy agreement was provided to me by the Landlord.

Service of the 10-Day Notice and Form and Content

Pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant. Pursuant to s. 46(4) of the *Act*, a tenant has 5-days from receiving a 10-day notice to end tenancy to either pay the overdue rent or file an application to dispute the notice.

The Landlord advised that the 10-Day Notice was posted to the Tenant's door on March 2, 2023. The Tenant acknowledges receiving the 10-Day Notice on March 2, 2023. I find that the 10-Day Notice was served in accordance with s. 88 of the *Act* and was received on March 2, 2023 as acknowledged by the Tenant at the hearing.

As per s. 46(2) of the *Act*, all notices issued under s. 46 must comply with the form and content requirements set by s. 52 of the *Act*. I have reviewed the 10-Day Notice provided to me and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, sets out the grounds for ending the tenancy, and is in the approved form (RTB-30). I note that there is no effective date listed in the 10-Day Notice. However, I find that this issue is irrelevant as the effective date is corrected automatically by s. 53 of the *Act*, which given the 10-Day Notice's receipt was on March 12, 2023.

Request for Additional Time to File Disputing the 10-Day Notice

Review of the information on file shows that the Tenant filed her application disputing the 10-Day Notice on March 11, 2023. As the 10-Day Notice was received on March 2, 2023, I find that the Tenant failed to file her application within the 5 days provided to her under s. 46(4) of the *Act*.

The Tenant does seek more time to dispute the notice. Pursuant to s. 66 of the *Act*, the director may extend a time limit established under the *Act* only under exceptional circumstances. Policy Guideline #36 provides guidance with respect to time extension requests and states the following with respect to what may be considered exceptional circumstances:

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

The Tenant, her son, and the advocate tell me that the Tenant did not file on time as she is of advanced age, in poor health, and that the Tenant on March 2, 2023 immediately sought financial assistance from support organizations such that she could not file on time. The Tenant tells me she was in hospital with pneumonia, though was unclear on when this occurred or for how long. I have not been provided with documentary evidence to show when the Tenant was in hospital.

I find that the Tenant has failed to disclose sufficient evidence to support a finding that exceptional circumstances were present such that she could not file her dispute on time. Indeed, she was able to seek assistance from support organizations on March 2, 2023, the same day she received the 10-Day Notice. The fact that she did so would counter the suggestion that the Tenant's health prevented her from taking any action at all. Further, waiting for financial support from third party organizations does not explain why the Tenant could not file her application with the Residential Tenancy Branch. That action is distinct from the requirement imposed on her to file her application on time.

I dismiss the Tenant's application for a time extension under s. 66 of the *Act* without leave to reapply.

Conclusive Presumption and Order of Possession

As the Tenant failed file her application within the time permitted and her application for a time extension was dismissed, I find that s. 46(5) of the *Act* applies such that the Tenant is conclusively presumed to have accepted the end of the tenancy and ought to have vacated on March 12, 2023. Given this, I dismiss the Tenant's application to cancel the 10-Day Notice without leave to reapply.

As the 10-Day Notice complies with s. 52 of the *Act* and the Tenant continues to reside within the rental unit, I find that the Landlord is entitled to an order of possession under s. 55. The order of possession shall be effective two days after it is received by the Tenant.

Unpaid Rent Claim

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The Landlord advises that the Tenant was short \$50.00 on rent for December 2022, January 2023, and February 2023 and failed to pay rent at all in March 2023, which prompted him to serve the 10-Day Notice listing total arrears of \$2,200.00 at that time. The Landlord also tells me that the Tenant failed to make payment on April 1, 2023.

The Tenant's son disputes this, saying that there was no shortage of \$50.00 for three months as mentioned but that the Tenant was short on rent of \$150.00 in February 2023. The Tenant and her son confirm rent was unpaid in March and April 2023. It was argued by the Tenant and the advocate that the Tenant attempted to make payment on rent on March 17, 2023 and March 28, 2023 but that the Landlord refused payment. The Landlord confirmed refusing payment on rent and expressed concern that doing so might reinstate the tenancy.

There is no dispute that rent was unpaid in the amount of \$2,200.00 when the 10-Day Notice was served and that the Tenant did not pay in April 2023. Though I appreciate the argument that the Landlord refused rent was relevant to the Tenant, it is not relevant to determining this dispute. Total arrears are confirmed. Should there be any doubt, it is clear the 10-Day Notice was properly issued and the Tenant failed to pay or offer to pay the arrears in the notice within 5 days of receiving the 10-Day Notice such that s. 46(4)(a) of the *Act* does not apply.

I find that the Landlord has established that the Tenant failed to pay rent in breach of the tenancy agreement and s. 26 of the *Act*. I allow the Landlord to seek compensation in lieu of rent for the overholding period as permitted by Rule 4.2 of the Rules of Procedure. Accordingly, I find that the Tenant's failure to vacate by the effective date of the 10-Day Notice is also in breach of the *Act*.

Further, I find that the Landlord has established a loss of \$2,200.00 for unpaid rent and \$2,050.00 for compensation in April while the Tenant overheld on the rental unit. The Landlord could not have mitigated his damages under the circumstances as the Tenant continued to reside within the rental unit.

I find the Landlord has established a monetary claim totalling \$4,250.00 for unpaid rent and compensation during the overholding period.

Pursuant to s. 72(2) of the *Act*, I direct that the Landlord retain the security deposit of \$1,025.00, plus interest accrued, in partial satisfaction of the total owed by the Landlord. In this case, the security deposit plus interest totals \$1,031.02.

The total monetary order is, therefore, \$3,218.98 (\$4,250.00 - \$1,031.02).

Conclusion

I dismiss the Tenant's claim for a time extension under s. 66 of the *Act* without leave to reapply. As such, the Tenant filed late such that her application disputing the 10-Day Notice is also dismissed without leave to reapply.

I grant the Landlord an order of possession pursuant to s. 55 of the *Act*. The Tenant shall provide vacant possession of the rental unit within **two (2) days** of receiving the order of possession.

As the tenancy is over, those claims severed from the Tenant's application under ss. 70 and 62 of the *Act* are dismissed without leave to reapply.

I grant the Landlord a monetary order pursuant to s. 67 of the *Act* totalling \$3,218.98.

As the Landlord was successful, I also grant him his filing fee. I order under s. 72(1) of the *Act* that the Tenant pay the Landlord's \$100.00 filing fee.

Pursuant to ss. 67 and 72 of the *Act*, I order the Tenant pay **\$3,318.98** to the Landlord (\$3,218.98 + \$100.00).

It is the Landlord's obligation to serve these orders on the Tenant. If the Tenant does not comply with the monetary order, it may be filed by the Landlord with the Small Claims Division of the Provincial Court and enforced as an order of that Court. If the Tenant does not comply with the order of possession, it may be filed by the Landlord with 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: April 20, 2023

Residential Tenancy Branch