



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding STARLIGHT CANADIAN GROWTH
FUND and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPC, MNRL-S, FFL

Introduction

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

- an order of possession for cause, pursuant to section 55;
- a monetary order for unpaid rent of \$11,236.81, pursuant to section 67;
- authorization to retain the tenants' security deposit of \$425.00, pursuant to section 38; and
- authorization to recover the \$100.00 filing fee paid for this application, pursuant to section 72.

The two tenants, "tenant JN" and "tenant BM" did not attend this hearing. The landlord's two agents, "landlord LM" and "landlord SP," attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

This hearing lasted approximately 26 minutes from 9:30 a.m. to 9:56 a.m. I monitored the teleconference line throughout this hearing. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord's two agents and I were the only people who called into this teleconference.

The landlord's agents provided their names and spelling. Landlord LM provided her email address for me to send this decision to the landlord after the hearing.

Landlord LM said she is a paralegal and landlord SP said she is a property manager. Both confirmed that they had permission to represent the landlord company ("landlord") named in this application. Landlord SP said that the landlord owns the rental unit, and

she provided the legal name of the landlord. Landlord LM provided the rental unit address.

Landlord LM identified herself as the primary speaker for the landlord at this hearing. However, landlord SP interrupted and contradicted landlord LM's testimony, throughout this hearing.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure* ("*Rules*") does not permit recordings of any RTB hearings by any participants. At the outset of this hearing, the landlord's agents both separately affirmed, under oath, that they would not record this hearing.

I explained the hearing process to the landlord's agents. They had an opportunity to ask questions, which I answered. I informed them that I could not provide legal advice to them, and they could hire a lawyer for same. I notified them that my role as an Arbitrator was to make a decision regarding this application. They did not make any adjournment or accommodation requests.

Preliminary Issue – Service of Documents and Amendment

Landlord LM testified that both tenants were served with the landlord's application for dispute resolution hearing package on March 17, 2023, by way of registered mail, to the rental unit, which only tenant BM occupies, as tenant JN moved out on February 28, 2022. Landlord LM stated that she did not have a forwarding address for tenant JN, so she served them at the rental unit address. Landlord LM provided two Canada Post tracking numbers verbally during this hearing.

In accordance with sections 89 and 90 of the *Act*, I find that tenant BM was deemed served with the landlord's application on March 22, 2023, five days after its registered mailing.

I find that tenant JN was not served with the landlord's application in accordance with section 89 of the *Act*, as the landlord knew that this tenant moved out on February 28, 2022, over one year prior to serving the application on March 17, 2023.

Landlord LM stated that both tenants were served with the landlord's second evidence package on May 5, 2023, by way of posting to the rental unit door.

In accordance with sections 88 and 90 of the *Act*, I find that tenant BM was deemed served with the landlord's second evidence package on May 8, 2023, three days after its posting.

I find that tenant JN was not served with the landlord's second evidence package, in accordance with section 88 of the *Act*, as the landlord knew that this tenant moved out on February 28, 2022, over one year prior to serving the evidence on May 5, 2023.

Landlord LM testified that the tenants were served with the landlord's amended 1 Month Notice to End Tenancy for Cause, dated January 27, 2023, and effective February 28, 2023 ("amended 1 Month Notice") on March 17, 2023, by way of registered mail to the rental unit, with the landlord's application for dispute resolution hearing package. As noted above, landlord LM provided two Canada Post tracking numbers verbally during this hearing. She said that she thinks the notice was served "by hand" in January 2023 sometime, but she did not have the service information in front of her during this hearing.

In accordance with sections 88 and 90 of the *Act*, I find that tenant BM was deemed served with the landlord's amended 1 Month Notice on March 22, 2023, five days after its registered mailing.

I find that tenant JN was not served with the landlord's amended 1 Month Notice, in accordance with section 88 of the *Act*, as the landlord knew that this tenant moved out on February 28, 2022, over one year prior to serving the notice on March 17, 2023.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlord's application to remove the name of the landlord's property management company, as landlord SP confirmed that it does not own the rental unit. I find no prejudice to either party in making this amendment.

Preliminary Issue – Severing the Landlord's Monetary Claims

The following RTB *Rules* state the following (my emphasis added):

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.

6.2 What will be considered at a dispute resolution hearing

The hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application.

*The arbitrator may refuse to consider unrelated issues in accordance with Rule 2.3 [Related issues]. **For example, if a party has applied to cancel a Notice to End Tenancy or is seeking an order of possession, the arbitrator may decline to hear other claims that have been included in the application and the arbitrator may dismiss such matters with or without leave to reapply.***

Rules 2.3 and 6.2 of the RTB *Rules* allow me to sever issues that are not related to the landlord's main, urgent claims. The landlord applied for 4 different claims in this application and 2 of those claims were dealt with at this hearing.

I informed the landlord's agents that the landlord was provided with a priority hearing date, due to the urgent nature of its claim related to an order of possession for cause. I notified them that this was the central and most important, urgent issue to be dealt with at this hearing. I informed them that the landlord filed this application on March 15, 2023, and received a priority hearing date of May 25, 2023.

The landlord's monetary claims are not related to their main, urgent order of possession claim. I notified the landlord's agents that the landlord's monetary claims were non-urgent lower priority issues, that could be severed at a hearing, in accordance with Rules 2.3 and 6.2 of the RTB *Rules* above.

I informed the landlord's agents that the landlord's monetary application for unpaid rent and to retain the security deposit, was dismissed with leave to reapply. I notified them that the landlord is at liberty to file a new application and pay a new filing fee, if it wants to pursue these monetary claims in the future.

The landlord's agents became upset and argued with me that they amended the landlord's 1 Month Notice to include "repeated late rent" as a reason to end the tenancy, so they wanted to deal with unpaid rent at this hearing. I repeatedly notified them of the above information regarding severing monetary claims, pursuant to the *Rules* above.

Issues to be Decided

Is the landlord entitled to an Order of Possession for cause?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

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

Landlord LM testified regarding the following facts. This tenancy began on July 1, 2017 with tenant JN, who is the only tenant that signed a written tenancy agreement with the landlord. Tenant JN vacated the rental unit on February 28, 2022. Tenant BM continues to occupy the rental unit.

Landlord LM initially stated that tenant BM was not a tenant, that she was, and that she was not. Landlord SP stated that tenant BM was an occupant, that she was also a tenant, that she was overholding the unit, and that she did not pay rent to the landlord.

Landlord LM initially stated that monthly rent in the current amount of \$941.77 is payable on the first day of each month. She then claimed that monthly rent is \$931.77 and there is an additional \$10.00 for other charges.

Landlord LM stated that no security deposit was paid by the tenants. She then claimed that it was returned by the landlord to tenant JN when they moved out.

Landlord SP claimed that a security deposit of \$425.00 was paid by tenant JN, the landlord initially returned it when that tenant moved out, but the landlord then reversed the charge since tenant BM was still occupying the unit, so the landlord continues to retain this deposit in full.

Landlord LM stated that the landlord was seeking an order of possession based on the amended 1 Month Notice, not the original 1 Month Notice issued by the landlord. She confirmed that the landlord indicated the following two reasons for ending this tenancy on the amended 1 Month Notice:

- *Tenant is repeatedly late paying rent.*
- *Tenant has assigned or sublet the rental unit/site/property/park without landlord's written consent.*

Analysis

Burden of Proof

The landlord, as the applicant, has the burden of proof, on a balance of probabilities, to present this application, claims, and evidence. The *Act, Regulation, RTB Rules*, and Residential Tenancy Policy Guidelines require the landlord to provide evidence of its claims and prove its application, in order to obtain an order of possession.

The landlord received an application package from the RTB, including instructions regarding the hearing process. The landlord's agents testified that the landlord served this application package to the tenants, as required. The landlord received a document entitled "Notice of Dispute Resolution Proceeding," dated March 16, 2023 ("NODRP"), from the RTB. This document contains the phone number and access code to call into this hearing.

The NODRP states the following at the top of page 2, in part (my emphasis added):

The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.

- **It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.**
- Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.
- Parties (or agents) must participate in the hearing at the date and time assigned.
- The hearing will continue even if one participant or a representative does not attend.
- A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.

The NODRP states that a legal, binding decision will be made and links to the RTB website and the *Rules* are provided in the same document.

The landlord received a detailed application package from the RTB, including the NODRP, with information about the hearing process, notice to provide evidence to support this application, and links to the RTB website. It is up to the landlord to be aware of the *Act, Regulation, RTB Rules*, and Residential Tenancy Policy Guidelines. It is up to the landlord, as the applicant, to provide sufficient evidence of the claims, since it chose to file this application on its own accord.

Rule 6.6 of the RTB *Rules* states the following (my emphasis added):

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.

The following RTB *Rules* are applicable and state the following, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim.

The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

I find that the landlord's agents did not sufficiently present and prove the landlord's claims and evidence, as required by Rule 7.4 of the RTB *Rules*, despite having the opportunity to do so during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules*.

This hearing lasted 26 minutes and only the landlord's agents attended the hearing, as the tenants did not attend. During this hearing, I provided the landlord's agents with ample and additional time to search for and review their evidence, and provide clear testimony and evidence, but they failed to do so.

I informed the landlord's agents that I found their testimony to be confusing, contradictory, and inconsistent. I find that the landlord failed to comply with section 59(2)(b) of the *Act* and Rule 6.6 of the *RTB Rules*, as noted above.

Findings

Section 47 of the *Act* states the following, in part:

47 (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.

...

(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.

As noted above, a 1 Month Notice must end the tenancy effective on a date that is not earlier than 1 month after the date the notice is received by tenants. Tenants then have 10 days from receipt, to file an RTB application to dispute the notice or to move out, pursuant to the notice.

In this case, the landlord served the amended 1 Month Notice on March 17, 2023, after the effective date on the notice of February 28, 2023. Therefore, the tenants did not have proper notice or sufficient time to dispute the notice or move out on the effective date indicated in the notice. The effective date on the notice is not automatically corrected in this case, pursuant to section 53 of the *Act*, because the landlord served the notice after the effective date.

For the above reasons, I find that the landlord is not entitled to an order of possession for cause, based on the amended 1 Month Notice, and I dismiss this portion of the landlord's application without leave to reapply. The landlord's amended 1 Month Notice, dated January 27, 2023, and effective February 28, 2023, is cancelled and of no force or effect.

As the landlord was unsuccessful in this application, I find that it is not entitled to recover the \$100.00 filing fee.

I informed the landlord's agents of my decision during this hearing. They both became upset and argued with me, claiming that they were sure the notice was served "by hand" in January 2023. I notified them again that they did not have the exact date or proof of service. They argued that there was an original 1 Month Notice that was served in January 2023. I informed them that they insisted on proceeding based on the amended 1 Month Notice, not the original notice, when I asked them at the beginning of this hearing. I notified them that I provided them with ample and additional time of 26 minutes during this hearing to search for and review their evidence and provide testimony regarding same. I informed them that their testimony was contradictory, inconsistent, and confusing throughout this hearing.

Conclusion

The landlord's application for an order of possession for cause and to recover the \$100.00 filing fee is dismissed without leave to reapply.

The landlord's amended 1 Month Notice, dated January 27, 2023, and effective February 28, 2023, is cancelled and of no force or effect.

The remainder of the landlord's application is dismissed with leave to reapply.

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: May 25, 2023

Residential Tenancy Branch