Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNL, FFT

Introduction

This hearing was convened in response to two Applications for Dispute Resolution filed by the tenant.

In the first Application for Dispute Resolution, the tenant applied to cancel a One Month Notice to End Tenancy for Cause and to recover the fee for filing an Application for Dispute Resolution. TM stated that this Application for Dispute Resolution/Dispute Resolution Package was sent to the landlord, via registered mail, on November 14, 2023. JG acknowledged receipt of these documents and I find they were served in accordance with section 89 of the Act.

In the second Application for Dispute Resolution, the tenant applied to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property and to recover the fee for filing an Application for Dispute Resolution. TM stated that the second Application for Dispute Resolution/Dispute Resolution Package was sent to the landlord, via registered mail, on November 17, 2023. JG acknowledged receipt of these documents and I find they were served in accordance with section 89 of the Act.

On October 26, 2023 and November 14, 2023, the tenant submitted evidence to the Residential Tenancy Branch. TM stated that this evidence was sent to the landlord, via registered mail, on November 14, 2023. JG acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On January 16, 2024, the tenant submitted additional evidence to the Residential Tenancy Branch. TM stated that this evidence was sent to the landlord, via registered

mail, on January 17, 2024. JG acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

The evidence submitted by the tenant on January 16, 2024 was not served in accordance with the timelines established by the Residential Tenancy Branch Rules of Procedure. It was accepted as evidence for these proceedings, in spite of the late service, because the landlord was clearly able to submit evidence in response to the Application for Dispute Resolution, although it was also not served in accordance with the timelines.

On January 23, 2024, the landlord submitted evidence to the Residential Tenancy Branch. JG stated that this evidence was sent to the tenant, via email, on January 23, 2024 and that the tenant signed a RTB-51, in which the tenant agreed to service by email.

TM stated that he agreed to receive documents by email and that he received the email sent by the landlord on January 23, 2024. TM stated that he was unable to open the attachments included with the email and he did not inform the landlord of his inability to open those documents because he believed he know the content of the attachments.

Section 88(j) of the Act permits a party to serve evidence to the other party by any other means of service provided for in the regulations.

Section 43(1) of the *Residential Tenancy Regulation* stipulates that documents described in section 88 of the *Act* may, for the purposes of section 88(j) of the *Act*, be given to a person by emailing a copy to an email address provided as an address for service by the person.

On the basis of the undisputed evidence that the tenant gave the landlord permission to serve hearing documents by email and that the tenant received the email the landlord sent on January 23, 2024, I find that the landlord's evidence was served to the tenant in accordance with section 88(j) of the Act.

I find that the tenant has been unable to access the documents sent to him on January 23, 2024 due to his own negligence. After giving a party the right to serve documents by email, I find a party has an obligation to inform the other party if they are unable to open attachments sent by email. Had the tenant informed the landlord he was unable to open attachments sent by email, the landlord would have had the opportunity to re-

send the documents or to provide them to the tenant in an alternate manner. In these circumstances, the tenant did not do so and I find that he failed to do so at his own peril.

As the landlord's evidence was properly served to the tenant, it was accepted as evidence for these proceedings. In the interests of providing the tenant with a reasonable opportunity to respond to the landlord's evidence, however, the landlord was advised that if he wished for me to consider his evidence he must refer to it at the hearing so the tenant would understand the nature of the evidence.

The landlord outlined some of the documents served to the tenant on January 23, 2024, which included documents such as tenancy agreements and copies of notices to end tenancy, which the tenant had in his possession. The landlord read out much of the information provided in written submissions included in the landlord's evidence package. The landlord referred to photographs which indicate there is a cat in the rental unit. The landlord submitted documents to support his submission that he intends to live in the rental unit, the majority of which are not relevant to this decision.

The evidence submitted by the landlord was not served in accordance with the timelines established by the Residential Tenancy Branch Rules of Procedure. It was accepted as evidence for these proceedings, in spite of the late service, because evidence served by the tenant was also served late. I find it reasonable to extend the deadline (by one day) for the landlord's response, given that he did not receive the tenant's evidence in a timely manner.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

The participants were advised that the Residential Tenancy Branch Rules of Procedure prohibit private recording of these proceedings. Each participant affirmed they would not record any portion of these proceedings.

Issue(s) to be Decided

Should the One Month Notice to End Tenancy for Cause be set aside?
Should the Two Month Notice to End Tenancy for Landlord's Use of Property be set aside?

Is the tenant entitled to compensation for the fee paid to file one or both of these Applications for Dispute Resolution?

Background and Evidence

The landlord and the tenant agree that:

- The tenant moved into the rental unit in 2010;
- There has been a series of tenancy agreements, with the most recent one being for a fixed term that began on August 01, 2016 and ended on July 31, 2020;
- Since the end of the most recent fixed term tenancy, the tenancy continued on a month-to-month basis;
- There is an addendum to the most recent tenancy agreement, which declares pets are not permitted; and
- Rent is due by the first day of each month.

JG stated that a One Month Notice to End Tenancy for Cause, dated October 23, 2023, was served to the tenant on October 23, 2023, by email and by placing it in the tenant's mailbox. TM stated that he received the Notice on October 24, 2023. The parties agree that the One Month Notice to End Tenancy for Cause declares the rental unit must be vacated by November 30, 2023 because the tenant has breached a material term of the tenancy agreement that was not corrected within a reasonable time.

JG stated that the One Month Notice to End Tenancy for Cause was served because the tenant was asked to either remove a cat from the unit or pay a pet damage deposit, and the tenant has failed to do so. TM stated that he understands the Notice was served because he did not comply with the landlord's request to remove his cat.

TM stated that in August of 2016 he asked the landlord if he could have a cat and the landlord agreed to allow a cat. JG stated that he does not recall this discussion but he "guesses" he agreed to the cat.

TM stated that he acquired a cat in September of 2016 and that he still has the cat. JG state that he has known about the cat for many years and he has now decided to end the tenancy on the basis of the cat because a previous attempt to end the tenancy for different reasons has failed.

JG stated that on October 17, 2023 he sent the tenant an email, which was submitted in evidence. This email declares, in part, that having a cat is a breach of a material term

of the tenancy and that it must be removed or the landlord will serve notice to end the tenancy. JG stated that when he sent the email he believed he was informing the tenant that the cat could remain in the rental unit if the tenant paid a pet damage deposit.

TM stated that he received the email of October 17, 2023 but he did not understand that he had the option of paying a pet damage deposit. He understood that the landlord would serve notice to end the tenancy if he did not remove the cat from the rental unit.

JG stated that a Two Month Notice to End Tenancy, dated October 31, 2023, for Landlord's Use of Property was served to the tenant on October 31, 2023, in person and by email. TM acknowledged receiving this Notice on October 31, 2023.

The landlord and the tenant agree that the Two Month Notice to End Tenancy for Landlord's Use of Property declares the rental unit must be vacated by December 31, 2023 because the unit will be occupied by the landlord or the landlord's spouse.

The landlord and the tenant agree that the landlord previously served a Two Month Notice to End Tenancy for Landlord's Use of Property, dated June 28, 2023, which was considered at a hearing on October 17, 2023. The file number of the previous proceeding appears on the first page of this decision.

The landlord and the tenant agree that the Two Month Notice to End Tenancy for Landlord's Use of Property that was the subject of the hearing on October 17, 2023 was also declared that the tenancy was ending because the unit will be occupied by the landlord or the landlord's spouse. The parties agree that this Notice was set aside by the Arbitrator considering that Application for Dispute Resolution.

JG stated that the Two Month Notice to End Tenancy for Landlord's Use of Property, dated October 31, 2023, was served because he needs a place to live and he wishes to move into the rental unit. He stated that the previous Two Month Notice to End Tenancy for Landlord's Use of Property was served for the exact same reason, and that he still wishes to move into the unit.

Analysis

Should the One Month Notice to End Tenancy for Cause be set aside?

Section 47(1)(h) of the Act permits a landlord to end a tenancy if a tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gives written notice to do so. On the basis of the undisputed evidence, I find that the landlord served the tenant with a One Month Notice to End Tenancy for Cause in October of 2023, which declared that the tenancy was ending pursuant to section 47(1)(h) of the Act.

On the basis of the tenant's testimony that the One Month Notice to End Tenancy for Cause was received on October 24, 2023. As the tenant filed this Application for Dispute Resolution to dispute the One Month Notice to End Tenancy for Cause on October 26, 2023, I find that it was disputed within the timeline established by section 47 of the Act.

As this One Month Notice to End Tenancy for Cause was disputed in accordance with the timelines established by the Act, the landlord bears the burden of proving there are grounds to end this tenancy pursuant to section 47(1)(h) of the Act.

Residential Tenancy Branch Policy Guideline #8, with which I concur, provides the following guidance:

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
- *that there is a problem;*
- *that they believe the problem is a breach of a material term of the tenancy agreement;*

• that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
• that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

On the basis of the undisputed evidence, I find that there is a term in the addendum to the tenancy agreement which prohibits pets. I find that the landlord has failed to meet the burden of proving that having a pet is a breach of a material term of the tenancy agreement.

On the basis of the undisputed evidence, I find that in 2016 the landlord agreed that the tenant could have a cat; that the tenant acquired a cat in 2016; and that the landlord has known about the cat for many years.

As the landlord gave permission for the tenant to have the cat and the landlord has known about the cat for many years, I cannot conclude that having a cat is a breach of a material term of the tenancy agreement. Clearly neither party considered the term prohibiting pets to be a material term of the tenancy agreement, as they mutually agreed to disregard that term in 2016. As the landlord agreed, in 2016, that the tenant could have a cat, the landlord does not now have the right to assert that having a cat is a breach of a material term.

As the landlord has failed to establish grounds to end this tenancy because the tenant breached a material term of the tenancy agreement, I grant the tenant's application to cancel this One Month Notice to End Tenancy for Cause.

The One Month Notice to End Tenancy for Cause, dated October 23, 2023, is set aside and has no force or effect.

I find that the tenant's application to cancel the One Month Notice to End Tenancy for Cause has merit, and that the tenant is entitled to recover the fee for filing the application to cancel the One Month Notice to End Tenancy for Cause.

Should the Two Month Notice to End Tenancy for Landlord's Use of Property be set aside?

Section 49(3) of the Act allows a landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

On the basis of the undisputed evidence, I find that the landlord served the tenant with a Two Month Notice to End Tenancy for Landlord's Use of Property on October 31, 2023, which declared that the tenancy was ending pursuant to section 49(3) of the Act.

As the tenant filed this Application for Dispute Resolution to dispute the Two Month Notice to End Tenancy for Landlord's Use of Property on November 14, 2023, I find that it was disputed within the timeline established by section 49 of the Act.

As this Two Month Notice to End Tenancy for Landlord's Use of Property was disputed in accordance with the timelines established by the Act, the landlord bears the burden of proving there are grounds to end this tenancy pursuant to section 49 of the Act.

I have read the decision from the hearing on October 17, 2023 and I find that the reason for serving the Two Month Notice to End Tenancy for Landlord's Use of Property, dated June 28, 2023, is identical to the reason for serving the Two Month Notice to End Tenancy for Landlord's Use of Property that is the subject of these proceedings. At the hearing, the landlord acknowledged that the reason for serving both Two Month Notices to End Tenancy for Landlord's Use of Property were the same, which is that JG wishes to move into the rental unit.

In a decision, dated October 18, 2023, the Arbitrator who considered the merits of the first Two Month Notice to End Tenancy for Landlord's Use of Property determined, in part, that the Two Month Notice to End Tenancy for Landlord's Use of Property should be cancelled because it was not served in good faith.

I find that the merits of the landlord’s attempt to end the tenancy pursuant to section 49(3) of the Act have already been determined by a previous Arbitrator. As the parties were advised at the hearing, the previous decision bars me from considering the same issue at these proceedings.

The principle of “res judicata” prevents a party from pursuing a claim that has already been decided. In these circumstances, an Arbitrator concluded that a Two Month Notice to End Tenancy for Landlord's Use of Property, dated June 28, 2023, was not served in good faith. I find that I am precluded from considering whether the Two Month Notice to End Tenancy for Landlord's Use of Property, dated October 31, 2023, was served in good faith because the reasons for serving it and the tenant’s argument that the Notice was not served in good faith are the same issues that were before the original Arbitrator.

It is important to recognize that the second Two Month Notice to End Tenancy for Landlord's Use of Property was served to the tenant less than two weeks after the original Arbitrator concluded that the first Two Month Notice to End Tenancy for Landlord's Use of Property was not served in good faith. Given that the issues to be considered are identical to the issues determined by the original Arbitrator and given the limited time between the Arbitrator concluding the first Two Month Notice to End Tenancy for Landlord's Use of Property was served in bad faith and the time the second Two Month Notice to End Tenancy for Landlord's Use of Property was served, I find that I would essentially be considering the same facts, which I do not have authority to do. A landlord cannot continually serve notices to end tenancy for identical reasons with hopes that a different Arbitrator will reach a different conclusion.

As I am precluded from considering the merits of the Two Month Notice to End Tenancy for Landlord's Use of Property, dated October 31, 2023, I grant the tenant’s application to set it aside.

The Two Month Notice to End Tenancy for Landlord's Use of Property, dated October 31, 2023, is set aside and has no force or effect.

I find that the tenant’s application to cancel the Two Month Notice to End Tenancy for Landlord's Use of Property has merit, and that the tenant is entitled to recover the fee for filing the application to cancel the Two Month Notice to End Tenancy for Landlord's Use of Property.

Conclusion

The One Month Notice to End Tenancy for Cause, dated October 23, 2023, is set aside and is of no force or effect.

The Two Month Notice to End Tenancy for Landlord's Use of Property, dated October 31, 2023, is set aside and is of no force or effect.

The tenancy continues until it is ended in accordance with the Act.

The tenant has established a monetary claim of $200.00 in compensation for the fee paid to file each of these Applications for Dispute Resolution. The tenant is granted a Monetary Order for $200.00. In the event the landlord does not voluntarily comply with this Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

In the event the landlord does not voluntarily comply with this Order and the tenant does not wish to enforce the Monetary Order in the Province of British Columbia Small Claims Court, the tenant has the right to deduct one rent payment by $200.00, pursuant to section 72(2) of the Act, in full compensation of this monetary claim.

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 31, 2024

Residential Tenancy Branch