Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNR, OLC, RP, RR, O, MT

Introduction

The tenant applies to cancel a one month Notice to End Tenancy for cause served November 30, 2014 and a ten day Notice to End Tenancy for unpaid rent received December 2, 2014. He also seeks a compliance order, a repair order and a rent reduction for loss of a service or facility.

The landlords verbally request an order of possession as they are entitled to do pursuant to s. 55 of the *Residential Tenancy Act* (the "*Act*").

The landlords raise the preliminary objection that the application and notice of hearing were not served on them within the three day time limit imposed by s. 59(3) of the *Act*.

Issue(s) to be Decided

Does the preliminary objection have merit and is it determinative of the proceeding?

Background and Evidence

The particulars of the tenancy are set out in the previous related decision noted on the first page of this decision.

The tenant's application was made on December 9, 2014, the date the fee was waived and the hearing letter was produced. The application and notice of hearing were served on a relation of the landlords on either December 24th or 26th and came to their attention on December 26th.

The tenant claims that he delayed serving the originating material because he was in negotiations with the landlords in an effort to resolve the dispute and that the negotiations failed. The landlords indicate there was an agreement and have filed a

“Mutual Agreement to End a Tenancy” dated December 11, 2014,signed by the tenant and indicating an end of the tenancy on December 31, 2014.

Analysis

The requirement to serve the Notice of Hearing package within three days after making the application is a requirement imposed by Rule 3.1 of the Rules of Procedure. Normally, non-compliance with procedural rules does not render an act invalid and an adjudicator has some discretion to relieve from the effect of non-compliance. Rule 17.2 specifically states that non-compliance with the Rules does not stop or nullify a proceeding.

However, the three-day service rule originates in the *Act* itself. Section 59 (3) of the *Act* provides;

> (3) Except for an application referred to in subsection (6), a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director.

Failure to serve the originating documentation is not simply a breach of the Rules of Procedure. It is a breach of the statute. The Rules have been made pursuant to the statute and cannot override it. The statutory provision takes precedent over the Rule.

Section 59 (3) says that an applicant “must” serve the respondent with the origination documents within three days of making it. The *Interpretation Act*, RSBC 1996, c. 29; provides that in any enactment use of the term "must" is to be construed as imperative. That means compliance is “mandatory.”

But it appears that “must” doesn’t always mean “must.” Despite the apparently conclusive definition of “must” in the *Interpretation Act*, courts have held that in some circumstances the use of the “must” in an enactment is “directory” only and its effect can be avoided where no prejudice has resulted from the breach of it.

In *Hyland Homes Ltd.* v *Thomas Pickering* et al, 2000 BCSC, 524, a case involving a manufactured home park and the application of a provision of the *Residential Tenancy Act*, RSBC 1996, c. 406, Madame Justice Downs reviewed the relevant law and held that despite the definition of “must” in the *Interpretation Act*, the common law allowed a less strict interpretation of the word “must” where it was related to the performance of a public duty (in that case the duty of the statutorily constituted Dispute Resolution Committee to give a notice within a certain time) and where serious general

inconvenience or injustice would result to persons who had no control over those entrusted with the duty.

In this case there is no “public duty” involved. The duty was one “entrusted” to a party to the proceeding; the applicant. The applicant had control over compliance with that duty. I find that I am not at liberty to interpret the word “must” otherwise that as a mandatory direction to the applicant.

Can an arbitrator extend that three-day time limit? Arbitrators are given a general power to extend time limits in exceptional circumstances. Section 66 (1) of the *Act* states:

> 66 (1) The director may extend a time limit established by this Act only in exceptional circumstances, **other than as provided by section 59 (3) [starting proceedings]** or 81 (4) [decision on application for review].

(emphasis added)

As can be seen from the portion of the extract emphasized in bold, the three-day service period imposed by s. 59 (3) is a specifically excluded from the arbitrator’s general power (delegated by the director) to extend time limits. I conclude that I cannot extend the three day time limit to encompass service effected after its expiry.

Can an arbitrator, having been delegated the powers of the director, specify a different period within which to serve the originating documentation?

Section 59 (3) states that the director may specify a period other than the three day period in which an applicant must served the originating documentation. In my view the word “specified” is indicative of a prospective action. That is, if a different period for service is to be allowed, it must be authorized at the time the application is being made or at least before service has been effected, and not after. Had the subsection meant to indicate that the director could extend the time for service of the origination documentation after expiry of the three day period or even after service of the originating documents, as a matter of simple consistency, the drafters of the legislation would have used the phrase “extend a time limit,” or its equivalent, as used elsewhere in the *Act.* I conclude that I cannot specify a different service period at this stage of the dispute.

The *Act* does not say what happens when an applicant breaches s. 59 (3); when service is effected after the expiry of the three day period. The *Act* does not provide for any penalty for non-compliance

The "Landlord and Tenant Fact Sheet" RTB 114, designed as public information regarding "The Dispute Resolution Process" indicates that non-compliance with the three-day service requirement may lead to dismissal of the application. It states:

> **Serving notices for dispute resolution**
> Each named respondent must receive a Hearing Package in order to prepare for the dispute resolution proceeding.
> Within **three (3) days**, the applicant must serve the Hearing Package on each of the respondents. This means that if the applicant is serving the Hearing Package by registered mail, it must be postmarked within **three days** of the date that the Hearing Package is available and the registered mail receipts from Canada Post should be submitted to the Residential Tenancy Branch as evidence for the file. If an applicant does not pick up the Hearing Package within three days of the date the Hearing Package is available, the application may be considered abandoned and the hearing may be cancelled.
> If the applicant does not serve the Hearing Package within three days, the arbitrator may dismiss the application with leave to reapply.

The fact sheet is not a statement of the law but, at best, an information sheet prepared by administrators of the law. In my view it has limited value in helping determine the meaning or effect of the three-day service requirement in s. 59 (3).

After consideration of the *Act* as a whole, I conclude that the purpose of s. 59 (3), requiring timely service of an application for dispute resolution and the notice of hearing letter, is to ensured that a respondent has early knowledge of the proceeding and is afforded a fair opportunity to preserve evidence and to prepare. It is likely that s. 59 (3) was drafted with the expectation that hearings would be set for only a few weeks after the application was made. That is in keeping with the broad intention of the *Act* to provide a speedy and inexpensive dispute resolution mechanism for landlords and tenants in British Columbia. In such a case, it is vital that the origination documentation reach the respondent in very short order so that evidence, for example, evidence of the state of the premises, can be preserved and a response to the claim can be prepared. Section 59 (3) would appear to be directed at that purpose.

I conclude that a breach of s. 59 (3) of the *Act*; failure to serve a respondent within the three day period prescribed, is a failure to comply with a mandatory statutory requirement essential to the dispute resolution process and is a failure from which I have no power to grant relief. Breach of s. 59 (3) may serve to nullify a proceeding unless reliance on it is waived by the respondent.

The landlords do not waive the tenant's non-compliance with s. 59 (3). I find that the tenant's non-compliance with that section is a bar to the proceeding and I dismiss his claim with leave to re-apply.

That does not conclude the matter. The tenant may not re-apply to cancel the one month Notice to End Tenancy. That Notice gave as its effective date January 1, 2015. Section 66 of the *Act* gives arbitrator general power to extend time limits imposed by the *Act* but subsection (3) of s. 66 provides:

> (3) The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.

The tenant is therefore foreclosed from obtaining an extension of time to apply to challenge the one month Notice.

As a result, the one month Notice has ended this tenancy. I find the tenancy ended on January 1, 2015 and that the landlords are entitled to an order of possession.

Conclusion

The landlords' preliminary objection is upheld. The tenant's application is dismissed with leave to re-apply subject to the foregoing time limitation. The landlords will have an immediate order of possession pursuant to s. 55 of the *Act*.

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 09, 2015

Residential Tenancy Branch