Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF; CNC, CNR

Introduction

This hearing dealt with the landlord's application filed 3 September 2015 pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession pursuant to section 55;
- a monetary order for unpaid rent, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

This hearing dealt with the tenant KP's application filed 12 August 2015 and amended 23 September 2015 pursuant to the Act for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order regarding a disputed additional rent increase pursuant to section 43;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70;
- an order of possession of the rental unit pursuant to section 54;
- authorization to change the locks to the rental unit pursuant to section 70;

- an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld pursuant to section 65;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- authorization to serve documents or evidence in a different way than required by the Act pursuant to section 71; and
- an "other" remedy.

The landlord attended the hearing and was represented by its agent. The landlord called one witness. The tenant TA did not attend. The tenant KP (the tenant) attended. I was not provided with any letter of authorization permitting the tenant to act as agent for the tenant TA. All in attendance were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Preliminary Issue – Service

The agent did not raise any issues with service of documents.

The agent testified that the landlord served the tenants with the dispute resolution package by registered mail on 4 September 2015. The agent confirmed that the mailing contained all of the evidence before me. The landlord provided me with a copy of the tracking numbers as well as a print out of the delivery actions taken by Canada Post. Both mailings were sent to the rental unit. I was also provided with copies of the unopened returned mailings.

Service of the dispute resolution package in an application such as the landlord's must be carried out in accordance with subsection 89(1) of the Act:

> An application for dispute resolution … when required to be given to one party by another, must be given in one of the following ways:
>
> (a) by leaving a copy with the person;…
>
> (c) by sending a copy by registered mail to the address at which the person resides or, …;
>
> (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;…

The parties agree that the tenant TA ceased to live in the rental unit on or about 31 July 2015. As such, the address of the rental unit was not the address at which the tenant TA resided. On this basis, the tenant TA was not served in a method that complies with

the Act. The landlord's application as against the tenant TA is dismissed with leave to reapply. This decision was provided to the landlord at the hearing.

The tenant testified that he did not receive the landlord's registered mailing. The tenant testified that he did receive the Canada Post delivery notice for the registered mailing, but stated that no sender was identified on that notice. The tenant testified that he does not receive mailings from unknown persons.

Residential Tenancy Policy Guideline, "12. Service Provisions" sets out that service cannot be avoided by failing to retrieve the mailing:

> Where a document is served by registered mail, the refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. Where the registered mail is refused or deliberately not picked up, service continues to be deemed to have occurred on the fifth day after mailing.

In accordance with sections 89 and 90 of the Act, the tenant was deemed served with the dispute resolution package on 9 September 2015, the fifth day after its mailing. I find that the tenant was served for the purposes of this Act and that the landlord's evidence is properly before me.

Preliminary Issue – Severance of Tenant's Claim

Residential Tenancy Branch Rules of Procedure (the Rules), rule 2.3 states that, if, in the course of the dispute resolution proceeding , the dispute resolution officer determines that it is appropriate to do so, the officer may sever or dismiss the unrelated disputes contained in a single application with our without leave to apply.

The tenant submitted that as his application was filed first, the content of his application should be dealt with and the landlord's application severed. I explained to the tenant at the hearing that possession issues are considered to be a priority issue and on this basis the issues surrounding possession would be dealt with first.

The following issues raised in the tenant's application are dismissed with leave to reapply:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;

- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70;
- an order of possession of the rental unit pursuant to section 54;
- authorization to change the locks to the rental unit pursuant to section 70;
- an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld pursuant to section 65;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- authorization to serve documents or evidence in a different way than required by the Act pursuant to section 71; and
- an "other" remedy.

Leave to reapply is not an extension of any applicable time limit.

Preliminary Issue – Mootness

The agent testified that the landlord had not issued a 1 Month Notice in respect of this tenancy. As there is no 1 Month Notice, the tenant's application to cancel a 1 Month Notice is moot and I will not consider it.

Preliminary Issue – Matter Before Supreme Court

At several points in the hearing, the tenant made reference to bringing this matter to the Supreme Court. I asked the tenant if there was a Notice of Civil Claim filed in relation to this tenancy. The tenant declined to answer the question.

Paragraph 58(2)(c) of the Act prevents this Branch from determining a dispute where the dispute is linked substantially to a matter that is before the Supreme Court.

On the basis of the evidence available to me, I find that this dispute is not substantially linked to a matter that is before the Supreme Court and find that this Branch is competent to determine these disputes.

Preliminary Issue – Discretion to Stop Cross-Examination

The tenant made use of his right to cross examine the agent and witness on their testimony. The tenant was given wide latitude to cross examine both the agent and witness on a wide range of topics.

The Rules set out that evidence at a hearing must be relevant:

> **3.6 Evidence must be relevant**
> All evidence must be relevant to the claim(s) being made in the Application(s) for Dispute Resolution.
>
> The Arbitrator has the discretion to decide whether evidence is or is not relevant to the issues identified on the application and may decline to hear evidence that they determine is not relevant.

"Relevant" is defined in the Rules:

> **Relevant** evidence is relevant if it relates to or bears upon the matter at hand, or tends to prove or disprove an alleged fact. Argument is relevant if it relates to or bears upon the matter at hand.

It was plain and obvious that the tenant's questions would not leave to relevant evidence. As the tenant was not asking questions that put any new relevant evidence before me. I exercised my discretion to terminate the tenant's cross examination of both the agent and witness. I asked the tenant to move on to providing his direct evidence and ordered that his cross examination was concluded.

Issue(s) to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an order of possession? Was the notice of rent increase validly issued? Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced

here. The principal aspects of the both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

The landlord and tenant TA entered into a tenancy agreement on 12 July 2011 for a tenancy beginning 1 August 2011. After the commencement of the tenancy, the tenant began occupying the rental unit. The tenant testified that this occurred later in 2011. The tenant was never named on a tenancy agreement. On most months, the tenant would pay rent directly to the landlord. The tenant testified that he would pay for half or more of the rent on any given month. Monthly rent at the beginning of the tenancy was $900.00. The landlord continues to hold a security deposit in the amount of $450.00, which was collected from the tenant TA at the beginning of her tenancy.

The tenant testified that when he began occupying the rental unit, he provided his information at the front office. The agent testified that he had no knowledge of this information being provided.

I was provided with a copy of the most recent rent increase. The copy provided by the landlord is dated 27 April 2015 and increases rent from $975.00 to $995.00 effective 1 August 2015. The tenant's copy is undated, but otherwise identical to the landlord's copy. The tenant submits that the rent increase last issued by the landlord is invalid because it is not dated.

On 30 June 2015, the tenant TA provided a notice to end tenancy to the landlord (the Tenants' Notice). The Tenants' Notice is signed and dated by the tenant TA. The Tenants' Notice sets out the address of the rental unit. The Tenants' Notice sets out an effective date to end the tenancy of 31 July 2015. The tenant TA vacated the rental unit on or about 31 July 2015. The tenant testified that the intent of the Tenants' Notice was just to terminate her tenancy.

The agent testified that he spoke to the tenant by telephone in early August and the tenant stated that he intended to continue to occupy the rental unit. The tenant testified that he contacted the agent in June and July to let the landlord know that the tenant intended to continue occupation of the rental unit. The agent testified that he may have spoken to the tenant in June and July. The tenant testified that he has tried to enter into a tenancy agreement with the landlord.

On 6 August 2015, the landlord served the tenant TA with a 10 Day Notice (the First Notice) by posting that notice to the rental unit door. The First Notice set out an effective date of 16 August 2015. The First Notice set out that the tenant had failed to

pay rent in the amount of $995.00, which was due on 1 August 2015. The tenant acknowledged receipt of the First Notice in his written submissions.

On 3 September 2015, the landlord served the tenant TA with a second 10 Day Notice (the Second Notice) by posting that notice to the rental unit door. The Second Notice set out an effective date of 13 September 2015. The Second Notice set out that the tenant had failed to pay rent in the amount of $1,990.00, which was due on 1 September 2015. The agent testified that this amount included arrears from August. In his written submissions, the tenant acknowledged receipt of the Second Notice and that this notice applied to him.

The agent testified that both the First Notice and Second Notice named the tenant TA only as the tenant. The agent testified that this was because the tenant TA was the only tenant of record.

The tenant provided direct evidence on alleged code violations in respect of screws used to hang the entrance doors. The agent testified that while the screws do not comply with current code, the building is grandfathered under the old building code under which this type of attachment was acceptable.

The tenant submits that the residential property is illegally situated on park land. The tenant further submits that the residential property is illegal as does not conform to current code requirements. The tenant submits that as the rental unit is on park land, he is entitled to camp on the park land as a result of the courts' decisions in *Abbotsford (City) v Shantz*, 2015 BCSC 1909 and *Victoria (City) v Adams*, 2009 BCCA 563.

The agent denies that the residential property is on park land. The agent denies that the building is illegal. The agent testified that the residential property and the rental unit comply with relevant historical codes. The agent denies that the tenant is permitted to camp in the rental unit for free. The agent testified that the building is a legal non-conforming use of the landlords and that the building is subject to a variance.

The agent testified that the landlord has not received any amount as rent or for the tenant's use and occupancy of the rental unit since July 2015. The tenant admits he has not paid any amounts to the landlord. The agent testified that he knew of no reason under the Act that would permit the tenant to deduct any amount from rent. In particular the agent testified:

- The landlord did not collect a security deposit that was in excess of the amount allowed by the Act.

- The landlord did not receive any claim for the cost of emergency repairs from the tenant.
- The landlord has not issue a rent increase in excess of the prescribed amount.
- The landlord did not at any time issue a 2 Month Notice to End Tenancy for Landlord's Use.
- There are no outstanding orders of this Branch in respect of this tenancy.

The tenant testified that he was permitted to deduct amounts from rent. In particular, the tenant testified:

- The security deposit amount was in excess of the prescribed amount as no security deposit is payable on an illegal building in a park.
- The tenant has not provided any receipts for emergency repairs to the landlord.
- All rent increases collected in respect of this building are illegal because it was on public land.
- The tenant agrees that there has been no 2 Month Notice to End Tenancy for Landlord's Use issued in respect of this tenancy.
- The tenant agrees that there are no outstanding orders of this Branch in respect of this tenancy.

The witness did not provide any testimony that assists in determining the matters before me on their merits.

The majority of the evidence provided by the tenant is in support of his monetary claim, which has been severed from the claims heard today. While I have reviewed all of the evidence submitted by the tenant, the irrelevant evidence has not been considered in reaching my decision.

Analysis

The Legal Relationship Among the Parties

The landlord provided me with a tenancy agreement. The tenancy agreement was signed by the tenant TA and the landlord. The tenancy agreement indicates that only the tenant TA would occupy the rental unit. The parties agree that the tenant was permitted to occupy the rental unit. The parties agree that over the course of the tenancy, the tenant paid amounts directly to the landlord as rent. The tenant was provided with a means of accessing the building by the landlord.

Subsection 6(1) of the Act sets out that the "rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement." "Tenancy agreement" is defined in section 1 of the Act:

> "tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

"Rent" is defined in section 1 of the Act:

> "rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following…

I find that by paying rent to the landlords for his right to possess the rental unit, the tenant and landlord entered into a tenancy agreement. As such, the tenant is a "tenant" and has standing before this Branch. In this case the tenancy agreement does not list the tenant as a "tenant" or an "occupant". I find that when the tenant began occupying the rental unit and paying rent directly into the landlord the parties entered into an implied oral tenancy agreement among the landlord, the tenant, and the tenant TA. The tenant and tenant TA were cotenants under the same tenancy agreement. There is no evidence before me that rebuts the presumption of joint tenancy between the cotenants.

*Residential Tenancy Policy Guideline, "*13. Rights and Responsibilities of Co-tenants" (Guideline 13) discusses the rights and obligations of tenants, cotenants, and occupants:

> Co-tenants are two or more tenants who rent the same property under the same tenancy agreement. Co-tenants are jointly responsible for meeting the terms of the tenancy agreement. Co-tenants also have equal rights under the tenancy agreement.

Amendment to Documents

The First Notice and Second Notice do not name the tenant on the notices. Section 52 sets out the form requirements of notices to end tenancy:

> In order to be effective, a notice to end a tenancy must be in writing and must
> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,

(d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and
(e) when given by a landlord, be in the approved form.

The notices comply with section 52, but are incomplete in that they do not name the tenant. Subsection 68(1) allows me to amend a notice to end tenancy in certain circumstances:

> If a notice to end a tenancy does not comply with section 52 *[form and content of notice to end tenancy]*, the director may amend the notice if satisfied that
> (a) the person receiving the notice knew, or should have known, the information that was omitted from the notice, and
> (b) in the circumstances, it is reasonable to amend the notice.

In this case, by the tenant's actions and admissions, it is clear that he understood these notices were issued to him. On this basis, I find that the tenant knew that the notices were for him and that it is reasonable to amend the notices to include the tenant's name. The First Notice and Second Notice are amended to add the tenant's name to the form.

Was the Additional Rent Increase Validly Issued?

Subsection 42(3) of the Act sets out that a notice of rent increase must be in the approved form. Subsection 42(2) of the Act establishes that a tenant must be provided with at least three months' notice of a rent increase.

In this case, the tenant's copy of the rent increase was undated. As such, it is not possible to know if the landlord complied with the notice requirement in subsection 42(2) of the Act. On this basis, I find that the rent increase effective 1 August 2015 is not in force.

Has the Tenancy Ended?

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant abandons the rental unit.

In this case there are three notices to end tenancy in respect of this tenancy:

1. the Tenants' Notice;

2. the First Notice; and
3. the Second Notice.

Subsection 45(1) of the Act sets out that:

> A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
> (a) is not earlier that one month after the date after the landlord receives the notice, and
> (b) is before the day in the month...that rent is payable under the tenancy agreement.

Pursuant to subsection 45(4) of the Act, a notice given pursuant to section 45 must comply with section 52 of the Act.

Section 52 sets out the various requirements of a notice to end tenancy:

> In order to be effective, a notice to end a tenancy must be in writing and must
> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,…

The Tenants' Notice provided to the landlord by the cotenant is signed by the cotenant, sets out the date, sets out an effective date of the notice, and sets out the address of the rental unit. I find that the Tenants' Notice complies with the requirements of section 52 of the Act.

In this case, a cotenant provided notice to the landlord to end the tenancy. Guideline 13 sets out the ramifications when a cotenant gives notice:

> If the tenant who moves out <u>gives proper notice</u> to end the tenancy the tenancy agreement will end on the effective date of that notice, and all tenants must move out, even where the notice has not been signed by all tenants. If any of the tenants remain in the premises <u>and continue to pay rent</u> after the date the notice took effect, the parties may be found to have entered into a new tenancy agreement. The tenant who moved out is not responsible for carrying out this new agreement.
>
> [emphasis added]

In this case the Tenants' Notice was a proper notice and the tenant has not paid any amount towards rent. The landlord and tenant attempted to continue the tenancy under a new tenancy agreement, but no rent was paid to the landlord. As a result of this

nonpayment the landlord issued the First Notice and Second Notice. Accordingly, the tenancy was at an end 31 July 2015, the effective date of the Tenants' Notice.

I reject outright the tenant's position regarding deductions from rent he was permitted to make as a result of the rental unit being on park land or the building standards of the residential property. These augments are without merit and I will not consider them further. The tenant was not permitted to deduct any amount from rent.

There are no official forms provided by the Residential Tenancy Branch for enforcing a cotenant's notice against another cotenant. Further, the application form used by the landlord does not permit the landlord to indicate that it is seeking an order of possession on the basis of the Tenants' Notice. I accept that by providing the First Notice and Second Notice the landlord was putting the tenant on notice that the continued failure to enter into a tenancy agreement by paying rent would result in the landlord seeking an order of possession. I find that by acting on these notices, the tenant had sufficient notice that the landlord was seeking an end to the tenancy.

Pursuant to subsection 55(2) of the Act, a landlord may request an order of possession of a rental unit where a notice to end the tenancy has been given by the tenant. As the Tenants' Notice is valid and the tenant has not paid any amount in rent to the landlord, the landlord is entitled to an order of possession. The landlord's application for an order of possession is granted.

As the tenancy ended 31 July 2015, the landlord is not entitled to "rent"; however, pursuant to section 57 of the Act, a landlord may make a claim for compensation from an overholding tenant. The tenant did not pay for the use and occupancy of the rental unit for August, September or October. As the tenant has been occupying the unit beyond the termination of the tenancy, the landlord is entitled to compensation for the tenant's use and occupancy. The landlord is entitled to a monetary order in the amount of $2,925.00 for the tenant's use of the rental unit for the months of August, September and October 2015.

When the tenancy ended pursuant to the Tenants' Notice, the joint tenancy was severed. The tenant TA is not responsible for the monetary amounts incurred by the tenant. On this basis, I decline to permit the landlord to retain the security deposit as the tenant TA was not served with notice of this hearing and thus was unable to provide any evidence in respect of this matter. The landlord is at liberty to reapply to retain the security deposit but must provide the tenant TA with notice.

As the landlord has been successful in its application, it is entitled to recover its filing fee from the tenant.

Conclusion

The tenant's application to dispute the additional rent increase is allowed.

The tenant's application to cancel the 10 Day Notice dismissed without leave to reapply.

I issue a monetary order in the landlord's favour in the amount of $2,975.00 under the following terms:

Item	**Amount**
Compensation for August	$975.00
Compensation for September	975.00
Compensation for October	975.00
Recovery of Filing Fee for this Application	50.00
Total Monetary Order	**$2,975.00**

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

The landlord is provided with a formal copy of an order of possession. Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: October 30, 2015

Residential Tenancy Branch