



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Company on October 1, 2018 (the “Application”). The Company applied for an Order of Possession based on a Two Month Notice to End Tenancy for Landlord’s Use of Property dated June 27, 2018 (the “Notice”).

The Landlord appeared at the hearing with his son and two other individuals to assist. The Tenant appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

The parties provided the correct rental unit address and I amended the Application to reflect this. This is also reflected on the front page of this decision.

The Company had submitted evidence prior to the hearing. The Tenant had not submitted evidence. I addressed service of the hearing package and Company’s evidence. The Tenant confirmed he received these.

The parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. I have considered all documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issue to be Decided

1. Is the Company entitled to an Order of Possession based on the Notice?

Background and Evidence

A written tenancy agreement was submitted as evidence. It is between the Company and Tenant. The agreement relates to a different rental unit address; however, the parties agreed the rental unit was renovated and the door was moved such that the address changed. The tenancy started September 5, 2005 and was a fixed term tenancy ending February 28, 2006. The tenancy then became a month-to-month tenancy. Rent is due on the first day of each month.

A copy of the Notice was submitted as evidence. It is addressed to the Tenant and relates to the rental unit. It is from the Company. It is signed and dated by an agent for the Company. It has an effective date of September 30, 2018. The grounds for the Notice are that the rental unit will be occupied by the landlord or the landlord's close family member.

The Landlord's son testified that he, the Landlord and a friend served the Notice on the Tenant by putting it in his mailbox on June 27, 2018. The Company submitted photos and a witness statement in relation to this.

The Tenant testified that he never received the Notice. He said he never received the envelope shown in the photos. The Tenant testified that he did not recall what his mailbox looked like; however, he did not dispute that the mailbox shown in the photo is his mailbox.

The Tenant said he did not dispute the Notice because he never received it.

One of the individuals assisting the Landlord said that the Company is a "family corporation" as that term is defined in the *Residential Tenancy Act* (the "Act"). He said all of the voting shares are held by the Landlord and his wife. The Tenant did not take issue with or dispute this.

I asked the son of the Landlord why the first ground on the Notice was checked rather than the second ground which reads "The landlord is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit". The son of the Landlord testified that they thought they checked off the correct ground and that they did not know what a family corporation was.

I asked for the parties' position on whether the Notice should be amended to include the correct ground. I explained the possible consequences of doing so and not doing so to the parties. The son of the Landlord took the position that the Notice should be amended as the inaccuracy was a mistake. The Tenant said he understood that the Landlord just checked the wrong box and said "okay sure" in relation to me amending the Notice.

The son of the Landlord testified that he intends to move into the rental unit. He said he is between places and currently living with his parents.

The Tenant questioned the intent of the son of the Landlord. He said the son of the Landlord just moved out of the building not long ago. The Tenant testified about a previous issue with a leak and said he believes the Landlord wants him to vacate the rental unit to make it easier to fix up the rental unit.

Analysis

The Notice is dated in June and therefore the new legislation that came into force May 17, 2018 applies.

The Notice was issued pursuant to section 49(3) of the *Act* although it should have been issued pursuant to section 49(4) of the *Act*. Regardless, the Tenant had 15 days from receiving the Notice to dispute it pursuant to section 49(8)(a) of the *Act*.

The Tenant testified that he did not dispute the Notice because he did not receive it. The son of the Landlord testified that the Notice was served by putting it in the Tenant's mailbox. The Company submitted evidence to support this including photos and a witness statement.

Pursuant to rule 6.6 of the Rules of Procedure, it is the Company who has the onus to prove that they are entitled to an Order of Possession based on the Notice. The onus of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

I am satisfied based on a balance of probabilities that the Notice was served on the Tenant as described given the photos and witness statement supporting the position of the Landlord's son in relation to service. I find the Notice was served on the Tenant in accordance with section 88(f) of the *Act*.

Pursuant to section 90 of the *Act*, parties can be deemed to have received documents served in accordance with section 88 of the *Act*. Policy Guideline 12 deals with the deeming provision and states in part the following at page 10 and 12:

The Legislation sets out when documents that are not personally served are considered to have been received. Unless there is evidence to the contrary, a document is considered or 'deemed' received:

...

- if given or served by leaving a copy of the document in a mailbox or mail slot, on the third day after leaving it.

...

At the dispute resolution hearing, if service or the time frame for having responded is in dispute, an arbitrator may consider evidence from both the party receiving the document and the party serving the document to determine the date of service and the calculation of time a respondent had for responding. S. 71 (2)(b) gives an arbitrator the authority to order that a document has been sufficiently served for the purposes of the *Act* on a date the arbitrator specifies, upon consideration of procedural fairness and prejudice to the affected party.

...

The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done. For example, the Supreme Court found in *Hughes v. Pavlovic*, 2011 BCSC 990 that the deeming provisions ought not to apply in that case because Canada Post was on strike, therefore unable to deliver Registered Mail.

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. For example, if a party claimed to be away on vacation at the time of service, the arbitrator would expect to see evidence to prove that claim, such as airplane tickets, accommodation receipts or a travel itinerary. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

I do not find that there is clear evidence before me that the Tenant did not receive the Notice. Therefore, pursuant to section 90(d) of the *Act*, the Tenant is deemed to have received the Notice on June 30, 2018.

The Tenant therefore had 15 days from June 30, 2018 to dispute the Notice. The Tenant acknowledged that he did not dispute the Notice. Pursuant to section 49(9) of the *Act*, the Tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice.

I note that the effective date of the Notice, September 30, 2018, complies with section 49(2)(a) of the *Act*. The Tenant therefore was required to vacate the rental unit by September 30, 2018.

I also note that the Notice must comply with section 52 of the *Act* in form and content pursuant to section 49(7) of the *Act*. Further, section 68 of the *Act* allows me to amend the Notice.

As noted during the hearing, I find the Landlord checked the wrong box on the Notice as the Company is not an individual but a family corporation. The son of the Landlord asked that the Notice be amended. The Tenant said "okay sure" in relation to the Notice being amended. Given the Tenant's position on amending the Notice, I will amend the Notice to include the correct ground which is that "The landlord is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit".

Upon a review of the Notice, and considering the amendment, I find it complies with section 49 and 52 of the *Act*.

I do not find it necessary to address whether the son of the Landlord does in fact intend to occupy the rental unit as the Tenant is conclusively presumed to have accepted that the tenancy ended as explained above.

I find the Company is entitled to an Order of Possession. The son of the Landlord asked that an Order of Possession be effective December 31, 2018 if issued based on the Notice. I grant the Company an Order of Possession effective at 1:00 p.m. on December 31, 2018 pursuant to section 55 of the *Act*.

Conclusion

The Company is granted an Order of Possession effective at 1:00 p.m. on December 31, 2018. This Order must be served on the Tenant. If the Tenant does not comply with the Order, it may be filed in the Supreme Court 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 *Act*.

Dated: November 15, 2018

Residential Tenancy Branch