Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR / CNC, OLC

Introduction

This hearing dealt with two applications of the tenants pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- the cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent pursuant to section 46;
- the cancellation of a One Month Notice to End Tenancy for Cause pursuant to section 47; and
- an order requiring the landlords to comply with the Act, regulation or tenancy agreement pursuant to section 62.

All parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenants testified, and the landlords confirmed, that the tenants served the landlords with the notice of dispute resolution form and supporting evidence package. As such, I find that they were served in accordance with the Act.

The landlords provided a large number of documents to the Residential Tenancy Branch (the "**RTB**") in advance of the hearing. However, they testified that they only served one of the documents on the tenants (a written overview of their response, titled "Facts and Concerns"). Landlord SB testified he was afraid of what tenant LB might do once he saw the documents submitted (which included court records relating criminal charges against LB).

RTB Rule of Procedure 3.15 states:

> The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. […] The respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

By failing to serve the tenants with any documents other than their written overview, I find that the respondents failed to comply with Rule 3.15.

The landlord submitted five different notices to end tenancy into evidence:

1) three 10-day notices to end tenancy for non-payment of rent dated:
    a. May 5, 2021 (the "**May 10 Day Notice**");
    b. August 3, 2021 (the "**August 10 Day Notice**"); and
    c. September 2, 2021 (the "**September 10 Day Notice**");
2) a one month notice to end tenancy for cause dated June 28, 2021 (the "**One Month Notice**"); and
3) a two month notice to end tenancy for landlord's use of property dated June 24, 2021 (the "**Two Month Notice**")

The tenants acknowledged having received all of these except the September 10 Day Notice.

Accordingly, I exclude from evidence all documents submitted to the RTB except the written overview and all of the notices listed above, except for September 10 Day Notice.

Preliminary Issue - Amendment to Dispute Two Month Notice

At the hearing, the tenants testified that they had intended to dispute the Two Month Notice when they made their applications. On their application, under the description of their request to dispute the One Month Notice, they wrote:

> This is the second notice we have received from the landlord I have also filed a dispute for the first which was served on the terms that they wished to occupy the suite themselves, however after I informed them that they cannot do that because we have a signed agreement that does not end until January 31, 2022 they have now served this notice. We have gotten rid of the dog the first time they asked on June 23, 2021. And they say we were not to use the basement however we were given the only key.

The tenants stated that they were confused by the application process and by the number of different types of notices they received from the landlords. I note that the other application filed by the tenants was not to dispute the Two Month Notice, but rather to dispute the August 10 Day Notice.

Having reviewed the tenants applications, I find that the tenants clearly intended to the One Month Notice (issued due to an incident with a dog and due to their use of the basement) and the Two Month Notice (issued due to the landlords' desire to occupy the rental unit).

Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**

> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.
>
> If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

I find that, on reviewing the tenants' applications, the landlords could have reasonably anticipated that the tenants intended to argue that the Two Month Notice should be cancelled. As such, I order that the tenants' application be amended to include a claim to cancel the Two Month Notice.

Preliminary Issue - Amendment to Dispute August 10 Day Notice

The tenants' application to cancel a 10 Day Notice is to cancel the May 10 Day Notice. At the hearing, the tenants made submissions regarding the non-validity of both the May and August 10 Day Notices. The landlords made submissions regarding the validity of the August 10 Day Notice. As such, despite the fact the tenant did not make an application to dispute the August 10 Day Notice, I find it appropriate to amend the tenants' application to include a claim to have it cancelled.

Issues to be Decided

Are the tenants entitled to:

1) an order cancelling the:
    a. May 10 Day Notice;
    b. August 10 Day Notice;
    c. One Month Notice; and
    d. Two Month Notice; and
2) an order that the landlords comply with the Act?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The exact terms of the tenancy agreement are at issue. The parties agree on the following. The rental unit is a single detached house. The landlords live in a small guest house on the residential property. A winery and a vineyard are also located on the residential property. Rent is due on the first of the month.

The tenant JJ contacted landlord HB via Facebook Messenger in December 2020 regarding an advertisement for the rental unit. The full exchange was submitted into

evidence by the tenants. The tenants viewed the rental unit and agreed to rent it. They moved in on January 4, 2021. On December 30, 2020, HB had sent a copy of a written tenancy agreement to the tenants for their signature. HB testified that the tenants never returned a signed copy to her. JJ testified that she thought she did, but if she had failed to do so, this was an oversight. JJ testified that the landlords never raised the issue with the tenants until they issued the Two Month Notice.

The tenants submitted a signed copy of the tenancy agreement which they received from the landlords. It was for a fixed term, starting on an unspecified date in January 2021 and ending January 31, 2022. Monthly rent was $1,850. Water was included, but electricity, heat, and natural gas were not. It contained a term that the “basement is used by landlord to store vineyard equipment”. The tenants were required to pay a security deposit of $900 and a pet damage deposit of $900.

The parties agree that the tenants paid the security deposit, but not the pet damage deposit. On February 1, 2021, HB messaged JJ on Facebook Messenger:

> Hi, did you find out about the damage deposit chq? Also you need to send pet damage deposit as well.

JJ replied:

> So she said the [damage deposit] check is at the office there in [redacted]. She just spoke to them. I was hoping I could make payments on the pet deposit, with the expenses of [moving] and hooking up hydro and getting the grocery essentials and what not we are going to be broke for three months. But if we can just send you a couple hundred here and there until it's paid off that would be really helpful. I spoke to your husband and he said he was fine with it, but run it by you because you're the real boss lol
>
> I was also wondering about the pet damage deposit, my sister told me that the new law states that all deposits collected cannot exceed the amount of one half of the months rent?

HB responded:

> I am not aware of any new laws regarding pet damage deposit but I can check on the govt website.

The landlords never responded regarding the results of checking on this. JJ testified that she understood this lack of response to mean that the landlords no longer required a pet damage deposit. The landlords did not make any further reference to the pet damage deposit until they issued the One Month Notice.

The written tenancy agreement listed the monthly rent as $1,850. However, the tenants testified that they “forgot” that this was the amount of monthly rent, and that they thought it was only $1,800, which the landlords accepted. The landlords testified that shortly after the start of the tenancy, they agreed to reduce the monthly rent from $1,850 to $1,800 in recognition of the fact that the rental unit and the landlord’s guest house both use the same electricity meter, and that the electricity bill is in the tenants’ name.

On December 29, 2020, prior to entering into the tenancy agreement, HB sent JJ the following message:

> Couple of things I'd like to mention do there are no surprises, first there is not lot of choices for Internet so please do some research period we have Telus hub which is more than enough for us and second there is no gas in our area so heat is electric and it's with Fortis. According to our tenant the highest bill he has seen his $400/month but again it depends how much you use.

JJ replied:

> You told me about the electricity when I came for the viewing. It works out to about the same as paying gas and hydro I think. I think Telus Internet should be fine, I can't see why not.

HB replied:

> Wasn't sure if I mentioned it law and also that's the highest, shoulder months are only $100 or so and you can always do monthly payment plan, just a suggestion.

On January 7, 2021, HB messaged JJ:

> Also you can call Fortis to transfer the electricity in your name and when you call them give meter # [redacted] as there are two meters one for the house and another for the winery.

JJ testified that the first bill they received from Fortis was for $3,400. The tenants did not submit a copy of this bill into evidence. JJ argued that prior to entering into the tenancy agreement she was unaware that the landlord's guest house ran off the same electrical meter as the rental unit. JJ argued that the landlord's electrical usage caused the tenant's electrical bill to be as high as it was.

The landlords did not dispute that the guest house’s electricity was on the same meter as the rental unit’s. However, they denied that their usage would have caused the electrical bill to be as high as the tenants said it was (they noted that they had never seen a copy of this bill). The landlords testified that the guest house does not even have a kitchen in it. They testified that they prepared their meals at the winery (which is on a

different electrical meter) and that the only appliances in the rental unit are three air conditioners (of which they only use one, a small window mounted air conditioner) and a coffee maker.

HB testified that once they learned of the tenant's high bill, they agreed to reduce the monthly rent by $50.

1. 10 Day Notices

HB testified that the tenants failed to pay rent on May 1, 2021. The landlords posted the May 10 Day Notice on the door of the rental unit on May 8, 2021. The tenants paid the full arrears owing on May 15, 2021. The landlords accept that this caused the May 10 Notice to be cancelled and of no force or effect.

HB testified that the tenants failed to pay rent on August 1, 2021. The landlords posted the August 10 Day Notice on the door of the rental unit on August 3, 2021. This notice stated that the landlords were ending the tenancy because the tenants failed to pay $1,800 due on August 1, 2021 and because they failed to pay the pet damage deposit of $900. The form used by the landlords does not have a section whereby the landlord may end a tenancy on 10 days' notice for non-payment of a deposit, so the landlords modified a section relating to unpaid utilities, crossing out the work "utilities" and replacing it with "pet deposit".

HB testified that the tenants e-transferred the landlords $1,000 on August 11, 2021.

HB testified that the tenants did not pay the balance on August 2021 rent or any part of September 2021 rent by September 1, 2021. She testified that she posted the September 10 Day notice on the door of the rental unit on September 2, 2021. The tenants stated that they were quarantined in another city on September 2, 2021 (having tested positive for COVID-19) and that when they returned, the September 10 Day Notice was not posted on their door. They testified that they were unaware of its existence until the hearing. They speculated that the wind might have blown it off.

In any event, the tenants testified that they got out of quarantine on September 5, 2021 (which started on August 12 or 13, 2021), and then immediately went to a payday loan company to get cash to pay their rent. JJ testified that they paid the landlords $2,300 cash on September 7, 2021 for August and September 2021 rent. She testified that the landlords never gave her a receipt.

The landlords vehemently denied that the tenants gave them cash or paid the balance of August or any of September 2021 rent. HB testified that the landlords operate six rental properties, and it is not their practice to accept cash. She stated that the winery has a debit machine, so she allows tenants to pay by debit card, cheque, or e-transfer only. She testified that the tenants paid their rent by e-transfer in the past.

The tenants argued that the August 10 Day Notice should be cancelled because the landlords misrepresented to the tenants how much the electrical bill would be prior to the tenancy. She testified that, upon receiving and paying their first electrical bill, the tenants were in dire financial straits. She testified that they became reliant on payday loans to pay their bills. She argued that were it not for the misrepresentation of HB prior to entering into the tenancy agreement, the tenants would not be in the financial circumstances they are currently in, and as such, they should not be evicted for non-payment or late payment of rent.

2. <u>One Month Notice</u>

The landlords posted the One Month Notice on the rental unit door on June 28, 2021. It set out the reason for ending the tenancy as:

- Tenant or a person permitted on the property by the tenant has:
    - Significantly interfered with or unreasonably disturbed another occupant or the landlord;
    - Seriously jeopardized the health or safety or lawful right have another occupant or the landlord;
- Residential tenancy act only: security or pet damage deposit was not paid within 30 days as required by the tenancy agreement

The One Month Notice also provided details as follows:

> We only okayed one dog, but there were two dogs for almost four months, the second dog was without our consent. On Tuesday night at 10:30 PM (22 June) when my wife was trying to get into our place your dog aggressively barking and almost attacked her period she was really scared and couldn't get in for 15 minutes until I got there. There was no one home to control the dog. Very irresponsible. Such an aggressive dog should not be left unleashed. Secondly we have never agreed for the use of the basement by the tenant. But the tenant is using the basement from day one period when I asked them about it they were very aggressive and confrontational. Also they make a lot of noise late at night and disturb our sleep.

HB testified that she was very scared by this confrontation with the second dog. She stated that she fell down during the encounter but was otherwise physically uninjured. SB testified that when he arrived on the scene, he was able to scare the dog off.

JJ testified that a friend of theirs abandoned the second dog with them. She testified that the day after receiving the One Month Notice, the tenants “got rid of” this second dog.

JJ also testified that the landlords gave them a key to the basement at the start of the tenancy and permitted them to use it. She conceded that the basement is quite messy, but attributed the mess to a contractor they had engaged had left it in that state.

Neither side made any submissions about noise made by the tenants.

3. Two Month Notice

The landlords posted the Two Month Notice on the rental unit door on June 24, 2021. It listed an effective date of August 31, 2021. On it, the landlords listed the reason for ending the tenancy as the rental unit will be occupied by the landlord.

At the hearing, the landlords testified that their adult children (aged 21 and 23) would be moving back in when them to assist in running the winery and vineyard. They testified that it would be difficult for all of them to live in the guest house and needed the space the rental unit would afford them.

The tenants argued that their tenancy is for a fixed term, and that, as such, the landlords are not permitted to end the tenancy in this fashion until January 31, 2022, at the earliest.

The landlords argued that, since the tenants never returned them a signed copy of the tenancy agreement, the tenancy was not for a fixed term and instead was month to month.

Analysis

1. Terms of the Tenancy Agreement

I do not find that the tenants' signature on the written tenancy agreement sent to them by the landlords prior to their moving in is necessary for the terms of that agreement to be enforceable. The necessary elements for a contract to come into existence are as follows:

1. The intention to create legal relations.
2. An offer containing the essential terms of the contract.
3. An acceptance of the offer and its terms.
4. Consideration (i.e. something given by each party to the contract).
5. Certainty of the agreed terms.

Of these elements, only the third and fifth are in dispute.

The acceptance of an offer is most often recorded by way of the person accepting the offer signing the written contract. However, this is not the only way that acceptance of an offer can be memorialized. Indeed, the signature itself does not represent the acceptance, but rather is an indication that the individual has agreed to accept the offer and enter into a contract. Acceptance of an offer can be demonstrated in other ways.

In the present circumstance, I find that the tenants accepted the landlord's offer to rent the rental unit on the terms set out in the written tenancy agreement by moving into the rental unit on January 4, 2020. At that point, the landlord had not withdrawn their offer to rent the rental unit on the terms set out in the written tenancy agreement, so the tenants were free to accept the offer on those terms.

Consideration was exchanged (by way of the tenants paying rent and the landlords providing the rental unit to the tenants for their use). The written tenancy agreement contained the terms which would govern the tenancy.

I see no reason why the terms of the agreement should change, going from a fixed-term tenancy to a month-to-month tenancy, because the tenants failed to sign the tenancy agreement. If the landlords intended the tenancy be month-to-month, they are required to have communicated this to the tenants before the tenants accepted the landlord's offer. The landlords cannot unilaterally change the terms of the tenancy agreement once it has been entered into. I am not persuaded by the landlords' argument that absent a signature on the written contract, the tenancy automatically becomes month-to-month. I am not aware of any legal principle that would cause this to be true.

As such, I find that the terms contained in the written tenancy agreement provided by the landlords to the tenants before the tenants moved into the rental unit to be the terms that govern the tenancy. I find that the tenancy is for a fixed-term ending January 31, 2022.

I find that the parties originally agreed that the monthly rent would be $1,850. However, at some point, the tenants started paying $1,800 in rent. The tenants say they did this by accident. The landlords say they agreed to reduce the rent by $50 to reflect the fact that the guest house and the rental unit use the same power meter. Of these two explanations, I find the landlords' more likely. I come to this conclusion based on the fact that the tenant's explanation necessarily requires a finding of fact that the landlords forgot how much rent was supposed to be as well. The landlords indicated on the May and August Notices that the arrears owed for each of those months was $1,800. This indicates that the landlords believed they were owed this amount of monthly rent. I do not find it likely that the landlords, when issuing the May and August 10 Day Notices, would forget how much rent was actually owed on two separate occasions.

Rather, I find it more likely that the landlords agreed to reduce the rent following the tenants complaining of the excessive utilities bill.

As such, I find that rent is currently $1,800, payable on the first of each month.

2. 10 Day Notices

Section 46 of the Act states:

> **Landlord's notice: non-payment of rent**
> **46**(1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
> (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
> (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
> (4) Within 5 days after receiving a notice under this section, the tenant may
> (a) pay the overdue rent, in which case the notice has no effect, or
> (b) dispute the notice by making an application for dispute resolution.
> (5) If a tenant who has received a notice under this section does not pay the rent or 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 to which the notice relates by that date.

The landlords admit that the tenants paid the full amount of arrears within five days of being deemed served with the May 10 Day Notice. As such, the May 10 Day Notice is cancelled pursuant to section 46(4) of the Act.

It is not disputed that the tenants failed to pay rent on August 1, 2021, when it was due. The parties agree that, on August 11, 2021, the tenants e-transferred $1,000 to the landlords. As such, $800 in rent remained outstanding.

The tenant did not pay the full amount of overdue August rent within five days of being served with the August 10 Day Notice. As such, any subsequent payment of the rent will not have the effect of cancelling the August 10 Day Notice. In order for the notice to remain in force, the landlords must prove that it both complies with the section 52 form and content requirements and that the amount of rent listed on the notice was due and owing at the time the notice was issued.

The tenants argued that the landlords' misrepresentation about the cost of electricity prior to tenancy should cause the August 10 Day Notice to be cancelled as the unexpectedly large first electricity bill put the tenants in dire financial circumstances. I disagree.

Section 26 of the Act states:

> **Rules about payment and non-payment of rent**
> **26**(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

As such, even if the landlords misrepresented the cost of electricity to the tenants (on which point I explicitly make no finding), this would not relieve the tenants of their obligation to pay rent under the tenancy agreement. Rent must be paid when it is due, notwithstanding any breach of the Act by the landlord. The proper course of action for the tenants would be for them to make a monetary application against the landlord to compensate them for any loss which might have stemmed from the landlord's alleged misrepresentation. The tenants did not do this.

I have reviewed the August 10 Day Notice, and find that it complies with the form and content requirements of section 52 of the Act, despite the fact it misstates the effective date as August 13, 2021 (it should be August 16, 2021, as the notice is deemed served three days after it is posted to the rental unit door). Section 53 of the Act automatically corrects incorrect effective dates to the earliest valid effective date.

As such, I find that the August 10 Notice was validly issued. I dismiss the tenants' application to cancel it, without leave to reapply.

Sections 55(1) and (1.1) state:

> **Order of possession for the landlord**
> **55**(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
>
> (a)the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b)the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.
>
> (1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 *[landlord's notice: non-payment of rent]*, and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

As I have dismissed the tenant's application to cancel the August 10 Day Notice and as I have found it complies with section 52 of the Act, I am obligated to grant the landlords an order of possession, per section 55(1) of the Act. I order that the tenants provide the landlords with vacant possession of the rental unit no later than five days after the landlords serve a copy of this decision and attached orders on the tenants.

As I have found that circumstances in section 51(1)(a) and (b) of the Act have been satisfied, I must make grant an order that the tenant pay the landlord the balance of the rental arrears.

The landlords testified that they are owed $800 for the balance of August 2021 rent and $1,800 for September 2021 rent ($2,600 total). The tenants testified that they gave the landlord $2,300 cash on September 7, 2021 which the obtained from a payday loan company two days prior. The tenants did not submit any documentary evidence to support their testimony (such as proof they obtained a payday loan or communication with the landlords regarding such a payment). The landlords did not provide any documentary evidence supporting their testimony either. However, I am unsure what documents they could have submitted which would have proved that the tenants did not pay rent. Documents which show a thing did not occur are rare, as documents are usually created to record an event, as opposed to the absence of one.

I accept the landlords' testimony that it is not their practice to accept cash rent payments. The parties agree that the tenants did not make any cash payments to the landlord prior to September 2021. They paid rent by e-transfer. I am unsure why the tenants would have changed their practice of paying by e-transfer in September 2021. I do not think it likely that it was because they had to take a payday loan to obtain the funds, as JJ testified that the tenants had become reliant of payday loans since getting the first electricity bill. I do not think it likely that they paid cash due to having received the September 10 Day Notice and wanted to pay the landlords as soon as possible, given that they testified that they did not receive the September 10 Day Notice.

Given the past practices of the parties, the absence of a basis for deviating from this practice, and the lack of any corroborative evidence from the tenants, I find that it is more likely than not that the tenants did not pay the landlords any amount in cash in September towards rental arrears.

As such, per section 55(1.1), I order that the tenants pay the landlord $2,600, representing the repayment of rental arrears for August and September 2021.

Pursuant to section 72 of the Act, the landlords may retain the security deposit ($900) in partial satisfaction of this amount.

3. One Month and Two Month Notices

As I have already issued an order of possession based on the August 10 Day Notice, it is not necessary for me to assess the validity of the One Month or Two Month Notice. The issues are moot.

Conclusion

Pursuant to sections 55(1.1), 65, and 72 of the Act, I order that the tenants pay the landlords $1,700, representing the outstanding arrears for August and September 2021, less the security deposit.

Pursuant to section 55(1) of the Act, I order that the tenants deliver vacant possession of the rental unit to the landlords within five days of being served with a copy of this decision and attached order(s) by the landlord at 1:00 pm.

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: September 22, 2021

Residential Tenancy Branch