



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT, CNC, OLC**
 FFT, CNC

Introduction

The tenants filed two applications for dispute resolution. The tenants' first application for dispute resolution was filed on July 22, 2021 (the "first application") pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the One Month Notice to End Tenancy for Cause dated July 15, 2021 (the "First Notice"), pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenants filed an amendment to the first application on August 11, 2021 which added a claim for an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62.

The tenants' second application for dispute resolution was filed on July 29, 2021 (the "second application") pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the One Month Notice to End Tenancy for Cause dated July 23, 2021 (the "Second Notice"), pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Tenant J.S. and the landlords' agent (the "agent") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this decision and order.

Tenant J.S. testified that she personally served an agent of the landlord at the landlord's office with both applications for dispute resolution, the tenants' evidence and the August 11, 2021 amendment on August 13, 2021. No proof of service documents were entered into evidence.

The agent testified that the tenant served the landlord's office with the tenants' second application for dispute resolution and evidence on August 19, 2021. The agent testified that the landlord was not served with the first application or amendment.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure (the "Rules") states that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Rule 3.5 of the Rules states:

At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.

Rule 3.1 of the Rules states:

The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

- a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;
- b) the Respondent Instructions for Dispute Resolution;
- c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and
- d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

See Rule 10 for documents that must be served with the Notice of Dispute Resolution Proceeding Package for an Expedited Hearing and the timeframe for doing so.

I find that the tenant has not proved, on a balance of probabilities, that the landlord was served with the first application for dispute resolution and amendment as required in Rule 3.5 and section 89 of the *Act* as no proof of service documents were provided. I also note that the Notice of Dispute Resolution Proceeding Package for the second application was not made available to the tenant until August 16, 2021, so it was not possible for the tenant to serve the landlord with the tenant's second application on August 13, 2021. For failure to prove service, the tenant's first application and amendment are dismissed with leave to reapply.

I accept the landlord's testimony that the landlord was served with the tenant's second application and evidence on August 19, 2021. I find that the tenant's second application was served on the landlord within three days of it being made available to the tenant, in accordance with Rule 3.1 of the Rules.

Section 55 of the *Act* requires that when a tenant submits an application for dispute resolution (the "application") seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the application is dismissed or the landlord's notice to end tenancy is upheld and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

The agent testified that the First Notice was cancelled by the landlord. As the First Notice is no longer of any force or effect, I find that I do not need to consider if the landlord is entitled to an Order of Possession pursuant to the First Notice and section 55 of the *Act*.

Preliminary Issue- Second Notice

Neither party entered into evidence a copy of the Second Notice; however, both parties agreed to the contents of the Second Notice and both agreed that they are in possession of a copy of the Second Notice. I allowed both parties 24 hours to upload the Second Notice, both parties uploaded a copy of the Second Notice within 24 hours of this hearing. I find that neither party is prejudiced by the late evidence as both parties

testified that they are in possession of the Second Notice. Neither party objected to the allowance of the late evidence.

Issues to be Decided

1. Is the tenant entitled to cancellation of the Second Notice pursuant to section 47 of the *Act*?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
3. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
4. If the tenants' application is dismissed or the Second Notice is upheld, and the Second Notice complies with the *Act*, is the landlord entitled to an Order of Possession, pursuant to section 55 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on April 9, 2019 and is currently ongoing. Monthly rent in the amount of \$4,000.00 is payable on the first day of each month. A security deposit of \$2,000.00 was paid by the tenants to the landlord.

The agent testified that she posted the Second Notice on the tenants' door on July 23, 2021. Tenant J.S. testified that she received the Second Notice on July 23, 2021. The tenants filed to dispute the Second Notice on July 29, 2021.

The Second Notice states the following reasons for ending the tenancy:

- Breach of material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;
- Tenant has assigned or sublet the rental unit/site without the landlord's written consent.

Both parties agree that the tenant rented out room(s) in the subject rental property on air bnb. Tenant J.S. testified that finances were difficult during COVID and that she

sought extra income through air bnb. Tenant J.S. testified that she is no longer hosting air bnb stays at the subject rental property.

The agent testified that the landlord's insurance is in jeopardy due to the unauthorized air bnb and that short term rentals in the subject rental city are not permitted. The agent did not enter into evidence any documentary evidence prior to the commencement of this hearing.

The agent provided no testimony regarding how the tenants were notified that the landlord considered air bnb a breach of a material term, other than by the issuance of the Second Notice. No warning or breach letters were entered into evidence by the landlord.

Analysis

Section 47(1)(i) of the *Act* states:

47 (1)A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(i)the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 [*assignment and subletting*];

Residential Tenancy Branch Policy Guideline #19 (PG#19) states:

Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord....

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the subtenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting

exclusive occupancy to the sub-tenant, becomes the “landlord” of the sub-tenant....

Section 4 of the RTA states that the Act does not apply to living accommodations occupied as vacation or travel accommodation and there is no recourse under the RTA for disputes arising from vacation or travel accommodation. However, there have been dispute resolution proceedings arising from tenants who have rented out all or part of their rental unit via AirBnB or other vacation/rental listing services and their landlord has issued a One Month Notice to End Tenancy (form RTB-33) for the tenant’s failure to obtain the landlord’s written consent to sublet. As stated above within section C, unless the tenant is acting as an agent for the landlord or has moved out of the unit, this is not a true sublet under the RTA. It is unlikely that a One Month Notice to End Tenancy (form RTB-33) for cause for the tenant’s failure to obtain the landlord’s written consent to sublet would be successful in these circumstances, although this type of action by a tenant may constitute other breaches of the Act or tenancy agreement for which the landlord might issue a One Month Notice to End Tenancy (form RTB-33).

Based on the testimony of both parties, I find that the tenants did not move out of the subject rental property and rented out a portion of the subject rental property on air bnb. As stated in PG #19, because the tenants did not move out, this is not a true sublet or an assignment and is therefore not grounds for eviction under section 47(1)(i) of the *Act*.

Section 47(1)(h) of the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if the 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.

Residential Tenancy Policy Guideline #8 states in part:

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.

I find that the landlord has not proved, on a balance of probabilities, that prior to the service of the Second Notice, the landlord informed the tenant in writing that:

- 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.

The landlord did not provide testimony on any breach letter served on the tenants and no such breach letter was entered into evidence.

I find that the landlord has not proved either of the grounds to end tenancy set out on the Second Notice. The Second Notice is therefore cancelled and of no force or effect.

As the tenants were successful in this application for dispute resolution, I find that the tenants are entitled to recover the \$100.00 filing fee from the landlord.

Section 72(2) of the *Act* states that if the director orders a landlord to make a payment to the tenant, the amount may be deducted from any rent due to the landlord. I find that the tenant is entitled to deduct \$100.00, on one occasion, from rent due to the landlord.

Conclusion

The Second Notice is cancelled and of no force or effect.

The tenants are entitled to deduct \$100.00 from rent due to the landlord.

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: November 23, 2021

Residential Tenancy Branch