Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC FFT**

Introduction

This hearing was convened by way of conference call in response to an application for dispute resolution ("Application") filed by the Tenant pursuant to the *Residential Tenancy Act* (the "Act") in which the Tenant seeks:

- an order cancelling a One Month Notice to End Tenancy for Cause dated June 24, 2022 ("1 Month Notice") pursuant to section 47; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

An agent for the Landlord ("AT") and the Tenant attended the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure* ("RoP"). The parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

Preliminary Matter – Service of Notice of Dispute Resolution Proceeding on Landlord

The Tenant testified he served the Notice of Dispute Resolution Proceeding ("NDRP") through the Landlord's door slot. AT acknowledged the Landlord received the NDRP.

Sections 89(1) of the Act states:

> 89(1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, 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;
(b) if the person is a landlord, by leaving a copy with an agent of the landlord;
(c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
(d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
(e) as ordered by the director under section 71 (1) *[director's orders: delivery and service of documents]*;
(f) by any other means of service provided for in the regulations.

The Tenant did not serve the NDRP using any of the methods set out in section 89(1) of the Act. However, AT acknowledged the Landlord received the 1 Month Notice. As such, I find the NDRP was sufficiently served on the Tenant pursuant to section 71(21)(b) of the Act.

Preliminary Matter – Service of Evidence by Parties

Although of the parties submitted evidence to the Residential Tenancy Branch for this proceeding, the parties acknowledged they did not serve each other with their respective evidence. Rules 3.14 and 3.15 of the RoP state:

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Except for evidence related to an expedited hearing (see Rule 10), documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing. In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

3.15 Respondent's evidence provided in single package

Where possible, copies of all of the respondent's available evidence should be submitted to the Residential Tenancy Branch online through the Dispute Access Site or directly to the Residential Tenancy Branch Office or through a Service BC Office. The respondent's evidence should be served on the other party in a single complete package.

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. Except for evidence related to an expedited hearing (see Rule 10), and subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. See also Rules 3.7 and 3.10

Pursuant to Rule 3.14, the Tenant was required to serve his evidence on the Landlord not less than 14 days before the hearing. Pursuant to Rule 3.15, the Landlord was required to serve its evidence on the Tenant not less than seven days before the hearing. Neither the Tenant nor the Landlord complied with those requirements. However, the Tenant agreed to accept, and AT agreed on behalf of the Landlord, to admit each other's evidence for this proceeding. As such, I will admit the Tenant's and Landlord's evidence for this proceeding.

Issues to be Decided

- Is the Tenant entitled to cancellation of the 1 Month Notice?
- Is the Tenant entitled to recover the filing fee for the Application from the Landlord?
- If the Tenant is not entitled to cancellation of the 1 Month Notice, is the Landlord entitled to an Order of Possession pursuant to section 55(1) of 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 Application and my findings are set out below.

AT submitted into evidence a copy of the tenancy agreement dated February 16, 2007, ("Tenancy Agreement") between the Landlord, the Tenant and a former tenant ("JR"). The parties agreed the tenancy commenced on March 1, 2007, for a fixed term ending February 29, 2008, with rent of $820.00 payable on the 1st day of each month. The parties agreed the rent is now $1,002.92 per month. The Tenant and JR were to pay a security deposit of $410.00 to the Landlord by February 9, 2007. AT stated the Tenant and JR paid the security deposit and the Landlord is holding the deposit in trust. AT stated the Tenant has paid the rent for November 2022. The Tenant stated JR vacated the rental unit. AT did not submit any evidence that JR gave written notice to end the tenancy. Based on the foregoing, I find there is a tenancy between the Landlord and Tenant and that I have jurisdiction to hear the dispute.

AT stated the 1 Month Notice was served on the Tenant's door on June 24, 2022. AT submitted into evidence a signed and witnessed Proof of Service on Form RTB-34 to corroborate his testimony that the 1 Month Notice was served on the Tenant door. Based on the foregoing, I find the 1 Month Notice was served in accordance with the provisions of section 88 of the Act. The 1 Month Notice stated the cause for ending the tenancy was:

- Breach of a material term of the tenancy agreement that was not corrected with a reasonable time after written notice to do so.

The details of the cause provided in the 1 Month Notice were:

> We were notified of occupants other than those listed on the tenancy agreement residing in the rental unit and during our May 17, 2022 RTB arbitration to confirmed the breach of this material term of your lease.
>
> On May 20, 2022 we served a warning letter request you comply with your RTA.
>
> No response was received in regards to with of our warnings so we are ending the tenancy based on your breach of your tenancy agreements that states:
>
> 13. ADDITIONAL OCCUPANTS. No person, other than those listed in paragraph 2 above, may occupy the rental unit.

AT stated there had been a Hearing ("Prior Hearing") of a dispute resolution proceeding between the parties in respect of a One Month Notice to End Tenancy for Cause ("Prior Notice"). AT stated the arbitrator who heard the dispute cancelled the Prior Notice on the basis that the Prior Notice was deficient. AT submitted into evidence a warning letter dated May 20, 2022 ("Warning Letter") that the Landlord served on the Tenant. The Warning Letter referred to a material breach of the Tenancy Agreement, referred to paragraph 13 of the Tenancy Agreement that states no person, other than those listed on the Tenancy Agreement may occupy the rental unit for more than 14 days unless the Landlord has the permission of the Landlord. The Warning Letter specified the Tenant was required to comply with the Tenancy Agreement by May 31, 2022. AT stated the Tenant did not communicate with the Landlord or comply with the request that the Tenant take steps to comply with the Warning Letter. AT stated the strata council for the building in which the rental unit is located are pressing the Landlord to resolve the issue of there being an undeclared occupant in the rental unit as soon as possible.

The Tenant admitted he received the Warning Letter from the Landlord. The Tenant admitted there was another occupant in the rental unit that is not listed on the Tenancy Agreement. The Tenant stated that, other than for permitting another occupant to reside it he rental unit contrary to the Tenancy Agreement, he considered himself to be a model tenant. The Landlord stated that, in the decision for the Prior Hearing, the arbitrator warned the Tenant that there could be dire consequences if he did not comply with the Tenancy Agreement.

Analysis

Subsection 41(1)(h) and sections 47(2) through 47(5) of the Act state:

> 47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
> […]
> (h) the tenant
> (i) has failed to comply with a material term, and
> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;
> […]

(2) A notice under this section must end the tenancy effective on a date that is
  (a) not earlier than one month after the date the notice is received, and
  (b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.

(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not 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 by that date.

The 1 Month Notice was served on the Tenant's door on June 24, 2022. Pursuant to section 90 of the Act, the Tenant was deemed to have received the 1 Month Notice on June 27, 2022. Pursuant to section 47(4) of the Act, the Tenants had until July 7, 2022, to make an application for dispute resolution to dispute the 1 Month Notice. The records of the Residential Tenancy Branch disclose the Tenant made his application on June 27, 2022.. Accordingly, the Tenant made the Application to dispute the 1 Month Notice within the 10-day dispute period required by section 47(4) of the Act.

Residential Tenancy Policy Guideline 8 ("PG 8") provides guidance on unconscionable and materials terms. PG 8 states in part:

Material Terms

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

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. A party might not be found in breach of a material term if unaware of the problem.

I have reviewed the Warning Letter served on the Tenant by the Landlord and find it complies with the requirements out in PG 8. The Tenant acknowledged that, although he received the Warning Letter, he did not remedy the material breach of the Tenancy Agreement by arranging for the other occupant in the rental unit to move out. Based on the foregoing, I find the Landlord has proven, on a balance of probabilities, cause for ending the tenancy pursuant to subsection 47(1)(h) of the Act. Based on the foregoing, I dismiss the Application without leave to reapply.

Section 55(1) of the Act states:

> **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.

I have reviewed the 1 Month Notice and find it complies with the form and content requirements of section 52 of the Act. Section 55(1) of the Act provides that, where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with section 52 of the Act, then I must grant the landlord an Order of Possession. As such, pursuant to section 55(1) of the Act, I must grant the Landlord an Order of Possession of the rental unit. The Landlord acknowledged the Tenant paid the rent for November 2022. As such, pursuant to section 68(2)(a), I find the tenancy ends on November 30, 2022.

Conclusion

The Application is dismissed without leave to reapply.

The Tenant is ordered to deliver vacant possession of the rental unit to the Landlord by 1:00 pm on November 30, 2022, after being served with a copy of this decision and attached Order of Possession by the Landlord. This Order may be filed in the Supreme Court of British Columbia 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 *Residential Tenancy Act*.

Dated: November 12, 2022

Residential Tenancy Branch