Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ET, FFL

Introduction

The Landlord seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order of possession pursuant to s. 56 for the early end to the tenancy; and
- return of the filing fee pursuant to s. 72.

R.B. appeared as agent for the Landlord. N.B. appeared as an assistant and did not participate in the hearing. L.M. appeared at the outset of the hearing as a witness for the Landlord. L.M. was asked to leave during the hearing and was not called upon to provide evidence for the Landlord.

S.T. and D.M. appeared as the Tenants. The Tenants were represented by A.F. as their counsel.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

Preliminary Issue – Service of the Parties Application Materials

At the outset of the hearing, I enquired whether the Landlord had served its application and evidence on the Tenants and was advised by the agent that it had been. Tenant's counsel advised that it was received and did not raise objection with respect to service except for some late evidence, which she says was received the day before the hearing. The Landlord's agent says that the additional evidence was served in response to the Tenants evidence, which he says was received late.

Tenant's counsel advised that the Tenants' primary evidence package was served on January 3, 2023 by posting it to the office door for the Landlord, a subsequent letter with respect to the D.M.'s reliance on the evidence was posted to the door on January 5, 2023, and additional evidence was posted to the door on January 7, 2023 with respect to a police record request. The Landlord's agent acknowledges receipt of the January 3 evidence package and the January 5 evidence, but denies receipt of the January 7, 2023 package. The Landlord's agent says that the evidence was received on January 8, 2023, arguing this was when it was deemed to have been received.

Tenant's counsel further advised that a courtesy copy was served via email on January 3, 2023 with the file contents in a drop box. I have been provided with a copy of the email as well as a confirmation that the file contents were downloaded on January 3, 2023. Tenant's counsel also provides photographs dated January 3, 2023 showing the evidence posted to the door and a photo later that day without evidence.

The Landlord's application is filed as part of the expedited process set out under Rule 10 of the Rules of Procedure. As per Rule 10.3 of the Rules of Procedure, applicants must serve their application and evidence within one day of receiving the Notice of Dispute Resolution from the Residential Tenancy Branch. Pursuant to Rule 10.5 of the Rules of Procedure requires respondents to serve their evidence as soon as possible and at least two days prior to the hearing.

The expedited process also does not contemplate service of additional evidence packages from either party, which is made clear both by reference to Rules 10.3 and 10.5 but also by reference to Rule 10.6 of the Rules of Procedure, which states: "If a piece of evidence is not available when the applicant or respondent submits and serves their evidence, the arbitrator will apply Rule 3.17". In other words, additional evidence is only permitted if it is new and relevant.

Section 89 of the *Act* sets out the methods of serving documents in dispute resolution proceedings. In particular, s. 89(2) of the *Act* permits landlords who seek an order of possession under s. 56 to serve tenants by posting the documents in a conspicuous place at which the tenant resides. The wording of s. 89(2) provides specific methods of service for landlords to serve tenants, but not the inverse. This can be seen by reference to the s. 89(1), which uses general language when proscribing methods of service between the parties. I highlight the distinction between ss. 89(1) and 89(2) of the *Act* because I find that it is procedurally unfair for landlords to be permitted methods of

service under s. 89(2) that are not also afforded to the tenants. I am cognizant of the protective purpose of the *Act* in making this finding.

Looking at the substantive issues of service here, based on their acknowledged receipt without objection, I find that pursuant to s. 71(2) of the *Act* the Landlord's application and initial evidence were sufficiently served on the Tenants. I find that the additional evidence served by the Landlord, which was the day before the hearing, was served in breach of Rule 10.3 of the Rules of Procedure and was so late that the Tenants, as respondents, could not have provided a response within compliance of Rule 10.5. Further, service of a second evidence package is not permitted under the Rule 10 except by application of the new and relevant evidence rule set out under Rule 3.17. Accordingly, I find that the inclusion of the Landlord's additional evidence would be procedurally unfair under the circumstances. It is excluded and shall not be considered by me.

Dealing next with service of the Tenants' evidence, the Landlord's agent says that the evidence was not received until January 8 by making reference to the deemed receipt provision of the *Act*. To be clear, the deeming provisions of s. 90 of the *Act* form an evidentiary presumption of receipt, which may be rebuttable, but are only relevant if receipt cannot be confirmed or is specifically denied. Here, however, I am told by the agent that the Landlord did receive the Tenant's initial evidence package prior to January 8, 2023. Indeed, it appears likely that the Landlord downloaded the evidence on January 3, 2023 as evidenced in the email provided to me by counsel. Reference to s. 90 of the *Act* by the Landlord is unnecessary under the circumstances.

I find that the Landlord did receive the Tenants' initial evidence package on January 3, 2023 as evidenced both in the photographs provided by the Tenants and the email provided by their counsel. Pursuant to s. 71(2) of the *Act*, I find that the Landlord was sufficiently served with the Tenants' initial evidence. With respect to the two subsequent evidence packages served by the Tenants, I find that they are not permitted under Rule 10 and the Tenants have failed to demonstrate that they are new or relevant, indeed they appear to be self-generated by the Tenants such that they could not be considered new or relevant under the circumstances. They are excluded and shall not be considered.

Issues to be Decided

1) Is the Landlord entitled to an order of possession without issuing a notice to end tenancy?
2) Is the Landlord entitled to the return of its filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the Tenants began to occupy the rental unit on August 1, 2015, though I am advised by counsel that S.T. was a tenant at another unit at the property prior to the current tenancy. I am advised that the rental unit in question is a townhouse.

The Landlord's agent says that present application was filed after D.M. assaulted a landscaper hired by the Landlord to look after the common areas of the property. I am told the alleged assault took place on November 14, 2022.

By way of some context, both parties provide in their evidence an email exchange from June 30, 2022 between D.M. and the Landlord's agent R.B.. The June 30, 2022 email exchange includes, among other things, allegations by D.M. that R.B. was improperly entering their area without notification and counter-allegations by R.B. that the Tenants broke a water line and damaged shrubs, which he regarded as common property. In one of the Tenant D.M.'s responses, he states the following to R.B.: "Any further action by you to come into my property without 24 hours notice and I will assume that you mean to harm me and/or my property and I will protect it accordingly." Tenants' counsel further submitted that the landlord-tenant relationship has been on a downward trajectory, despite this being a long tenancy. Tenants' counsel directed me to clause 20 of the tenancy agreement, arguing the patio was the Tenants responsibility as per the contract.

The Landlord's evidence includes affidavits from M.J., T.H., and G.D., all of whom identify themselves as employees for the gardening company and all of whom indicate they were undertaking their duties for the Landlord on November 14.

M.J.'s affidavit details how he had first met the man residing at the subject rental unit in the summer of 2022. M.J. details how the man began taking pictures of him, "stormed" up to him and cornered him. M.J. says the man was very mad and came to within 6 inches of his face and said "Are you the one blowing leaves onto my entrance way".

M.J. further details that on November 14, 2022 he was loading his truck about 40 feet away from the rental unit entrance when he heard the man yelling and saw him throw a punch and hit G.D.'s face. M.J. says the yelling continued and G.D. walked away. M.J. further details how he, T.H., and G.D. were by their trucks when the man approached them 45 seconds to a 1.5 minutes later and began to yell at them once more, "pushing" a phone into G.D.'s face while G.D. just stood there.

T.H. in her affidavit details how on November 14th a resident from the property approached her claiming she did not clean the leaves from in front of his entrance door. T.H. reports that she told the resident that she had but that maybe more had fallen and offered to clean them up. T.H. says that the resided became agitated, started pacing back and forth and yelling about how terrible they were, how terrible the company was, and that he would call the Better Business Bureau. T.H. then reports that the resident began to take photographs of herself, her co-worker, and their truck. T.H. says to disengage she went about her duties on the backside of the property.

T.H. indicates that when she returned from working at the back of the property she noticed that areas she had cleaned had soil and leaves spread about. She says that she began recording a video of the area. She further says that she recorded a second video when she heard yelling and swearing. I have been provided with a copy of both videos by the Landlord.

T.H. reports that she witnessed the man spit on her boss. She further reports that later the "three of us" were standing by their truck when the individual approached with his camera out, yelling, and getting "really close". T.H. says she say the individual put the phone about a foot away from G.D.'s face. Finally, T.H. reports that the man walked away still swearing.

G.D.'s affidavit details how he had received a text message from T.H. about a man harassing the staff. The Landlord's evidence includes a copy of the November 14 text message sent from T.H. to G.D.. G.D. says that he was near to the area and went to the property in question at approximately 2:15 PM. G.D. says that he asked M.J. whether the individual in question was the man from the corner suite and M.J. confirmed that it

was. G.D. indicates in his affidavit that the man was known to him as he had previously harassed, taken photographs of staff members, and acted aggressively to staff over the previous 18 months.

G.D. reports having walked to the rental unit and seen the man outside. G.D. reports that the man looked at him and said “What (superlatives) are you doing her, what are you going to do about it?”. G.D. says he had not yet said anything to the man. G.D. says that he remained at the sidewalk and started to tell him to stop harassing staff member and taking photographs of their female workers. G.D. admits to yelling and using superlatives.

G.D. further reports that the man opened the gate, approached him, and came very close to him “knowingly spraying saliva on [his] face”. G.D. says that he told him to “get the (superlative) out of my face”. G.D. reports that the man bumped into his chest, that G.D. pushed him back with both his arms stepping back as he pushed. G.D. then says that the man “took a swing at [him], grazing [his] check and nose.” G.D. says he stepped back and that the argument continued.

Finally, G.D. says the man retreated toward his gate and continued to yell at G.D.. G.D. says he told the man to stop taking pictures of his staff and that D.M. spat at him. G.D. indicates he returned to the work truck when the man returned, began to yell and held a phone 12 inches away from his face. G.D. says that the man eventually returned to his patio.

According to Tenants’ counsel, on November 14th D.M. took note of leaves that had blown onto the Tenants’ patio. I am told by counsel that D.M. asked the landscapers to clean the patio and says he was told that this was not their responsibility. I am further told that D.M. then went to take photographs of the landscaper’s trucks. After this point, D.M. is said to have begun sweeping his patio when G.B. approached aggressively and told D.M. that if he was not working, he would take him out back. Counsel admits that D.M. swung at G.D. but argues that this was in self-defence after G.D. had pushed D.M., referring me to G.D.’s admission in his evidence.

I am advised by counsel that the Tenant D.M. reported the incident to the police on the day it occurred and that G.D. reported the incident some days later. It was argued by counsel that G.D.’s delay in filing with the police is likely due to his initiating the physical confrontation with the Tenant.

Counsel further raised issue with the quality of the Landlord's evidence, pointing to inconsistencies in the respective narratives from the affidavits of T.H., M.J., and G.D.. In particular, counsel says that M.J. was said to have witnessed the interaction but does not report seeing G.D. push the Tenant, despite G.D. admitting to doing so in his own affidavit. Counsel further pointed that M.J. did not report seeing the Tenant bumping G.D.'s chest either. Counsel also raised issue with being unable to cross-examine G.D. as the Landlord relied solely on affidavit evidence. The Landlord's agent says that G.D. was to attend but could not as his daughter was in the hospital.

Tenants' counsel argued that the present matter is the result of the Landlord's financial interest in raising the rent. I am advised that the Landlord has applied for an additional rent increase for a capital expenditure (the "ARI-C Matter") and that the Tenants refused to accept the rent increase when it was requested of the Landlord prior to filing the application. In the Tenants' written submissions, it was argued that the timing of this application was the result of a pre-hearing on the ARI-C Matter which did not go to plan for the Landlord. The Tenants' evidence includes a copy of a pre-hearing decision on the ARI-C Matter indicating the hearing took place on December 2, 2022 and the decision rendered on December 7, 2022.

Tenant's counsel submitted that the test for an order of possession under s. 56 of the *Act* is a high one and requires sufficient evidence, reading passages of Policy Guideline #51 in her submissions. It was argued that the Landlord had failed to meet this threshold. It was further argued that the Tenants do not pose any risk to the Landlord or the other occupants at the residential property in general and that landscapers do not fall within the ambit of the legislation as they are neither the Landlord or the other occupants. Finally, it was argued that there is no immediate risk posed by D.M., such that ending the tenancy early was unwarranted.

The parties confirm the Tenants continue to reside within the rental unit.

Analysis

The Landlord applies for an early termination of the tenancy pursuant to s. 56 of the *Act*. A landlord may end a tenancy early under s. 56 where a tenant or a person permitted on the residential property by the tenant:

- significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property;
- put the landlord's property at significant risk;

- engaged in illegal activity that has caused or is likely to cause damage to the landlord's property, has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord; or
- caused extraordinary damage to the residential property,

These grounds, as set out in s. 56(2)(a), mirror those found within s. 47(1)(d) to (f). The key difference between ss. 47 and 56 is that under s. 56(2)(b) a landlord is not required to issue a notice to end tenancy on the basis that it would be unreasonable or unfair to the landlord or other occupants of the residential property to wait for a one-month notice given under s. 47 to take effect.

Policy Guideline #51 sets out that applications to end a tenancy early under s. 56 are for very serious breaches and require sufficient supporting evidence. Policy Guideline #51 provides examples, including acts of assault, vandalism, production of illegal narcotics, and sexual harassment.

As the applicant, the Landlord bears the onus of proving the claim on a balance of probabilities as per Rule 6.6 of the Rules of Procedure.

Based on the context of the June 30, 2022 email, it appears that the Landlord and Tenants were in the midst of an ongoing dispute on who was responsible for the patio and what portions constituted common property. Review of that correspondence from June 30 shows that the parties became rigid in their view of the matter. I find that D.M.'s response to the Landlord, particularly his interpretation of the Landlord's entry as a threat and that he would take steps to protect himself and his property to be relevant to the present matter. It demonstrates, in my mind, D.M.'s elevated emotional state with respect to the issue of the patio. It is most unfortunate the parties were unable to sort this issue out before November 14th as the present matter may not have occurred had cooler heads prevailed.

It is within this heightened context the landscapers came to the property on November 14th to undertake their duties under contract with the Landlord. There is no dispute between the parties that D.M. interacted with G.D. on November 14, 2022. Looking first at the argument that the landscapers do not fall within the ambit of s. 56 of the *Act* as they are neither occupants nor the landlord, I find counsel's argument to be unpersuasive. In this instance, the Landlord is a corporate entity not an individual. The

Landlord cannot undertake any of its responsibilities under the *Act* and the tenancy agreement except through agents, employees, and contractors. It would seem to be entirely incongruous with the legislation to permit certain rights and protections to individual landlords while not also affording those same rights and protections to corporate landlords as well.

Further, s. 1 of the *Act* defines “landlord” and includes “the owner of the rental unit, the owner’s agent or another person who, on behalf of the landlord” “exercises powers and performs duties under this Act, the tenancy agreement” (underline added). I interpret this to mean persons who are, under contract, undertaking regular maintenance of a residential property on behalf of a landlord fall within the definition of landlord under s. 1 of the *Act*. To interpret otherwise would, in my view, lead to an absurd result. For example and relying on scenario from Policy Guideline #51, if a tenant pepper sprayed an occupant of the residential property they would be subject to eviction under s. 56 of the *Act* but if they were to pepper spray an elevator repairperson repairing the elevator, they would not. It would be inconsistent, in my view, to absolve tenants of being responsible for their actions to tradespeople or repairpeople hired by a landlord in fulfilment of their duty to maintain and repair the property under s. 32(1) of the *Act*.

Based on the evidence provided, there is no disagreement with respect to the general interactions between D.M. and G.D.. G.D. went to the rental unit to speak with D.M. about his interactions with the staff, words were shared, G.D. pushed D.M. and D.M. swung at G.D.. Though not specifically admitted by the Tenant, I accept the Landlord’s evidence in the form of G.D.’s affidavit that D.M. did make physical contact with the landscaper.

The Tenants argue that this was self-defence. However, I find that the Tenants are looking at the interactions between G.D. and D.M. narrowly without a view for the wider exchange. More took place here than simply a push and a strike. G.D.’s affidavit is clear that he went to the sidewalk in front of the rental unit and did not enter the patio area at all. According to G.D., D.M. exited through his front gate and approached him such that he sprayed saliva on his face and bumped into his chest.

D.M. attended the hearing and, despite this, provided nearly no direct evidence. Neither he nor his counsel denied that G.D. was at the sidewalk, that he approached G.D., that he was came so close as to spray saliva or that he bumped G.D.’s chest. I make these comments because though I am cognizant that the Landlord bears the onus of proving the claim, I would expect some form of a rebuttal on these points from the Tenant. None

were provided. Given there was no denial on any of these points, I accept the Landlord's evidence that the Tenant did approach G.D. as detailed in G.D.'s affidavit.

In other words, the Tenant was so close as to spray saliva on him and actually made contact with his chest, meaning his face could have only been inches away from G.D.'s face. It is within this context that G.D., reasonably in my view, pushed the Tenant. In G.D.'s telling, which I accept, he stepped back while doing so. It is at this point that the Tenant swung at and grazed G.D.'s cheek and nose, which would appear consistent with G.D. stepping away from the Tenant.

Counsel argued that the Tenant reported the issue to the police first, which was held out as being indicative that he was the victim and G.D. wished to avoid raising the issue. I place no weight in this argument. If this were relevant, one may anticipate a stampede of individuals trying to file with the police first lest they be labelled as the person with someone to hide.

Looking at the self-defence argument broadly, I note that this is only permissible as a defence so far as it is reasonable with regard to, among other things, the person's role in the incident, the nature of the force or threat, and the nature and proportionality of the response to the use or threat of force (see s. 34 of the *Criminal Code*). It is incongruous for the Tenant to argue that striking someone's head is self-defence when he was pushed. That is not self-defence. The Tenant's conduct was disproportionate and escalatory in nature. Even if I were to accept the Tenant's narrative, which I do not, his conduct was excessive under the circumstances in any event.

I either event, I do not place any weight in the argument that D.M. was acting in self-defence as I find he initiated the physical interaction and struck G.D.. D.M.'s actions constitute illegal activity, namely assault, of a contractor hired by the Landlord to undertake maintenance duties in its fulfilment of its obligation under s. 32(1) of the *Act*. I further find that the Tenant's conduct seriously jeopardized the health, safety, and lawful right of the contractor in question and that this also constituted a significant interference. Given the seriousness of the breach, I further find that it would be unreasonable and unfair to the Landlord to wait for a One-Month Notice issued under s. 47 *Act* to take effect.

I find that the Landlord has made out its claim and is entitled to an order of possession under s. 56 of the *Act*.

I have considered counsel's various arguments and will address each in turn, first that the Landlord was financially motivated here. I find this argument to be entirely without merit. The ARI-C Matter is separate and apart from the present application. If the argument is that the Landlord, by hook or crook, was trying to get rid of the Tenants, surely the Landlord did not engineer the exchange between D.M. and G.D., compel the Tenant to come within inches of G.D.'s face, or for him to strike G.D.. The argument misses the point that the Tenant is responsible for his own actions. It can hardly be said that the Landlord held onto the matter to use at some later date as review of the evidence shows the affidavits were sworn in late November, with this matter being filed on December 12. In other words, in less than a month after the incident, the Landlord organized its evidence and submitted the application.

Counsel also argued that the Tenants did not have an opportunity to cross-examine G.D. and that the affidavit is somehow deficient evidence. Proceedings before the Residential Tenancy Branch are largely conducted on a summary basis, which is in keeping objective as set out under Rule 1.1 of ensuring a fair, efficient and consistent process. There is no obligation to call a witness to provide direct evidence. Affidavit evidence is more than sufficient. Further, if the Tenants felt that they ought to be permitted the opportunity to cross-examine the Landlord's affiants, the Tenants could have made an application for a summons as per Rule 5.3. In this case, the Tenants did not do so.

Finally, I also consider the argument that there is no future threat posed by the Tenant. That is not a relevant portion of the test. Provided the conduct meets the requirements set out under s. 56(2)(a), which in this case it has, and the conduct is sufficiently serious such that it is unreasonable or unfair to wait for notice to end tenancy to take effect, which in this case it is as per Policy Guideline #51, then the landlord is entitled to an order of possession. As explained above, I have found that the Landlord has made out its claim.

Conclusion

The Landlord is entitled to an order of possession pursuant to s. 56 of the *Act*. The Tenants shall provide vacant possession of the rental unit to the Landlord within **two (2) days** of receiving this order.

The Landlord was successful in its application. I find that it is entitled to the return of its filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Tenants pay the Landlord's

$100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Landlord retain $100.00 from the Tenants security deposit in full satisfaction of its filing fee.

It is the Landlord's obligation to serve the order of possession on the Tenants. If the Tenants do not comply with the order of possession, it may be filed by the Landlord with 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: January 12, 2023

Residential Tenancy Branch