Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes LANDLORD: OPC, FFT
TENANT: CNC, FFT

Introduction

This was a cross application hearing that dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

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

This hearing also dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for Cause, pursuant to sections 47 and 55; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The tenant and the landlord's 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.

Preliminary Issue- Service

Both parties agree that the landlord served the tenant with the landlord's application for dispute resolution and that it was received by the tenant. I find that the tenant was sufficiently served, for the purposes of this *Act*, pursuant to section 71 of the *Act,* with the landlord's application for dispute resolution because receipt was acknowledged. No issues with the timing of service were raised in the hearing.

Both parties agree that the tenant personally served the landlord with the tenant's application for dispute resolution and evidence. The landlord testified that the above service occurred on August 5, 2022. The tenant did not dispute this testimony. I find that the landlord was served with the above documents in accordance with section 88 and 89 of the *Act.*

The agent testified that the tenant was served with the landlord's evidence via registered mail on December 15, 2022. A registered mail receipt dated December 15, 2022 was entered into evidence. A customer receipt bearing the tenant's address and the same tracking number as seen in the December 15, 2022 registered mail receipt was entered into evidence. The landlord entered into evidence a Canada Post Tracking report for the tracking number on the above mentioned receipts which states that a notice card indicating where and when to pick up the item was left on December 16, 2022. The agent testified that the package was never picked up and was returned to sender.

The tenant testified that he did not receive the landlord's evidence or notice of a package to pick up. The tenant hypothesized that the December 15, 2022 registered mailing was delivered to the wrong address.

Based on the registered mail receipt and customer receipt, I find that the landlord served the tenant with the landlord's evidence in accordance with section 88 of the *Act.* Based on the Canada Post Tracking report, I find that a notice card pertaining to the attempted delivery of the landlord's evidence, was left at the subject rental property on December 16, 2022. I find, on a balance of probabilities, that the tenant failed to pick up this package. I find that there is no evidence to support the tenant's supposition that the package was delivered to an incorrect address. I find, on a balance of probabilities, that the tenant was properly served, and failed to pick up his mail.

Pursuant to section 90 of the *Act,* I find that the tenant was deemed served with the landlord's evidence on December 20, 2022. The landlord's evidence is accepted for consideration. I note that failure to pick up registered mail does not override the deeming provisions in section 90 of the *Act.*

Issues to be Decided

1. Is the tenant entitled to cancellation of the Notice, pursuant to section 47 of the *Act*?
2. Is the tenant entitled to recover the filing fee from the landlord, pursuant to section 72 of the *Act*?
3. Is the landlord entitled to and Order of Possession for Cause, pursuant to section 72 of the *Act*?
4. Is the landlord entitled to recover the filing fee from the tenant, pursuant to section 72 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 1, 2014 and is currently ongoing. Monthly rent in the amount of $1,325.00 is payable on the first day of each month. A security deposit of $575.00 and a pet damage deposit of $575.00 were paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for these applications.

The agent testified that the Notice was posted on the tenant's door on July 26, 2022. The tenant testified that he received the Notice, posted on his door, but does not recall the date he received it. The tenant testified that he filed to dispute the Notice within the time period allowed. The tenant filed to dispute the Notice on August 5, 2022, 10 days after the landlord testified the Notice was posted.

The Notice was entered into evidence, is signed by the agent, is dated July 26, 2022, gives the address of the rental unit, states that the effective date of the notice is August 26, 2022, is in the approved form, #RTB-33, and states the following grounds for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant;
- Tenant has not done required repairs of damage to the unit/site.

The Details of Cause section of the Notice states:

> Tenant has modified the railings of the balcony and form the gate, installed stairs down between properties creating a sitting area for his personal use. Warning notice was served on July 6,2022 the railing was not restored since.
>
> Tenant is smoking cigarettes inside the unit which poses significant health and safety risk for not only the building, but tenants who live in this building and all employees and/or trades engaged to perform service at the building.

The agent testified that the Notice was served on the tenant because the tenant made unapproved alterations to the railing on the tenant's patio and refused to return the patio gate to its original condition. The agent testified that the tenant installed a gate in the railing and stairs leading down to the ground space between the apartment building and a neighbouring property (the "ground space").

The agent's written submissions state that the tenant is using the ground space as a private sitting area. The agent testified that the tenant is not permitted to use the ground space for his own personal use and that the ground space is not part of the tenancy agreement. The agent entered into evidence photographs of the gate, the stairs and the ground space. In the ground space, an outdoor carpet, table and chairs can be seen.

The agent testified that she verbally informed the tenant on multiple occasions that he had to return the railing to its original condition and that he had to remove the stairs. The agent testified that the tenant refused.

The agent testified that the tenant was then served with a warning letter on July 6, 2022. The agent testified that she posted the July 6, 2022 warning letter on the tenant's door on July 6, 2022, and that her assistant witnessed the posting.

After providing the above testimony the agent called her assistant O.O. (the "assistant") as a witness. O.O. affirmed to tell the truth. O.O. testified that she witnessed the agent post a warning letter pertaining to the unauthorized alteration of the railing on July 6, 2022, on the tenant's door.

The July 6, 2022 warning letter was entered into evidence and states:

> It was brought to our attention that you modified the railing of balcony and form the gate, installed the stairs down between properties creating a sitting area for your personal use.
>
> The area between [redacted] is not for tenants use, and it is against the Clause 12 of your Agreement.
>
> I refer you to the Tenancy Agreement signed by you on March 28, 2014 in respect to the above.
>
> **12. ALTERATIONS. The Tenant shall not make or cause any structural alterations to be made.** PAINTING, PAPERING AND DECORATING shall be done only with the prior written consent of the Landlord with authorized colours only. HOOKS, NAILS, TAPES OR OTHER DEVICES for hanging pictures or plants or for affixing anything to the structure shall be of a type approved by the Landlord and shall only be used with his prior consent. HEAVY APPLIANCES OR EQUIPMENT of any kind may not be installed by the Tenant without written permission of the Landlord. AUTOMOBILE AND OTHER REPAIRS SHALL NOT BE DONE IN PARKING AREAS or on the Landlord's property. Failure to comply shall result in a charge of $50.00 for cleaning a soiled parking stall (i.e. oil, etc.). The Tenant is responsible for chimney cleaning when necessary and not less than once a year.
>
> According to other tenants complaints you are having BBQ down there, listening to the loud music, letting dog run and poop there, as well disturbing the dogs of our neighbor using sticks under the fence. After that our neighbor does not longer allow his dogs be on his own yard.
>
> After that I did repeat few times that you were not allowed to make any alteration on the property you are renting but instead you threatened me saying that you will destroy me and company I am working for. The way you were talking to me was very aggressive and intimidating.
> All the time the phone was on speaker and I had Assistant manager beside. If needed she could provide a statement.

The agent testified that after receiving the above letter, the tenant continued to refuse to return the railing to its original condition and so the Notice was served on the tenant.

The tenant testified that in July or August 2021 he received verbal permission from the agent to clean up the ground space which was full of weeds and garbage and to modify the railing to install a gate and install stairs.

The tenant testified that he filled 30 garden bags with materials he collected from the ground space and that the agent was happy with his volunteer work. The tenant entered into evidence undated text messages between himself and the agent showing full garden bags. In the text messages the tenant states “21 bags plus Your welcome”. The agent responds “Thank you”. The tenant also texted the landlord before and after photographs of the ground space. The modified railing and stairs cannot be seen in any of the photos.

The tenant testified that he is not using the ground space and that he installed the gate and the stairs so that he could clean the ground space. The tenant testified that he spent a lot of money to make the ground space beautiful for all the tenants. The tenant testified that the only thing he does in the ground space is garden and that he doesn’t have a bbq down there.

The tenant testified that he only had the table and chairs set up for one day for photography purposes. The tenant testified that the landlord knew about the alterations he made for a full year before he received the Notice.

The tenant testified that he does not recall receiving the July 6, 2022 warning letter. The tenant testified that the agent verbally told him to return the railing back to the way it was and to remove the stairs. Both parties agree that the tenant has not done so.

The agent testified that he gave the tenant permission to clean up the ground space, but did not provide him with permission to physically alter the subject rental property. The agent testified that she only learned of the alterations made in 2022.

Both parties agree that after the Notice was served the tenant offered to pay the landlord a $250.00 deposit on the alterations. Both parties agree that the landlord did not accept the tenant’s offer.

The tenant asked the landlord what illegal activity she is alleging against him, as one of the reasons to end tenancy on the Notice is that the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant.

The agent testified that he changed the railing. The tenant testified that changing a railing is not illegal. The agent testified that the tenant is disturbing people and that this is a safety issue. The tenant denied disturbing people and testified that he has not done anything illegal. The agent did not testify as to what law the tenant breached.

Analysis

Based on the testimony of both parties I find that the Notice was posted on the tenant's door on July 26, 2022, in accordance with section 88 of the *Act*. I find that the tenant was deemed served with the Notice on July 29, 2022, three days after its posting, in accordance with section 90 of the *Act.*

Section 53(2) of the *Act* states that if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section. The earliest date permitted under section 47 is August 31, 2022. I find that the corrected effective date of the Notice is August 31, 2022.

Upon review of the Notice I find that it meets the form and content requirements of section 52 of the *Act* because it:

- is signed and dated by the agent,
- gives the address of the subject rental property,
- state the effective date of the notice,
- states the ground for ending the tenancy, and
- is in the approved form, RTB Form #33.

I note that stating the incorrect effective date does not invalidate the Notice, and that the corrected effective date applies.

Section 47(1)(e)(ii) states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that 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.

The term "illegal activity" includes a serious violation of federal, provincial or municipal law, whether or not it is an offence under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw.

The agent did not submit into evidence or testify as to what law the landlord is alleging the tenant breached. I find that the landlord has not proved the basic elements of this ground for eviction as the landlord did not state what law the tenant allegedly breached. I find that the landlord is not entitled to an Order of Possession pursuant to section 47(1)(e)(ii) of the *Act.*

Section 47(1)(g) of the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant does not repair damage to the rental unit or other residential property, as required under section 32 (3) *[obligations to repair and maintain]*, within a reasonable time.

Section 32(3) of the *Act* states that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

I find that the tenant cut the railing on the patio of the subject rental property and installed a gate and stairs. I find that in cutting the railing, the tenant damaged the property.

I find that the tenant did not have authorization, verbal or otherwise, to cut the railing and install a gate and stairs. In making this finding I take into consideration the testimony of both parties and in particular the text messages entered into evidence by the tenant between the landlord and the tenant regarding the garden bags. I note that in the text messages, the tenant is clearly reporting to the agent on the work he completed at the subject rental property. The images in the texts show the before and after condition of the ground space and the amount of filled garden bags. What the images clearly do not show are the alterations made to the subject rental property. I find that had the landlord approved the alterations, the images of those alterations would also have been provided to the agent. I find that the tenant only had permission to clean the ground space and did not have permission to alter the subject rental property.

I accept the agent's testimony that she did not know about the alterations made by the tenant until 2022 when other tenants reported the issue to her. Based on the testimony of both parties, I find that the agent verbally, on more than one occasion before the July 6, 2022 warning letter was posted, asked the tenant to repair the railing and remove the stairs and that the tenant refused to do so.

Based on the testimony of the agent and the assistant, I find, on a balance of probabilities, that the July 6, 2022 warning letter was posted on the tenant's door on July 6, 2022. I accept the agent's testimony over that of the tenant because the agent's testimony was supported by the independent testimony of the assistant. I find that pursuant to section 90 of the *Act,* the tenant was deemed served with the July 6, 2022 warning letter on July 9, 2022, three days after its posting.

I find that based on the warning letter and the verbal communication between the tenant and the agent, that the tenant was aware that the landlord wanted the railing repaired and the stairs removed. I find that the tenant elected not to make the repairs. I find that the tenant was obligated to make the repairs pursuant to section 32(3) of the *Act* because the tenant's actions intentionally caused the damage.

I find that while the July 6, 2022 warning letter does not specifically state that the tenant must return the railing to its original condition, the tenant was well aware of the landlord's request for same as the tenant acknowledged that the agent verbally requested the tenant to do so.

I find that the tenant has not repaired the damage to the rental unit within a reasonable time as required under section 32(3) of the *Act* and the landlord was therefore entitled to serve the tenant with the Notice pursuant to section 47(1)(g) of the *Act*. I find that a reasonable time to have completed the repairs was within two weeks of receipt of the July 6, 2022 warning letter. I find that the repairs have still not been made six months after receipt of the July 6, 2022 warning letter and approximately five months after the service of the Notice.

Pursuant to my above findings, I uphold the Notice and dismiss the tenant's application for dispute resolution without leave to reapply.

Section 55(1) of the *Act* states that 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 find that since the Notice complies with section 52 of the *Act* and the tenant's application to cancel the Notice was dismissed, the landlord is entitled to an Order of Possession.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover the $100.00 filing fee from the tenant, pursuant to section 72 of the *Act.*

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain $100.00 from the tenant's security deposit.

Conclusion

The tenant's application for dispute resolution is dismissed without leave to reapply.

The landlord is entitled to retain $100.00 from the tenant's security deposit.

Pursuant to section 55(1) of the *Act,* I grant an Order of Possession to the landlord effective at **1:00 p.m. on January 31, 2023,** which should be served on the tenant. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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 10, 2023

Residential Tenancy Branch