



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes OPR, FFL

Introduction

This hearing dealt with the landlords' application, filed on November 15, 2022, pursuant to the *Residential Tenancy Act* ("Act") for:

- an order of possession for unpaid rent, pursuant to section 55; and
- authorization to recover the \$100.00 filing fee paid for this application, pursuant to section 72.

The tenant did not attend this hearing. The two landlords, "landlord PB" and "landlord JB," and the landlords' lawyer attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

This hearing lasted approximately 23 minutes from 11:00 a.m. to 11:23 a.m. I monitored the teleconference line throughout this hearing. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the two landlords, the landlords' lawyer, and I were the only people who called into this teleconference.

All hearing participants provided their names and spelling. Both landlords confirmed that they co-own the rental unit. Both landlords confirmed that their lawyer had permission to represent them, and identified him as the primary speaker. Landlord JB provided her email address for me to send this decision to both landlords after this hearing.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure* ("*Rules*") does not permit recordings of any RTB hearings by any participants. At the outset of this hearing, all hearing participants affirmed that they would not record this hearing.

I explained the hearing process to all hearing participants. They had an opportunity to ask questions. They did not make any adjournment or accommodation requests.

The landlords' lawyer stated that the tenant was personally served with a copy of the landlords' application for dispute resolution hearing package on November 25, 2022, by a process server. The landlords provided an affidavit of service, which is signed by the process server and a commissioner for affidavits. The landlords' lawyer said that the commissioner of affidavits witnessed the above service. He later clarified that the commissioner did not witness the above service but only the signing of the affidavit. In accordance with section 89 of the *Act*, I find that the tenant was personally served with the landlords' application on November 25, 2022.

The landlords' lawyer confirmed that the landlords uploaded evidence, which includes a copy of the 10 Day Notice and the affidavit of service, to the online RTB dispute access site, late on March 24, 2023. He said this was an "oversight" on the part of the landlords, before he became involved in representing them. The landlords' evidence was provided to the RTB late, contrary to Rule 3.1 and 3.14 of the RTB *Rules*, which requires the applicants' evidence to be provided as soon as possible, and no less than 14 days prior to this hearing, which occurred on March 28, 2023.

The landlords' lawyer repeatedly stated that the landlords' Ten Day Notice to End Tenancy for Unpaid Rent or Utilities, dated October 11, 2022 ("10 Day Notice") was personally served to the tenant on November 25, 2022, by a process server. The landlords provided an affidavit of service, which is signed by the process server and a commissioner for affidavits. Landlord PB was arguing with the landlords' lawyer, indicating it was not served on the above date, but landlord PB did not provide another date of service. Landlord PB stated that he did not have a copy of the 10 Day Notice in front of him during this hearing. In accordance with section 88 of the *Act*, I find that the tenant was personally served with the landlords' 10 Day Notice on November 25, 2022.

Pursuant to section 64(3)(c) of the *Act*, I amend the landlords' application to include the full first legal name of landlord PB, who only indicated his nickname. The landlords' lawyer consented to this amendment during this hearing. I find no prejudice to either party in making this amendment.

Issues to be Decided

Are the landlords entitled to an order of possession for unpaid rent?

Are the landlords entitled to recover the filing fee paid for this application?

Background and Evidence

While I have turned my mind to the landlords' documentary evidence, the testimony of the two landlords, and the submissions of the landlords' lawyer at this hearing, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the landlords' claims and my findings are set out below.

Landlord PB testified regarding the following facts. This tenancy began on June 1, 2019. A written tenancy agreement was signed by both parties, but a copy was not provided for this hearing. Monthly rent in the current amount of \$1,700.00 is payable on the first day of each month. A security deposit of \$850.00 was paid by the tenant and the landlords continue to retain this deposit in full. The tenant continues to reside in the rental unit, as the landlords observed him there on the day before this hearing.

Landlord PB stated the following facts. The landlords issued a 10 Day Notice, which states that rent of "\$1,700.00 plus 5,100 from June until Aug 2022 Total of 4 Month Rent," was due on October 1, 2022, on page 2 of the notice. This includes four months of unpaid rent from June to August and September 2022. The fourth month of rent is for October 2022. The fourth month of rent is actually for September 2022, which was not explained on the notice.

The landlords' lawyer made the following submissions. The landlords seek an order of possession against the tenant. The tenant failed to pay rent to the landlords. The Arbitrator can "correct the anomalies" in the landlords' 10 Day Notice. The landlords indicated that no utilities were due on October 11, 2022, on page 2 of the notice.

Analysis

Burden of Proof

The landlords have the burden of proof, on a balance of probabilities, to prove this application. The *Act*, *Regulation*, *RTB Rules*, and Residential Tenancy Policy Guidelines require the landlords to provide evidence of this application, in order to obtain an order of possession and a monetary order for the filing fee, against the tenant.

At the outset of this hearing, the landlords' lawyer confirmed that the landlords served their application to the tenant, as required. The landlords were provided with a four-page document entitled "Notice of Dispute Resolution Proceeding" ("NODRP") from the RTB, which includes the phone number and access code to call into this hearing.

The NODRP states the following at the top of page 2, in part (emphasis in original):

The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.

- *It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.*
- *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.*
- *Parties (or agents) must participate in the hearing at the date and time assigned.*
- *The hearing will continue even if one participant or a representative does not attend.*
- *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

The NODRP contains provisions that a legal, binding decision will be made and links to the RTB website and the *Rules* are provided in the same document. During this hearing, I informed the landlords and their lawyer that I had 30 days to issue a written decision regarding this application.

The landlords received a detailed application package from the RTB, including the NODRP, with information about the hearing process, notice to provide evidence to support this application, and links to the RTB website. It is up to the landlords to be aware of the *Act*, *Regulation*, *RTB Rules*, and Residential Tenancy Policy Guidelines. It is up to the landlords, as the applicants, to provide sufficient evidence of their claims, since they chose to file this application on their own accord.

Rules

The following RTB *Rules* are applicable and state the following, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

I find that the landlords did not properly present their evidence, as required by Rule 7.4 of the RTB *Rules of Procedure*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules of Procedure*.

This hearing lasted 23 minutes, so the landlords and their lawyer had ample time and opportunity to present this application and evidence. Only the landlords and their lawyer attended this hearing, as the tenant did not attend. During this hearing, I repeatedly asked the landlords and their lawyer if they had any other information to present and provided them with multiple opportunities for same.

The landlords provided confusing and inconsistent testimony during this hearing. I frequently had to ask them questions to clarify service of their application and their 10 Day Notice, and to clarify the inconsistent information provided on the 10 Day Notice, as well as direct them to the relevant page numbers and dates, during this hearing.

The landlords did not provide a copy of the written tenancy agreement for this hearing. The landlords did not have a copy of the 10 Day Notice in front of them during this hearing. The landlords argued with their own lawyer regarding the date of service of the 10 Day Notice. The landlords' lawyer asked the landlords to clarify the amount of unpaid rent that was indicated on page 2 of the notice because he said it was unclear.

Findings

Section 46 of the *Act* states the following, in part:

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...

Section 46(1) of the *Act* permits the landlords to issue a 10 Day Notice only after rent is unpaid and section 52(d) of the *Act* requires the landlords to state on a notice to end tenancy, the reason for issuing the notice.

The landlords indicated on the 10 Day Notice, that \$1,700.00 plus \$5,1000 was due from June to August 2022, which was 4 months of rent. June to August 2022 is 3 months of rent, not 4. I repeatedly stated this during the hearing. The landlords did not indicate that September 2022 rent was unpaid on the notice. Landlord JB stated that the fourth month of rent was for October 2022, but then clarified it was for September 2022. There is no total amount of unpaid rent indicated on the 10 Day Notice for the correct months, there is only a calculation to be added together by the tenant.

As such, I find that the tenant did not have proper notice of the correct total amount of rent due on October 1, 2022, for the correct number of months and the correct months. I find that the tenant did not have an opportunity to pay the rent in order to cancel the 10 Day Notice. I find that the 10 Day Notice does not comply with section 52 of the *Act*.

The landlords' lawyer repeatedly stated that the 10 Day Notice was served to the tenant on November 25, 2022. When I asked how this was possible when the landlords filed this application on November 15, 2022, he insisted that the date of November 25, 2022 was correct, even when landlord JB was arguing with him that it was not correct. Landlord JB did not provide another date of service.

As such, I find that the tenant did not have sufficient time to pay the rent or file an application to dispute the 10 Day Notice at the RTB. The tenant received the notice on November 25, 2022, and had 5 days until November 30, 2022, to pay the rent or to file an application.

The effective date on the 10 Day Notice is automatically corrected to December 5, 2022, which is 10 days after the tenant was served on November 25, 2022, as per section 53 of the *Act*. During this hearing, the landlords' lawyer repeatedly stated that the tenant had 30 days for the notice to take effect. After I repeatedly asked him the effective date indicated by the landlords on page 1 of the notice, he then clarified that it stated October 31, 2022.

The landlords filed this application on November 15, 2022, prior to serving the 10 Day Notice to the tenant on November 25, 2022, and prior to the corrected effective date of the notice of December 5, 2022.

While the effective date in the landlords' 10 Day Notice can be automatically corrected pursuant to section 53 of the *Act*, I cannot correct or alter other information in the 10 Day Notice, such as dates, months, amounts, or service. These are not simply "anomalies," as explained above.

Accordingly, I find that the landlords' 10 Day Notice, dated October 11, 2022, is cancelled and of no force or effect. The landlords are not entitled to an order of possession and this claim is dismissed without leave to reapply. This tenancy will continue until it is ended in accordance with the *Act*.

As the landlords were unsuccessful in this application, I find that they are not entitled to recover the \$100.00 filing fee from the tenant. This claim is dismissed without leave to reapply.

Conclusion

The landlords' entire application is dismissed without leave to reapply.

The landlords' 10 Day Notice, dated October 11, 2022, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

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: March 28, 2023