



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      OPR, MNR, FF

### **Introduction**

This hearing was convened by way of conference call in response to an application made by the landlord for an Order of Possession for unpaid rent or utilities, for a monetary order for unpaid rent or utilities, and to recover the filing fee from the tenants for the cost of this application.

The landlord and both tenants attended the conference call hearing, gave affirmed testimony and were given the opportunity to cross examine each other on the testimony. The landlord also provided evidence in advance of the hearing. All evidence and testimony has been reviewed and is considered in this Decision.

### **Issue(s) to be Decided**

Is the landlord entitled to an Order of Possession for unpaid rent or utilities?

Is the landlord entitled to a monetary order for unpaid rent or utilities?

### **Background and Evidence**

The landlord testified that this fixed term tenancy began on May 1, 2011 and expires on April 1, 2012. A tenancy agreement was signed by the parties on April 16, 2011, a copy of which was provided for this hearing. Rent in the amount of \$1,300.00 per month is payable in advance on the 1<sup>st</sup> day of each month. Prior to the commencement of the tenancy, the landlord collected a security deposit from the tenants in the amount of \$650.00. No move-in condition inspection report was completed.

The landlord also testified that the tenants were served with the Landlord's Application for Dispute Resolution and notice of hearing documents on February 8, 2012 by a friend of the landlord. The landlord was present when the documents were placed in the mail slot of the rental unit. When questioned about notice of hearing being dated February 9, 2012, the landlord stated that to the best of his recollection, the documents were served around the 8<sup>th</sup> of the month. The landlord provided a copy of a registered mail receipt from Canada Post dated February 9, 2012 which shows that 2 registered mail packages

were sent, but the landlord testified that the registered mail was sent to the Residential Tenancy Branch, not to the tenants.

The landlord also testified that the tenants have been continually late with the rent, and failed to pay rent when it was due for the month of February, 2012. The landlord stated that the tenants were sent a text message on February 1, 2012 and one of the tenants responded. The landlord asked the tenant to deliver the rent money to the landlord, although usually throughout the tenancy the landlord would attend the rental unit to pick up the rent, and on one occasion the parties met at a restaurant and rent was collected at that time. The landlord also testified that the tenants were served with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities on February 2, 2012 by serving one of the tenants personally. The 2-page document was handed to the tenant by a friend of the landlord. A copy of the notice was provided for this hearing and it states that the tenants failed to pay rent in the amount of \$1,300.00 that was due on February 1, 2012 and contains an expected date of vacancy of February 12, 2012. The landlord received the rent in full on February 9, 2012 which caught up the rental arrears but the tenants have not vacated the rental unit.

When questioned about when the cheque was received, the landlord admitted that on February 7, 2012 a notice was received from Canada Post stating that express mail would be available for pick-up on February 8, 2012, but the landlord did not pick it up until February 9, 2012.

During the course of the hearing discussions took place about the interpretation of when the rent was paid. The *Act* states that the tenant must pay the rent within 5 days of receiving the notice, and the dates of events as described by the landlord shows that the landlord did not receive the rent within 5 days, although it was sent prior to the 5 days, the landlord had notice of it on the 5<sup>th</sup> day, and the landlord was not able to receive the money from the post office until the 6<sup>th</sup> day. The landlord picked up the mail on the 7<sup>th</sup> day.

The landlord also testified that there have been noise complaints by other tenants, but the testimony was not continued because I found that it is not related to the landlords' application. The landlord claims an Order of Possession due to the tenants' failure to pay rent within the 5 days as provided for in the *Residential Tenancy Act*.

The first tenant testified that a girl attended at the rental unit on February 2, 2012, asked the tenant what the tenant's name was, and handed the tenant the notice to end tenancy. The tenants contacted the Residential Tenancy Branch, and an employee advised the tenants to send the rent money by express mail, which they did on February 4, 2012 in the amount of \$1,300.00. The tenants provided an item number assigned to

the express mail by Canada Post and testified that the date on the receipt is February 4, 2012.

The tenants also testified that they intend to move from the rental unit by the end of March, 2012, which is the expiry date of the fixed term.

## **Analysis**

### **Notice to End Tenancy**

The *Residential Tenancy Act* states:

**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.

In this case, the tenants do not dispute being personally served with the notice to end the tenancy on February 2, 2012, and I find that the tenants have been served in accordance with the *Residential Tenancy Act*.

The *Act* goes on to state:

(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.

(5) If a tenant who has received a notice under this section does not pay the rent or 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 to which the notice relates by that date.

In the circumstances, I find that the tenants did not dispute the notice, but paid the rent on February 4, 2012 by sending it by express mail to the landlord on that date. I further find that the landlord has attempted to prove that the rent wasn't paid until February 9, 2012, but admitted receiving notification of the express mail on February 7, 2012, which was the 5<sup>th</sup> day after service of the notice to end tenancy. The landlord testified that the express mail notification stated that the express mail would be available for pick-up on

February 8, 2012, and takes the position that the rent was received by the landlord on the 9<sup>th</sup> of February, and therefore, the tenants did not pay the rent within 5 days after service of the notice to end the tenancy.

### Use and Occupancy

The Residential Tenancy Branch publishes Fact Sheets for landlords and tenants, and I refer to *Landlord and Tenant Fact Sheet RTB-124 – Re-instatement of Tenancies*, which states as follows:

“A landlord and tenant can agree to reinstate the tenancy if the tenant pays all or some of the rent after the five day period has passed but before the tenant is required to vacate.

When a landlord does not want the tenancy to continue, the landlord must:

1. Clearly tell the tenant that the payment of rent outside the 5 day period, or payment of some of the rent within the five 5 day period, does not cancel the Notice;
2. Specifically tell the tenant that the rental payment is being accepted for the use and occupancy only and does not reinstate the tenancy; and
3. Tell the tenant of one of the following options:
  - The tenant must vacate in accordance with the Notice to End Tenancy, or
  - The tenant must vacate at the end of the month.

If a dispute arises, the landlord must prove the payment was accepted for use and occupation only and not to reinstate the tenancy. Therefore, the landlord should advise the tenant, in writing, that the tenancy is not being reinstated and the tenant must vacate.”

In this case, I find that the tenants paid the rent on February 4, 2012 by sending it by express post that day. The landlord testified that it was available for pick-up at the post office on February 8<sup>th</sup>, which was the 6<sup>th</sup> day after the notice was served but the landlord had notice of it on the 7<sup>th</sup>, which was the 5<sup>th</sup> day after the notice was served. There is no evidence before me, nor did I hear any testimony with respect to the landlord ever telling either tenant verbally or in writing that the landlord was accepting the rent for use and occupancy only and that the notice was not cancelled and the tenancy was not being reinstated. If I accept the landlord’s interpretation of Section 46 of the *Act*, that the landlord did not receive the rent until after the 5<sup>th</sup> day, the landlord had the obligation to notify the tenants that the rent money was being received for use and occupancy

only. If I do not accept the landlord's interpretation of Section 46, then I must find that the tenants paid the rent within the 5 day period. In either case, the landlord's application for an Order of Possession cannot succeed.

### Service Requirements

The *Act* requires a person who makes an application for dispute resolution to serve a copy on the other party together with the notice of hearing within 3 days of making it. The landlord testified that the application was served on the tenants by putting it in the mail slot of the rental unit on February 8, 2012. However, I do not accept that testimony because the notice of hearing was not issued until February 9, 2012. The landlord filed the application on February 8, 2012, and if the landlord served it on that date, the landlord would not have served the notice of hearing because it was not yet prepared by the Residential Tenancy Branch. Therefore, I find that the landlord has failed to establish that the tenants were served in accordance with the *Residential Tenancy Act*.

Since the landlord has not been successful with the application, the landlord is not entitled to recovery of the filing fee for the cost of this application.

### Conclusion

For the reasons set out above, the landlord's application is hereby dismissed in its entirety.

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 01, 2012.

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Residential Tenancy Branch