



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **Decision**

**Dispute Codes:** MNR, OPR

### **Introduction**

This hearing dealt with an Application for Dispute Resolution by the landlord for an Order of Possession based on the Notice to End Tenancy for Unpaid Rent dated September 13, 2012 and a monetary order for rent owed. Both parties appeared and gave testimony during the conference call.

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

The issues to be determined based on the testimony and the evidence are:

Is the landlord entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent?

Is the landlord entitled to monetary compensation for rental arrears owed?

### **Preliminary Matter: Service of Respondent's Evidence**

The tenant had submitted documentary evidence on file to dispute the landlord's claims. However, the landlord testified that the evidence was never received by the landlord. The tenant stated that he had only sent the evidence to the Residential Tenancy Branch, but did not serve copies to the landlord.

The Residential Tenancy Rules of Procedure, Rule 3.1, requires that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding. If the respondent intends to dispute an Application for Dispute Resolution, Rule 4 states that copies of all available documents, photographs, video or audio tape evidence the respondent intends to rely upon as evidence at the dispute resolution proceeding must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding but if the date of the dispute resolution proceeding does not allow the five (5) day requirement in a) to be met, then all of the respondent's evidence must be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

I note that the Landlord and Tenant Fact Sheet contained in the hearing package makes it clear that *“copies of all evidence from both the applicant and the respondent and/or written notice of evidence must be served on each other and received by RTB as soon as possible..”*

Given the above, I declined to accept or consider any evidence that was not properly served on the other party. However, verbal testimony from both parties was considered.

### **Background and Evidence**

The landlord submitted into evidence a copy of the 10-Day Notice to End Tenancy dated September 13, 2012 with effective date of September 28, 2012. No copy of the tenancy agreement was submitted into evidence.

The landlord testified that the tenancy began approximately five years ago at which time the tenant paid a security deposit of \$425.00. The landlord testified that the tenant failed to pay \$782.00 rent for the month of September due on September 1, 2012. The landlord testified that a Ten Day Notice to End Tenancy for Unpaid Rent was served on the tenant by registered mail sent on September 13, 2012.

The tenant denied receiving the Ten Day Notice to End Tenancy for Unpaid Rent. However, the landlord supplied the Canada Post tracking number to confirm that the Notice was properly served on the tenant.

I note that section 90 of the Act provides direction for when a document is deemed to have been served, as follows:

(a) if given or served by mail, on the 5th day after it is mailed; (my emphasis)

(b) if given or served by fax, on the 3rd day after it is faxed;

(c) if given or served by attaching a copy of the document to a door or other place, on the 3rd day after it is attached;

(d) if given or served by leaving a copy of the document in a mail box or mail slot, on the 3rd day after it is left.

A Notice mailed on September 13, 2012, would be deemed to be received on September 18, 2012.

The tenant testified that, on September 28, 2012, he tried to pay the landlord September's rent in the form of a money order, but the landlord refused payment. The tenant testified that he also tried to pay rent owed for October 2012, which was refused.

The landlord testified that the tenant's offer to pay occurred after the 5-day deadline to cancel the Ten Day Notice to End Tenancy for Unpaid Rent. The landlord stated that, although the rent for September and October 2012 is still owed, he feared accepting the funds after the five-days allowed as it would reinstate the tenancy.

The landlord is seeking an Order of Possession based on the Notice and a monetary order for rent owed for September and October 2012. The total arrears being claimed by the landlord are \$1,564.00 plus the \$50.00 cost of this application .

The tenant confirmed that the rent was not paid and stated that he still has the two money orders to pay the arrears. The tenant gave testimony regarding his personal financial circumstances.

### **Analysis**

Section 26 of the Act provides that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations or the tenancy agreement. I find that the tenant did not pay the rent when rent was due.

When a tenant fails to comply with section 26, then section 46 of the Act permits the landlord to end the tenancy by issuing a Ten-Day Notice effective on a date that is not earlier than 10 days after the date the tenant receives it. This section of the Act also provides that within 5 days after receiving a notice under this section, the tenant may either pay the overdue rent, in which case the notice has no effect, or dispute the notice by making an application for dispute resolution. In this instance I find that the tenant did neither.

The Ten-day Notice also included written instructions on page 2 informing the respondent about how and when a tenant may dispute the notice if the claim is not being accepted. Under the heading "Important Facts" the form cautions that "*The tenant is not entitled to withhold rent unless ordered by a dispute resolution officer*".

In this instance I find that the tenant was in arrears at the time Notice dated September 13, 2012 was deemed served, which was September 18, 2012. I find that the tenant failed to pay the arrears within the five-day period that would cancel the Notice. Although the tenant had the funds ready to pay on September 28, 2012, I find that this was too late for the payment to function to cancel the Notice as it was beyond 5 days.

In any case, section 46(5) of the Act provides that if a tenant does not pay the rent or make an application for dispute resolution in accordance with the above, then the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date.

Given the above, I find that in the matter before me, the tenant did not pay the outstanding rent within 5 days and did not apply to dispute the Notice and is therefore conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the effective date of the Notice. Based on the evidence, I find that the landlord is entitled to an Order of Possession.

I find that the landlord has established a total monetary claim of \$1,564.00 accrued rental arrears. I hereby grant the landlord an order under section 67 for \$1,564.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

As the tenant apparently has two money orders being held for the landlord totalling \$1,564.00, I order that, these be given to the landlord in payment of the above debt.

The landlord may retain the \$50.00 cost of the application, from the tenant's security deposit and interest of \$432.46 in partial satisfaction of the claim leaving a balance of \$382.46 to be administered in compliance with section 38 of the Act.

I hereby issue an Order of Possession in favour of the landlord effective two days after service on the tenant. This order must be served on the tenant and may be filed in the Supreme Court and enforced as an order of that Court.

### **Conclusion**

The landlord was granted an Order of Possession and a monetary order for unpaid rent based on the Ten Day Notice to End Tenancy for Unpaid Rent.

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 01, 2012.

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Residential Tenancy Branch