



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, MND, MNR, MNSD, MNDC, FF

### Introduction

This hearing dealt with a landlord's application for an Order of Possession for unpaid rent and a Monetary Order for unpaid and/or loss of rent; and, authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

### Preliminary and Procedural Matters

At the beginning of the hearing the tenants' Advocate objected to the inclusion of the landlord's latest evidence submission on the basis it was served later than permitted under the Rules of Procedure. However, during the hearing the tenants' Advocate pointed to and asked that I view the content of the same evidence package. I have reviewed and considered the landlord's latest evidence package, along with all other evidence provided by both parties, in making this decision.

### Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession for unpaid rent?
2. Is rent currently outstanding and, if so, what is the amount owed?

### Background and Evidence

The tenancy commenced November 1, 2012 and the tenants paid a \$650.00 security deposit. The co-tenants are required to pay rent of \$1,300.00 on the 1<sup>st</sup> day of every month.

The landlord served one of the co-tenants with a 10 Day Notice to End Tenancy for Unpaid Rent on April 19, 2013 (the 10 Day Notice). It was in dispute as to whether the landlord gave the tenant the second page of the 10 Day Notice.

The tenants testified that they received only the first page of the 10 Day Notice. The landlord submitted that the tenants were served with both pages. I noted that the landlord only provided page one of the 10 Day Notice for my review.

The first page of the 10 Day Notice indicates that rent of \$1,070.00 was outstanding and that this was the outstanding balance as of April 19, 2013. Both parties agreed that \$300.00 was paid to the landlord on April 24, 2013 bringing the balance to \$770.00 as of April 24, 2013.

Both parties provided consistent testimony that there was a discussion between the parties after the 10 Day Notice was served regarding the payment of rent by May 1, 2013. The landlord submitted that she agreed to continue with the tenancy if the tenants paid their rent for May 2013 and the outstanding rent for April 2013 by May 1, 2013. The tenants submitted that the agreement was for the tenants to pay the May 2013 rent when due and give the landlord installment payments toward the rental arrears.

The crux of the dispute between the parties revolved around an alleged cash payment of \$1,500.00 on April 28, 2013. Below, I have summarized the respective parties' positions regarding this matter.

The tenants testified that on April 28, 2013 \$1,500.00 in new \$100.00 bills were counted out and placed in an envelope, the envelope was sealed and then deposited in a mail slot the landlord uses to collect rent payments. The tenants testified that Tenant GL and GL's wife both counted the money before it was sealed in an envelope and that the envelope was deposited in the landlord's mailbox in the presence of both co-tenants and the GL's wife.

GL's wife had been excluded as a witness at the commencement of the hearing. After I had heard testimony from both parties, GL's wife was called to testify. GL's wife testified that she did not handle the money on April 28, 2013 but watched her husband count it before it was sealed in the envelope. GL's wife also testified that the money was comprised of both new and older versions of \$100.00 bills, plus \$50.00 bills.

Tenant GL provided evidence that \$1,300.00 was withdrawn from his bank account on April 28, 2013. The other tenant testified that he contributed \$200.00 toward the April 28, 2013 payment.

The landlord testified that only she has access to the mail slot which is accessible through a secured door. The tenants did not dispute this and acknowledged that the mail slot did not appear to be tampered with.

The landlord testified that on May 1, 2013 she spoke with the tenants about the payment of rent and the arrears. The tenants informed her that they had put all of the rent arrears and May's rent in the landlord's mail slot. The landlord went to the mail slot on May 1, 2013 and found an envelope that has the co-tenants' first names and unit number on the upper left hand corner. The landlord submitted that the envelope was obviously empty and she did not open it. Rather, she photocopied the front and back of the envelope and submitted it as evidence.

It was undisputed that the rent payment for November 2012 had also gone missing under similar circumstances. Tenant GL had submitted that \$1315.00 in cash was placed in an envelope in the landlord's mail slot at the end of October 2012. The landlord submitted that she found an envelope in the mail slot that was empty. As a result, the tenants made instalment payments to the landlord to satisfy November's rent. Further, all subsequent cash payments, except the alleged payment made April 28, 2013, were given to the landlord in person and in exchange the landlord would give the tenants a receipt. I heard that the usual practice for payments made between November 2012 and April 2013 was that the tenants would phone the landlord when they had a cash payment to make and the landlord would meet the tenants to receive the cash in person and provide them with a receipt.

Documentary evidence provided for this proceeding included copies of: the tenancy agreement; page one of the 10 Day Notice; a Proof of Service for the 10 Day Notice; several receipts issued by the landlord for cash payments; a document indicating the tenant received a loan for rent from a third party on an unspecified date; a bank withdrawal receipt dated April 28, 2013; and the front and back the envelope received in the mail slot on May 1, 2013 and the envelope received at the end of October 2012.

### Analysis

In order to end a tenancy for unpaid rent a landlord must serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent in the approved form. A 10 Day Notice in the approved form is two pages and the landlord must serve the tenant with both pages as the second page contains important information with respect to the tenant's rights and obligations. The landlord bears the burden to prove both pages of the 10 Day Notice were served.

The tenants submitted that only the first page of the 10 Day Notice was served. The Proof of Service does not indicate whether the witness observed service of one or both pages, leaving me with disputed verbal testimony as to whether both pages of the Notice were served. Considering I was provided only the first page of the Notice as evidence I find I am not persuaded by the disputed verbal testimony that both pages were served. Therefore, I find the landlord has not met her burden to prove both pages were served and I do not grant the landlord's request for an Order of Possession with this Application.

The second issue to determine in this case is whether rent remains outstanding and, if so, the amount owed. According to the tenants the May 2013 rent has been paid and only \$5700.00 [\$770.00 – \$200.00 paid April 28, 2013] remains outstanding for April 2013. According to the landlord \$2,070.00 is currently outstanding and this is comprised of \$770.00 owed for April 2013 and \$1,300.00 for May 2013. The difference between the two parties' figures is \$1,500.00 which is the amount the tenants assert was deposited in the landlord's mail slot on April 28, 2013. The tenants bear the burden to prove they deposited \$1,500.00 in the landlord's mail slot.

I was provided evidence that Tenant GL withdrew \$1,300.00 on April 28, 2013 from his bank account. The question that remains is whether that money, along with another \$200.00 from Tenant DB, was actually deposited in the landlord's mail slot. In support of the tenants position that the money was deposited in the mail slot I was provided verbal testimony from the two tenants and a witness who is the wife of one of the tenants.

I found there to be some consistency and some inconsistency with the testimony of the tenants and their witness. Inconsistencies included:

- Tenant DB testified that both Tenant GL and the witness handled and counted the money before it was sealed in the envelope; however, the witness testified that she did not handle or count the money.
- Tenant GL testified that the cash payment of \$1,500.00 was comprised of new \$100.00 bills; whereas, the witness testified that the payment was comprised of \$100.00 and \$50.00 bills of new and older versions.
- Tenant DB testified that the witness was standing in the lobby area when the envelope was deposited in the landlord's mail slot; whereas, Tenant GL and the witness testified that the witness was standing near the rental unit door when the envelope was deposited in the mail slot.

Given the inconsistencies with the witness' testimony and that of the tenant, I found the witness' testimony did not lend any further credibility to the tenants' submissions; leaving me to weigh the credibility of the tenants versus that of the landlord.

With respect to credibility, in *Bray Holdings Ltd. v. Black* BCSC 738, Victoria Registry, 001815, 3 May, 2000, the court quoted with approval the following from *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p.174:

*The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the current existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

In considering all of the evidence presented to me, I find the landlord more credible and the version of events presented by the landlord to be more likely than that put forth by the tenants. I have made this determination considering the following circumstances:

- The tenants have been in rental arrears or late with their rent payments for the majority of their tenancy with their March 2013 being paid over a month late on April 5, 2013;
- After the incident with the missing payment for November 2012 the landlord always came to collect cash payments from the tenants when they called her to inform her that they had a payment to make and the landlord issued receipts.
- The tenants had been issued a 10 Day Notice on April 19, 2013 and after discussions with the landlord were aware that their tenancy would continue if they made a substantial payment to the landlord by May 1, 2013;
- The tenants deviated from their established practice of calling the landlord when time came for them to make the substantial payment to the landlord and yet the subject payment was in cash;
- The two times the tenants did not pay the landlord in person and chose to place an envelope in the landlord's secured mail box the landlord found the envelopes devoid of any cash yet the envelopes had allegedly been filled by the tenants with a substantial amount of cash.
- Only the landlord has had access to the security mail slot and the tenants acknowledged it did not appear to be tampered with, meaning, if I were to accept the tenants' version of events, the implication would be that the landlord was responsible for removing the cash. Yet, I find this highly unlikely considering:

- the landlord had accepted late and partial payments from the tenants and even granted the tenants an extension until May 1, 2013 to satisfy the arrears with an interest in keeping the tenancy going; and
- the envelope received in the landlord's mail slot on May 1, 2013 was unopened yet is obviously empty, or at least devoid of the several \$100.00 bills the tenants purport to have inserted into the envelope.

For all of the reasons given above, I find, on the balance of probabilities, that the tenants still owe the landlord \$2,070.00 in rental arrears for the months of April and May 2013, as asserted by the landlord.

The landlord is at liberty to issue a 10 Day Notice to end Tenancy for Unpaid Rent indicating rent of \$2,070.00 is outstanding.

As the parties were informed during the hearing, the issue of whether the tenants owe the landlord rent for April and May 2013, and the amount owed as of the date of this hearing, were before me to determine by way of this Application. Accordingly, my findings are final and binding upon the parties and are not to be the subject of a future dispute resolution hearing.

### Conclusion

The landlord's request for an Order of Possession was denied as I was not satisfied the landlord served both pages of the 10 Day Notice to the tenants. I have determined that the tenants owe the landlord \$2,070.00 in rent for the months of April and May 2013 and the landlord is at liberty to serve the tenants with a 10 Day Notice for that amount.

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: May 30, 2013

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Residential Tenancy Branch