



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding GATEWAY PROPERTY MANAGEMENT  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      OPR, MNR, FF

### Introduction

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

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- recovery of its filing fee from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 0945 in order to enable the tenant to connect with this teleconference hearing scheduled for 0930. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The agent testified that he served the tenant with the dispute resolution package on 22 April 2015 by registered mail. The agent provided me with a Canada Post tracking number that showed the same. On the basis of this evidence, I am satisfied that the tenant was deemed served with dispute resolution package pursuant to sections 89 and 90 of the Act.

The agent testified that he served the tenant with the 10 Day Notice on 2 April 2015 by posting the notice to the tenant's door. On the basis of this evidence, I am satisfied that the tenant was deemed served with 10 Day Notice pursuant to sections 88 and 90 of the Act.

### Preliminary Issue – Evidence After The Hearing

The agent testified that he brought a copy of the 10 Day Notice with him when he filed this application, but could not say for certain whether he left a copy with the Residential Tenancy Branch. I could not locate a copy of the 10 Day Notice.

Rule 3.19 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) provides that I may direct that evidence be submitted after the commencement of a hearing. As the tenant was recently served with the 10 Day Notice, there is no undue prejudice to the tenant by my acceptance of the agreement after the hearing. I order that the landlord submit the 10 Day Notice by fax.

I did not receive the 10 Day Notice from the agent.

#### Preliminary Issue – Amendment to Landlord's Application

Paragraph 64(3)(c) allows me to amend an application for dispute resolution.

The agent testified that after he filed this application, the tenant made a payment towards rent in the amount of \$740.00. At the hearing, the agent asked to amend this application to reduce the amount of the monetary order sought to take into account this payment. I have allowed the amendment as there is no prejudice to the tenant in doing so.

#### Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent? Is the landlord entitled to a monetary award for unpaid rent? Is the landlord entitled to recover the filing fee from the tenant?

#### Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 1 December 2014. Monthly rent of \$840.00 is due on the first. The agent testified that the landlord continues to hold the tenant's security deposit in the amount of \$420.00, which was collected at the beginning of this tenancy. The landlord did not submit a copy of the tenancy agreement as evidence.

The agent testified that on 2 April 2015, the landlord issued the 10 Day Notice to the tenant. The agent testified that the 10 Day Notice was dated 2 April 2015 and set out an effective date of 15 April 2015. The agent testified that the 10 Day Notice set out that the tenant failed to pay \$840.00 in rent that was due on 1 April 2015.

On or about 24 April 2015, the tenant paid \$740.00 towards his rental arrears. The landlord issued a receipt to the tenant that the payment was received on the basis of “use and occupancy only”. The agent testified that he has not received any payments since this payment.

The agent testified that there are no outstanding orders of this Branch in respect of this tenancy. The agent testified that the tenant has not submitted any receipts for emergency repairs to the landlord.

The landlord seeks a total monetary order in the amount of \$1,885.00:

Item	Amount
Unpaid April Rent	\$840.00
Payment Received for Use and Occupancy (24.Apr.2015)	-740.00
Unpaid May Rent	840.00
April Late Fee	25.00
May Late Fee	25.00
Recover Filing Fee	50.00
<b>Total Monetary Order Sought</b>	<b>\$1,040.00</b>

### Analysis

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice. The Act sets out that the 10 Day Notice must comply with the form and content requirements of section 52 of the Act.

In this case, the landlord did not supply a copy of the 10 Day Notice. All evidence surrounding the issuance of this notice was supplied by way of testimony. I provided the agent with an opportunity to provide a copy of the 10 Day Notice after the hearing.

While I do not disbelieve the agent’s testimony, oral evidence provided in the place of available documentary evidence is given less weight as it is inherently less reliable. This is especially the case where documentary evidence is available that could easily substantiate the landlord’s case: The best evidence available should be provided. Further, without seeing the 10 Day Notice, I am unable to determine whether that notice complied with section 52 of the Act. As such, I am unable to find, on a balance of probabilities, that the tenant was served with a 10 Day Notice that met the requirements

of sections 46 and 52 of the Act. Accordingly, I dismiss the landlord's claim for an order of possession with leave to reapply.

Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

The agent testified that \$840.00 in rent for this tenancy was due under the tenancy agreement on the first of the month. The agent has provided sworn and uncontested testimony that the tenant has unpaid rental arrears totaling \$940.00. This amount represents arrears from April and May less the payment received in the amount of \$740.00. There is no evidence before me that indicates that the tenant was permitted to deduct all or a portion of the rent. As such, I find that the landlord has proven its entitlement to the rent arrears. The landlord is entitled to a monetary order for the unpaid rent.

Paragraph 7(1)(d) of the *Residential Tenancy Regulations* (the Regulations) provides that a landlord may charge an administration fee of \$25.00 for late payment of rent. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee.

There is no tenancy agreement in evidence before me. Accordingly, the landlord has failed, on a balance of probabilities, to prove that the tenancy agreement contains a clause regarding the payment of late fees and the quantum of any such payment. The landlord is not entitled to recover late fees.

The agent testified that the landlord continued to hold the tenant's \$420.00 security deposit, plus interest, paid in or about December 2014. Over that period, no interest is payable. Although the landlord's application does not seek to retain the security deposit, using the offsetting provisions of section 72 of the Act, I allow the landlord to retain the security deposit in partial satisfaction of the monetary award.

As the landlord was partially in this application, I find that the landlord is entitled to recover half of the \$50.00 filing fee paid for this application.

### Conclusion

I issue a monetary order in the landlord's favour in the amount of \$545.00 under the following terms:

Item	Amount
Rent Arrears	\$940.00
Filing Fee	25.00
Offset Security Deposit	-420.00
<b>Total Monetary Order</b>	<b>\$545.00</b>

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: June 2, 2015

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Residential Tenancy Branch

