



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding C/O Remax Crest Realty  
and [tenant name suppressed to protect privacy]

## **DECISION**

### Dispute Codes:

**OPR, MNR, MNSD, FF**

### Introduction

This was a cross-application hearing.

On December 18, 2015 the tenants applied to cancel a 10 day Notice to end tenancy for unpaid rent that was issued on December 11, 2015 and to recover their filing fee costs.

On December 29, 2015 the landlord applied requesting an Order of possession for unpaid rent, a monetary Order for unpaid rent, to retain the security deposit, compensation for damage or loss under the Act and to recover the filing fee costs.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present affirmed oral testimony and to make submissions during the hearing.

### Preliminary Matters

The landlord received the tenant's original application on December 18, 2015. The application was left with the landlord's reception personnel.

At the start of the hearing the tenants said that on January 14, 2016 they submitted an amended application and evidence. Those documents were not before me. The landlord confirmed they received the amended application on January 14, 2016, including some evidence. The tenants said they amended their application to include a monetary claim in the sum of \$22,150.00.

Section 2.11 of the Residential Tenancy Branch (RTB) Rules of Procedure provides, in part:

#### ***2.11 Amending an application before the dispute resolution hearing***

*The applicant may amend the application without consent if the dispute resolution hearing has not yet commenced.*

*If applications have not been served on any respondents, the applicant must submit an amended copy to the Residential Tenancy Branch and serve the amended application on each respondent as soon as possible.*

*If the application has been served, a copy of the amended application must be served on each respondent so that they receive it at least 14 days before the scheduled date for dispute resolution hearing.*

(Emphasis added)

Therefore, as the tenants served the landlord with their original application they were required to serve any amended application to the respondent not later than 14 days before the hearing. Service on January 14, 2016 provided the landlord with only seven days prior notice of the claim. Therefore, I determined that the tenants had not complied with the Rules of Procedure and that I would not consider the amended application. The tenants are at liberty to submit another application and to serve documents as set out in the legislation and Rules.

The tenants confirmed that they vacated the rental unit effective January 19, 2016. The tenants will return the keys to the landlord within the next day.

#### Issue(s) to be Decided

Is the landlord entitled to a monetary Order for unpaid rent in the sum of \$7,200.00 for December 2015 and January 2016?

May the landlord retain the security and pet deposits paid by the tenants?

#### Background and Evidence

This two year fixed term tenancy agreement commenced on September 1, 2015. Rent was \$3,600.00 per month, due on the first day of each month. The tenants' paid pet and security deposits, each in the sum of \$1,800.00.

There was no dispute that the tenants received a 10 day Notice ending tenancy for unpaid rent or utilities issued on December 11, 2015, with an effective date of December 24, 2015. The tenants disputed that Notice on December 18, 2015. The Notice was served through the mail slot on December 15, 2015.

The Notice indicated that the Notice would be automatically cancelled if the landlord received \$3,600.00 within five days after the tenants were assumed to have received the Notice. The Notice also indicated that the tenants were presumed to have accepted that the tenancy was ending and that the tenants must move out of the rental by the date set out in the Notice unless the tenants filed an Application for Dispute Resolution within five days.

The tenants confirmed they did not pay December 2015 and January 2016 rent owed as the result of a dispute over repairs they believe were required to the home. The tenants confirmed that they did not make any emergency repairs or expenditures, outside of the purchase of several air filters and a letter from a friend who is a contractor.

I explained that deductions may be made from rent owed if the tenants have made emergency repairs to the rental unit and that the items described would not qualify as emergency repairs.

### Analysis

Section 90 of the Act stipulates that a document that is placed in a mail slot is deemed to be received on the 3<sup>rd</sup> day after it is posted. Therefore, I find that the tenants received the Notice to end tenancy on December 18, 2015, the date they applied to dispute the Notice.

Section 46(1) of the Act stipulates that a 10 day Notice ending tenancy is effective 10 days after the date that the tenant receives the Notice. As the tenants are deemed to have received this Notice on December 18, 2015, I find that the earliest effective date of the Notice is December 28, 2015.

Section 53 of the Act stipulates that if the effective date stated in a Notice is earlier than the earliest date permitted under the legislation, the effective date is deemed to be the earliest date that complies with the legislation. Therefore, I find that the effective date of this Notice to End Tenancy was December 28, 2015.

In the absence of evidence to the contrary, I find that the tenants were served with a Notice ending tenancy that required the tenants to vacate the rental unit on December 28, 2015, pursuant to section 46 of the Act.

Section 46 of the Act stipulates that a tenant has five days from the date of receiving the Notice ending tenancy to either pay the outstanding rent or to file an Application for Dispute Resolution to dispute the Notice. In the circumstances before me the tenants did dispute the Notice but have come to the hearing confirming that rent was not paid. Therefore, pursuant to section 46(5) of the Act, I find that the tenants accepted that the tenancy has ended on the effective date of the Notice; December 28, 2015.

During the hearing I explained Section 26(1) of the Act, which provides:

**26** (1) *A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.*

In the absence of any emergency repairs completed by the tenants the tenants were required to pay rent when it was due. Their remedy was to submit an application for dispute resolution, not to withhold rent owed. Therefore, I find that the tenants' application is dismissed.

As the tenant's application is dismissed, pursuant to section 55(1) of the Act, I find that the landlord is entitled to an Order of possession.

In the absence of evidence to the contrary, I find that the tenants have not paid rent from December 1, 2015 to December 28, 2015 and per diem rent from December 29, 2015 to January 31, 2016 totalling \$7,200.00 and that the landlord is entitled to compensation in that amount.

I find that the landlord is entitled to per diem rent from December 29, 2015 to the end of January 2016 as it is highly unlikely the landlord will be able to obtain possession and locate new tenants within that time. The landlord had no knowledge of the tenants' decision to vacate and became aware of this only during the hearing. The tenants had disputed the Notice, indicating they intended to remain in the rental unit.

I find that the landlord's application has merit and, pursuant to section 72 of the Act that the landlord is entitled to recover the \$100.00 filing fee from the tenants for the cost of this Application for Dispute Resolution.

Pursuant to section 72 of the Act, I find that the landlord is entitled to retain the pet and security deposits in partial satisfaction of the claim.

The landlord has been granted an Order of possession that is effective two days after service to the tenants. This Order may be served on the tenants, filed with the Supreme Court of British Columbia and enforced as an Order of that Court.

Based on these determinations I grant the landlord a monetary Order for the balance of \$3,700.00. In the event that the tenants do not comply with this Order, it may be served on the tenants, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

### Conclusion

The landlord is entitled to an Order of possession and monetary Order for unpaid rent and per diem rent.

The landlord may retain the security and pet deposits in partial satisfaction of the claim.

The landlord is entitled to filing fee costs.

The tenant's application is dismissed.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: January 21, 2016

---

Residential Tenancy Branch

