



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding LUXMORE REALTY  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      CNR, OLC (Tenant)  
                             FFL, OPRM-DR (Landlord)

### Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Tenant filed her application December 31, 2018 (the "Tenant's Application"). The Tenant applied to dispute a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated December 21, 2018 (the "10 Day Notice"). The Tenant also sought an order that the Landlord comply with the Act, regulation and/or the tenancy agreement.

The Landlord filed their application December 27, 2018 (the "Landlord's Application"). The Landlord applied for an Order of Possession based on the 10 Day Notice, to recover unpaid rent and for reimbursement for the filing fee.

The Landlord submitted an amendment dated January 4, 2019 (the "Amendment"). The Amendment changed the monetary claim to \$7,750.00.

T.Z. appeared at the hearing for S.L. who is named on the tenancy agreement and Tenant's Application as the landlord. T.Z. advised that S.L. is an employee of the Landlord and the Landlord acts as agent for the owner of the rental unit. T.Z. confirmed that orders issued should be issued to the Landlord and therefore I have only named the Landlord in the style of cause and not S.L.

Nobody appeared at the hearing for the Tenant.

I explained the hearing process to T.Z. who did not have questions in this regard. T.Z. provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence for the Landlord's Application.

T.Z. referred to a registered mail receipt submitted as evidence. He confirmed the package included the evidence and Amendment. The registered mail receipt shows the package was sent to the Tenant at the rental unit January 4, 2019. I looked the tracking number up on the Canada Post website which shows the package was delivered and signed for by the Tenant January 7, 2019.

Based on the undisputed testimony of T.Z., evidence submitted and Canada Post website information, I find the Tenant was served with the hearing package, evidence and Amendment in accordance with sections 88(c) and 89(1)(c) of the *Residential Tenancy Act* (the "*Act*"). Based on the Canada Post website information, I accept the Tenant received the package January 7, 2019. I find the Tenant was served in sufficient time to prepare for, and appear at, the hearing.

I also note the Tenant would have been aware of the hearing as the Tenant's Application was scheduled for the same date and time.

As I was satisfied of service, I proceeded with the hearing in the absence of the Tenant.

I have not considered the evidence submitted by the Tenant as she did not attend the hearing and present the evidence as required by rule 7.4 of the Rules of Procedure (the "Rules").

Rule 7.3 of the Rules states that an arbitrator can dismiss an Application for Dispute Resolution without leave to re-apply if a party fails to attend the hearing.

Given the Tenant did not appear at the hearing, I have no evidence before me as to the basis for the Tenant's Application. In the absence of evidence from the Tenant, the Tenant's Application is dismissed without leave to re-apply.

T.Z. was given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered the Landlord's documentary evidence and oral testimony of T.Z. I will only refer to the evidence I find relevant in this decision.

### Issues to be Decided

1. Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?
2. Is the Landlord entitled to recover unpaid rent?
3. Is the Landlord entitled to further monetary compensation?
4. Is the Landlord entitled to reimbursement for the filing fee?

### Background and Evidence

A written tenancy agreement was submitted as evidence. It is between S.L. on behalf of the Landlord and the Tenant in relation to the rental unit. The tenancy started December 15, 2018 and was for a fixed term ending December 31, 2019. Rent is \$3,000.00 per month due on the first day of each month. The Tenant was supposed to pay a security deposit of \$1,500.00. There is an addendum attached to the agreement. The agreement and addendum are signed by S.L. and the Tenant.

Term 2 in the addendum states that there will be a late fee of \$50.00 if rent is not paid by the first day of the month and \$100.00 if not paid by the seventh day. It also states there will be a \$50.00 NSF fee.

The 10 Day Notice states the Tenant failed to pay \$1,500.00 in rent due December 15, 2018. It is addressed to the Tenant and refers to the rental unit. It is signed and dated by S.L. It has an effective date of December 26, 2018.

T.Z. testified that he and S.L. served both pages of the 10 Day Notice on the Tenant in person on December 21, 2018. The Landlord submitted a Proof of Service signed by the Tenant. T.Z. confirmed this is the Tenant's signature.

The Tenant disputed the 10 Day Notice December 31, 2018.

T.Z. testified that the Tenant was supposed to pay \$1,500.00 for the security deposit and \$1,500.00 for pro-rated rent for December by December 15, 2018. He testified that the Tenant provided a cheque that was returned. A copy of this was submitted as evidence. T.Z. testified that the Tenant paid \$1,500.00 on December 27, 2018. T.Z. said the Landlord treated this as the pro-rated rent for December. T.Z. testified that the Tenant did not pay rent since December 27<sup>th</sup> and did not pay the security deposit. T.Z. testified that the Tenant had provided post-dated cheques and that the cheque for January was returned.

T.Z. said he did not think the Tenant had authority under the *Act* to withhold rent.

The Landlord sought the following monetary compensation:

1. \$100.00 December late payment fee;
2. \$3,000.00 January rent;
3. \$50.00 January late payment fee;
4. \$3,000.00 February rent;
5. \$1,500.00 security deposit;
6. \$50.00 NSF charge for January cheque; and
7. \$50.00 NSF charge for December cheque.

T.Z. pointed to a document submitted as evidence and stated that it shows the January cheque was returned.

### Analysis

Section 26(1) of the *Act* requires tenants to pay rent in accordance with the tenancy agreement unless they have a right to withhold rent under the *Act*.

Section 46 of the *Act* allows a landlord to end a tenancy where a tenant has failed to pay rent. The relevant portions of section 46 state:

- 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.
- (2) A notice under this section must comply with section 52...
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
- (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.

...

Section 55(1) of the *Act* requires me to issue an Order of Possession when a tenant has disputed a notice to end tenancy and the application is dismissed or the notice is upheld. The notice must comply with section 52 of the *Act*.

Based on the written tenancy agreement, I accept the Tenant was obligated to pay \$3,000.00 in rent per month by the first of each month. Based on the undisputed testimony of T.Z., tenancy agreement and cheque submitted, I accept the Tenant was to pay \$1,500.00 in rent as pro-rated rent for December by December 15, 2018. I accept that the Tenant did not have a right to withhold rent under the *Act*. There is no evidence before me that she did. I find the Tenant was required to pay \$1,500.00 in rent by December 15, 2018 under section 26(1) of the *Act* and that section 46(3) of the *Act* does not apply.

Based on the undisputed testimony of T.Z., and cheque submitted, I accept the Tenant's rent cheque for December rent was not processed due to the account being closed and find the Tenant failed to pay rent as required.

Given the Tenant failed to pay rent as required, the Landlord was entitled to serve her with the 10 Day Notice pursuant to section 46(1) of the *Act*. Based on the undisputed testimony of T.Z., and Proof of Service, I find the Tenant was served with the 10 Day Notice in accordance with section 88(a) of the *Act*. Given the 10 Day Notice was served in person, I find the Tenant received it December 21, 2018. I also note the Tenant must have received the Notice as she disputed it.

Upon a review of the 10 Day Notice, I find it complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*.

The Tenant had five days from receipt of the 10 Day Notice on December 21, 2018 to pay or dispute it under section 46(4) of the *Act*. Given the dates involved, I find the Tenant had until December 27, 2018 to dispute the 10 Day Notice and until December 26, 2018 to pay the outstanding rent. I find that the Tenant had an extra day to dispute the 10 Day Notice as the RTB office was not open December 26, 2018.

I accept the undisputed testimony of T.Z. that the Tenant paid the outstanding rent on December 27, 2018. This was past the five-day time limit for paying the rent.

Our records show the Tenant filed the Application December 31, 2018, after the time limit for doing so. The Tenant did not seek more time to file the Application. Nor did the Tenant appear at the hearing.

I find the Tenant did not pay the outstanding rent, or dispute the 10 Day Notice, within the time limit set out in section 46(4) of the *Act*. Therefore, pursuant to section 46(5) of the *Act*, the Tenant is conclusively presumed to have accepted that the tenancy ended December 31, 2018, the corrected effective date of the 10 Day Notice. The Tenant was required to vacate the rental unit by December 31, 2018.

I note that, even if the Tenant disputed the 10 Day Notice within the five-day time limit, her dispute has been dismissed without leave to re-apply. The Landlord therefore would have been entitled to an Order of Possession pursuant to section 55(1) of the *Act*.

I find the Landlord is entitled to an Order of Possession based on the 10 Day Notice and I award the Landlord this Order. The Order is effective two days after service on the Tenant. I acknowledge that I have awarded the Landlord a monetary order for unpaid rent for February. I find it appropriate to issue an Order effective two days after service on the Tenant given rent is due on the first day of each month and given the date in the month.

I accept the undisputed testimony of T.Z. that the Tenant did not pay rent other than the \$1,500.00 paid December 27, 2018. I accept the Tenant owes \$6,000.00 for January and February rent.

Section 7 of the *Residential Tenancy Regulation* (the "*Regulations*") states:

Non-refundable fees charged by landlord

7 (1) A landlord may charge any of the following non-refundable fees:

...

(c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;

(d) subject to subsection (2), an administration fee of **not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent**;

...

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

I understand the late payment fees sought pursuant to term 2 in the addendum to fall under section 7(2)(d) of the *Regulations*. There is no evidence before me that the fees requested fall under section 7(1)(c) of the *Regulations*. I find term 2 in the addendum contravenes the *Regulations* as it relates to "late handling fees". I find the term unenforceable pursuant to section 5 of the *Act*. I decline to award the Landlord compensation for the late payment fees sought.

I am not satisfied based on the evidence before me that the NSF fees requested are fees that have been charged by a financial institution as the Landlord did not submit any evidence supporting this. I decline to award the Landlord compensation for the NSF fees.

Based on the tenancy agreement and cheque submitted, I accept the Tenant was supposed to pay the Landlord a \$1,500.00 security deposit. I accept the undisputed testimony of T.Z. that the Tenant never paid this. However, the recourse for the Landlord in these circumstances would have been to issue a notice to end tenancy under section 47 of the *Act* which is now a moot point. The Landlord is not entitled to a monetary order for the security deposit.

As the Landlord was partially successful in this application, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, the Landlord is entitled to monetary compensation in the amount of \$6,100.00. Pursuant to section 67 of the *Act*, I award the Landlord a Monetary Order in this amount.

Conclusion

The Tenant's Application is dismissed without leave to re-apply.

The Landlord is granted an Order of Possession effective two days after service on the Tenant. This Order must be served on the Tenant and, if the Tenant does not comply with this Order, it may be filed and enforced in the Supreme Court as an order of that Court.

The Landlord is entitled to monetary compensation in the amount of \$6,100.00. I issue the Landlord a Monetary Order in this amount. This Order must be served on the Tenant and, if the Tenant does not comply with the Order, it may be filed in the Provincial Court (Small Claims) 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 Section 9.1(1) of the *Act*.

Dated: February 11, 2019

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Residential Tenancy Branch