



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR, OPR MNRL -S MNDCL -S FFL

### Introduction

This hearing was set to deal with cross applications. The tenant filed to dispute a 10 Day Notice to End tenancy for Unpaid Rent and filed an Amendment to seek other non-specific remedies. The landlord filed for an Order of Possession for unpaid rent; and, a Monetary Order for unpaid and loss of rent, and other anticipated damages or losses; and, authorization to retain the security deposit.

Both parties appeared or were represented at the hearing and had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

### Preliminary and Procedural Matters

I confirmed that the landlord received the tenant's Application for Dispute Resolution and Amendment.

The landlord sent his Application for Dispute Resolution and evidence to the tenant via registered mail on January 25, 2020 but it was not picked up by the tenant. The tenant stated she did not receive any notice cards for registered mail. The tenant indicated there have been issues with receiving mail at the rental unit because the landlord retrieves the mail from the community mailbox. The landlord testified that he received the notice cards in the community mailbox and that he placed the cards in the mailbox where the tenants ordinarily retrieved their mail. The landlord testified that the tenant's father, who also lived in the rental unit, picked up the notice cards.

The parties were in agreement that the tenants have since vacated the rental unit and possession of the unit was returned to the landlord on February 16, 2020. As such, it is unnecessary to consider whether the 10 Day Notice should be upheld or cancelled, and

I dismiss the tenant's application. I did not permit the tenant to amend her Application for Dispute Resolution as the remedies she sought were not specified. Further, the tenancy is over meaning the tenant's remedy for breaches of the Act or tenancy agreement by the landlord are monetary and the tenant has not made a monetary claim. The tenant was informed of her right to file another Application for Dispute Resolution if she seeks to make a monetary claim against the landlord.

The landlord no longer requires an Order of Possession since the tenants have already returned possession of the unit to him and that portion of his application is dismissed. The other component of the landlord's application was a monetary claim against the tenant. The landlord's monetary claim included a claim for unpaid and/or loss of rent and other anticipatory damages or losses.

Although the tenant did not pick up or receive the registered mail sent to her, considering the tenant came to this hearing to dispute a 10 Day Notice for unpaid rent, I found it reasonable the tenant would expect this proceeding to deal with the matter of unpaid rent. The tenant confirmed that she was prepared to deal with the issue of non-payment of rent. Accordingly, I informed the parties that I would made a decision pertaining to unpaid and/or loss of rent.

With respect to the other anticipatory loses claimed by the landlord in filing his monetary claim, the Act does not permit me to award anticipatory losses. As such, I dismissed the landlord's claims for anticipatory losses with leave to reapply. The landlord may pursue other losses not considered in this decision by making another Application for Dispute Resolution.

#### Issue(s) to be Decided

1. Is the landlord entitled to recovery unpaid and/or loss of rent, and if so, what is the amount he is entitled to receive at this point?
2. Is the landlord entitled to a late fee?
3. Is the landlord authorized to retain the tenant's security deposit?

#### Background and Evidence

The landlord entered into a five month fixed-term tenancy agreement with the former tenants for a tenancy set to commence on March 15, 2019. The tenancy agreement provides that the tenants would pay a monthly rent of \$1,400.00 on the 15<sup>th</sup> day of every month. The tenancy agreement provides that upon expiry of the fixed term on August

15, 2019 the tenancy would continue on a month to month basis. The Addendum includes a provision for payment of a late payment fee of \$25.00.

On September 15, 2019 the tenancy agreement described above was assigned to the named tenant and her boyfriend. The security deposit of \$700.00 paid by the former tenants remained held in trust by the landlord for the named tenant.

The tenant confirmed that she had a copy of the written tenancy agreement entered into by the former tenants and that she had agreed to the terms in the agreement.

The landlord submitted by way of his ledger that the tenants requested permission to have a third person, the tenant's father, occupy the rental unit and \$50.00 was added to the monthly rent. By way of her testimony, the tenant agreed that the monthly rent obligation was \$1,450.00.

The landlord received rent of \$1,450.00 for the months September 2019, October 2019 and November 2019; however, only \$980.00 was paid toward the rent due on December 15, 2019.

The landlord testified that on December 16, 2019 the landlord put a 10 Day Notice to End Tenancy for Unpaid Rent in the mailbox where the tenants ordinarily received their mail. On December 24, 2019 the tenant filed to dispute the 10 Day Notice indicating her income assistance cheque was not due to be received until December 18, 2019 and that she received the 10 Day Notice on December 21, 2019.

On December 24, 2019 the tenant also sent an e-transfer payment of \$490.00 to the landlord but the e-transfer was cancelled on December 25, 2019. The landlord submitted the tenant cancelled the e-transfer. The tenant submitted that the landlord did not accept the payment, so her bank cancelled the transfer. In either event, the tenant did not present payment to the landlord in any other way and the shortfall of rent has not yet been paid.

The tenants did not pay any rent for January 15, 2020. The tenant submitted that this is because the landlord was in breach of the Act and the tenancy agreement and she suffered damages and losses as a result. The alleged breaches included termination of cable and internet services; the tenant's vehicle being towed twice; and, excessive noise due to stomping in the unit above.

On January 21, 2020 the tenant sent the landlord a text message stating they would be vacating the rental unit on February 15, 2020. The landlord acknowledged receipt of the text message on the same date.

The tenant testified that they finished moving out late in the evening of February 15, 2020 and returned the keys and possession of the rental unit to the landlord on February 16, 2020.

The landlord seeks to recover the unpaid rent for December 2019; loss of rent for January 2020 and February 2020; as well as late fees. The landlord argued that he should be awarded the full months rent payment that was due on February 15, 2020 since the tenants did not give him at least 30 days of advance notice of their intention to vacate.

The tenant objected to paying a late fee, claiming the landlord “knew” her income assistance cheques came after the 15<sup>th</sup> day of the month and because the landlord withheld her cheque until December 21, 2019. The landlord denied withholding her cheque and any delay was due to the mail system.

The tenant objected to having to pay the full amount of rent due on February 15, 2020 since they gave the landlord notice that they would be vacating on January 21, 2020; the tenants vacated the rental unit late in the evening of February 15, 2020; and, returned they keys on February 16, 2020.

### Analysis

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent. The Act provides for very limited and specific circumstances when a tenant may withhold rent.

The landlord relies upon a written tenancy agreement entered into with former tenants and assigned to the tenant and the tenant recognized that she was agreeable to the terms in that written tenancy agreement.

I note that the tenancy agreement before me provides for a monthly rent of \$1,400.00, not \$1,450.00. Nor, is there any provision for additional rent payable for additional occupants in the written tenancy agreement presented to me. Under section 13 of the Act, a landlord may charge more rent for an additional occupant, but such a term must

be included in the tenancy agreement. Further, amendments to a tenancy agreement must be agreed upon by both parties and where there is a written tenancy agreement, I expect that any change also be in writing and there was no written agreement to amend the existing tenancy agreement. Also, rent cannot be increased except in accordance with the rent increase provisions of the Act. In the absence of a term requiring the tenants to pay more rent for additional occupants, and the absence of a written amendment or proper rent increase, I find the tenant's monthly rent obligation was \$1,400.00 per month as provided in the written tenancy agreement. Accordingly, I find the tenants over-paid rent by \$50.00 per month for the months of September 2019, October 2019 and November 2019.

Where a tenant has over-paid rent or paid a rent increase that does not comply with the rent increase provisions, section 43 of the Act provides that the tenant may recover the overpaid rent by deducting it from rent otherwise payable.

I accept the unopposed evidence before me that the tenants paid \$980.00 for December 2019 rent and I find that left a shortfall of \$420.00 [ $\$1,400.00 - \$980.00$ ] less the \$150.00 they were entitled to recover for the previous month's overpayments. This has never been received by the landlord and I find the landlord remains entitled to receive the rent.

Where a tenant does not pay the full amount of rent due the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent. When a tenant receives a 10 Day Notice the tenant has five days to pay the outstanding rent to nullify the 10 Day Notice or the tenant has five days to dispute the 10 Day Notice by filing an Application for Dispute Resolution. If a tenant does not pay the outstanding rent or dispute the 10 Day Notice within five days then, pursuant to section 46(5) of the Act, the tenant is conclusively presumed to have accepted the tenancy will end and must vacate the rental unit by the effective date of the 10 Day Notice.

The tenant submitted that she received the 10 Day Notice on December 21, 2019. On December 24, 2019 the tenant sent the landlord a payment of \$490.00 and filed to dispute the 10 Day Notice; however, the payment was "cancelled". The landlord provided a copy of the email received from "Interac" on December 25, 2019 that reflects the tenant cancelled the payment. I find it more likely than not that the tenant cancelled the payment since she had filed to dispute the 10 Day Notice on December 24, 2019 and as reflected in the email from "Interac". The tenant did not have a legal basis under the Act for not paying the rent when due or within five days after receiving the 10 Day Notice. As such, I find the tenancy came to an end pursuant to the 10 Day Notice due

to unpaid rent and the tenants continued to over-hold the unit without compensating the landlord for their continued occupation.

Over-holding is where a tenancy has ended and the tenants remain in possession of the rental unit. Under section 57 of the Act, if a tenant over-holds, the landlord may recover compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended. In this case, I find the tenants did not return possession of the unit until February 16, 2020. Therefore, I award the landlord compensation for over-holding up to and including that date.

I calculate the landlord's entitled to compensation for over-holding to be \$1,400.00 that would have been paid on January 15, 2020 for the period of January 15 – February 14, 2020 and \$96.55 for February 15 and 16, 2020 [\$1,400.00 x 2/29 days in February 2020].

As for the landlord's request for the full amount of rent payable on February 15, 2020, I decline to consider that request with this decision since the landlord may be able to rent the unit in March 2020 and the landlord's burden to prove mitigation of rental losses requires further evidence that has not been provided, especially considering the tenant gave the landlord notice of their intention to vacate the rental unit on January 21, 2020. Therefore, I dismiss the landlord's request to recover loss of rent after February 16, 2020 with leave to reapply.

As for late fees, I find the addendum contains a term that complies with section 7 of the Residential Tenancy Regulations and I award the landlord a late fee of \$25.00 for late payment of the rent due on December 15, 2019. The tenant's argument that the landlord "knew" her income assistance cheques came after the 15<sup>th</sup> of the month is not a legal basis for failing to pay rent when agreed upon in the tenancy agreement. As for the tenant's argument the landlord withheld her income assistance cheque until December 21, 2019, I find that of no consequence since the tenant admitted that her cheque was not due to be received until December 18, 2019 and at that point the rent was already late. I make no award for late fees beyond December 2019 since the entitlement to receive late fees is provided in a tenancy agreement and I have found that the tenancy agreement came to an end in December 2019.

I authorize the landlord to retain the tenant's security deposit in partial satisfaction of the rent owed to the landlord. I also award the landlord recovery of the \$100.00 filing fee paid for this application.

In light of all of the above, the landlord is provided a Monetary Order to serve and enforce upon the tenant, calculated as follows:

Unpaid rent due December 15, 2019 [\$1,400.00 - \$980.00]	\$ 420.00
Less: overpaid rent for Sept, Oct and November 2019	(150.00)
Overholding for period of: January 15 – February 14, 2020	1,400.00
Overholding for period of February 15 and 16, 2020	96.55
Filing fee	100.00
Less: security deposit	<u>(700.00)</u>
Monetary Order	\$1,166.55

### Conclusion

The tenant's application to cancel the 10 Day Notice is dismissed. The tenants have already returned possession of the rental unit to the landlord and an Order of Possession is not required or provided to the landlord.

The tenant's Amendment was not considered as the remedy sought was not specified. The tenant remains at liberty to seek monetary compensation for breaches of the Act or tenancy agreement by the landlord, if any.

The landlord has been awarded unpaid rent and loss of rent for over-holding, and a late fee. The landlord is authorized to retain the tenant's security deposit and is provided a Monetary Order for the balance of \$1,166.55 to serve and enforce upon the tenant. The landlord's claims for other anticipated damages or loss were dismissed with leave.

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: February 27, 2020

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Residential Tenancy Branch