



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR, OLC, FFT  
OPR-DR, OPRM-DR, MNDCL-S, FFL

### Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (the “Act”). The matter was set for a conference call.

The Tenant’s Application for Dispute Resolution was made on February 20, 2020. The Tenant applied to cancel a 10-Day Notice for Unpaid Rent and Utilities (the “Notice”) Dated February 12, 2020, for an order for the Landlord to comply with the *Act*, and the return of their filing fee.

The Landlord’s Application for Dispute Resolution was made on February 22, 2020. The Landlord is requesting an order of possession to enforce a 10-Day Notice for Unpaid Rent and Utilities (the “Notice”) Dated February 12, 2020, for a monetary order for unpaid rent, a monetary order for compensation for my monetary loss or other money owed, and to recover the filing fee paid for this application.

The Landlord and the Landlord’s husband (the “Landlord”) and the Tenant attended the hearing and were each affirmed to be truthful in their testimony. The Tenant and the Landlord were provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

In a case where a tenant has applied to cancel a Notice, Rule 7.18 of the Residential Tenancy Branch Rules of Procedure require the landlord to provide their evidence submission first, as the landlord has the burden of proving cause sufficient to terminate the tenancy for the reasons given on the Notice.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Issues to be Decided

- Should the Notice to End Tenancy dated February 12, 2020 be cancelled?
- If not, is the Landlord entitled to an order of possession pursuant to section 55 of the Act?
- Is the Landlord entitled to a monetary order for unpaid rent and utilities?
- Is the Landlord entitled to a monetary order for compensation for my monetary loss or other money owed?
- Is the Landlord entitled to the return of his filing fee?
- Should the Landlord be ordered to comply with the Act and/or tenancy agreement?
- Is the Tenant entitled to the return of his filing fee?

### Background and Evidence

The parties agreed that the tenancy began on May 11, 2018, and that rent was set at \$1700.00, at the outset of this tenancy agreement, and is to be paid by the 11<sup>th</sup> day of each month. The parties also agreed that the Landlord is holding a \$850.00 security deposit for this tenancy. The Landlord submitted a copy of the tenancy agreement with attached 12-page addendum into documentary evidence.

The Landlord testified that they served the 10-Day Notice to the Tenant on February 12, 2020, by posting it to the front door of the rental unit. The 10-Day Notice listed an effective date of February 23, 2020, and an outstanding rent amount of \$1,742.50. for the February 2020, rent.

The Landlord testified that the Tenant had not paid the outstanding rent as indicated on the Notice for February 2020 and had also not paid the rent for January 2020, March 2020 and April 2020.

The Tenant testified that he had not paid the rent for January, February, March and April 2020. The Tenant testified that they had been paying an illegal rent increase as of May 2019 and late fees in breach of the Act and that they were withholding their rent until that matter was resolved.

The Tenant testified that the Landlord had issued a rent increase by text message and that they never issued the correct form as required by the Act. The Tenant also testified

that the Landlord had been collecting late fees that were in excess of the allowable amount.

The Landlord testified that the rent increase form had been served to the Tenant by text message, and by posting it to the front door of the rental unit on February 5, 2019. The Landlord testified that the rent increase was for \$42.50 and was effective as of May 11, 2019. The Landlord submitted a copy of the rent increase notice into documentary evidence.

The Tenant disagreed with the Landlord's claim that the rent increase notice had been posted to the front door of the rental unit.

The Landlord is requesting that the Notice to end tenancy be enforced and that an order of possession and a monetary order be issued, as the Tenant had not paid the rent within five days of receiving the 10-Day Notice as required.

### Analysis

Based on the above, the oral testimony and the documentary evidence, and on a balance of probabilities, I find as follows:

Section 46 of the *Act* requires that upon receipt of a Notice to End Tenancy for Non-payment of Rent, a tenant must, within five days, either pay the amount of the arrears indicated on the Notice or dispute the notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch. If the tenant does not do either of these things, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice under section 46(5).

#### ***Landlord's notice: non-payment of rent***

**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 [form and content of notice to end tenancy].*

(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.*

I find that the Tenant received the 10-Day notice on February 15, 2020, three days after it was posted to the front door of the rental unit, pursuant the deeming provisions set out in section 90 of the *Act* and that the Tenant did apply to dispute the Notice within the legislated timeline.

I accept the agreed-upon testimony of both parties that the Tenant had not paid the outstanding rent, as stated on the 10-Day Notice within the required five days. Therefore, I find that the Tenant is in breach of section 26 of the *Act* by not paying the rent in accordance with the tenancy agreement, and I dismiss the Tenant's application to cancel the 10-Day Notice.

Section 55 of the *Act* states that a landlord may request an order of possession if a notice to end the tenancy has been given by the landlord and the tenant's request to dispute the notice is dismissed. Section 55(1) of the *Act* states as follows:

***Order of possession for the landlord***

***55(1)*** *If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if*

- (a) the landlord's notice to end tenancy complies with section 52 [form and content of notice to end tenancy], and*
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.*

I have reviewed the Notice to end the tenancy, and I find the Notice complies with section 52 of the *Act*.

Therefore, I find that the Landlord is entitled to an order of possession, pursuant to section 55 of the *Act*. I grant the Landlord an **Order of Possession** effective **two days** after service on the Tenant. This order may be filed in the Supreme Court and enforced as an order of that Court. The Tenant is cautioned that the costs of such enforcement are recoverable from the tenant.

Additionally, I accept the testimony of both parties that the Tenant has not paid the outstanding rent as indicated on the Notice, nor has the Tenant paid the full rent for January, March, and April 2020. However, during these proceedings, I find that the parties offered conflicting verbal testimony regarding the service of a notice of rent increase, and the amount of rent due. In cases where two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In this case, as it is the Landlord who is claiming for a monetary order for unpaid rent, I find that it is the Landlord who holds the burden of proof.

I have reviewed the documentary evidence submitted to these proceedings by the Landlord, and I find that there is no evidence before me to support their claim that the notice of rent increase had been served to the Tenant in accordance with the *Act*. In the absence of evidence to support the Landlord's claim for the rent in the increased amount, I find that I must rely on the tenancy agreement to provide the amount of rent due for this tenancy. Therefore, I find that the Landlord has established an entitlement to a monetary award for the outstanding rent, at a rate of \$1,700.00 per month, for January, February, March and April 2020, in the amount of **\$6,800.00**. I authorized the Landlord to retain the Tenant's security deposit as partial satisfaction of this award.

As for the Landlord's claim for \$569.00 in late fees for this tenancy. I have reviewed the tenancy agreement and noted that page nine of the attached 12-page addendum to this tenancy agreement states the follow regarding late fees:

"Rent is due and payable on the 11<sup>th</sup> day of each month for the term of the tenancy specified in the above contract. Post dated cheques will be issued for the entire term of the tenancy agreement. If the cheques are returned NSF in the tenants account then there will be a charge of \$25 per cheque returned (*E-transfer*) as well as \$5.00 charge for the first day rent is late and \$2.00 for each additional day the rent is not paid."

[Reproduced as Written, the italicised section was ink amended]

The Residential Tenancy Regulation (Regulation) speaks to the allowable fee that may be charged by a landlord during a tenancy, section 7 of the Regulation states the following:

***Non-refundable fees charged by landlord***

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

- (a)direct cost of replacing keys or other access devices;*
- (b)direct cost of additional keys or other access devices requested by the tenant;*
- (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;***
- (e)subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;*
- (f)a move-in or move-out fee charged by a strata corporation to the landlord;*
- (g)a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.*

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

Pursuant to section 7(1d) of the Regulation, I find that the Landlord breached the Regulation by writing a tenancy agreement term that would allow for a late fee to exceed the maximum allowable amount. Section 5 of the *Act* states the following regarding attempts to contract contrary to the *Act* or the Regulation:

***This Act cannot be avoided***

***5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.***

*(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.*

I find that the Landlord has attempted to contract out of the maximum allowable late fee as set out by Regulation. Consequently, I find that the term in this tenancy agreement

regarding the payment of late fees to be of no effect, and I dismiss the Landlord's claim for the recovery of late fees due for this tenancy in its entirety.

The Tenant has also claimed for an order of the Landlord to comply with the Act. As I have already determined that the Landlord has breached section 5 of the Act and section 7 of the Regulation, I find it appropriate to order the Landlord to comply with the Act and the Regulation and to make no further attempts to contract contrary to the Act or the Regulation.

Section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Landlord has been successful in part of their application, I find the Landlord is entitled to recover the \$100.00 filing fee for this application.

As the Tenant has been unsuccessful in their application, I find the Tenant is not entitled to recover the \$100.00 filing fee for this application.

I grant the Landlord a **Monetary Order** in the amount of **\$6,050.00**; consisting of \$6,800.00 in outstanding rent for the months of January, February, March, and April 2020, \$100.00 in the recovery of the Landlord's filing fee, less the \$850.00 the Landlord is holding in a security deposit for this tenancy.

### Conclusion

The Tenant's application is dismissed, without leave to reapply.

The Landlord's application for the recovery of late fees is dismissed, without leave to reapply.

I order the Landlord to comply with the Residential tenancy Act and the Residential Tenancy Regulation.

I grant an **Order of Possession** to the Landlord effective not later than **2 days** after service upon the Tenant. The Tenant must be served with this Order. Should the Tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I grant the Landlord a **Monetary Order** in the amount of **\$6,050.00**. The Landlord is provided with this Order in the above terms, and the Tenant must be served with this Order as soon as possible. Should the Tenant 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: April 28, 2020

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Residential Tenancy Branch