



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR-PP MNRL-S FFL

Introduction

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

- an order of possession for non-payment of rent pursuant to section 55;
- a monetary order for unpaid rent in the amount of \$6,554.60 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

Tenant BV attended the hearing on behalf of both parties. The landlord was represented at the hearing by an agent ("**JR**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

JR testified, and BV confirmed, that the landlord served the tenants with the notice of dispute resolution form and supporting evidence package on September 17, 2020. I find that the tenants have been served with the required documents in accordance with the Act.

BV testified that she did not submit any documentary evidence in advance of this hearing, but instead would be relying on her oral testimony.

Preliminary Issue – Identity of the Landlord

At the start of the hearing, JR advised me that the landlord ("**DO**") had passed away and that he was a representative of DO's estate. I asked if he sought an amendment to change the name of the landlord from "DO" to "The Estate of DO". He declined. As such, I proceeded with the hearing without altering the style of cause.

Preliminary Issue – Amendment Amount Claimed

The application was filed by the landlord on September 15, 2020. At the hearing, JR testified that the tenants had paid \$909.10 of the rental arrears on September 17, 2020. Additionally, he testified that the tenants have not paid any amount of October 2020 rent (\$2,409.10). He sought to amend the application to reflect these changes.

Rule of Procedure 4.2 states:

4.2 Amending an application at the hearing

In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.

If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

In this case, the landlord is seeking compensation for unpaid rent that has increased since the application for dispute resolution was made. The increase in the landlord's monetary claim should have been reasonably anticipated by the tenants. Therefore, pursuant to Rule 4.2, I order that the landlord's application be amended to reflect the fact that the tenants paid \$909.10 of the rental arrears on September 22, 2020 and to include a claim for October 2020 rent. The new amount of the monetary claim sought is \$7,954.60

Issues to be Decided

Is the landlord entitled to:

- 1) an order of possession;
- 2) a monetary order for \$7,954.60;
- 3) recover their filing fee;
- 4) retain the security deposit in partial satisfaction of the monetary orders made?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a tenancy agreement starting January 1, 2003. No copy of the tenancy agreement was entered into evidence. Monthly rent is \$2,409.10 and is payable on the first of each month. The tenants paid the landlord a security deposit of \$750, which the landlord continues to hold in trust for the tenants.

JR testified that the tenants struggled to pay the full amount of rent due for the months of April to August 2020. During this time, the tenants paid \$6,500.00 of the \$12,045.50 that was due. The tenants are in arrears of \$5,545.50 for this period of time. Because of the eviction freeze due of COVID-19, the landlord did not issue any notice to end tenancy during this time.

JR testified that the tenant did not pay any rent on September 1, 2020. He served the tenant personally with a 10 Day Notice to End Tenancy on September 2, 2020 (the **"Notice"**) with an effective date of September 9, 2020.

On September 2, 2020, BV gave JR \$1,500 cash. JR testified he issued a receipt for this amount for "use and occupancy only" (this was not entered into evidence). He testified that the tenant paid the balance of September 2020 rent (\$909.10) on September 17, 2020 via cheque. He provided a ledger showing these amounts but acknowledged that the dates in the ledgers were incorrect as there was a delay between the time the payments were received and when they were processed. (The ledger incorrectly showed that the first payment of September rent was made September 9, 2020 and the second on September 22, 2020.)

BV agreed that she paid September rent late, paying \$1,500 on September 2, 2020 and \$909.10 on September 17, 2020.

JR testified that, on September 2, 2020, he served BV with a copy of a repayment plan (Form #RTB-14) setting out the repayment of the arrears for April to August 2020 (\$5,545.50) as follows:

Due Date	Installment Payment Due
10/01/2020	\$554.55
11/01/2020	\$554.55
12/01/2020	\$554.55
01/01/2021	\$554.55
02/01/2021	\$554.55
03/01/2021	\$554.55
04/01/2021	\$554.55
05/01/2021	\$554.55
06/01/2021	\$554.55
07/01/2021	\$554.55

BV agreed she received the repayment plan but disagreed on the day she received it. She testified that she did not receive a copy of Repayment Plan until September 17, 2020, when it was included in the application materials served to her.

JR testified that the tenants did not make the first installment payment of \$554.55 on October 1, 2020, or at all. He also testified that they have not paid any amount of October 2020 rent. BV agreed that this was correct.

BV testified that the tenants have been affected by the COVID-19 pandemic. She testified that she ran a daycare out of the rental unit, and that all of her clients withdrew

their children from it in March 2020. She also testified that the international students she was housing move out due to COVID-19. She testified that, with schools opening up again, her daycare business is starting to run again, and she has one child in her care.

BV testified that she paid her rent when she could, using the CERB payment she was receiving. She testified that she did not know she had to dispute or pay the full amount of September 2020 rent within five days of being served with the Notice. She is now in a position to pay the full amount of October 2020 rent.

Analysis

In accordance with sections 88 and 90 of the Act, I find that the tenant was served with the Notice on September 2, 2020.

1. Order of Possession

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

As such, the landlord must satisfy me that the tenant has failed to pay September 2020 rent when it was due. The parties agree that rent is due on the first of each month, and that September rent was not paid in full until September 17, 2020. On this basis, I find that the Notice was properly issued.

Section 46 of the Act, in part, states:

Landlord's notice: non-payment of rent

46(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.

On BV's own evidence, the tenants neither paid the full amount of arrears nor disputed the Notice within five days of being served with it. That the tenants did not know of this requirement does not excuse them from comply with it. I note that the Notice itself, in two different locations, advises recipients of the requirement to dispute or pay within five days of service.

Based on my review of the Notice, I find that it complies with the form and content requirements of section 52 of the Act. I note that the Notice lists an incorrect effective date (September 9, 2020, 7 days after the Notice was served). However, section 53 of the Act automatically corrects this error to the next earliest date that complies with the Act: September 11, 2020 (10 days after the Notice was served).

As such, I have no alternative but to apply section 46(5) of the Act and find that the tenants are conclusively presumed to have accepted that the tenancy has ended, and order that they vacate the rental unit.

I order that the tenants provide the landlord with vacant possession of the rental unit within seven days of being served with this decision and attached order of possession by the landlord.

2. Monetary Order

a. April to August Arrears

Due to the COVID-19 pandemic, the provincial government put in place special regulations called COVID-19 (*Residential Tenancy Act and Manufactured Home Park Tenancy Act*) (No. 2) Regulation (the “**C19 Tenancy Regulation**”) which, in part, address the payment of rent due between March 18 and August 17 (the “**affected rent**”). It states:

Non-payment of affected rent

3 (1) As an exception to sections 44 (1) (a) (ii) and 46 [landlord's notice: non-payment of rent] of the Residential Tenancy Act and any other provision of the Residential Tenancy Act and the Residential Tenancy Regulation, a landlord must not give a page 4 of 11 tenant notice to end a tenancy under section 46 (1) of the Residential Tenancy Act in respect of affected rent that is unpaid and instead this Division applies.

- (2) The landlord must give the tenant a repayment plan if
 - (a) the tenant has overdue affected rent, and

(b) subject to subsection (3), the landlord and tenant did not enter into a prior agreement.

[...]

Terms of repayment plan

4 (1) The following are terms of each repayment plan:

- (a) the repayment period starts on the date the repayment plan is given by the landlord to the tenant and ends on July 10, 2021;
- (b) the payment of the overdue rent must be in equal instalments;
- (c) each instalment must be paid on the same date that rent is due under the tenancy agreement;
- (d) the date the first instalment must be paid must be at least 30 days after the date the repayment plan is given by the landlord to the tenant.

(2) A repayment plan must be in writing and include all of the following:

- (a) the date the repayment period starts as determined under subsection (1) (a);
- (b) the total amount of the affected rent that is overdue;
- (c) the date on which each instalment must be paid;
- (d) the amount that must be paid in each instalment.

(3) If a repayment plan given by the landlord to the tenant under section 3 (2), (3) or (4)

(a) does not comply with a requirement set out in subsection (1) of this section,

(b) does not include the information described in subsection (2), or

(c) includes information that is inaccurate or incomplete,

the landlord must give the tenant another repayment plan that complies with this section and includes accurate and complete information.

So, the landlord was obligated to provide a repayment plan for the repayment of the affected rent (April to August arrears) to tenants that complied with section 4 of the C19 Tenancy Regulation. The parties agree that a repayment plan was provided to the tenants but disagree as to when this occurred. JR testified it was served on September 2, 2020 and BV testified it was served on September 17, 2020.

However, it is not necessary for me to make a determination as to when the Repayment Plan was served, as it is invalid no matter the date.

The first repayment installment is listed as due on October 1, 2020. This is less than 30 days after September 2, 2020. Section 1 of the Residential Tenancy Branch Rules of procedure states:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

As the C19 Tenancy Regulation states “at least 30 days”, September 2 and October 1 must be excluded from this calculation. There are 28 days between September 3 and September 31, 2020 (inclusive). This is less than the required 30 days. Therefore, per section 4(3) “the landlord must give the tenant[s] another repayment plan that complies with section 4(1)”.

Policy Guideline 52 states:

B. REPAYMENT PLANS

If a repayment plan does not comply with the terms and requirements set out above, it has no effect.

[...]

F. APPLICATIONS FOR MONETARY ORDERS FOR UNPAID AFFECTED RENT MADE ON OR AFTER JULY 31, 2020

If no valid repayment plan has been given to a tenant, or a valid repayment plan has been given to a tenant or a landlord and tenant have a valid prior agreement in place and the tenant is in good standing because:

- the first payment has not come due, or
- the tenant is paying the installments as required,

then an arbitrator may dismiss the application with leave to reapply, until such time as the tenancy ends and/or the tenant has failed to pay, at least, one installment.

Based on the foregoing, I find that the repayment plan served on the tenants is of no effect because the date the first installment was to be paid was less than 30 days after it was served. Accordingly, the tenants do not yet have an obligation to start making instalment payments. Therefore, they have not missed paying the first installment as alleged by JR.

I dismiss this portion of the landlord’s application with leave to reapply.

1. October 2020 Rent

It is common ground that the tenants have not paid any part of October 2020 rent and the arrears for this time are \$2,409.10. Section 26 of the Act requires tenants to “pay rent when it is due”. There are very limited exceptions to this requirement under the Act, and I have no evidence before me to suggest that any of the exceptions would apply in this case.

Accordingly, I order that the tenants pay the landlord \$2,409.10.

Pursuant to section 72(1) of the Act, as the landlord has been successful in the application, he may recover their filing fee from the tenants (\$100).

Pursuant to section 72(2) of the Act, the landlord may retain the security deposit of \$750 in partial satisfaction of the monetary order made above.

Conclusion

I dismiss the portion of the landlord's application for a monetary order to recover affected rent.

Pursuant to sections 67 and 72 of the Act, I order that the tenants pay the landlord \$1,759.10, representing the following:

October Arrears	\$2,409.10
Filing Fee	\$100.00
Security Deposit Credit	-\$750.00
Total	\$1,759.10

Pursuant to section 55 of the Act, I order that the tenants deliver vacant possession of the rental unit to the landlord within seven days of being served with a copy of this decision and attached orders by the landlord.

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: October 30, 2020

Residential Tenancy Branch