



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant: CNR

Landlord: OPR-DR, OPRM-DR, FFL

Introduction

This was a cross application hearing that dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46.

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

- an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent, pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email addresses for service of this decision and order.

Preliminary Issue- Service

Section 43 of the Residential Tenancy Branch Regulation states:

43 (1)For the purposes of section 88 (j) [*how to give or serve documents generally*] of the Act, the documents described in section 88 of the Act may be given to or served on a person by emailing a copy to an email address provided as an address for service by the person.

(2)For the purposes of section 89 (1) (f) [*special rules for certain documents*] of the Act, the documents described in section 89 (1) of the Act may be given to a person by emailing a copy to an email address provided as an address for service by the person.

(3)For the purposes of section 89 (2) (f) of the Act, the documents described in section 89 (2) of the Act may be given to a tenant by emailing a copy to an email address provided as an address for service by the tenant.

Section 88 of the *Act* states:

88 All documents, other than those referred to in section 89 [*special rules for certain documents*], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

- (a)by leaving a copy with the person;
- (b)if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c)by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d)if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
- (e)by leaving a copy at the person's residence with an adult who apparently resides with the person;
- (f)by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

- (g)by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
- (h)by transmitting a copy to a fax number provided as an address for service by the person to be served;
- (i)as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
- (j)by any other means of service provided for in the regulations.

Section 89 of the *Act* states:

89 (1)An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

- (a)by leaving a copy with the person;
- (b)if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c)by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d)if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
- (e)as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
- (f)by any other means of service provided for in the regulations.

(2)An application by a landlord under section 55 [*order of possession for the landlord*], 56 [*application for order ending tenancy early*] or 56.1 [*order of possession: tenancy frustrated*] must be given to the tenant in one of the following ways:

- (a)by leaving a copy with the tenant;
- (b)by sending a copy by registered mail to the address at which the tenant resides;
- (c)by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;

(d)by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;

(e)as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];

(f)by any other means of service provided for in the regulations.

(3)A notice under section 87.5 [*notice of administrative penalty*] must be given in a manner referred to in subsection (1).

Section 71 of the *Act* states:

71 (1)The director may order that a notice, order, process or other document may be served by substituted service in accordance with the order.

(2)In addition to the authority under subsection (1), the director may make any of the following orders:

(a)that a document must be served in a manner the director considers necessary, despite sections 88 [*how to give or serve documents generally*] and 89 [*special rules for certain documents*];

(b)that a document has been sufficiently served for the purposes of this Act on a date the director specifies;

(c)that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act.

Neither party entered into evidence written authorization from the other to permit service via email. The landlord entered into evidence a text message between the parties in which the landlord asks the tenants how they would like to sign the tenancy agreement, online or in person, and the tenants respond that they would prefer to sign it on line. The email addresses of both parties are confirmed in the text message. The tenant did not provide any documentary evidence to show that the landlord accepted service via email.

I find that the tenants provided the landlord with authorization to send them the tenancy agreement via email; however, they did not provide the landlord with authorization to serve all documents via email. I find that while service via email for all tenancy related documents was not authorized by the parties, the parties were sufficiently served for the purposes of this Act, with emailed and texted documents, pursuant to section 71(2)(c) of

the *Act*, in circumstances where the opposing party confirmed receipt of the emailed / texted document(s).

Both parties agree that the tenants served the landlord with the tenants' application for dispute resolution via email on April 19, 2021. The landlord testified that the tenants' application for dispute resolution was received on April 19, 2021. I find that the landlord was sufficiently served for the purposes of this *Act*, pursuant to section 71(2)(c) of the *Act*, with the tenants' application for dispute resolution on April 19, 2021 because the landlord confirmed receipt on that date.

The landlord testified that the tenant was served with the landlord's application for dispute resolution via registered mail on April 16, 2021. A registered mail receipt stating same was entered into evidence. The tenants testified that they received the landlord's application for dispute resolution but could not recall on what date. Pursuant to sections 89 and 90 of the *Act*, I find that the tenants were deemed served on April 21, 2021, five days after the landlord's application for dispute resolution was mailed.

The tenants' testified that they e-mailed the landlord their evidence. The tenants did not provide a date their evidence was e-mailed. The serving email was not entered into evidence. The landlord testified that they were not served with the tenant's evidence. I find that the tenants have not proved, on a balance of probabilities, that the landlord was served with their evidence pursuant to section 88 or was sufficiently served pursuant to section 71(2)(c) of the *Act*. The tenants' evidence is therefore excluded from consideration.

The landlord testified that the tenants were emailed the landlord's evidence via email (no dates were provided) and that the tenant was personally served with additional evidence on May 13, 2021. The landlord testified that the evidence that was personally served on May 13, 2021 was also emailed to the tenant on April 25, 2021. The April 25, 2021 serving email was entered into evidence.

The tenants testified that they received two or three emails from the landlord containing the landlord's evidence more than seven days before this hearing. The tenants confirmed that they received a copy of the 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") and text messages between the parties dated April 1-6, 2021. The tenants testified that they did not receive the April 25, 2021 email. The tenants testified that they did not have time to review and respond to the landlord's evidence that was personally served on May 13, 2021.

I find that the 10 Day Notice and text messages between the parties dated April 1-6, 2021 were sufficiently served on the tenants, pursuant to section 71(2)(c) of the *Act*. I find that the April 25, 2021 email from the landlord was not served in accordance with section 88 of the *Act* and was not sufficiently served under section 71(2)(c) of the *Act* because the tenants testified that they did not receive it. The evidence contained in the April 25, 2021 email is excluded from consideration.

Section 3.15 of the Residential Tenancy Branch Rules of Procedure (the “*Rules*”) states that the respondent’s evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

The landlord’s May 13, 2021 evidence package was served on the tenants six days before this hearing. The tenants testified that they did not have time to review and respond to this evidence. Due to the late service of this evidence, I exclude it from consideration.

Given that different evidence was served on the tenant at different times via different modes of service, some of which was disputed, I informed the landlord that pursuant to Rule 7.4 of the Residential Tenancy Branch Rules of Procedure, all evidence that the landlord wished to rely on must be presented in the hearing. I asked the tenants to inform me if any of the evidence presented by the landlord was either not received by the tenants or was received less than seven days before the hearing. The only relevant evidence presented by the landlord was the 10 Day Notice. The tenant presented a text messages between the parties dated April 1-6, 2021 that was uploaded by both the tenant and the landlord.

As no other relevant documentary evidence was presented by the landlord, the only landlord documentary evidence considered in this decision are the 10 Day Notice and the April 1-6, 2021 text messages.

I find that even if the 10 Day Notice and text messages were not served in accordance with the *Act* neither party would be prejudiced by their acceptance into evidence because both parties confirmed that they each had those documents in their possession prior to the either application for dispute resolution.

Preliminary Issue- Amendment

Section 64(3)(c) of the *Act* states that subject to the rules of procedure established under section 9 (3) [director's powers and duties], the director may amend an application for dispute resolution or permit an application for dispute resolution to be amended.

Section 4.2 of the Residential Tenancy Branch Rules of Procedure (the “Rules”) states that 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.

The landlord’s original application claimed unpaid rent in the amount of \$2,400.00. Since filing for dispute resolution, the landlord testified that the amount of rent owed by the tenant has increased to \$3,200.00.

I find that in this case the fact that the landlord is seeking compensation for all outstanding rent, not just the amount outstanding on the date the landlord filed the application, should have been reasonably anticipated by the tenants. Therefore, pursuant to section 4.2 of the Rules and section 64 of the *Act*, I amend the landlord’s application to include a monetary claim for all outstanding rent in the amount of \$3,200.00.

Issues to be Decided

1. Are the tenants entitled to cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46 of the *Act*?
2. Is the landlord entitled to an Order of Possession for Unpaid Rent, pursuant to sections 46 and 55 of the *Act*?
3. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
4. Is the landlord entitled to recover the filing fee for this application from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on February 1, 2021 and is currently ongoing. Monthly rent in the amount of \$2,400.00 is payable on the first day of each month. A security deposit of \$1,200.00 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The landlord testified that the tenant was served with the 10 Day Notice via email on April 6, 2021. The tenants testified that they received the 10 Day Notice via text message on April 6, 2021.

Both parties agree that the tenants did not pay rent on April 1, 2021 when it was due. Both parties agree that the tenant's paid \$1,600.00 towards April 2021's rent on April 21, 2021 and have not paid any rent towards May 2021's rent.

Both parties agree that in early April 2021 the landlord offered to give the tenant's April 2021's rent for free if the tenants moved out at the end of April 2021. Both parties agree that the tenants declined the above offer.

Both parties agree that the landlord offered to give the tenant's May 2021's rent for free if the tenants agreed to move out of the subject rental property at the end of May 2021. Both parties agree that the tenants declined the above offer.

The tenants testified that they were not able to pay April's rent on April 1, 2021 but on April 2, 2021 offered to give the landlord everything they had in their bank account, but the landlord would not accept a partial payment. The landlords testified that they never refused to accept rent from the tenants and that all partial payments were accepted, which is evidenced by the accepted April 21, 2021 partial payment.

The landlord testified that the tenants owe the landlord \$3,200.00 in unpaid rent. The tenants testified that they did not pay May 2021's rent because the landlord offered to give them May 2021's rent for free. The landlord testified that the offer of free May

2021's rent was conditional on the tenants moving out at the end of May 2021 which they have refused to do.

The tenant presented the following text messages between the parties made on April 2, 2021:

- Landlord:
 - Hi [tenants], We are so disappointed that you can not pay the rent on time just on the third month of our tenancy. Rent must be paid in full and on time- by midnight on the due day. It is your most important legal responsibility as a tenant. Right now it is 7 am April 2, 2021, we haven't get any response from you about the rent which is due on yesterday. Please let us know your plan. Are you planning end the tenancy agreement mutually or by a 10 day notices? Please let us know your plan by 12pm today. If there is no response from you by that time, a 10 day notice for unpaid rent or utilities to end the tenancy will be served.
- Tenants:
 - Just waiting on the rest of my check. I can't do anything else till union hall opens on Tuesday it's a long weekend. And you have gotten a response you just chose not to reply yesterday. And you can cut some slack considering I paid the last most almost two weeks early if your gonna Be sour about it from now on your way I'll get your rent the 1st at 11:59pm before it's due every month.
 - I told you last night I can send what we have until it's resorted out from my union hall. If that's not good enough for you than you can wait for it all. You wanna send a 10 day eviction go ahead I'll challenge it talk to the Rtb in 6 months [thumbs up emoji]
 - Also there putting a freeze on eviction asw again just wait lol they won't even be applicable again very soon with covid.
- Landlord:
 - I didn't sent the notice directly is because I want to give you a chance to stay. This time I can wait till April 6.
- Tenant:
 - Ok
- Landlord:
 - By the way, please check the bylaw carefully, the message you wrote above is false. E don't want to play game with any tenant we have, but we know the law. We take care of you, also we want to you take care of us. The tenant also is the main source of our living.
- Tenant:

- I do know the law by friends mom also works for the Rtb and told me that is coming with in the next month of change doesn't happen. Your not even allowed to eat in restaurants I never said they are on freeze but htye will be again very soon.
 - I understand that aswell I never said I wasn't going to pay it I also said I can send what we have at the moment which is more than half.
- Landlord:
 - It is ok. As We know your situation, we can wait till April 6.

Analysis

Based on the testimony of the tenants, I find that the tenants were sufficiently served for the purposes of this *Act*, pursuant to section 71 of the *Act*, with the 10 Day Notice on April 6, 2021 because the tenants' confirmed receipt on that day.

Section 26(1) of the *Act* states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*. Pursuant to section 26(1) of the *Act*, I find that the tenants were obligated to pay the monthly rent in the amount of \$2,400.00 on the first day of each month. Based on the testimony of both parties, I find that the tenants did not pay rent in accordance with section 26(1) of the *Act*.

I find that the tenants have not produced any evidence which proves that the landlord refused to accept rent money. I find that the text messages entered into evidence show that the landlord gave the tenants until April 6, 2021 to pay the rent in full which they failed to do. I find that when rent was not paid on April 6, 2021, the landlord served the tenants with the 10 Day Notice. I find that the tenants did not pay all outstanding rent within five days of receipt of the 10 Day Notice. I accept the landlord's testimony that all partial payments were accepted, which is supported by the \$1,600.00 partial payment accepted on April 21, 2021.

I find that the landlord offered to give the tenants May 2021's rent for free if the tenants moved out by the end of May 2021. Based on the testimony of the tenants, I find that the tenants refused to accept the landlord's offer. I therefore find that the tenants are not entitled to May 2021's rent for free, because the landlord's offer was not accepted.

Pursuant to section 26(1) of the *Act*, I find that the tenants owe the landlord \$3,200.00 in unpaid rent.

Section 46(1) of the *Act* states that 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.

Section 46(4) of the *Act* states that 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.

In this case the tenants did not pay the overdue rent within five days of receiving the 10 Day Notice and did not pay rent in accordance with section 26 of the *Act*. I therefore dismiss the tenants' application to cancel the 10 Day Notice and uphold the 10 Day Notice. Upon review of the 10 Day Notice I find that it meets the form and content requirements of section 52 of the *Act*. Pursuant to section 46(1) and 55 of the *Act*, I award the landlord a two-day Order of Possession for nonpayment of rent.

As the landlord was successful in their application, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit due to the tenant. I find that the landlord is entitled to retain the tenants' entire security deposit in the amount of \$1,200.00 in part satisfaction of their monetary claim for unpaid rent against the tenants.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
April rent	\$800.00
May rent	\$2,400.00
Filing Fee	\$100.00
Less security deposit	-\$1,200.00
TOTAL	\$2,100.00

The landlord is provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants 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.

Pursuant to sections 46 and 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenants**. Should the tenants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: May 25, 2021

Residential Tenancy Branch