



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Beverly Manor
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, RP, RR, PSF
 MNR-DR, OPR-DR, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenant (the Tenant's Application) under the *Residential Tenancy Act* (the *Act*), seeking:

- Cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice);
- An order for the Landlord to make repairs to the rental unit;
- An order for the reduction of rent for repairs, services or facilities agreed upon but not provided; and
- An order for the Landlord to provide services or facilities required by the tenancy agreement or law.

I note that section 55 of the *Act* requires that when a tenant submits an Application seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the 10 Day Notice is upheld or the Application is dismissed, and the landlord has issued a notice to end tenancy that is compliant with section 52 of the *Act*.

This hearing also dealt with a Cross-Application for Dispute Resolution that was filed by the Landlord (the Landlord's Application) under the *Act*, seeking:

- An Order of Possession based on a 10 Day Notice;
- Recovery of unpaid rent; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant and the agent for the Landlord D.L. (the Agent), both of whom provided affirmed testimony. The parties were advised that pursuant to rule 6.11 of the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), persons are prohibited

from recording dispute resolution hearings, except as allowed by rule 6.12. As neither party had requested or been granted authorization to hire an accredited Court Reporter as allowable under rule 6.12, I confirmed with the parties that they were not recording the hearing. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the Tenant, a copy of the decision and any orders issued in their favor will be mailed to them at the rental unit address. At the request of the Agent, a copy of the decision and any orders issued in favor of the Landlord will be emailed to the Agent at the email address confirmed in the hearing. This email address has been listed on the cover page of this decision for reference.

Preliminary Matters

Preliminary Matter #1

In their Application the Tenant sought multiple remedies under multiple sections of the *Act*, a number of which were unrelated to one another. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

As the Tenant applied to cancel a 10 Day Notice, I find that the priority claim relates to whether the tenancy will continue or end. I find that the other claims filed by the Tenant are not sufficiently related to the 10 Day Notice or continuation of the tenancy and as a result, I exercise my discretion to dismiss the following claims by the Tenant with leave to reapply:

- An order for the Landlord to make repairs to the rental unit;
- An order for the reduction of rent for repairs, services or facilities agreed upon but not provided; and
- An order for the Landlord to provide services or facilities required by the tenancy agreement or law.

As a result, the hearing proceeded based only on the Tenant's Application seeking cancellation of a 10 Day Notice.

Preliminary Matter #2

The Tenant stated that they had personally served an agent for the Landlord (Z.G.) with the Notice of Dispute Resolution Proceeding Package for their Application, which includes a copy of the Application and the Notice of hearing, as well as their documentary evidence, on July 13, 2021. Although Z.G. was not present at the hearing, the Agent acknowledged service of the Tenant's Application and documentary evidence on the Landlord as set out above and raised no concerns with regards to the method or date of service. As a result, I find that the Tenant's Application and documentary evidence was served on the Landlord in accordance with the Act.

However, the Tenant denied receipt of the Landlord's Application and documentary evidence, stating that until the commencement of the hearing, they were not aware that the Landlord had filed an Application or submitted any evidence for consideration to the Residential Tenancy Branch (the Branch). The Agent stated that they were advised by another agent that the Notice of Dispute Resolution Proceeding Package for the Landlord's Application, which includes the Application and the Notice of Hearing, as well as the documentary evidence before me from the Landlord, was sent to the rental unit by registered mail on July 16, 2021 and returned as unclaimed on August 6, 2021. The Agent provided me with the registered mail tracking number, which has been recorded on the cover page of this decision. The Canada Post online tracking system shows that the registered mail was sent on July 16, 2021, that a notice card was left on July 19, 2021, that a final notice card was left on July 24, 2021, and that the registered mail was returned to sender as unclaimed on August 5, 2021.

Despite the above, I advised the Agent that there was no documentary or other evidence before me connecting this registered mail tracking number to mail sent to the Tenant's address, such as a copy of the addressed envelope with the registered mail label attached, testimony from the person who sent the registered mail affirming the address used, or any written proof of service document. The Agent stated that they have an email from the agent who sent the registered mail confirming it was sent, however, a copy of this email was not before me for review or consideration. I offered the Agent the opportunity to call a witness who could provide affirmed testimony regarding service of the Notice of Dispute Resolution Proceeding Package for the Landlord's Application, and the Landlord's documentary evidence, on the Tenant, but the Agent declined, stating that the Agent who had served the registered mail package is no longer employed by the Landlord as an agent.

The ability to know the case against you and to submit evidence in your defense is fundamental to the dispute resolution process. As the Tenant denied receipt of the above noted documents from the Landlord or their agents, the registered mail tracking information shows that the registered mail package attached to that tracking number was never delivered or picked up, and there is a lack of evidence before me from the Landlord or their agents linking the registered mail tracking number provided to me by the Agent to mail sent to the Tenant's address, I find that the Agent has failed to satisfy me, on a balance of probabilities, that the Notice of Dispute Resolution Proceeding Package and the documentary evidence before me from the Landlord, were served or deemed served on the Tenant as required by the *Act*. As a result, I find that it would be a breach of the *Act*, the Rules of Procedure, and the principles of natural justice to accept the Landlord's Application or documentary evidence for consideration in this hearing as I am not satisfied they have been served on the Tenant as required by the *Act* and the Rules of Procedure. As a result, I dismiss the Landlord's Application with leave to reapply and I decline to accept any of the documentary evidence before me from the Landlord for consideration.

Based on the above, the hearing therefore proceeded only on the Tenant's Application and documentary evidence.

Preliminary Matter #3

Although the Tenant sought to settle the matter pursuant to section 63 of the *Act*, the Agent was not open to discussing a settlement agreement and therefore a settlement was not reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the Branch) under Section 9.1(1) of the *Act*.

Preliminary Matter #4

During the hearing there was some disagreement about the name of the legal entity that is the Landlord. Although the name of the Landlord listed by the parties in their respective Applications was virtually identical, the Tenant's Application contained the word "The" at the start of the Landlord's name. I advised the Tenant that pursuant to Residential Tenancy Policy Guideline (Policy Guideline) #43, it is their responsibility to name the respondent correctly. I also advised the parties that if a party is not named correctly, any order issued through the dispute resolution process against the incorrectly named party may not be enforceable. The Agent stated that the Landlord was named correctly in their Application and requested that any orders be issued under that name.

The Tenant did not object. As a result, any orders granted in favor of the Landlord will be granted in the name given for the Landlord on the Landlord's Application.

Preliminary Matter #5

At approximately 9:35 A.M. the Tenant exited the teleconference suddenly and without notice. The Agent and I waited in the teleconference for the Tenant to return, which they did at 9:37 A.M. No testimony was accepted while the Tenant was absent from the teleconference and no matters material to the matters before me for dispute resolution were discussed.

Issue(s) to be Decided

Is the Tenant entitled to cancellation of the 10 Day Notice?

If not, is the Landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Is the Landlord entitled to recovery of any unpaid rent pursuant to section 55(1.1) of the *Act*?

Background and Evidence

The parties agreed at the hearing that the one year fixed term tenancy had commenced on January 1, 2020, and transitioned to a month to month tenancy on January 1, 2021, after the expiration of the fixed term. The parties agreed that rent at the start of the tenancy was \$1,805.00, due on the first day of the month, and that \$1,805.00 was still the monthly rent amount as of the date of the hearing. The parties agreed that the Tenant paid a \$903.00 security deposit, which the Agent confirmed is still held in trust by the Landlord.

The Agent stated that on June 4, 2021, a 10 Day Notice was posted to the door of the Tenant's rental unit as the Tenant owed some amount of rent for each month between October 2020 and June 2021. The 10 Day Notice in the documentary evidence before me is signed and dated June 4, 2021, has an effective date of June 14, 2021, and states that as of June 3, 2021, the Tenant owed \$4,05.00 in outstanding rent. The Tenant stated that they received the 10 Day Notice from their door on June 8, 2021, and that they had not seen it prior to this as they do not frequently leave their rental unit. The Tenant also stated that it was placed under a wreath on their door.

Although the parties were agreed that there was some amount of rent outstanding both at the time the 10 Day Notice was served, and as of the date of the hearing, they could not agree on the amount owed. The Agent provided a verbal account of the amounts owed and paid between September 2020 and the date of the hearing, including amounts owed and paid in relation to a repayment plan. Although the Tenant did not deny owing rent, they stated that prior to the hearing they were not provided with any accounting of the rent owed or for what time periods, that they were never consulted by the Landlord regarding the repayment plan, and therefore they cannot confirm that the amounts shown on the 10 Day Notice or the amounts given by the Agent at the hearing are correct. Despite the above, the Tenant acknowledged that they only paid \$1,405.00 in rent for June 2021, and that they made no further rent payments between the date of their initial rent payment for June 2021, in the amount of \$1,405.00 and 5 days after receipt of the 10 Day Notice on June 8, 2021.

Analysis

Based on the documentary evidence and testimony before me for consideration, I am satisfied that a tenancy to which the *Act* applies exists between the parties, that rent in the amount of \$1,805.00 is due on the first day of each month under the tenancy agreement, and that the Landlord still holds the Tenant's 903.00 security deposit in trust. Pursuant to section 90 of the *Act*, I also find that the Tenant was deemed served with the 10 Day Notice on June 7, 2021, three days after it was posted to the door of the rental unit.

Section 46(4) of the *Act* states that if a tenant who has received a 10 Day Notice does not either pay the overdue rent or make an application for dispute resolution within 5 days after the date the tenant receives the notice, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date.

Although the 10 Day Notice states that the effective date of the notice is June 14, 2021, given the date the 10 Day Notice was deemed served as set out above, and the date upon which rent is due under the tenancy agreement, I find that this date does not comply with the minimum notice period required under section 46(1) of the *Act*. As a result, I find that the effective date of the 10 Day Notice is automatically corrected to June 17, 2021, pursuant to section 53 of the *Act*.

Although the Tenant disputed the 10 Day Notice, records at the Branch show that the Application seeking cancellation of the 10 Day Notice was filed on June 16, 2021. As June 16, 2021, is more than 5 days after the deemed service date for the 10 Day Notice, I find that the Tenant failed to dispute the 10 Day Notice within the legislative time frame set out under section 46(4) of the *Act*. Further to this, even if I had found that the deemed service provisions of the *Act* do not apply and that the 10 Day Notice was served on the Tenant on June 8, 2021, which I have not, I find that the Tenant would still not have filed their Application within the above noted legislative time frame. Further to this, the Tenant did not seek an extension to the legislative time frame in their Application or at the hearing.

Having made this finding, I will now turn my mind to whether or not the Tenant paid the outstanding rent within 5 days after being deemed served with the 10 Day Notice, therefore rendering the 10 Day Notice of no force and effect, and negating the need for the Tenant to file an Application seeking its cancellation, pursuant to section 46(4)(a) of the *Act*. At the hearing the Agent stated that the Tenant is significantly behind in rent, and that the Tenant owes some rent for each month between October 2020 and October 2021. The Agent provided testimony regarding the Tenant's monthly rent and repayment plan obligations as well as their rent payment history between September 2021 and the hearing date. Although the Tenant acknowledged owing some rent, they were unsure if the amounts given at the hearing by the Agent were correct, and argued that they should have been provided with evidence of the overdue amounts and rent payment history by the Landlord, which they stated they were not. Regardless, the parties were agreed that rent in the amount of \$1,805.00 is due on the first day of each month under the tenancy agreement, that the Tenant only paid \$1,405.00 in rent in June of 2021, and that no further rent payments were made within 5 days after either the deemed service date for the 10 Day Notice or the actual date upon which the Tenant stated they received the 10 Day Notice from their door.

Although I note that the outstanding rent amount listed on the 10 Day Notice differs from the rent amount that would be owed in accordance with the Agent's testimony at the hearing, I am satisfied based on the testimony of the parties at the hearing that the Tenant owed at least \$400.00 in rent on the day the 10 Day notice was served, and that this amount was not paid by the Tenant within the time period set out under section 46(4) of the *Act*. As a result, I find that the Tenant is conclusively presumed under section 46(5) of the *Act* to have accepted the 10 Day Notice and I find that the tenancy therefore ended on June 17, 2021. As the 10 Day Notice is on the current version of the written approved form, is signed and dated, gives the address of the rental unit, and states the effective date and the grounds for issuance of the Notice, I find that it

complies with section 52 of the *Act*. I also find that the Tenant is overholding the rental unit and that the Landlord is therefore entitled to an Order of Possession pursuant to section 55(2)(b) of the *Act*. As the corrected effective date has passed and I am satisfied that at least some amount of rent is still outstanding, the Order of Possession will therefore be effective two days after service on the Tenant.

Section 55(1.1) of the *Act* states that if a tenant's application seeking cancellation of a 10 Day Notice is either dismissed or the 10 Day Notice is upheld, and the 10 Day Notice complies with section 52 of the *Act*, the director must grant an order requiring the payment of the unpaid rent. Although the Agent argued at the hearing that the Tenant owes a substantial amount of outstanding rent, up to and including the month of October 2021, no documentary evidence was before me from the Agent or the Landlord in support of those amounts and the Tenant disputed the accuracy of the amounts. As a result, I find I cannot be satisfied as part of the Tenant's Application of the exact amount of rent outstanding up to and including June 17, 2021, the end date for the tenancy. Although the Tenant may be liable to compensate the Landlord for overholding pursuant to section 57 of the *Act*, I find that compensation for overholding is not the same as outstanding rent.

Based on the monthly rent amount of \$1,805.00, and the number of days in the month, I find that the Tenant owed \$1,022.83 in rent for June 2021, up to and including June 17, 2021. As the parties agreed at the hearing that the Tenant paid the Landlord \$1,405.00 in rent for June 2021, and pursuant to Policy Guideline #3, I therefore decline to award the Landlord any amount of outstanding rent under section 55(1.1) of the *Act*, as I am not satisfied of the full amount owing prior to the end of the tenancy and any amounts owed for overholding the rental unit after June 17, 2021, would not constitute unpaid rent for the purpose of section 55(1.1) of the *Act* as set out in Policy Guideline #3. However, the Landlord remains entitled to seek any unpaid rent owed during the course of the tenancy, and/or compensation for overholding the rental unit after the end of the tenancy, by filing an Application for Dispute Resolution seeking these amounts from the Tenant, should they wish to do so.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the Landlord effective **two days after service of this Order** on the Tenant. 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 Supreme Court of British Columbia and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Branch under Section 9.1(1) of the *Act*.

Dated: October 27, 2021

Residential Tenancy Branch