



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR-DR, MNR-DR, FFL, MNDCL, MNSD

### Introduction

This participatory hearing was scheduled for 9:30 a.m. on this date, via teleconference call, pursuant to an Interim Decision issued by an Adjudicator on November 2, 2021 in response to the landlord's application for an Order of Possession and Monetary Order for unpaid rent made under the Direct Request Procedure. The Interim Decision should be read in conjunction with this decision.

At the participatory hearing, the landlord was represented by a friend and an authorized agent. The landlord's representative and agent were affirmed. There was no appearance on part of the tenants.

Since the tenants did not appear, I explored service of the hearing materials upon the tenants.

The landlord's agent submitted that the original Application for Dispute Resolution by Direct Request and all other required materials were sent to each tenant via registered mail on September 30, 2021. Registered mail receipts, including tracking numbers, were provided as proof of service.

The landlord submitted that the Notice of Dispute Resolution Proceeding and the Interim Decision, along with another copy of the original hearing package, were served in two ways: registered mail sent to each tenant on November 5, 2021 and by personal service to an adult male occupant of the rental unit by the agent on November 5, 2021. The agent testified that he was accompanied by a witness and he believes the person he personally served was the tenant referred to by initials DS although the occupant would not identify himself. The landlord provided registered mail receipts, including tracking numbers, as proof of service and was prepared to call the witness to service.

I was satisfied the landlord met his obligation to serve each of the tenants in a manner that complies with section 89(1) of the Act. I note that on November 22, 2021 evidence was uploaded to the Residential Tenancy Branch by a person assigned the dispute access code for tenant DS which further satisfied me that the tenants were served with notice of this proceeding. Therefore, I found the tenant's to be duly served and I continued to hear this case without the tenants present.

The landlord's representative and agent affirmed to me that they were not served with the tenant's evidence. As such, I did not give it further consideration.

During the hearing, the landlord's agent requested the monetary claim be amended to reflect loss of rent for the months of October 2021 and November 2021 since the tenants continue to hold possession of the rental unit without making any payment

Rule 4.2 of the Rules of Procedure provide:

#### **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.

I find the landlord's request to amend the monetary claim to include unpaid and/or loss of rent for the months while awaiting this hearing is reasonably foreseeable and meets the criteria of Rule 4.2. As such, I amend the application accordingly.

The landlord's agent also requested authorization to retain the tenant's security deposit. I permitted the amendment as doing so would reduce any Monetary Order I were to issue to the landlord and is therefore non-prejudicial to the tenants.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of possession?
2. Is the landlord entitled to a Monetary Order for unpaid and/or loss of rent?
3. Is the landlord authorized to retain the tenants' security deposit?
4. Award of the filing fee.

Background and Evidence

Pursuant to a written tenancy agreement, the tenancy started on April 1, 2021 and the tenants paid a security deposit of \$1150.00. The tenants were required to pay rent of \$2300.00 on the first day of every month.

The landlord's representative testified the tenants paid rent for April 2021 and May 2021 but nothing after that.

On September 2, 2021 the landlord's agent personally served all three pages of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("10 Day Notice") to the male occupant believed to be tenant DS, in the presence of a witness. The landlord's agent pointed out that in serving the tenants with the proceeding packages, all three pages of the 10 Day Notice were included in the packages.

The landlord's agent acknowledged that an error was made on the first page of the Proof of Service for the 10 Day Notice and that the witness's statement that service occurred on September 2, 2021, in person, was correct. The landlord's agent was prepared to call the witness to testify if necessary.

The 10 Day Notice indicates an effective date of September 12, 2021 and outstanding rent of \$12800.00. The landlord's agent acknowledged the amount appearing on the 10 Day Notice was incorrect and should have read \$9200.00, which is the sum of the monthly rent for the months of June 2021 through September 2021 [ $\$2300.00 \times 4$  months].

The landlord's agent and representative affirmed that after serving the tenant with the 10 Day Notice there was no payment received toward the outstanding rent. Nor, did the tenants file to dispute the 10 Day Notice. The landlord's agent testified that when he served the 10 Day Notice the tenant indicated he had been suffering financial

difficulties. The landlord's agent pointed him to information on the 10 Day Notice and the authorization letter as to how to make payment or file to dispute the 10 Day Notice.

I heard the tenants have not yet vacated the rental unit and did not pay any monies for their continued use and occupation of the rental unit.

Documentary evidence before me includes: the tenancy agreement; the 10 Day Notice; a Proof of Service for the 10 Day Notice signed by a witness; and, a signed authorization for the landlord's agent.

### 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 very limited and specific circumstances when a tenant may withhold rent. I was not provided any evidence to suggest the tenants had any legal right to withhold rent otherwise payable.

Where a tenant does not pay rent 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.

I accept the affirmed evidence before me that the tenants were required to pay rent of \$2300.00 on the 1st day of every month and the tenants failed to do so for the months of June 2021 onwards. I also accept the affirmed testimony and the signed witness statement that the tenant, or an adult occupant of the rental unit, was personally served with a 10 Day Notice on September 2, 2021. Accordingly, I find the tenants had until September 7, 2021 to either pay the outstanding rent or file to dispute the 10 Day Notice. Although the amount appearing on the 10 Day Notice was incorrect, an error does not automatically invalidate a notice. In this case, I accept the affirmed testimony of the landlord's agent and representative that there was no attempt to pay anything toward the outstanding rent by the tenants. Nor, did the tenants file to dispute the 10 Day Notice if they were of the position the 10 Day Notice should be found invalid.

Therefore, I find the tenants conclusively presumed to have accepted that the tenancy would end on the stated effective date of September 12, 2021.

Since I have found the tenancy to be at an end and the tenants remain in possession of the rental unit, I find the landlord is entitled to an Order of Possession. With this decision, I provide the landlord with an Order of Possession effective two (2) days after service upon the tenants.

Based upon the terms of tenancy and the affirmed evidence before me, I find the landlord entitled to recover from the tenants the unpaid rent for the months of June 2021 through September 2021 in the sum of \$9200.00. I further find the landlord entitled to recover loss of rent incurred for the months of October 2021 and November 2021 in the sum of \$4600.00 considering the tenants' failure to return possession of the rental unit to the landlord at the end of the tenancy and non-payment toward their continued use and occupancy of the rental unit.

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 the above, the landlord is provided a Monetary Order to serve and enforce upon the tenants, calculated as follows:

Unpaid rent for June 2021 through September 2021	\$ 9200.00
Loss of rent for October 2021 and November 2021	4600.00
Filing fee	100.00
Less: security deposit	<u>(1150.00)</u>
Monetary Order	\$12750.00

### Conclusion

The landlord is provided an Order of Possession effective two (2) days after service upon the tenants.

The landlord is authorized to retain the tenant's security deposit and is provided a Monetary Order for the balance owing of \$12750.00 to serve and enforce upon the tenants.

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: November 26, 2021

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Residential Tenancy Branch