



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPR-DR**

Introduction

The hearing was reconvened as a result of the Landlord's application under the *Residential Tenancy Act* (the "Act") for an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent and/or Utilities dated July 29, 2021 ("10 Day Notice") pursuant to sections 46 and 55 of the Act.

This hearing was reconvened from a non-participatory, *ex parte*, "direct request" proceeding. In an interim decision dated November 4, 2021 ("Interim Decision"), the presiding adjudicator determined that a participatory hearing was necessary to address questions that could not be resolved on the documentary evidence submitted by the Landlord. As a result, this hearing was scheduled and came on for hearing on December 23, 2021 to consider the Landlord's application. Notices of the reconvened hearing were enclosed with the Interim Decision. The Landlord was instructed to serve the notice of reconvened hearing, the Interim Decision and all other required documents, upon the Tenant within three days of receiving the Interim Decision, in accordance with section 89 of the Act.

The Landlord's legal counsel ("JG") and agent ("ED") and the Tenant attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

JG stated that Landlord served the Tenant with the Notice of Dispute Resolution Proceeding and its evidence ("NDRP Package") on the Tenant in person by a process server on November 5, 2021. The Tenant acknowledged receipt of the NDRP Package. I find that the NDRP Package was served on the Tenant pursuant to sections 88 and 89 of the Act.

The Tenant stated he did not serve any evidence on the Landlord.

Preliminary Matter – Tenant's Request for Adjournment

At the commencement of the hearing, the Tenant requested an adjournment of the hearing. The Tenant stated that his legal counsel was not able to attend the hearing. JG objected to the Tenant's request for an adjournment on the basis the Landlord had waited for a lengthy period of time for the hearing and stated that Tenant had more than 6 weeks to obtain legal counsel since the NDRP Package was served on the Tenant. JG also stated that he had not received any request from legal counsel for the Tenant to adjourn the hearing.

7.8 Adjournment after the dispute resolution hearing begins

At any time after the dispute resolution hearing begins, the arbitrator may adjourn the dispute resolution hearing to another time. A party or a party's agent may request that a hearing be adjourned. The arbitrator will determine whether the circumstances warrant the adjournment of the hearing.

7.9 Criteria for granting an adjournment

Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

I find that the Tenant had more than six weeks after the Landlord served the NDRP Package, and more than 4 months since the 10 Day Notice was served on the Tenant, for the Tenant to retain legal counsel to act on his behalf. I find that the Tenant's request for an adjournment arises out of the intentional action or neglect of the Tenant to seek legal counsel in a timely manner. I find the Tenant is present at the hearing and has the opportunity to be heard. I find that an adjournment of the hearing would be prejudicial to

the Landlord. Based on the above, I dismiss the Tenant's request for an adjournment of the hearing.

Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession?
- recovery of the unpaid rent?

Background and Evidence

JG testified there was an implied tenancy between the parties commencing sometime around September 25, 2019. He stated there was confusion whether the Tenant was a member of the Landlord which is a co-operative housing association. JG stated the tenancy is on a month-to-month basis, requires the Tenant to pay on the 1st of each month. The amount of the monthly rent is more fully discussed below. The Tenant was not required to pay a security deposit or pet damage deposit.

JG stated the issue regarding status of the Tenant as a non-member had been dealt with in BC Supreme Court. Although neither party submitted a copy of the Supreme Court decision, the Tenant agreed that he was not a member of the Landlord. Accordingly, the Landlord was not entitled to charge the \$10.00 per month membership fee.

JG testified the Landlord served the 10 Day Notice in the Tenant's mailbox on July 30, 2021. JG submitted a copy of a Proof of Service on Form RTB-34 to corroborate his testimony. The Tenant acknowledged receipt of the 10 Day Notice. I find that 10 Day Notice was served on the Tenant pursuant to section 88 of the Act.

JG stated that the \$1,910.00 rental arrears owing by the Tenant as of July 1, 2021 was calculated as follows:

Date	Owed	Paid	Balance
01-Oct-20	\$955.00	0.00	\$955.00
01-July-21	\$955.00	0.00	\$1,910.00
Total	\$1,910.00	\$0.00	\$1,910.00

JG stated the Landlord had refused to accept any further rent from the Tenant after the five-day dispute period service following service of the 10 Day Notice on the Tenant. JG stated the Tenant owes the Landlord approximately \$6,729.00 for total rental arrears as of the date of this hearing. However, the exact amount of rental arrears must be recalculated to remove the monthly \$10.00 co-operative membership fee and remove the 4% rent increase that did not comply with the requirements of the Act. JG stated that the Landlord was not seeking recovery of the rental arrears at this time and that the Landlord would make another application for dispute resolution to seek the rental arrears from the Tenant. JG stated that Landlord was seeking an Order of Possession requiring the Tenant to vacate the rental unit by January 15, 2022.

The Tenant stated he thought he had 10 days after service of the 10 Day Notice to pay the rental arrears. He stated he attempted to pay the arrears on the 9th day after service of the Notice but the Landlord refused to accept the payment. The Tenant admitted he has not made any application for dispute resolution to dispute the 10 Day Notice.

Analysis

Section 26 of the Act states:

- 26 (1)** A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

The Act provides very limited and specific circumstances when a tenant may withhold rent such as (i) where a tenant has overpaid a security deposit and/or pet damage deposit, (ii) where a tenant has previously overpaid the rent (iii) where authorization has been given by the landlord or an arbitrator or (iv) where the landlord does not reimburse the tenant for emergency repairs that have been made by the Tenant.

No testimony or evidence was provided at the hearing to prove that the Tenant was excused, pursuant to any provisions of the Act, from paying the rent to the Landlord for any month or months from the commencement of the tenancy to the date of the 10 Day Notice. As such, I find that the Tenant was required to pay the rent in full for every month since the commencement of the tenancy to the date of the 10 Day Notice pursuant to the provisions of section 26(1) of the Act.

Sections 46(1) and 46(4) of the Act state:

- 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]*.
- (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.*

[emphasis added in italics]

The Tenant admitted he did not make an application for dispute resolution to dispute the 10 Day Notice. Accordingly, he is conclusively presumed to have accepted that the tenancy ends on the effective date of the 10 Day Notice, being August 16, 2021. The Tenant has not vacated the rental unit.

Sections 55(2), 55(3) and 55(4) of the Act state:

- 55(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:
- (a) a notice to end the tenancy has been given by the tenant;

- (b) *a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;*
 - (c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
 - (c.1) the tenancy agreement is a sublease agreement;
 - (d) the landlord and tenant have agreed in writing that the tenancy is ended.
- (3) The director may grant an order of possession before or after the date when a tenant is required to vacate a rental unit, and the order takes effect on the date specified in the order.
- (4) *In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 [Resolving Disputes],*
- (a) *grant an order of possession, and*
 - (b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

[emphasis added in italics]

I find the Landlord has satisfied its onus to prove, on a balance of probabilities, that the 10 Day Notice was issued for a valid reason. I have reviewed the 10 Day Notice and find it complies with the section 52 form and content requirements. Accordingly, pursuant to section 55(4)(a) of the Act, I order the Tenant provide the Landlord with vacant possession of the rental unit by 1:00 pm on January 15, 2022.

Conclusion

The Landlord is provided with an Order of Possession effective at 1:00 pm on January 15, 2022. This Order must be served by the Landlord on the Tenant as soon as possible upon receipt from the Residential Tenancy Branch. Should the Tenant or anyone on the premises 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: January 10, 2022

Residential Tenancy Branch