



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      **OPR-DR, MNR-DR, FFL**

### **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 for non-payment of 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 its application from the Tenant pursuant to section 72.

The Tenant did not attend this hearing. I left the teleconference hearing connection open until 11:28 am in order to enable the Tenant to call into this teleconference hearing scheduled for 11:00 am. The Landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Dispute Resolution Proceeding. I also confirmed from the teleconference system that the Landlord and I were the only ones who had called into this teleconference.

This hearing was reconvened from a non-participatory, *ex parte*, "direct request" proceeding. In an interim decision dated November 3, 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 17, 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 testified he served the Tenant with the Notice of Dispute Resolution Proceeding and his evidence ("NDRP Package") on the Tenant by registered mail on November 5, 2021. The Landlord submitted a registered mail receipt and tracking number to corroborate his testimony regarding service of the NDRP Package on the Tenant. Pursuant to section 90 of the Act, I deem the NDRP Package was served on the Tenant pursuant to sections 88 and 89 of the Act on November 10, 2021, being five days after its posting by the Landlord.

The Landlord stated the Tenant did not served any evidence on him for these proceedings.

#### Preliminary Issue – Amendment of Landlord's Monetary Claim

At the hearing, the Landlord testified he and the Tenant entered into a Mutual Agreement to End Tenancy ("Mutual Agreement") in which the Tenant agreed to move out of the rental unit on November 30, 2021. The Landlord stated the Tenant vacated the rental unit on December 10, 2021 and, on that date, the Tenant paid all of the rental arrears set out in the 10 Day Notice as well as the rent owing up to November 30, 2021. As a result, the Landlord was seeking rent of \$532.26 for the 10-day period the Tenant overheld the rental unit. The Landlord stated that, as a result of the Tenant overholding 10 days in December 2021, he was unable to move into the rental unit on December 1, 2021. The Landlord stated he was able to arrange to keep the apartment he was living in, but he was required to pay for the entire month of December 2021. The Landlord sought to claim rent from the Tenant for the remaining 21 days of December 2021 as compensation for the requirement that he pay the entire month of December for his previous apartment.

Rule of Procedure 4.2 of the RoP 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 accrued while the Tenant was overholding the rental unit. I find that request for an amendment to the Landlord's claim for unpaid rent that accrued while the Tenant was overholding the rental unit from December 1 to 10, 2021 inclusive should have been reasonably anticipated by the Tenant. Therefore, pursuant to Rule 4.2, I order that the Landlord's application be amended to claim \$532.26 compensation for unpaid rent for the 10-day period that Tenant overheld the rental unit.

The Tenant may not have reasonably anticipated that the Landlord would be seeking compensation for December 11 to 31, 2021 as a result of expenses incurred by the Landlord resulting from the inability of the Landlord to move into the rental unit due to the Tenant's overholding the rental unit. As a result, I decline to amend the Landlord's claim for recovery of rental arrears to include compensation to include compensation for December 11 to 31, 2021. The Landlord has the option of making an application for dispute resolution to make a claim for compensation for expenses incurred by the Landlord as a result of the Tenant failing to vacate the rental unit by November 30, 2021.

#### Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession for non-payment of rent?
- monetary compensation for unpaid rent?
- recover the filing fee for this application from the Tenant?

#### Background and Evidence

The Landlord testified he purchased the rental unit from the original landlord named on the tenancy agreement on or about April 30, 2021. The Landlord submitted a copy of the freehold transfer submitted to the New Westminster Land Title Office whereby ownership of the rental unit was transferred to the Landlord. The Landlord submitted a copy of the tenancy agreement that stated the tenancy commenced on December 1, 2020 with a fixed term ending November 30, 2021 with rent of \$1,650.00 payable on the

1<sup>st</sup> of each month. The Tenant paid a security deposit of \$825.00. The Landlord is holding the deposit in trust for the Tenant.

The Landlord testified the 10 Day Notice was served on the Tenant's door on September 4, 2021. The Landlord submitted a signed Proof of Service on Form RTB-34 to corroborate his testimony. I find the Tenant was served with the 10 Day Notice pursuant to section 88 of the Act. Pursuant to section 90, I find the Tenant was deemed to have received the 10 Day Notice on September 7, 2021.

The Landlord testified paragraph 3 of the tenancy agreement stated that, in typewritten form, that the rent was \$1,650.00 per month. However, the typewritten figure of \$1,650.00 was struck out and in handwriting above the strike-out was the figure \$1,700.00. Next to the handwritten figure of \$1,700.00 were the initials of an unknown party. As the origins of these alterations were unknown, and as it could not be established at the hearing that the Tenant had agreed to pay rent of \$1,700.00 per month, the Landlord stated he was seeking to recover unpaid rent based on \$1,650.00 per month that appeared in typewritten form of paragraph 3.

As noted above, the Landlord stated the parties entered into the Mutual Agreement whereby the Tenant agreed to vacate the rental unit on November 30, 2021. The Landlord submitted a copy of the Mutual Agreement into evidence to corroborate his testimony. The Landlord stated the Tenant did not move out of the rental until December 10, 2021. He stated that, on the day the Tenant moved out, the Tenant paid all of the rental arrears that were owing pursuant to the 10 Day Notice as well as the rent owing to the end of November 30, 2021. As a result, the Landlord was claiming \$532.26 for the 10 days the Tenant overheld the rental unit after the effective date of the Mutual Agreement.

The Landlord stated he was not aware of the Tenant making 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.

I find the monthly rent payable by the Tenant is \$1,650.00 per month, in accordance with the amount that appears in typewritten form in paragraph 3 of the tenancy agreement. I find the rent is due on the 1<sup>st</sup> day of each month. The Landlord testified that the Tenant has paid the rent up to November 30, 2021. However, the Landlord testified that the Tenant overheld the rental unit for 10 days after the effective date of the Mutual Agreement and is seeking to recover \$532.26 for the 10 days the Tenant overheld the rental unit.

Subsection 46(4) of the Act states:

- 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.

The 10 Day Notice was served on the Tenant's door on September 4, 2021. Pursuant to section 90, the Tenant was deemed to have received the 10 Day Notice on September 7, 2021. Pursuant to section 46(4) of the Act, the Tenant had until September 13, 2021, being the next business day after the five-day dispute period ended, to either pay the rental arrears or make an application for dispute resolution to dispute the 10 Day Notice. I find the Tenant did not pay the rental arrears stated on the 10 Day Notice within the five-day dispute period. The Landlord stated that he aware unaware of the Tenant making an application for dispute resolution to dispute the 10 Day Notice.

Section 46(5) of the Act states:

- 46(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 in italics added]

I find the monthly rent is \$1,650.00 and that the Tenant did not pay the rent for September 1, 2021 nor make an application for dispute resolution to dispute the 10 Day Notice within 5 days of deemed service of the 10 Day Notice, I find that the Tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice, being September 15, 2021. As such, I find the 10 Day Notice was issued for a valid reason.

I have reviewed the 10 Day Notice and find it complies with section 52 form and content requirements. Sections 55(2), 55(3) and 55(4) of the Act states:

- 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 have found the Tenant owes the Landlord for \$532.26 for the 10-day period she overheld the rental unit from December 1 through 10, 2021, calculated as follows:

$$\frac{\$1,700}{31} \times 10 = \$532.26$$

The Tenant must compensate the Landlord \$532.26 for the unpaid rent resulting from the Tenant's overholding of the rental unit. Pursuant to section 55(4)(b) of the Act, I order the Tenant to pay the Landlord \$532.26 in satisfaction of the arrears.

As the Tenant has vacated the rental unit, it is unnecessary for me to consider whether the Landlord is entitled to an Order of Possession pursuant to section 55(4)(a) of the Act.

As the Landlord has been successful in its application, he may recover his filing fee from the Tenant pursuant to section 72(1) of the Act.

Pursuant to section 72(2) of the Act, the Landlord may retain \$632.26 of the \$825.00 security deposit paid by the Tenant in satisfaction of the monetary orders made above. The Landlord must handle the balance of the security deposit of \$192.74 in accordance with the requirements of the Act.

### Conclusion

Pursuant to section 44(4)(b) of the Act, I order that the Tenant pay the Landlord \$532.26 for unpaid rent and pay \$100.00 for the Landlord's filing fee of this application for a total of \$632.26. The Landlord is authorized to deduct a total of \$632.26 from the Tenant's security deposit.

The Landlord must handle the balance of the security deposit of \$192.74 in accordance with the requirements of the Act.

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 7, 2022

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Residential Tenancy Branch