



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the tenants: CNR
For the landlord: MNR-DR, OPR-DR, FFL

Introduction

This hearing dealt with a cross application. The tenants' application pursuant to the Residential Tenancy Act (the Act) is for cancellation of the 10 day Notice to End Tenancy for unpaid Rent or Utilities (the Notice), pursuant to section 46 of the Act.

The landlord's application pursuant to the Act is for:

- an order of possession under the Notice, pursuant to sections 46 and 55;
- a monetary order for unpaid rent, pursuant to section 26; and
- an authorization to recover the filing fee for this application, under section 72.

Tenant SD (the tenant) and Landlord PB (the landlord) attended the hearing. The landlord was assisted by agent AB. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

I note the tenants' application lists applicants tenants SD and RF and respondent landlord PB. The landlord's application lists applicant landlord PB and respondent tenant RF.

Preliminary Issue – Update of Tenancy and tenants' Addresses

At the outset of the hearing the landlord corrected the tenancy and tenants' addresses. Pursuant to section 64(3)(a) of the Act, I have amended the tenants' application.

Preliminary Issue – Service of the tenants' application

The tenant affirmed she served the notice of hearing by registered mail. The landlord confirmed receipt of the notice of hearing and stated that he had enough time to review it. Based on the testimony provided by both parties, I find the tenant served the notice of hearing in accordance with sections 88 and 89 of the Act.

The tenant testified she served her evidence but did not submit it to the RTB. The landlord said he did not receive response evidence.

Rule of procedure 3.14 states:

Evidence not submitted at the time of Application for Dispute Resolution Except for evidence related to an expedited hearing (see Rule 10), **documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly** or through a Service BC Office not less than 14 days before the hearing. In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

(emphasis added)

Per Rule of Procedure 3.14, I am excluding the tenants' evidence.

Preliminary Issue – Service of the landlord's application

I accept the landlord's testimony that tenant RF was served with the notice of hearing and evidence (the materials), by registered mail on November 17, 2021, in accordance with section 89(2)(b) of the Act. The package was mailed to the rental unit's address (the tracking number is recorded on the cover of this decision).

The tenant affirmed tenant RF received the materials.

Section 90 of the Act provides that a document served in accordance with Section 89 of the Act is deemed to be received if given or served by mail, on the 5th day after it is mailed. Given the evidence of registered mail the tenant is deemed to have received the materials on November 22, 2021, in accordance with section 90 (a) of the Act.

Rule of Procedure 7.3 allows a hearing to continue in the absence of the respondent.

Preliminary Issue – Amendment of monetary claim

At the hearing the landlord sought to amend his application for \$2,600.00 in unpaid rent to include an additional \$2,600.00 for the unpaid rent of December 2021 and January 2022.

The increase in the landlord's monetary claim for unpaid rent should have been reasonably anticipated by the tenants. Therefore, pursuant to section 4.2 of the Rules of Procedure and section 64 of the Act, I amend the landlord's monetary claim for unpaid rent to \$5,200.00.

Issues to be Decided

Are the tenants entitled to cancellation of the Notice?

Is the landlord entitled to:

1. an order of possession based on the Notice?
2. a monetary order for unpaid rent?
3. an authorization to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the testimony and accepted evidence of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenants' claim and landlord's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlord's obligation to present the evidence to substantiate the Notice.

Both parties agreed the tenancy started on September 01, 2017. Monthly rent is \$1,300.00, due on the first day of the month. At the outset of the tenancy a security deposit of \$550.00 (the deposit) was collected and the landlord holds it in trust. The tenancy agreement dated September 01, 2017 was submitted into evidence. It indicates the tenant is RF and that monthly rent is due on the first day of the month.

The tenant stated she moved out after she served the application, but RF continues to occupy the rental unit. The landlord said the tenant was an occupant and that RF continues to occupy the rental unit.

The tenant testified a new tenancy agreement was signed after the September 01, 2017 tenancy agreement and that she is a tenant. The tenant does not remember when the new tenancy agreement was signed.

Both parties agreed a two month notice to end tenancy for landlord's use of the rental unit (the two month notice) was served on July 09, 2021. The parties agreed that the tenancy would end on October 09, 2021 and the tenant did not have to pay rent due on October 01, 2021 because of the two month notice.

Both parties agreed the tenant did not pay monthly rent in the amount of \$1,300.00 due on November, December 2021 and January 01, 2022.

The landlord is seeking an order of possession and a monetary order for rent due on November, December 2021 and January 01, 2022 in the total amount of \$3,900.00.

Both parties agreed the landlord served the Notice in person on November 01, 2021. The landlord submitted into evidence a witnessed proof of service indicating the landlord served the Notice to tenant RF in person on November 01, 2021 at 2:13 PM (RTB form 34).

A copy of the November 01, 2021 Notice was submitted into evidence. It indicates tenant RF failed to pay rent in the amount of \$2,600.00 due on October 31, 2021. The effective date is November 10, 2021.

The landlord testified that he indicated the amount of \$2,600.00 because he considered the rent due on October 01 and November 01, 2021.

The landlord submitted into evidence a monetary order worksheet indicating the tenant failed to pay rent due on September 31 and October 31, 2021 in the total amount of \$2,600.00.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Cancellation of the Notice

I find the tenant's testimony about a new tenancy agreement was vague. The tenant did not submit a copy of the new tenancy agreement.

Based on the landlord's convincing testimony and the September 01, 2017 tenancy agreement, I find the tenant is an occupant and tenant RF is the only tenant.

I accept both parties uncontested testimony and the tenancy agreement that rent is due on the first day of the month.

I accept both parties uncontested testimony that the landlord served a two month notice on July 09, 2021 and that the tenant was authorized to not pay rent due on October 01, 2021, per section 51(1) of the Act.

Thus, I find that when the Notice was served the tenant was not in rental arrears, as the Notice was served on November 01, 2021 and the tenant was authorized to not pay rent due on October 01, 2021.

Section 46(1) of the Act states: "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."

As the landlord served the Notice on the rent due date and there were no rental arrears, I find the Notice does not comply with section 46(1) of the Act.

Thus, I find the Notice is not effective and I cancel it.

Unpaid rent

Based on the testimony offered by both parties and the monetary order worksheet, I find tenant RF must pay monthly rent of \$1,300.00 on the first day of the month and RF did not pay rent due on November 01, 2021, December 01, 2021 and January 01, 2022.

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.

Per section 26(1) of the Act, I award the landlord \$3,900.00 for November, December 2021 and January 2022 rent.

Filing fee

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee.

As explained in section D.2 of Policy Guideline #17, section 72(2)(b) of the Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord. I order the landlord to retain the \$550.00 deposit in partial satisfaction of the monetary award.

In summary:

Item	Amount \$
Unpaid rent	3,900.00
Filing fee	100.00
Deposit	550.00 (minus)
Total:	3,450.00

Conclusion

The Notice dated November 01, 2021 is cancelled and of no force or effect. This tenancy shall continue until ended in accordance with the Act.

Per sections 26 and 72 of the Act, I authorize the landlord to retain the \$550.00 deposit and award the landlord \$3,450.00. This award is against tenant RF.

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 07, 2022

Residential Tenancy Branch