



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Parties	File No.	Codes:
(Tenants) J.R. and R.N.	310060796	CNR, FFT
(Landlord) A.P. (Witness) M.M.	310061521	OPR-DR

Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* ("Act") by the Parties. Their respective claims are as follows:

The Tenants filed claims for:

- an Order to cancel the 10 Day Notice to End Tenancy for Unpaid Rent dated January 14, 2021 ("10 Day Notice"); and
- recovery of their \$100.00 application filing fee.

The Landlord filed a claim for:

- an order of possession for unpaid rent, further to having served the 10 Day Notice.

The Tenants and the Landlord appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process. One witness for the Landlord, M.M., was also present and available to provide affirmed testimony; however, he was not called on by the Landlord to give evidence.

During the hearing, the Tenants and the Landlord were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy

Branch (“RTB”) Rules of Procedure (“Rules”); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

When a tenant applies to cancel a notice to end tenancy issued by a landlord, section 55 of the Act requires me to consider whether the landlord is entitled to an order of possession. This is the case if I dismiss the application and if the notice to end tenancy is compliant with section 52 of the Act, as to form and content.

Further, 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. In most circumstances this is the person who applies for dispute resolution. However, in some situations the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy. As such, I find that the burden of proof in this matter is on the Landlord on a balance of probabilities.

Issue(s) to be Decided

- Should the 10 Day Notice be cancelled or confirmed?
- Is the Landlord entitled to an order of possession?

Background and Evidence

The Parties agreed that the fixed term tenancy began on April 1, 2018, and ran to March 31, 2019, and then operated on a month-to-month basis. They agreed that the tenancy agreement requires the Tenants to pay the Landlord a monthly rent of \$1,450.00, due on the first day of each month. The Parties agreed that the Tenants paid the Landlord a security deposit of \$725.00, and a pet damage deposit of \$725.00. They agreed that the Landlord still holds both deposits.

The Tenants submitted a copy of the 10 Day Notice, which was signed and dated January 14, 2022, which has the rental unit address, and which was served by attaching it to the rental unit door on January 14, 2022. The 10 Day Notice has an effective

vacancy date of January 27, 2022. The 10 Day Notice was served on the grounds that the Tenants failed to pay \$1,027.55 in rent when it was due on January 1, 2022.

In the hearing, the Parties agreed that the Tenants have not paid the Landlord rent for December 2021, January 2022, or February 2022, except for \$500.00, which the Parties agreed that the Tenants paid the Landlord on December 27, 2021.

I asked the Landlord how he arrived at the amount he has claimed in unpaid rent from the Tenants. The Landlord explained that he has also served the Tenants with a Two Month Notice to End the Tenancy for Landlord's Use, as the Landlord said that he has sold the property. A provision of the Act states that tenants are entitled to one month of free rent when a landlord serves them with a Two Month Notice. The Parties agreed that they have another hearing regarding the Two Month Notice in March 2022.

In the situation before me, the Landlord explained that he was considering December 2021 as the Tenant's free month of rent for the Two Month Notice. However, as the Tenants did not pay rent on January 1, 2022, as required, the Landlord served them with the 10 Day Notice. The Landlord explained that he calculated the amount claimed, as follows:

~~\$1,450.00~~ - waived for free rent per Two Month Notice
\$1,450.00 – rent owing for January 1, 2022
(\$ 500.00) – rent paid on December 27, 2021
\$ 950.00 – rent owing on January 1, 2021
\$ 77.55 – gas bill owing
\$1,027.55

The Landlord said that the Tenants were responsible for paying the gas bill, although, they did not put it in their name, so it is still in the Landlord's name for this rental unit. The Landlord said that the Tenants were on an equal payment plan for gas usage, so the amount was the same each month, until it is reconciled once a year.

In the hearing, the Tenants said:

We submitted partial rent on good faith that we were going to be able to pay. Then all the stuff about the house being sold. He owes me the deposits back. I had asked him to just take that off of what we owe him. We have the month, I just wanted him to take that money because it was easier, because we have to find a place to live now. I guess, he said that he wasn't okay with that, because he was

going to have to give it to the new owners, so we are having to sign a new lease with them. They're renovating and are going to rent it out again. They're not renting it right now. It's more of a renoviction.

I explained to the Parties that a landlord is not required to use the deposits for rent, as the landlord may need to rely on these amounts for any damage to the unit at the of the tenancy. Further section 21 of the Act says that: "Unless the landlord gives written consent, a tenant must not apply a security deposit or a pet damage deposit as rent."

The Tenants said that they have the money and can pay the Landlord what is owing, if necessary.

The Tenants said the following about the Landlord's claim of an amount for the gas bill:

We were not aware that he was going to take it from the \$500.00 we paid. We only had a verbal agreement for the gas. Our Hydro is in our name, then I was going back to the gas bill, but we didn't sign off. There's nothing in the tenancy agreement that says we were going to pay the gas bill. I pointed this out to him. We've been paying this on an honour system. We've never seen a bill, but one time in May there was going to be an adjustment in the charges – to, I think it was \$95.00. I think our whole bill was \$1,545.00 after that went into account – supposedly \$95.00. But he didn't give me proof of these bills – we never really signed off on paying the gas bill. It was a verbal thing that he never covered clearly. We thought he would put it in our name, but it never happened. I never knew he was taking it off of what I had given him. It's still not the full amount because it was to be \$95.00.

The Landlord responded:

They knew from day one they should have put the gas bill in their name. It is the tenant's responsibility. I rent out several places. I can't remember – maybe they didn't have the money for the deposit for [the gas company]; there are times when I use my credit to help the tenants out. I don't have to, but despite this, I let it run on my name. We go for the equalized billing. Once a year they do adjust it.

The Tenants said:

We just should have had some sort of agreement, like an addendum; we were willing to put it in our name on it. We would not have gone on the equal payment

plan, so we would have done it a different way. There were extra pages that could have been added, like putting the gas in our name.

On page two of the tenancy agreement at part 3, it indicates what is included in the rent. Natural gas and electricity are not checked off as being included in the rent. As such, I find that according to the tenancy agreement that the Parties signed, the Tenants are responsible for paying the gas bill for the rental unit.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Section 46 (1) of the Act outlines the grounds on which to issue a 10 Day Notice for non-payment of rent:

Landlord's notice: non-payment of rent

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]*.

(3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(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.

(6) If

(a) a tenancy agreement requires the tenant to pay utility charges to the

landlord, and

(b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

I reviewed all relevant documentary evidence and oral testimony before me and pursuant to sections 88 and 90 of the Act, I find that the Tenants were properly served with the 10 Day Notice on January 17, 2022, three days after it was attached to the rental unit door.

Section 26 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 the Act, the regulations, or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent. In the hearing, the Landlord said that he was owed \$1,027.55 in unpaid rent as of January 1, 2022.

Based on the above, I find that the amount of rent outstanding listed on the 10 Day Notice of \$1,027.55 is incorrect, as it was based on outstanding rent amount for January 2022 at the time that the 10 Day Notice was served. Further, the Landlord stated that the amount owing is now up to \$2,477.55, as the Tenants have not paid any rent since November 2021. As set out in the tenancy agreement, the Tenants owe the Landlord \$1,450.00 per month for the rental unit. The Landlord noted that his Application for a monetary order should be increased to this amount to reflect the changing amount of unpaid rent.

Pursuant to Rule 4.2 and section 64 (3) (c) of the Act, I amend the Landlord's application for dispute resolution to correct the amount of the monetary order sought, reflecting the ongoing failure of the Tenants to pay their monthly rent owing. I find no prejudice to the Tenants, as they are aware of how much rent they have or have not paid, so they could have anticipated that the Landlord would claim reimbursement for the full amount of rent owing. Accordingly, after correcting the Landlord's original amount claimed, I find it reasonable to amend the amount of the monetary order sought by the Landlord from the Tenants from \$1,027.55 to \$2,477.55.

The 10 Day Notice was signed, dated, had the rental unit address and the effective vacancy date of January 27, 2021. I find that the 10 Day Notice is in the approved form and is valid, pursuant to section 52 of the Act.

The Tenants wanted the Landlord to use their security and pet damage deposits in place of rent; however, the Landlord did not agree to this, so I find that this is not a reasonable excuse for failing to pay rent owing. The Tenants did not point me to any evidence establishing that they had a right under the Act to deduct all or a portion of the \$1,450.00 in rent owed each of January and February 2022. As a result, I find that the Landlord has submitted sufficient evidence to meet his burden of proof on a balance of probabilities. I find that the Tenants' application to cancel the 10 Day Notice is without merit and it is dismissed without leave to reapply, pursuant to sections 26, 46, and 62 of the Act.

As a result, I find that the Landlord is entitled to an Order of Possession pursuant to section 55 of the Act. As the effective date of the 10 Day Notice has passed and the undisputed evidence is that the Tenants have not paid rent for January or February 2022, the Order of Possession will be effective two days after service of this Order on the Tenants.

Section 55 (1.1) states that if a tenant applies to dispute a landlord's notice to end a tenancy, then the director must grant an order requiring the payment of the unpaid rent by the tenant, if the following circumstances apply:

- (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice;

I have found that the 10 Day Notice complies with section 52 of the Act, as to form and content. Further, I uphold the Landlord's 10 Day Notice to end the tenancy. Accordingly, I find that the Landlord is eligible for a Monetary Order pursuant to the Tenants' Application. I award the Landlord with **\$2,477.55** in unpaid rent from the Tenants, pursuant to sections 26 and 55 (1.1) of the Act.

I authorize the Landlord to retain the Tenants' \$725.00 security deposit and their \$725.00 pet damage deposit in partial satisfaction of this monetary award. Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order of **\$1,027.55** for the remaining award amount owed by the Tenants to the Landlord.

Conclusion

The Landlord's undisputed evidence is that the Tenants have not paid rent for the last

three months; therefore, their application is dismissed without leave to reapply.

Pursuant to section 55 of the Act, I grant the Landlord an Order of Possession effective **two days after service of this Order** on the Tenants. The Landlord is provided with this Order in the above terms and the Tenants must be served with this Order as soon as possible.

Should the Tenants fail to comply with this Order, it may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

The Landlord is also awarded recovery of **\$2,477.55** in unpaid rent and gas bill owing. The Landlord is authorized to retain the Tenants' security and pet damage deposits in partial satisfaction of this award. I grant the Landlord a Monetary Order of **\$1,027.55** for the remaining amount of the award owing.

This Order must be served on the Tenant by the Landlord and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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: February 28, 2022

Residential Tenancy Branch