



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

This hearing dealt with cross-applications filed by the parties. On September 23, 2021, the Tenant made an Application for Dispute Resolution seeking to cancel a 10 Day Notice to End Tenancy for Unpaid Rent and Utilities (the “Notice”) pursuant to Section 46 of the *Residential Tenancy Act* (the “Act”).

On September 26, 2021, the Landlord made an Application for Dispute Resolution seeking an Order of Possession for unpaid rent based on the Notice pursuant to Section 46 of the *Act*, seeking a Monetary Order for unpaid rent pursuant to Section 67 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

Both the Tenant and the Landlord attended the hearing. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, all parties in attendance provided a solemn affirmation.

The Tenant initially advised that he “did not think” he served his Notice of Hearing and evidence package to the Landlord. When he was asked to clarify this uncertain statement, he confirmed that he did not serve this package to the Landlord at all. He stated that he did not do so as it was his belief that the tenancy was re-instated and that he did not realize that there was even a need for the hearing. When he was asked why he did not withdraw his Application to dispute the Notice or why he even bothered to attend the hearing if it was his belief that the tenancy was simply continuing, he provided varying answers which were not logical or consistent with common sense.

At one point, despite him making his own Application, he claimed that he did not even know that there would still be a hearing, and only was aware of this fact when he received a notification recently from the Residential Tenancy Branch. Given that he did not withdraw his Application, and as he had initiated his own Application, it is not clear to me why he would not know that the scheduled hearing was still to take place. He then stated that he did not know that there would be a hearing because he never received the Landlord's Notice of Hearing package. However, it again does not make sense that he would not have known that there was a hearing scheduled as he made his own Application.

It should be noted that it appeared as if the reason for these inconsistent, varying responses was due to the Tenant concocting them on the spot. This was even more evident as the Tenant would take long pauses mid-statement, and between statements, in an obvious attempt to formulate a new response.

I found that the Tenant's dubious and inconsistent testimony caused me to question his credibility and the legitimacy of his submissions on the whole. Regardless, as he acknowledged that he did not serve his Notice of Hearing and evidence package to the Landlord, I have dismissed his Application without leave to reapply. Furthermore, I have excluded his evidence and will not consider it when rendering this Decision.

The Landlord advised that he served his Notice of Hearing and evidence package to the Tenant by registered mail on October 6, 2021. He stated that the tracking history indicated that this package was delivered to the Tenant. In addition, he testified that he served his Amendment to the Tenant by registered mail on January 12, 2021 (the registered mail tracking numbers are noted on the first page of this Decision). He did not check the tracking history on this second package, however.

The Tenant denied receiving either of the Landlord's packages. I have weighed the Landlord's solemnly affirmed testimony and documentary evidence of serving the packages by registered mail against the Tenant's solemnly affirmed denial of receipt of these packages. Given the doubts created by the Tenant's already dubious submissions, I find that I prefer the Landlord's testimony and documentary evidence. As such, I am satisfied that these packages were served to the Tenant by registered mail. Consequently, I find that the Tenant has been deemed to have received these packages five days after they were mailed. Furthermore, I have accepted the Landlord's evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for

Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that complies with the *Act*.

Issue(s) to be Decided

- Is the Landlord entitled to an Order of Possession?
- Is the Landlord entitled to a Monetary Order for compensation?
- Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on August 15, 2021, that the rent was currently established at an amount of \$2,200.00 per month, and that it was due on the fifteenth day of each month. A security deposit of \$1,100.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence.

The Landlord advised that the 10 Day Notice to End Tenancy for Unpaid Rent and Utilities was served to the Tenant on September 17, 2021 by being posted to the Tenant's door. He testified that \$2,200.00 was owing for rent on September 15, 2021 and that the Tenant did not pay this rent on time. Thus, the Notice was served. He submitted that the Tenant paid \$880.00 on September 21, 2021, \$890.00 on September 28, 2021, and then \$430.00 on October 1, 2021. He testified that he posted a letter on the Tenant's door on September 28, 2021 indicating that the rent payments were accepted for use and occupancy only. He read from this letter during the hearing, and he referenced his documentary evidence to support his claims for non-payment of rent. The effective end date of the tenancy was noted on the Notice as September 27, 2021.

He then advised that the Tenant paid \$200.00 and a further \$2,000.00 on October 25, 2021 for October 2021 rent. Another letter was posted on the Tenant's door indicating that these payments were accepted for use and occupancy only. He referenced his documentary evidence that corroborated this as well. He stated that the Tenant has not paid any rent for November or December 2021, and has not paid any rent for January 2022. Therefore, in addition to an Order of Possession, the Landlord is also seeking a Monetary Order in the amount of **\$6,600.00** for rental arrears.

The Tenant advised that he had a limit on how much he could electronically transfer to the Landlord as an explanation for the multiple payments. He confirmed that he received the Notice on September 17, 2021, that he paid \$880.00 on September 21, 2021, \$890.00 on September 28, 2021, and then \$430.00 on October 1, 2021. He denied ever receiving the Landlord's letter for use and occupancy in September 2021. As well, he stated that the reason that he did not pay September 2021 rent on time was because he contracted COVID.

He confirmed that he paid \$200.00 and then \$2,000.00 on October 25, 2021 for October 2021 rent. He acknowledged receiving the Landlord's letter for use and occupancy in October 2021.

Regarding November 2021 rent, he stated that "as far as [he knew]" he paid rent for November 2021. He was asked to clarify this vague statement and he then testified that he paid this via one e-transfer "all at the same time", but he was not sure when he did actually this. He was provided with ample opportunity to go through his banking records to confirm when he made this payment. The Tenant took a substantial amount of time to attempt to elaborate on this claim; however, he repeated that he could not determine when he made this payment and he suggested that the reason for this inability was due to his allegation that he did not receive the Landlord's documentary evidence. This did not make any sense as the Tenant would have had access to his own banking records, and there would have been no need to rely on the Landlord's evidence to prove this. Furthermore, instead of providing an answer about when he allegedly made this payment, he brought up other irrelevant issues during the tenancy that he believed the Landlord was engaging in. After being provided with a sufficient amount of time to search his bank account records to confirm that his claims to have paid November 2021 rent were legitimate, he then claimed to have had issues due to different bank accounts being closed. He eventually conceded that he actually did not pay any rent for November 2021.

In addition, he acknowledged that he did not pay any rent for December 2021 or January 2022. He was provided with all of the reasons he would have been permitted to withhold rent under the *Act*, and he admitted that he did not have a valid reason under the *Act* to withhold the rent.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 26 of the *Act* states that rent must be paid by the Tenant when due according to the tenancy agreement, whether or not the Landlord complies with the tenancy

agreement or the *Act*, unless the Tenant has a right to deduct all or a portion of the rent. Should the Tenant not pay the rent when it is due, Section 46 of the *Act* allows the Landlord to serve a 10 Day Notice to End Tenancy for Unpaid Rent. Once this Notice is received, the Tenant would have five days to pay the rent in full or to dispute the Notice. If the Tenant does not do either, the Tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the Notice, and the Tenant must vacate the rental unit.

Section 52 of the *Act* requires that any notice to end tenancy issued by the Landlord must be signed and dated by the Landlord, give the address of the rental unit, state the effective date of the Notice, state the grounds for ending the tenancy, and be in the approved form.

The undisputed evidence before me, and by his own admission, is that the Tenant received the Notice on September 17, 2021. According to Section 46(4) of the *Act*, the Tenant then had 5 days to pay the overdue rent and/or utilities or to dispute this Notice. Section 46(5) of the *Act* states that *"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 is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit to which the notice relates by that date."*

As the Notice was received on September 17, 2021, the Tenant must have paid the rent in full or disputed the Notice by September 22, 2021 at the latest. Again, by the Tenant's own admission, he did not pay the rent in full by September 22, 2021 to cancel the Notice. While the Tenant disputed this Notice, I note that he did so on September 23, 2021 which was a day late. It was explained to the Tenant during the hearing that he applied to dispute the Notice outside of the legislated timeframe which, as a consequence, meant that he had already been conclusively presumed to accept the Notice.

It was also explained to the Tenant that even if I were to accept that he disputed the Notice on time, he acknowledged that he did not have any authority under the *Act* to withhold the rent in any event. In addition, he was also advised that even if I were to accept that he disputed the Notice on time, he did not serve the Landlord his Notice of Hearing package as required by the *Act*. As a consequence, his Application was dismissed without leave to reapply.

As there is no evidence before me that the Tenant had a valid reason under the *Act* for withholding the rent, I am satisfied that he breached the *Act* and jeopardized his tenancy.

While the Tenant claimed that the Landlord accepted his late payments of September 2021 rent and did not serve him with a letter for use and occupancy only until late

October 2021, thereby reinstating the tenancy, I find it important to note that when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Given the contradictory testimony and positions of the parties, I must also turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

As stated above, the Tenant's testimony was hesitant, inconsistent, and appeared as if it was being concocted as he made submissions. Moreover, the only consistency in his testimony was his repeated denial that he was served documents from the Landlord. To add further doubt to the legitimacy of the Tenant's submissions, I note that his initial testimony was that he had paid November 2021 rent, but when he was pressed to provide any other information to corroborate this allegation, he wavered, he brought up irrelevant issues, and he continued to provide contradictory testimony.

For example, he stated that he paid this rent in one e-transfer "all at the same time"; however, he had earlier noted that he was unable to do so as he had limits on how much money he could transfer at once. Then, after much time afforded to allow him to provide testimony that would support his claim to have paid November 2021 rent, he finally admitted that he did not pay this rent at all.

In considering the testimony of the parties in its totality, I am highly doubtful of the reliability or truthfulness of any of the Tenant's submissions. I find the Landlord to be a more credible witness than the Tenant, as he provided consistent, logical testimony that was supported with documentary evidence where available. Based on the foregoing, where the testimony of the parties clashed, I found that the Landlord's version, supported by documentary evidence, to be more credible. As such, I am satisfied that the Landlord posted letters for use and occupancy only on the Tenant's door in September and October 2021. As such, I do not find there to be any evidence before me that substantiates that the Landlord reinstated the tenancy.

As the Landlord's Notice for unpaid rent is valid, as I am satisfied that the Notice was served in accordance with Section 88 of the *Act*, and as the Tenant has not complied with the *Act*, I uphold the Notice and find that the Landlord is entitled to an Order of Possession for unpaid rent pursuant to Sections 46 and 55 of the *Act*. As such, I find that the Landlord is entitled to an Order of Possession that takes effect **two days** after service of this Order on the Tenant.

In addition, I am satisfied that the Landlord is entitled to a monetary award for the rental arrears for November and December 2021, and January 2022. As such, I grant the Landlord a monetary award in the amount of **\$6,600.00**.

As the Landlord was successful in his Application, I find that the Landlord is entitled to recover the \$100.00 filing fee. Under the offsetting provisions of Section 72 of the *Act*, I allow the Landlord to retain the security deposit in partial satisfaction of these claims. Pursuant to Sections 38, 67, and 72 of the *Act*, I grant the Landlord a Monetary Order as follows:

Calculation of Monetary Award Payable by the Tenant to the Landlord

Item	Amount
Rental arrears for November 2021	\$2,200.00
Rental arrears for December 2021	\$2,200.00
Rental arrears for January 2022	\$2,200.00
Filing Fee	\$100.00
Security deposit	-\$1,100.00
Total Monetary Award	\$5,600.00

Conclusion

The Tenant's Application for Dispute Resolution is dismissed without leave to reapply.

Based on the above, I grant an Order of Possession to the Landlord effective **two days after service of this Order** on the Tenant. Should the Tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

In addition, the Landlord is provided with a Monetary Order in the amount of **\$5,600.00** in the above terms, and the Tenant must be served with **this Order** as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: February 4, 2022

Residential Tenancy Branch