



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

CNR (Tenant)
OPR-DR (Landlord)

Introduction

This hearing dealt with the cross Applications for Dispute Resolution filed by the parties pursuant to the *Residential Tenancy Act* (the “**Act**”).

The landlord’s application is dated December 31, 2021. The landlord applied for the following relief pursuant to the *Act*:

- an order of possession for non-payment of rent pursuant to section 55;

The tenant’s application was received at the Residential Tenancy Branch (the “**RTB**”) on December 27, 2021. The tenant applied for the following relief pursuant to the *Act*:

- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the “**Notice**”) pursuant to section 46;

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 11:45 in order to enable the tenant to call into this teleconference hearing scheduled for 11:00 a.m. The landlord and the landlord’s caretaker attended the hearing and were 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 Hearing. I also confirmed from the teleconference system that the landlord, the caretaker, and I were the only ones who had called into this teleconference.

The landlord testified she served that the tenants with the notice of dispute resolution form and supporting evidence package via registered mail on January 13, 2022. The landlord provided a Canada Post tracking numbers confirming this mailing which is reproduced on the cover of this decision. I find that the tenants were deemed served with this package on January 18, 2022, five days after the landlord mailed it, in accordance with sections 88, 89, and 90 of the *Act*. The landlord was not served with the tenants Notice of Dispute.

At the outset, I advised the landlord of rule 6.11 of the Rules of Procedure (the “**Rules**”), which prohibits participants from recording the hearing. The landlord confirmed that they were not recording the hearing.

I also advised the landlord that pursuant to Rule 7.4, I would only consider written or documentary evidence that was directed to me in this hearing.

Issues to be Decided

Is the landlord entitled to:

- 1) an order of possession;
- 2) a monetary order for \$3875.00?

Background and Evidence

While I have considered the documentary evidence and the testimony of the landlord, not all details of her submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The tenant entered into a written fixed term tenancy agreement starting July 1, 2020, with the former property owner/landlord. The tenancy agreement continues on a month-to-month basis. Monthly rent is \$1550.00, payable on the first of each month. The tenants paid the landlord a security deposit of \$775.00. The landlord still retains this deposit in trust.

The landlord testified that she purchased the apartment building in December 2021. The completion date was December 16, 2021, and she took possession of the building December 17, 2021. The previous owner pro-rated the December rent at 50%. The tenants paid no rent for December. The current landlord issued a 10-Day Notice for the December 's unpaid rent on December 17, 2021, as recommended by the previous owner/landlord.

The landlord has issued a subsequent Notice for the unpaid rent on January 1, 2022. Unpaid rent continues to accrue, but the landlord has not yet issued a Notice for February. The caretaker advised that the total arrears to date for the current landlord equals \$3875.00. The landlord is not asking for a Monetary Order, she only wants an Order of Possession.

The landlord explained that the tenants have a long-standing history of rental arrears. The previous property owner/landlord filed a direct request (DR) for a monetary order in the amount of \$18,600 for unpaid rent from July 1, 2020 through July 1, 2021 and an order of possession. The application was dismissed because the landlord did not fill out the paperwork correctly. A copy of the DR was uploaded as part of the landlord's evidence package.

The landlord is very concerned about damage to the unit. The tenants' bathtub overflowed, causing significant damage to the suite below. The landlord believes there

is likely water damage in the tenants' suite but has been unable to gain access to determine damage.

Analysis

The landlord is requesting an order of possession.

The landlord served the tenants with a 10-Day Notice for Unpaid Rent on December 17, 2021. The Notice was posted on the tenants' door. The Notice is deemed served December 20, 2021.

Section 46(4) provides that the tenants must, within five (5) days after receiving the notice either pay the overdue rent thereby rendering the notice of no effect or dispute the notice by making an Application for Dispute Resolution.

The Rules, specifically rule 2 "Making a Claim", sets out the application requirements and explains when an application is considered complete and submitted.

Rule 2.1 "Starting an Application for Dispute Resolution" reads as follows: *"To make a claim, a person must complete and submit an Application for Dispute Resolution"*.

Rule 2.6 of the Rules, "Point at which an application is considered to have been made" reads: *"The Application for Dispute Resolution has been made when it has been submitted and either the fee has been paid or when all documents for a fee waiver have been submitted to the Residential Tenancy Branch directly or through a Service BC Office. The three- day period for completing payment under rule 2.4 is **not** an extension of any statutory timelines for making an application."* [emphasis added]

In other words, an application is complete only after 1) the application has been submitted and 2) either the fee has been paid or all documents for a fee waiver submitted within the five (5) days allowed under s. 46(4).

The tenants' application was received at the RTB on December 27, 2021, sans the fee or fee waiver request. On January 1, 2022, the application was deemed abandoned by the RTB. The fee/fee waiver request, however, was submitted and the fee paid on January 4, 2022. The completed application was received January 4, 2022, well beyond the five (5) days permitted under s. 46(4).

If tenants fail to submit a complete application within the prescribed five (5) days, the tenants are conclusively presumed to have accepted that the tenancy ended on the effective date, pursuant to s.46(5).

Based on the foregoing, the tenants are conclusively presumed to have accepted that the tenancy ended.

Pursuant to s. 46 of the *Act*, a landlord may end a tenancy with 10 days' notice when the tenant has not paid rent. Section 26(1) of the *Act* states a tenant must pay rent when it is due under the tenancy agreement.

The landlord's application was originally filed as a direct request. Since the tenants filed an application disputing the 10 Day Notice, the RTB determined a participatory hearing was required and a cross application arbitration hearing scheduled.

The landlord served the 10 Day Notice to the tenants, posting the Notice on the tenants' door on December 17, 2021. The tenants are deemed served December 20, 2021. I note the effective date on the Notice is December 28, 2021. Given the date the 10 Day Notice was deemed served, the effective date should read December 30, 2021. Pursuant to s. 53 of the *Act*, the effective date is automatically corrected to December 30, 2021.

I further note that the 10-Day Notice was issued on the basis that the tenants failed to pay \$1550.00 on December 1, 2021. Although accurate, the landlord testified that the December rent was pro-rated at 50% based on the possession date therefore the correct demand set out in the Notice should be \$775.00, the 50% owed to the current landlord. While I do not encourage the improper dating and demand as set out in the 10-Day Notice, I accept that the tenants were in significant arrears of rent when the 10-Day Notice was issued and that all of December's rent was unpaid. Pursuant to s. 68 of the *Act*, I amend the 10 Day Notice to reflect the tenants owed the current landlord \$775.00 for prorated rent December 17, 2021 through December 31, 2021.

I make this correction on the basis that the tenants knew or should have known that when the 10 Day Notice was issued, they were in significant arrears in rent. I find it reasonable to amend the Notice on the basis that I do not believe this technical defect should delay the resolution of this matter. After the amendments (effective date and demand), I find that the 10-Day Notice complies with the formal requirements of s. 52.

Pursuant to s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

- (1) A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
- (2) Loss or damage has resulted from this non-compliance.
- (3) The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
- (4) The party who suffered the damage or loss mitigated their damages.

I find that the tenants have failed to pay rent pursuant to the tenancy agreement and had no lawful reason to withhold the rent. The breach of the tenancy agreement and s. 26 of the *Act* establish a landlord's claim for unpaid rent.

I accept the landlord's undisputed testimony that the tenants have not paid rent to this landlord from December 17, 2021, to date. The landlord has been unable to mitigate her losses as the tenants continues to reside in the rental unit and so therefore, she is not able to re-rent the unit.

I find that the tenants have failed to pay rent of \$1550.00 for the past two and one half (2 ½) months, comprising a total of \$3875.00 in unpaid rent owed to this landlord. The landlord is entitled to an order for unpaid rent. Although she respectfully declined a monetary order, the landlord is entitled to a monetary order for unpaid rent. I will issue a monetary order that the landlord may or may not chose to enforce.

The tenant is conclusively presumed to have accepted the 10 Day Notice effective December 30, 2021. Since the tenants continue to reside in the rental unit, the landlord is entitled to an order of possession.

I exercise my discretion under s. 72(2) and order that the landlord may retain the security deposit of \$775.00, she currently holds in trust in partial satisfaction of the debt owed by the tenants.

Conclusion

Pursuant to section 55 of the *Act*, I grant the landlord an order of possession. The tenant shall provide vacant possession of the rental unit no later than **two (2) days** after having been served with the order of possession.

If the tenant does not comply with the order of possession, it may be filed by the landlord with the Supreme Court of British Columbia and enforced as an order of that court.

Pursuant to section 67 of the *Act*, I issue a monetary order in the landlord's favour in the amount of \$3875.00 for unpaid rent December 17, 2021 through February 1, 2022, inclusive. I leave it to the landlord to decide whether to serve the monetary order. If the landlord decides to serve the monetary order, the tenants 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.

Pursuant to s. 72(2) the landlord may retain the \$775.00 security deposit in partial satisfaction of the debt owed by the tenants.

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 18, 2022

Residential Tenancy Branch