



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #910055013: CNR

File #310054692: OPR-DR, MNR-DR, FFL

Introduction

The Tenant applies to cancel a 10-Day Notice to End Tenancy dated November 2, 2021 (the “10-Day Notice”) pursuant to s. 46 of the *Residential Tenancy Act* (the “Act”).

The Landlord makes a cross-application for an order for possession under s. 55 of the *Act* after issuing the 10-Day Notice, an order for unpaid rent pursuant to s. 67, and for return of his filing fee pursuant to s. 72.

M.H. appeared as Tenant. K.L. appeared as Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing.

The Landlord advises that he served the 10-Day Notice on the Tenant by posting it to his door on November 2, 2021. The Tenant acknowledges receipt of the 10-Day Notice on November 5, 2021 upon returning to the rental unit after being out of town. I find that the 10-Day Notice was served in accordance with s. 88 of the *Act* and was received by the Tenant on November 5, 2021.

The Tenant advises that he served the Landlord with the Notice of Dispute Resolution for his application by way of registered mail. The Tenant provides proof of service in the form of a photograph of the registered mail package indicating it was sent on November 19, 2021. The Landlord acknowledges receipt of the Tenant’s Notice of Dispute

Resolution. I find that the Tenant's Notice of Dispute Resolution was served in accordance with s. 89 of the *Act*. Pursuant to s. 90 of the *Act*, I deem that the Landlord received the Notice of Dispute Resolution on November 24, 2021.

The Tenant further indicates that the evidence provided to the Residential Tenancy Branch was served on the Landlord in the same application package sent on November 19, 2021. The Landlord denies receiving the Tenant's evidence. I note that the Tenant's evidence was uploaded to the Residential Tenancy Branch on either January 31 or February 1, with the exception of the proof of service for the registered mail package of November 19, 2021, which was uploaded on November 19, 2021.

I am not satisfied that the Tenant served his evidence on the Landlord by way of registered mail on November 19, 2021. I note that there is a significant time discrepancy between when the registered mail was sent in November 2021 and when it was uploaded to the Residential Tenancy Branch on January 31, 2022 or February 1, 2022. Presumably the Tenant could have uploaded the evidence on November 19, 2021, the same day he uploaded his proof of service for the registered mail package. He did not. Further, the Tenant failed to explain the time difference other than noting that there was a time delay.

In light of the Landlord's denial of receiving the Tenant's evidence and the Tenant's inability to satisfy me that his registered mail package included his evidence, I find that the Tenant's evidence was not served in accordance with s. 89 of the *Act* or in compliance with his obligation under Rules 3.1 and 3.14 of the Rules of Procedure. Accordingly, the documents the Tenant provided to the Residential Tenancy Branch on January 31 and February 1 are not admitted into evidence.

The Landlord advises that he served his Notice of Dispute Resolution and evidence on the Tenant by way of registered mail sent on November 26, 2021. The Tenant denies receiving any registered mail from the Landlord. The Landlord provides a registered mail tracking number that shows the carrier attempted delivery, left a notice, and the package was returned to sender after it was not retrieved.

Policy Guideline #12 states the following with respect to service via registered mail:

Where a document is served by Registered Mail or Express Post, with signature option, the refusal of the party to accept or pick up the item, does not override the deeming provision. Where the Registered Mail or Express Post, with signature

option, is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

Under s. 89 of the *Act*, the Landlord is entitled to serve the Notice of Dispute Resolution and his evidence by way of registered mail. Policy Guideline #12 is clear that failing to pick up registered mail sent to the correct address does not impact the deemed service provisions of the *Act*. I find that the Landlord did in fact serve the Notice of Dispute Resolution and his evidence in accordance with s. 89 of the *Act* through registered mail sent on November 26, 2021. I make this finding based on the Landlord's registered mail receipt and the tracking information associate. Pursuant to s. 90 of the *Act*, I deem that the Tenant received the Landlord's application materials on December 1, 2021.

I would further note that given the parties both raised issues with respect to service, I canvassed the inclusion of certain documents into the record based on the parties' consent. I did so on the basis of basic documents that were likely in everyone's possession, being the tenancy agreement and the 10-Day Notice. The parties consented to the inclusion of these two documents into evidence.

Preliminary Issue – Amendment to Landlord's Claim

At the outset of the hearing, the Landlord asked that I revise his monetary claim to take into account the unpaid rent that is claimed for those months between when his application was made and the hearing.

Rule 4.2 of the Rules of Procedure permits amendments to applications at the hearing "[i]n 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." I find that amending the Landlord's claim for unpaid rent to include the months between when the application was made and the hearing could reasonably be anticipated. Accordingly, I grant the Landlord's requested amendment to include the additional claim for unpaid rent since the application was made.

Issue(s) to be Decided

- 1) Should the 10-Day Notice be cancelled?
- 2) If not, is the Landlord entitled to an order for possession?
- 3) Is the Landlord entitled to an order for unpaid rent?
- 4) Is the Landlord entitled to return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on May 1, 2018.
- Rent of \$2,750.00 is due on the first day of each month.
- The Landlord holds an security deposit of \$1,375.00 in trust for the Tenant.

A copy of the written tenancy agreement was admitted into evidence on the consent of the parties.

The Landlord advises that he issued the 10-Day Notice on November 2, 2021 on the basis that the Tenant failed to pay rent in full for October 2021 and at all on November 1, 2021. The Landlord says that the last payment he received from the Tenant for rent was for \$1,600.00 on October 5, 2021. The Landlord says that the Tenant failed to pay rent when due for the months of November 2021, December 2021, January 2022, and February 2022.

The Tenant says that this is not the first instance that the parties have been before the Residential Tenancy Branch. The Tenant referred me to a previous dispute between the parties. At the hearing, the Tenant provided the file number for the previous dispute.

Review of the previous file indicates that on August 24, 2020 the Landlord had obtained an order for possession and a monetary order for unpaid rent in the amount of \$11,100.00. The Tenant says that these judgments were obtained by way of fraud. I note that the Tenant had previously raised the issue of fraud in an application for review considerations at for the previous decision. The Tenant's review consideration application for the August 24, 2020 decision was denied.

The Tenant says that the Landlord used the order for possession as a means to exert pressure on him to provide payment, with these payments exceeding the total rent he ought to have paid and the amount owed in the previous monetary order. The Tenant says that as of November 1, 2021, he calculates that he overpaid the Landlord in the

amount of \$14,725.00. The Tenant did not explain at the hearing how this number was calculated.

The Landlord denies the overpayment and submits a copy of a settlement agreement signed with the Tenant on September 12, 2020. The settlement agreement sets out a payment plan for the repayment of total arrears following the August 24, 2020 monetary order. The agreement further sets out that the Landlord would forego enforcement of the order for possession provided the terms of the repayment plan were followed.

The Landlord advised that he asked the Tenant for evidence of the alleged overpayment and received no evidence from the Tenant. The Landlord says he only received a vulgar response from the Tenant to his request.

The Tenant says that he took no action with respect to deducting rent overpayment because he was fearful of the order for possession, which he says was being used as leverage by the Landlord. The Tenant says that the order for possession lapsed in September 2021, which prompted his taking matters into his own hands in October 2021.

The Tenant acknowledges that his last payment was made as alleged by the Landlord, being the \$1,600.00 on October 5, 2021. The Tenant says he has not paid rent from November 2021 to February 2022 as the Landlord still owes him money due to the overpayment.

The Tenant continues to reside within the rental unit.

Analysis

The Tenant applies to cancel the 10-Day Notice. The Landlord seeks an order for possession and an order for unpaid rent after issuing the 10-Day Notice.

Pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant.

Pursuant to s. 26(1) of the *Act*, a tenant must pay rent when it is due whether or not the landlord complies with the *Act*, the Regulations, or the tenancy agreement unless the *Act* grants the tenant the right to deduct all or a portion of the rent. The *Act* proscribes a

set of limited circumstances in which monies claimed by the Tenant can be deducted from rent, which include:

1. Where a tenant has paid a security deposit or pet damage deposit above that allowed by s. 19(1), then the amount that was overpaid may be deducted from rent (see s. 19(2)).
2. The reimbursement of costs borne by a tenant for emergency repairs after the process contemplated by s. 33(5) have been followed (see s. 33(8)).
3. Where a landlord collects rent following a rent increase that does not comply with the amount proscribed by the regulations, then the tenant may deduct the overpayment from rent (see s. 43(5)).
4. As ordered by the Director pursuant to ss. 65 and 72.

Presently, the Tenant argues that the Landlord has essentially extorted him for money. The Tenant says that his total payments to the Landlord exceed his rent obligations and the amount set out in the monetary order. As of November 1, 2021, the Tenant says the total overpayment he made to the Landlord was \$14,725.00

The Tenant raises an allegation of fraud and extortion. The Tenant provides no evidence of either other than the bare allegation he made at the hearing. I note that the Tenant's argument that the August 24, 2020 order was obtained by fraud was previously dismissed in his review consideration application. The Landlord provides a copy of a settlement agreement which outlines a repayment plan that was signed by the Tenant.

I find that the Tenant's allegation lacks all credibility. The previous file before the Residential Tenancy Branch indicates that the Landlord had previously obtained an order for possession and a monetary order. That monetary order was in the amount of \$11,100.00. The Landlord and the Tenant entered into a repayment plan. That repayment plan was enforceable by either party.

The Landlord was, in his words, flabbergasted, by the Tenant's allegations. I cannot blame the Landlord for his sentiment. He is quite right that it is entirely illogical for the Tenant to make payments to the Landlord in excess of his obligations under the tenancy agreement or the repayment plan. The Tenant had alternate recourse to any alleged extortion, being the filing of an application or otherwise attempting to enforce the repayment plan and his obligations under the tenancy agreement. The Tenant did not

do so and raised the present allegation without any evidence in support of it. I place no weight in the Tenant's allegation that he overpaid the Landlord in any amount.

Based on the undisputed evidence of the parties, I am satisfied that the Tenant failed to pay rent in full in October 2021 and that he failed to pay rent at all from November 2021 to February 2022. I find that the 10-Day Notice was properly issued and meets the formal requirements of s. 52 of the *Act*. Accordingly, the Tenant's claim to cancel the 10-Day Notice is hereby dismissed.

Pursuant to s. 55(1), where a tenant's application to cancel a notice to end tenancy that is in the proper form is dismissed, I must grant the landlord an order for possession. Accordingly, the Landlord is entitled to an order for possession and shall have that order.

The undisputed evidence of the parties is that the Tenant paid rent in the following amounts since October 2021:

Month	Rent Due	Rent Paid	Difference
October 2021	\$2,750.00	\$1,600.00	-\$1,150.00
November 2021	\$2,750.00	\$0.00	-\$2,750.00
December 2021	\$2,750.00	\$0.00	-\$2,750.00
January 2022	\$2,750.00	\$0.00	-\$2,750.00
February 2022	\$2,750.00	\$0.00	-\$2,750.00
TOTAL UNPAID RENT			\$12,150.00

I find that total unpaid rent is in the amount of \$12,150.00.

I note I may make this finding under either the Tenant's application (under s. 55(1.1)) or the Landlord's application (under s. 67). Under s. 55(1.1) of the *Act*, where a Tenant's application to dispute a 10-Day Notice to End Tenancy is dismissed, I must grant the Landlord an order for unpaid rent. Accordingly, I grant the Landlord an order in the amount of \$12,150.00 for unpaid rent pursuant to s. 55(1.1).

I would also make this order under s. 67 *Act* as the Tenant acknowledges that he is in breach of his obligation to pay rent under the tenancy agreement, that the unpaid rent is undisputed between the parties, and that the Landlord was unable to mitigate their damages as the Tenant continues to reside within the rental unit.

Conclusion

The Tenant's application to cancel the 10-Day Notice is dismissed. Accordingly, I grant the Landlord an order for possession pursuant to s. 55(1) of the *Act*. The Tenant shall provide vacant possession of the rental unit to the Landlord within **two (2) days** of receiving this order.

I further find that the Tenant has failed to pay rent to the Landlord in the amount of \$12,150.00. Pursuant to s. 55(1.1) of the *Act*, I grant the Landlord an order for unpaid rent.

As the Landlord was successful in their application, I order pursuant to s. 72(1) of the *Act* that the Tenant pay the Landlord's filing fee.

Pursuant to s. 67 of the *Act*, I order that the Tenant pay the Landlord a total amount of **\$12,250.00**, comprising the total amount for unpaid rent and the Landlord's filing fee as outlined above.

It is the Landlord's obligation to serve these orders on the Tenant. If the Tenant does not comply with the monetary portion of this order, it may be filed by the Landlord with the Small Claims Division of the Provincial Court and enforced as an order of that Court. If the Tenant does not comply with the order for possession, it may be filed by the Landlord with the Supreme Court of British Columbia 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 15, 2022

Residential Tenancy Branch