



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- 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 11:20 a.m. in order to enable the tenant to call into this teleconference hearing scheduled for 11:00 a.m. The landlord attended the hearing with her agent and was 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 and I were the only ones who had called into this teleconference.

The landlord testified that the tenant sent a text on January 6, 2022, advising her that he had filed an application for dispute with the Residential Tenancy Board (the "**RTB**") and would send the package when he received it. The notice of dispute resolution form and without evidence was received on January 15, 2022. I find that the landlord was served with this package on January 15, 2022, in accordance with section 88 and 89 of the *Act*.

The landlord testified she provided the tenant with her evidence on February 13, 2022, by registered mail. The Canada Post tracking number confirming this mailing is reproduced on the cover of this decision. I find that the tenant is deemed served with the respondent's evidence on February 18, 2022, five days after the party mailed it, in accordance with sections 88 and 90 of the *Act*.

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.

Preliminary Issue #1 -Tenant Application Dismissed

Rules 7.1 and 7.3 of the Rules of Procedure provide as follows:

Rule 7- During the Hearing

7.1 Commencement of the dispute resolution hearing

The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.

7.3 Consequences of not attending the hearing

If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party or dismiss the application, with or without leave to re-apply.

Further, Rule 7.4 states:

Rule 7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

Rule 2.5 Documents that must be submitted with an Application for Dispute Resolution

To the extent possible, the applicant should submit the following documents at the same time as the application is submitted:

- *a detailed calculation of any monetary claim being made;*
- *a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and*
- *copies of all other documentary and digital evidence to be relied on in the proceeding, subject to Rule 3.17 [Consideration of new and relevant evidence]*

Other than the initial application, the tenant failed to submit the above referenced documentation to support his claim and did not attend the hearing to present oral testimony. Accordingly, in the absence of any attendance at this hearing by the applicant (tenant) I order the tenant's application dismissed without leave to reapply.

I note s. 55 of the *Act* requires that when a tenant applies 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 or a monetary order if the application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Relying on *M.B.B v. Affordable Housing Charitable Association*, 2018 BSCS 2418, the landlord must still prove the grounds to end tenancy when a tenant does not appear to present their application to cancel the notice.

[27] I accept it was open to the arbitrator to proceed with the hearing or dispense with the hearing altogether and decide the matter in the absence of M.B.B., but in doing so, the arbitrator still had to resolve the issue raised by the application on the merits in some way. It was insufficient to dismiss the application solely on the grounds that M.B.B. had not dialed in to the hearing within the first ten minutes as she was supposed to have done.

Preliminary Issue #2- Predictable Amendment

In the 10 Day Notice, the Agent/landlord requested a monetary order for unpaid rent in the amount of \$1750.00 as of December 25, 2021. In the hearing, the Agent/landlord stated the amount does not include outstanding rent from January 1, 2022 through February 1, 2022, inclusive, in the amount of \$3500.00. The landlord/Agent requests an amendment of the rent owing to reflect the current outstanding balance of \$5250.00.

Policy Guideline #23 “Amending an Application for Dispute Resolution” subsection F provides:

F. PREDICTABLE AMENDMENTS

In accordance with rule 4. 2 (Amending an application at the hearing), when the amount of rent owing has increased since the time the application initially was filed, or in other circumstances that can reasonably be anticipated, the application may be amended through an oral request at the hearing. If such an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be filed or served.

I grant the Agent’s request and amend the rental arrears to reflect the current outstanding balance of \$5250.00.

Issues to be Decided

Is the landlord entitled to:

- 1) an order of possession;
- 2) a monetary order for \$5250.00;
- 3) retain the security deposit partial satisfaction of the monetary orders made?

Background and Evidence

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

The parties entered into a written fixed term tenancy agreement starting August 1, 2021. Monthly rent is \$1750.00 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$875.00. The landlord still retains this deposit.

The landlord issued a 10-Day Notice for Unpaid Rent. The Notice is signed and dated December 25, 2021, with an effective date of January 15, 2022. The landlord sent the Notice by registered mail to the tenant on December 31, 2021. The tenant filed for dispute resolution on January 5, 2022. The tenant is deemed served with the 10-Day Notice on or before January 5, 2022.

The landlord submitted into evidence multiple texts between the tenant and the landlord requesting payment of rent starting in December 2021. The tenant told the landlord that he was unable to pay rent because he lost his job and he applied to the RTB to have more time to find a new rental unit. He was looking for work and also looking for another rental unit.

The landlord believes that the tenant is still living in the unit although the last text message from the tenant was February 16, 2022. The landlord said that prior to the tenant going to Turkey, he paid his rent on time so when he told the landlord he would pay the rent, albeit late, she trusted him. That is why she waited to issue the 10 Day Notice. The landlord believes that the tenant has found work and is working but does not know where and he does not respond to texts.

The landlord is requesting an Order of Possession and a Monetary Order. Rental arrears currently stand at \$5250.00. The landlord is also requesting the monetary award include the penalty written into the Addendum of the Tenancy Agreement.

The “Addendum to the Residential Tenancy Agreement” contains a clause that reads: “The Tenant will be charged an additional amount of \$25.00 per day for any Rent that is received after the latter of the due date and the expiration of any grace period under the Act, if any.”

$$\$25.00 \times 90 \text{ (days)} = \underline{\underline{\$2,250.00}}$$

Analysis

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 10-Day Notice was issued on the basis that the tenant failed to pay the December 1, 2021, rent.

When a 10 Day Notice to End Tenancy issued under s. 46 of the *Act* is received by the tenants, the tenants must, within 5-days, either pay the overdue rent or dispute the notice with the Residential Tenancy Branch. In this case, the tenant filed an application.

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 tenant has 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* gives rise to the landlord's claim for unpaid rent.

I accept the undisputed evidence that the landlord has not received rent from the tenant since December 1, 2021. The landlord has been unable to mitigate her losses as the tenant continues to reside in the rental unit and, therefore, she is unable to re-rent the unit.

I find that the tenant has failed to pay rent of \$1750.00 for the past three (3) months, comprising a total amount of unpaid rent of \$5250.00. The landlord is entitled to an order for unpaid rent in the amount of \$5250.00.

I exercise my discretion under s. 72(2) and order that the landlord may retain the security deposit of \$875.00, she currently holds in trust in partial satisfaction of the debt owed by the tenants.

Monetary Order: $\$5250.00 - \$875.00 = \mathbf{\$4375.00}$

The landlord requests a monetary order for an additional \$2250.00. The landlord testified that the Tenancy Agreement Addendum contained a penalty clause for late or unpaid rent. The addendum arbitrarily identified a fine or penalty of \$25.00 per day. Pursuant to Policy Guideline #4, I find that the sum of \$2250.00 is a penalty and not enforceable. I dismiss the landlord's claim for \$2250.00.

Pursuant to s. 55, I grant the landlord an order of possession.

Conclusion

Pursuant to sections 62, 65, 67, and 72 of the Act, I order that the tenant pay the landlord **\$4375.00** representing the following: rental arrears for December 1, 2021 (\$1750.00); January 1, 2022 (\$1750.00); and February 1, 2022 (\$1750.00) less the \$875.00 security deposit.

Pursuant to section 55 of the Act, I order that the tenant deliver vacant possession of the rental unit to the landlord within two (2) days of being served with a copy of this decision and the attached order(s).

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 24, 2022

Residential Tenancy Branch