



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH POOL XVI LP c/o Metcap Living Management
Inc and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, MNDCL-S, OPR-PP, FFL

Introduction

The Landlord filed an Application for Dispute Resolution on July 19, 2021 seeking an order of possession of the rental unit, as well as recovery of money owing for unpaid rent. Additionally, they applied for reimbursement of the Application filing fee. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the “Act”) on March 17, 2022.

Both parties attended the telephone conference call hearing. I informed the parties of the hearing format and provided the opportunity for them to ask questions.

Preliminary Matter – Landlord service

I have amended the Respondents’ information to show there are two individuals on the tenancy agreement. The agent who appeared on the Tenant’s behalf clarified this in the hearing. Additionally, I corrected the spelling of the Tenant’s name as it appears in the evidence provided by the Landlord.

An agent for the Tenant -- who is a family member -- appeared on their behalf in the hearing. This individual testified under oath that they reside in the unit. They spoke to the ill-health of one Tenant named on the agreement. They confirmed that the second named Tenant also still resides at the rental unit. I accept this family member as capable and authorized to speak on the Tenant’s behalf in this matter.

The Tenant’s agent stated they received the notice of this hearing from the Landlord. They could not confirm whether they received all pieces of the Landlord’s evidence as became apparent in the hearing. The Landlord, with that agent’s consent, forwarded an updated copy of the Tenant ledger to the agent during the hearing for their reference.

Issues to be Decided

Is the Landlord entitled to issue an Order of Possession for unpaid rent, pursuant to s. 55 of the *Act*?

Is the Landlord entitled to monetary compensation for unpaid rent pursuant to s. 67 of the *Act*?

Is the Landlord entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

Background and Evidence

The Landlord spoke to the terms of the tenancy agreement, a copy of which they provided as evidence. The Tenant signed the agreement on February 20, 2019 and the Landlord followed with their signature on March 5, 2019. The Landlord provided – from the date of their Tenant ledger sheet – that the tenancy started on April 1, 2019 and the Tenant's agent in attendance in the hearing did not provide a different date.

Over the course of the tenancy, the rent increased to \$2,806.47, with a separate fee of \$75. This is normally payable on the first of each month. The Tenant paid a security deposit (\$1,382.60) and a pet deposit (\$1,382.50).

The Landlord provided a copy of the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "10-Day Notice"), issued July 9, 2021. This document gave the move-out date of July 24, 2021. There was no method of service indicated on page 2. The reason for ending the tenancy was the tenant not paying the amount of \$8,750 that was due on July 1, 2021.

The Landlord provided a separate completed form, the Proof of Service that they signed and dated on July 9, 2021. Page 1 has the Landlord's indication that they left a copy in the mailbox or mail slot at the address where the Tenant resides.

In the hearing, the Landlord provided that they served 10-Day Notice by regular mail to the rental unit. The Landlord described that all notices to end tenancy are system-generated and sent by regular mail.

In the hearing, the agent for the tenants stated they did not receive a copy of this document via regular mail. They also stated, under affirmed oath, that they did not receive this in the

Landlord's evidence material for this hearing. They described how the Tenants did not receive this document and did not convey to them any information that a 10-Day Notice was served by the Landlord.

In the interim, the Tenant was paying rent amounts to the Landlord, though not on the 1st of each month as the tenancy agreement specifies. The Landlord provided there was a payment plan in place, and provided a document signed by the Landlord on August 25, 2020 showing proof of this. The Tenant in the hearing acknowledged the amount of \$8,750 (as noted on the 10-Day Notice and stated in the hearing) was for a couple of missed rent payments, and the continuing missed rent payments are "a mess in terms of getting everything organized."

The Landlord provided a ledger dated March 9, 2022. There are \$75 entries per month for parking and this adds to the running total. On their Application, they provided the amount of \$5,810 owing. The updated ledger provides an amount of \$14,654.41, as of March 2, 2022, and shows intermittent rent amount payments.

Analysis

The *Act* s. 26 sets out the duty of a tenant to pay rent:

A tenant must pay rent when it is due under the tenancy agreement, whether or not the Landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent.

The evidence shows the Landlord issued a 10-Day Notice on July 8, 2021 for rent amounts owing.

I order this 10-Day Notice is of no effect because the Landlord could not prove service to the Tenant. The Landlord provided contradictory evidence where they indicated it was left in the mailbox or mail slot at the address where the person resides on the Proof of Service document; yet stated in the hearing they delivered it by regular mail, with their office location being in another province. Both of these modes of delivery have different considerations for when they are deemed to have been received as per s. 90 of the *Act*, affecting the timeline in which a tenant may challenge a landlord's attempt at ending the tenancy.

More importantly, the Tenant's agent in the hearing provided that the Tenant did not receive the 10-Day Notice.

The *Act* s. 88(c) does give authority for a landlord to serve a 10-Day Notice via ordinary mail; however, this requires proof that a tenant received the document. There are other modes of service in place that provide more certainty: registered mail, in-person service, or attesting with a witness that a copy was left at the address. The Landlord here is not wrong for using regular mail; however, the difficulty is with having to prove the Tenant received the document. The Tenant's agent in the hearing (who I accept as a family member with authorization in this matter) stated directly they did not receive it, and the Landlord has not overcome the burden to show service was definitively accomplished.

I also find as fact that the Tenant did not dispute the 10-Day Notice within the timeframe of 5 days after they received it. This increases the weight of the Tenant's statement that they did not receive it. Without evidence showing service as fact, I find on a balance of probabilities that the Tenant did not receive the 10-Day Notice. The Landlord seeks an Order of Possession because of this 10-Day Notice; however, without proof of service, I dismiss this portion of the Landlord's Application, without leave to reapply.

I am satisfied the Tenant received the current version of the ledger, with the Landlord emailing that document to the email address directly provided by the Tenant's agent – under affirmed oath – in the hearing. Given the assurance of the Tenant's agent in the hearing of their email address, and the Landlord utilizing that method in the hearing, I am satisfied the Landlord has now provided the updated March 9, 2022 ledger to the Tenant's agent.

I find the Tenant now is aware of the current balance. I find the record accurate and up-to-date, and so award the outstanding balance to the Landlord by way of Monetary Order. Given that the tenancy is not ending, I make no provision for the Landlord to apply the security deposit against the outstanding amount owing. This is \$14,654.41, reflecting accumulating rent amounts from approximately May 2020 onwards.

The *Act* s. 72 grants me the authority to order the repayment of a fee for the Application. As the Landlord was successful in their monetary claim, I find they are entitled to recover the filing fee from the tenants.

Conclusion

For the reasons outlined above, I order that the 10-Day Notice issued on July 8, 2021 is cancelled. There is no order of possession issued to the Landlord and the tenancy will continue.

Pursuant to sections 67 and 72 of the *Act*, I grant the landlord a Monetary Order in the amount of \$14,754.41. I provide the Landlord with this Order and they must serve the Tenant in compliance with the *Act* as soon as possible. Should the Tenant fail to comply with this Order, the Landlord may file this Order in the Small Claims Division of the Provincial Court where it will be 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 s. 9.1(1) of the *Act*.

Dated: March 18, 2022

Residential Tenancy Branch