



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding FJL HOUSING SOCIETY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, MNDCT, LRE, LAT, OPR-DR, MNR-DR, FFL

Introduction

This hearing dealt with cross applications filed by the parties. On December 6, 2021, the Tenant applied for a Dispute Resolution proceeding seeking to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the “Notice”) pursuant to Section 46 of the *Residential Tenancy Act* (the “*Act*”), seeking to restrict the Landlord’s right to enter pursuant to Section 70 of the *Act*, seeking authorization to change the locks pursuant to Section 31 of the *Act*, and seeking a Monetary Order for compensation pursuant to Section 67 of the *Act*.

On December 17, 2021, the Landlord applied for a Dispute Resolution proceeding seeking an Order of Possession based on the Notice pursuant to Section 46 of the *Act*, seeking a Monetary Order for compensation pursuant to Section 67 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing. J.L. attended the hearing as an agent for the Landlord. 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, they were reminded to refrain from doing so, and all parties acknowledged these terms. As well, all parties in attendance provided a solemn affirmation.

The Tenant advised that he served the Notice of Hearing package to an agent of the Landlord by hand sometime in January 2022, but he did not have any proof of this service. J.L. advised that the Landlord did not receive such a package. Records indicate that the Tenant was emailed this package on December 15, 2021 with specific instructions to serve by December 18, 2021. Furthermore, the Tenant personally picked up this package on December 20, 2022 from the Residential Tenancy Branch, and it was noted that he was aware at that point that the service deadline of this package was December 18, 2022. Given that the Tenant allegedly served this package late, weeks after he was aware it was supposed to be served, I am satisfied that it was not served in accordance with Rule 3.1. of the Rules of Procedure. In addition, as there is no evidence to corroborate service, I am doubtful that this package was served at all. As such, I have dismissed the Tenant's Application, concerning the dispute of the Notice, without leave to reapply.

J.L. advised that the Landlord's Notice of Hearing package was served by being posted to the Tenant's door on December 23, 2021 and she submitted a proof of service document to corroborate this. The Tenant claimed not to have received any such document. When reviewing the evidence before me, I am satisfied from the Landlord's proof of service document that this package was more likely than not posted to the Tenant's door on December 23, 2021. As such, I find that the Tenant was deemed to have received this package three days after it was posted.

She then advised that the Landlord's evidence was served to the Tenant on February 28, 2022 by registered mail, and included was a proof of service document. The Tenant claimed that he did not have ID, so he was not able to retrieve this package. Based on this testimony and evidence, I am satisfied that the Landlord's evidence was served by registered mail, thus was deemed to have been received five days after it was mailed. As such, 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.

J.L. advised that the most current tenancy agreement started on August 1, 2021, that the subsidized rent was established at \$375.00 per month, and that it was due on the first day of each month. A security deposit of \$540.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence. The Tenant could not adequately explain any discrepancies with how he believed the basic details of the tenancy were not correct.

J.L. testified that the Notice was served to the Tenant by being posted to his door on December 3, 2021 and the Tenant confirmed that he received this. She stated that the Notice was served because \$431.00 was in arrears and was due on December 1, 2021. She referenced the rent ledger provided, but she had difficulty explaining how this particular amount was calculated. In addition, she stated that included in this amount were charges for NSF fees. She was informed that these fees cannot be considered as rental arrears on the Notice. She later claimed that the Tenant did not pay any rent from October 2021 to service of the Notice, which would still not accurately account for the amount of \$431.00 on the Notice. She advised that the Tenant has not paid any rent from October 2021 to the date of the hearing. The effective end date of the tenancy was noted on the Notice as December 16, 2021.

The Tenant acknowledged that he understood the amount outstanding on the Notice was not correct; however, he confirmed that he did not pay any rent for December 2021. He stated that he had paid \$2,983.00 for an emergency repair, in January 2022, for his toilet that backed up in September 2021. He stated that he notified the Landlord of this emergency repair in September 2021 and the Landlord did not fix this. He did not submit any documentary evidence to substantiate that he was not negligent for the flooding of the toilet, nor did he submit any documentary evidence regarding this amount that he paid. He acknowledged that he has not paid any rent since December 2021, but he claims to have paid rent prior to this.

J.L. referenced the Landlord's documentary evidence demonstrating the cost of repairs and restoration due to the toilet issue. It is the Landlord's position that these invoices indicate that the toilet flooding issue was attributed to the Tenant's negligence. She stated that the Tenant would not allow access to the rental unit to conduct any repairs and that the Tenant attempted to make these repairs himself.

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.

Section 33 of the *Act* indicates that the Tenant may withhold the rent for emergency repairs if the Tenant has made at least two attempts to phone the Landlord to advise of these emergency repairs, and then deduct the amount of those repairs if the Landlord did not complete them in a reasonable period of time. The Tenant must give the Landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

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.

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. The undisputed evidence before me is that the Tenant received the Notice on December 4, 2021. According to Section 46(4) of the *Act*, the Tenant has 5 days to pay the overdue rent 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 Tenant received the Notice on December 4, 2021, he must have paid the rent in full or disputed the Notice on December 9, 2021 at the latest. While the Tenant did not pay the amount on the Notice to cancel it, the Tenant did dispute the Notice on December 6, 2021. However, as noted above, the Tenant's Application to dispute the Notice has been dismissed.

As such, the Landlord's Application will be addressed. While the Tenant claimed that he paid for an emergency repair, I note that this was allegedly paid in January 2022, which was much later than when the Notice was served. In addition, the Tenant did not submit any documentary evidence to prove that there was an emergency repair or that the toilet flooding issue was not caused by his own negligence. As such, I am not satisfied that the Tenant was permitted to withhold any rent.

Given that the Tenant acknowledged that he withheld rent for December 2021, as I have found that he was not permitted to withhold the rent, I am satisfied that the Tenant has breached the *Act* and jeopardized his tenancy. As such, I grant the Landlord an Order of Possession effective **two days** after service of this Order on the Tenant.

With respect to the Landlord's request for a monetary award, J.L. was advised that because her Notice of Hearing package was served by being posted to the door, this method of service was not acceptable for seeking a Monetary Order in accordance with Section 89 of the *Act*. She was also informed that despite this, a Monetary Order could be granted due to the Tenant's Application being dismissed.

However, as J.L. could not go through the ledger and identify exactly how much was in arrears, I decline to award the Landlord a monetary award for any rental arrears pursuant to Section 55 of the *Act*. The Landlord is at liberty to apply for this in a separate Application.

As the Landlord was partially successful in their claims, I find that the Landlord is entitled to recover the \$100.00 filing fee paid for this Application. Under the offsetting provisions of Section 72 of the *Act*, I permit the Landlord to withhold this amount from the security deposit.

Conclusion

I dismiss the Tenant's Application for Dispute Resolution seeking to cancel the Notice, seeking to restrict the Landlord's right to enter, and seeking authorization to change the locks without leave to reapply. The Tenant's Application seeking a Monetary Order for compensation is severed and the Tenant is at liberty to apply for this on a separate Application.

Furthermore, 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.

The Landlord is at liberty to apply for a Monetary Order for compensation on a separate Application.

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: March 25, 2022

Residential Tenancy Branch