



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, FFT

Introduction

The Tenant applies to cancel a 10-Day Notice to End Tenancy dated December 7, 2021 (the “10-Day Notice”) pursuant to s. 46 of the *Residential Tenancy Act* (the “Act”). The Tenant also seeks the return of his filing fee pursuant to s. 72 of the *Act*.

A.B. appeared as Tenant. K.O. and P.L. appeared as agents for the Landlord. L.T. appeared as assistant for the Landlord and provided no submissions during the hearing.

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’s agent advised that the 10-Day Notice was served on the Tenant by way of registered mail sent on December 7, 2021. The Tenant acknowledges receipt of the 10-Day Notice and indicated he received it on December 10, 2021. I find that the Landlord served the 10-Day Notice in accordance with s. 88 of the *Act* and that it was received by the Tenant on December 10, 2021, as acknowledged by the Tenant.

The Tenant did not advise how the Notice of Dispute Resolution was served and admitted that the evidence he provided to the Residential Tenancy Branch was not served on the Landlord. The Landlord acknowledges being served with the Notice of Dispute Resolution and confirmed that they did not receive evidence from the Tenant. Based on the acknowledged receipt, I find that pursuant to s. 71(2) of the *Act* the Landlord was sufficiently served with the Notice of Dispute Resolution. As the Tenant’s evidence was not served in compliance with the *Act* or the Rules of Procedure, it is not admitted into the record.

The Landlord's agent advised that the Landlord's responding evidence was served on the Tenant by way of registered mail sent on January 27, 2022. The Landlord says that the registered mail package was returned to them on February 18, 2022.

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.

The Landlord is entitled to serve their evidence by way of registered mail in accordance with s. 89 of the Act. 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.

The Landlord's evidence includes a registered mail tracking receipt and package indicating clearly that it was sent to the Tenant's mailing address. I find that the Landlord's responding evidence was served in accordance with s. 89 of the Act by way of registered mail sent on January 27, 2021. Pursuant to s. 90 of the Act, I deem that the Tenant received the Landlord's responding evidence on February 1, 2021.

Preliminary – Amending the Style of Cause

I clarified with the Landlord's agents who, in fact, was the Landlord. The Landlord confirmed that the corporate Landlord, as listed in the tenancy agreement, is the correct Landlord. The Tenant raised no objections with respect to the amendment. Accordingly, I amend the application pursuant to Rule 4.2 of the Rules of Procedure such that the style of cause reflects the corporate Landlord as listed in the tenancy agreement.

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?

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 of the tenancy:

- The Tenant took occupancy of the rental unit on November 15, 2020.
- Rent of \$1,450.00 was due on the first day of each month and was increased to \$1,471.00 effective on January 1, 2022.
- The Landlord holds a security deposit of \$725.00 in trust for the Tenant.

A copy of the written tenancy agreement was put into evidence by the Landlord. The Landlord advised of a \$30.00 parking fee and a late rent fee of \$25.00, both of which are set out in the written tenancy agreement. The Tenant confirmed this was correct.

The Landlord's agent advised that the Tenant had paid rent in full and on-time up until October 1, 2021. The Landlord's agent indicates that the Tenant's rent cheque for October 1, 2021 bounced and that he made a partial payment of \$600.00 in October. The Landlord's agent further advised that rent for November 2021 also went unpaid when it was due and that they received \$2,000.00 from the Tenant at some point later in November 2021.

The Tenant indicates that his last payment for rent was in either November or October 2021 in the amount of \$2,000.00 and acknowledges that he was in arrears of rent in the amount of \$460.00 as of November 30, 2021.

The Landlord's agent indicates that the 10-Day Notice was issued on December 7, 2021 after the Tenant had failed to pay rent on the first. The amount listed in the 10-Day Notice was \$1,750.00. As mentioned above, the Tenant acknowledged receipt of the 10-Day Notice on December 10, 2021.

The Landlord provides a statement of rental account comprising the period up until January 2022. The ledger indicates that the Tenant owed \$460.00 from November 2021, which carried forward and was added to the amount owed on December 1, 2021, which included parking and late fees.

The Landlord's agent indicates that the Tenant has not made any payments for December 2021, January 2022, February 2022, and March 2022. The Landlord indicates that they seek the following amounts:

- \$6,163.00 for unpaid rent;
- \$180.00 for unpaid parking fees; and
- \$225.00 for late fees.

The Tenant confirmed that his last payment was the \$2,000.00 made in either October or November 2021 and that he has made no payments since that time. The Tenant indicated that he lost his job in November 2021 and has had difficulties in obtaining employment insurance.

The Tenant continues to reside within the rental unit.

Analysis

The Tenant applies to cancel the 10-Day Notice. Despite it being the Tenant's application, the Landlord bears the onus of proving on a balance of probabilities that the 10-Day Notice was properly issued, as made clear by Rule 6.6 of the Rules of Procedure.

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.

When a 10-day Notice to End Tenancy issued under s. 46 of the *Act* is received by a tenant, a tenant must, within 5-days, either pay the overdue rent or dispute the notice with the Residential Tenancy Branch. This is made clear at the very top of the 10-Day Notice, which states:

HOW TO DISPUTE THIS NOTICE

You have **5 days** to pay rent and/or utilities to the landlord or file an Application for Dispute Resolution with the Residential Tenancy Branch online, in person at any Service BC Office or by going to the Residential Tenancy Branch Office at #400 - 5021 Kingsway in Burnaby. If you do not apply within the required time limit, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the effective date of this Notice.

In this case, the Tenant acknowledges receiving the 10-Day Notice on December 10, 2021. Pursuant to Rule 2.6 of the Rules of Procedure, an application is considered to have been made when the application is submitted to the Residential Tenancy Branch and the application fee is paid. On review of this matter, I find that the application was made on December 16, 2021, which is when the Residential Tenancy Branch received the Tenant's application and his fee waiver application.

Given the Tenant's acknowledged receipt of the 10-Day Notice on December 10, 2021, the Tenant had until December 15, 2021 to file his application. The Tenant failed to do so and filed one day late on December 16, 2021. Further, the Tenant failed to ask for more time to dispute the 10-Day Notice, as permitted by s. 66 of the *Act*.

Given this, s. 46(5) of the *Act* comes into effect and the Tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the rental unit on the effective date. The Tenant continues to reside within the rental unit. As the Tenant is conclusively presumed to have accepted the end of the tenancy, his application to cancel the 10-Day Notice is dismissed.

Pursuant to s. 55(1) of the *Act*, when a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with s. 52, I must grant the landlord an order for possession of the rental unit.

I have reviewed the 10-Day Notice and I find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, states the correct effective date, which was corrected by virtue of when it was received by the Tenant, sets out the grounds for ending the tenancy, and is in the approved form (RTB-30).

The Tenant ought to have vacated the rental unit on the effective date of the 10-Day Notice. He has failed to do so and continues to reside within the rental unit. Accordingly, I find that the Tenant has been overholding since December 20, 2021, which is the effective date of the 10-Day Notice after it is corrected by s. 53 of the *Act*. As such, I grant the Landlord an order for possession pursuant to s. 55(1) of the *Act*.

To be clear, had the Tenant filed in time, I would have still upheld the 10-Day Notice and issued the order for possession. The Tenant admitted that he was in arrears in the amount of \$460.00 as of November 30, 2021 and that he has not made rent payments since paying \$2,000.00 in November or October 2021. I would have found that the 10-

Day Notice was properly issued by the Landlord as the Tenant admits that he did not pay rent as required under the tenancy agreement and in compliance with s. 26 of the *Act*. Though I empathize with the Tenant's present financial circumstances, there is no provision of the *Act* that permits him to withhold rent from the Landlord due to the loss of his employment.

Pursuant to s. 55(1.1) of the *Act*, if a tenant's application to cancel a notice to end tenancy for unpaid rent is dismissed and the notice complies with the formal requirements of s. 52, then the Director must grant an order for unpaid rent. In accordance with Policy Guideline #3, an order for unpaid rent is limited to rent owed during the tenancy and does not include compensation for an overholding tenant.

Where a tenant is conclusive presumed to have accepted the end of the tenancy pursuant to s. 46(5) of the *Act*, the tenancy ends on the effective date in the notice to end tenancy. In this case, that is December 20, 2021. As made clear by Policy Guideline #3, only rent owed up until the effective date constitutes unpaid rent and I cannot order compensation in lieu of rent from a tenant that is overholding. Therefore, the amount claimed by the Landlord for the months of January to March 2022, which comprise of a claim for compensation in lieu of rent from an overholding tenant, cannot be granted under s. 55(1.1). The Landlord must file a separate application for that relief.

The parking fee and late fee do not constitute rent as defined by s. 1 of the *Act*. The Landlord did not make an application under the present circumstances and my ability to order these amounts is made by s. 55(1.1), which is limited to unpaid rent. Therefore, the Landlord's claims for other fees payable under the tenancy agreement cannot be made under s. 55(1.1) and must be made in a separate application.

The parties are not in dispute that as of November 30, 2021, the Tenant was in arrears in the amount of \$460.00 and failed to pay rent on December 1, 2021 in the amount of \$1,450.00. Total arrears in unpaid rent before the effective date of the 10-Day Notice is, therefore, \$1,910.00.

Accordingly, I grant the Landlord an order for unpaid rent in the amount of \$1,910.00 pursuant to s. 55(1.1) of the *Act*. Pursuant to s. 72(2) of the *Act*, I direct that the Landlord withhold the security deposit in the amount of \$725.00 in partial satisfaction of the amount owed by the Tenant.

Conclusion

The Tenant failed to dispute the 10-Day Notice within the 5-days permitted by s. 46(4) of the *Act*. Pursuant to s. 46(5) of the *Act*, he is conclusively presumed to have accepted the end of the tenancy and ought to have vacated the rental unit by the effective date of the 10-Day Notice. The Tenant's application is therefore dismissed.

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 the order for possession.

Pursuant to s. 55(1.1) of the *Act*, the Landlord has demonstrated that the Tenant failed to pay rent in the amount of \$1,910.00 before the effective date of the 10-Day Notice, which is December 20, 2021. The amounts claimed after the tenancy ended is compensation in lieu of rent from an overholding tenant and cannot be granted under s. 55(1.1), which is limited to claims of unpaid rent. Similarly, the Landlord's claims for fees payable under the tenancy agreement cannot be granted under s. 55(1.1) as they are not rent as defined by s. 1 of the *Act*. These additional amounts, if they are to be claimed, must be made in a separate application given that the conclusive presumption applies in the present circumstances.

I make a total monetary award to the Landlord taking the following into account:

Item	Amount
Unpaid rent as permitted by s. 55(1.1)	\$1,910.00
Less security deposit to be retained by the Landlord pursuant to s. 72(2)	-\$725.00
TOTAL	\$1,185.00

Accordingly, I order that the Tenant pay **\$1,185.00** to the Landlord pursuant to ss. 55(1.1), 67, and 72(2).

It is the Landlord's obligation to serve these orders on the Tenant. If the Tenant does not comply with the monetary order, it may be filed 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 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: March 08, 2022

Residential Tenancy Branch