



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPR, FFL**

Introduction

This hearing was convened as a result of the Landlord's application under the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession for non-payment of rent pursuant to sections 46 and 55; and
- authorization to recover the filing fee of the Landlord's application from the Tenant.

The Tenant did not attend this hearing. I left the teleconference hearing connection open until 9:58 am in order to enable the Tenant to call into this teleconference hearing scheduled for 9:30 am. The Landlord and the Landlord's legal counsel ("BH") attended the hearing and were 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 Dispute Resolution Proceeding ("NDRP"). I also confirmed from the teleconference system that the Landlord, BH and I were the only ones who had called into this teleconference.

Preliminary Matter – Service of NDRP and Landlord's Evidence on Tenant's Door

BH stated that a process server ("AH") served the NDRP and the Landlord's evidence on the Tenant's door on January 13, 2022. BH submitted a Statutory Declaration dated January 13, 2022 BH in which AH stated he served the NDRP and the Landlord's evidence on the Tenant's door. BH stated the Landlord was only seeking an Order of Possession and not recovery of the rental arrears owed by the Tenant. Section 89(2) of the Act states:

- 89(2) An application by a landlord under section 55 [*order of possession for the landlord*], 56 [*application for order ending tenancy early*] or 56.1 [*order of possession: tenancy frustrated*] must be given to the tenant in one of the following ways:
- (a) by leaving a copy with the tenant;
 - (b) by sending a copy by registered mail to the address at which the tenant resides;
 - (c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;
 - (d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;
 - (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
 - (f) by any other means of service provided for in the regulations.

As the Landlord is only seeking an Order of Possession pursuant to the 10 Day Notice, I find the NDRP Package was served in accordance with sections 88 and 89(2) of the Act. I find, pursuant to section 90 of the Act, the Tenant was deemed to have been served with the NDRP Package on January 16, 2022.

Preliminary Matter – Correct of Rental Address

I noted there appeared the rental address contained the word “Upper” when it was not required as a unit number was already provided as part of the rental address. BH requested that I amend the Landlord’s application to remove the word “Upper” from the rental address so as to ensure there could be no confusion as to the correct address of the rental unit. Section 4.2 of the *Residential Tenancy Branch Rules of Procedure* states:

4.2 Amending an application at the hearing

In 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, the application may be amended at the hearing.

If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

As the Tenant could reasonably have anticipated the Landlord would seek an amendment, I amend the application to remove the word "Upper" from the rental address.

Issues to be Decided

- Is the Landlord entitled to an Order of Possession?
- Is the Landlord entitled to recover the filing fee of his application from the Tenant?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Landlord's application and my findings are set out below.

BH stated the tenancy commenced on June 1, 2021, on a month-to-month basis, with rent of \$800.00 payable on the 1st day of each month. The Tenant was to pay a security deposit of \$400.00 on or before June 1, 2021. The Landlord confirmed that he received the security deposit and was holding it in trust on behalf of the Tenant.

BH stated the Landlord served a Ten Day Notice for Unpaid Rent dated November 6, 2021 ("First 10 Day Notice") on the Tenant's door on November 6, 2021. The First 10 Day Notice stated the Tenant owed rental arrears of \$800.00 as of November 1, 2021.

BH stated the Landlord served a Ten Day Notice for Unpaid Rent dated December 2, 2021 ("Second 10 Day Notice") on the Tenant's door on December 2, 2021. The Second 10 Day Notice stated the Tenant owed rental arrears of \$1,600.00 as of December 1, 2021.

BH stated the Tenant did not pay any of the rental arrears to the Landlord except for a payment of \$800.00 in cash she made to the Landlord in early March 2022. BH stated the Landlord returned the \$800.00 to the Tenant on March 24, 2022, with a letter from BH advising the Landlord was not reinstating the tenancy and the Tenant was still required to vacate the rental unit.

Analysis

1. Landlord's Claim for Order of Possession

The undisputed testimony of BH was the Landlord served the First 10 Day Notice on the Tenant's door on November 6, 2021. Pursuant to section 90 of the Act, the Tenant was deemed to have been served with the First 10 Day Notice on November 9, 2021. The undisputed testimony of BH was the Landlord served the Second 10 Day Notice on the Tenant's door on December 2, 2021. Pursuant to section 90 of the Act, the Tenant was deemed to have been served with the First 10 Day Notice on December 5, 2021.

Sections 46(1) through 46(5) of the Act state:

- 46(1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
- (2) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (4) Within 5 days after receiving a notice under this section, the tenant may
 - (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.
- (5) 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
 - (a) *is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and*
 - (b) *must vacate the rental unit to which the notice relates by that date.*

[emphasis added in italics]

Pursuant to section 46(4), the Tenant had until November 15, 2021, being the next business day after the end of the 5-day dispute period, to make an application for

dispute resolution to dispute the First 10 Day Notice and until December 10, 2021, to dispute the Second Day Notice. BH stated the Landlord was unaware of the Tenant making an application to dispute either the First or Second 10 Day Notice.

Based on the undisputed testimony of BH, I find the Tenant owed the Landlord \$1,600.00 for rental arrears as of the date of the Second Day Notice. I find the Landlord has satisfied his onus to prove, on a balance of probabilities, that the Second 10 Day Notice was issued for a valid reason. I have reviewed the Second 10 Day Notice and find it complies with the form and content requirements of section 52 of the Act.

BH stated the Landlord accepted a payment of \$800.00 cash from the Tenant in early March 2022 and issued a receipt for that payment without noting that the Landlord was taking the payment for “use and occupancy” of the rental unit. However, the Landlord paid the \$800.00 back to the Tenant on March 24, 2022, with a letter from BH which stated the Landlord was not reinstating the tenancy and that the Tenant would still be required to vacate the rental unit.

Residential Tenancy Branch Policy Guideline 11 (“PG 11”) provides guidance on the amendment, withdrawal and waiver of a notice to end tenancy. PG 11 states, in part:

D. WAIVER OF NOTICE AND NEW OR CONTINUED TENANCY

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” *it could be implied that the landlord and tenant intend for the tenancy to continue.*

Intent may also be established by evidence as to:

- whether the landlord specifically informed the tenant that the money would be for use and occupancy only;
- whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and
- *the conduct of the parties.*

[emphasis in italics added]

Although the Landlord accepted a payment of \$800.00 from the Tenant, he returned the \$800.00 shortly after its receipt with a letter from BH advising the Tenant that it was not the Landlord's intention to reinstate the tenancy. The Tenant accepted the return of the \$800.00 from the Landlord. I find that, in these circumstances, the Landlord did not intend to reinstate the tenancy and, by accepting the return of the \$800.00, the Tenant implicitly accepted that the Landlord would be continuing to seek the end of the tenancy based on the First and Second 10 Day Notices.

I find the Landlord has established cause under section 46 of the Act. Pursuant to section 46(5) of the Act, I find the Tenant is conclusively presumed to have accepted the end of the tenancy on the effective date of the Second 10 Day Notice. However, the Tenant has not vacated the rental unit.

Sections 55(2) and 55(4) state:

55(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

- (a) a notice to end the tenancy has been given by the tenant;
- (b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;
- (c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97 (2) (a.1), requires the tenant to vacate the rental unit at the end of the term;
- (c.1) the tenancy agreement is a sublease agreement;
- (d) the landlord and tenant have agreed in writing that the tenancy is ended.

[...]

- (4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 [*Resolving Disputes*],
 - (a) grant an order of possession, and
 - (b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

Pursuant to section 5(4)(a) of the Act, I grant the Landlord an Order of Possession requiring the Tenant vacate the rental unit.

2. Reimbursement of Landlords' Filing Fee

As the Landlord been successful in his application, I order the Tenant pay the Landlord \$100.00 for the filing fee of his application. Pursuant to section 72(2)(b) of the Act, the Landlord may deduct the \$100.00 from the Tenant's security deposit of \$400.00. The Landlord must handle the remaining \$300.00 of the Tenant's deposit in accordance with the requirements of the Act.

Conclusion:

I order the Tenant deliver vacant possession of the rental unit to the Landlord within two days of being served with a copy of this decision and attached order by the Landlord. Should the Tenant or anyone on the premises 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 may retain \$100.00 from the Tenant's security deposit to reimburse the Landlord for his filing fee for this 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: April 4, 2022

Residential Tenancy Branch