



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Parties	File No.	Codes:
(Tenants) D.D., A.D.	910060124	CNR-MT
(Landlord) J.L.	210060593	OPR-DR, MNR-DR, FFL

Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* ("Act") by the Parties.

The Tenant applied for:

- an Order cancelling a 10 Day Notice to End Tenancy for Unpaid rent dated January 2, 2022 ("10 Day Notice"); and
- more time to apply to cancel the 10 Day Notice.

The Landlord applied for:

- an Order of Possession, having served the Tenant with the 10 Day Notice;
- a Monetary Order for recovery of unpaid rent of \$4,465.00; and
- recovery of the \$100.00 application filing fee.

The Tenant, D.D., an assistant for the Tenant, C.J. ("Assistant"), and the Landlord, J.L., appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it.

During the hearing the Tenant and the Landlord were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to

the issues and findings in this matter are described in this Decision.

I reviewed the service of the cross applications on the respective Parties, and the Landlord said he received the Tenant's Notice of Hearing documents at the end of February 2022. The Tenant confirmed that he had not submitted any documentary evidence to the RTB or the Landlord.

The Landlord said he served the Tenant with his Notice of Hearing documents by registered mail sent on January 28, 2022. The Landlord provided a receipt with the tracking number of this mailing. I checked this number in the Canada Post website, and it indicated that the package was delivered on February 8, 2022. The Tenant said that he did not receive anything from the Landlord in this regard; however, he also said that he was in and out of hospital several times around that time. The Tenant was asked if he wanted to adjourn in order to review the Landlord's evidence; however, the Tenant chose to proceed with the hearing, as is.

I find that the Landlord followed the requirements of the Act and Rules in serving the Tenant; therefore, I find that the Tenant was properly served with the Landlord's Notice of Hearing documents and evidence pursuant to the Act. As such, I considered the Landlord's documentary submissions in making my Decision.

Preliminary Matters

The Parties provided their email addresses in their respective applications, and the Assistant added her email address in the hearing. The Parties also confirmed their understanding that the Decision would be emailed to the Landlord and to the Assistant, on the Tenant's behalf, and that any Orders would be sent to the appropriate Party.

Early in the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

At the outset of the hearing, I asked the Tenant if the other named tenant, A.D., was in attendance, as his name was on the Tenant's application as an applicant. However, the Tenant confirmed that A.D. is not a tenant and that his name was erroneously added to the Tenant's application. Accordingly, I amended the Tenant's name in the Application in this regard, pursuant to section 64 (3) (c) and Rule 4.2.

Section 46 of the Act permits a landlord to take steps to end a tenancy when rent remains unpaid on any day after the day it is due by issuing a notice to end tenancy for unpaid rent. A tenant has five days after receipt of a 10 Day Notice to pay the overdue rent or dispute the notice by applying to the RTB for dispute resolution. Failure to pay the overdue rent or dispute the notice results in the conclusive presumption that the tenancy ends on the effective date of the notice.

In this case, I find the Tenant received the 10 Day Notice on January 5, 2022, pursuant to section 90 of the Act. Accordingly, and pursuant to section 46 (4) of the Act, the Tenant had until January 10, 2022, to dispute the 10 Day Notice by applying for dispute resolution or paying the outstanding rent in full. The Tenant did not do either by January 10, 2022. Rather, he applied to dispute the 10 Day Notice on January 14, 2022.

Policy Guideline #36 ("PG #36"), "Extending a Time Period" provides that an arbitrator may extend or modify a time limit established by the Act *only in exceptional circumstances*. An arbitrator may not extend the time limit to apply for arbitration beyond the effective date of a Notice to End a Tenancy and may not extend the time within rent must be paid without the consent of the landlord. PG #36 states:

Exceptional Circumstances

The word "exceptional" means that an ordinary reason for a party not having complied with a particular time limit will not allow an arbitrator to extend that time limit. The word "exceptional" implies that the reason for failing to do something at the time required is very strong and compelling. Furthermore, as one Court noted, a "reason" without any force of persuasion is merely an excuse. Thus, the party putting forward said "reason" must have some persuasive evidence to support the truthfulness of what is said.

Some examples of what might **not** be considered "exceptional" circumstances include:

- the party who applied late for arbitration was not feeling well
- the party did not know the applicable law or procedure
- the party was not paying attention to the correct procedure
- the party changed his or her mind about filing an application for arbitration
- the party relied on incorrect information from a friend or relative

The following is an example of what could be considered "exceptional" circumstances, depending on the facts presented at the hearing:

- the party was in the hospital at all material times

The evidence which could be presented to show the party could not meet the time limit due to being in the hospital could be a letter, on hospital letterhead, stating the dates during which the party was hospitalized and indicating that the party's condition prevented their contacting another person to act on their behalf.

The criteria which would be considered by an arbitrator in making a determination as to whether or not there were exceptional circumstances include:

- the party did not wilfully fail to comply with the relevant time limit
- the party had a bona fide intent to comply with the relevant time limit
- reasonable and appropriate steps were taken to comply with the relevant time limit
- the failure to meet the relevant time limit was not caused or contributed to by the conduct of the party
- the party has filed an application which indicates there is merit to the claim
- the party has brought the application as soon as practical under the circumstances.

[underlining emphasis added]

In the hearing, I asked the Tenant why he was late applying for dispute resolution, and he said that he was: "In and out of hospital in this time. I have serious medical issues. I don't recall if I paid any money, but I don't recall exactly when."

Based on the testimony in the hearing, I find that the Tenant did not direct me to any documentary evidence to support his testimony as to why he was late applying for dispute resolution. For instance, he did not provide any hospital records showing that he was in the hospital during the relevant time period.

I find that the Tenant did not wilfully fail to comply with the relevant time limit; however, I find there is insufficient evidence before me that he intended to comply with the time limit. Further, I find that the Tenant has not filed an application which indicates there is merit to his claims. Overall, I find that the Tenant has failed to direct me to any evidence to support that he had exceptional circumstances for failing to apply to dispute the 10 Day Notice on time. Accordingly, I find that the Tenant has failed to apply for dispute resolution on time and therefore, his **Application is dismissed without leave to reapply.**

However, that is not the end of the matter, as the Landlord still needs to meet his burden of proof on a balance of probabilities for his application.

Issue(s) to be Decided

- Is the Landlord entitled to an Order of Possession?
- Is the Landlord entitled to a Monetary Order, and if so, in what amount?
- Is the Landlord entitled to recovery of his \$100.00 Application filing fee?

Background and Evidence

The Parties agreed that the fixed-term tenancy began on July 1, 2020, and ran to June 30, 2021, and then operated on a month-to-month basis. They agreed that the Tenant is required by the tenancy agreement to pay the Landlord a monthly rent of \$1,500.00, due on the first day of each month. The Parties agreed that the Tenant paid the Landlord a security deposit of \$750.00, but they disagreed about whether the Tenant paid the Landlord a pet damage deposit or not. As this is peripheral to the issues before me, I have not determined whether or not the Tenant paid the Landlord a pet damage deposit. The Landlord confirmed that he still holds the Tenant's \$750.00 security deposit in full.

The 10 Day Notice was signed and dated January 2, 2022, it has the rental unit address, it was served by email on January 2, 2022, with an effective vacancy date of January 15, 2022, and it was served on the grounds that the Tenant failed to pay the Landlord \$4,465.00 in rent when it was due on January 1, 2022.

In the hearing, I asked the Landlord why I should grant him an order of possession for this rental unit and he said:

We have an agreement that he lives there for \$1,500.00, and he did not pay me the amount agreed upon. That's our contract, so he breached the contract.

The Assistant responded, as follows:

There is no response. [The Tenant] has paid some sums of money; he had an agreement with the Landlord to complete some repairs, such as a fence in lieu of rent. We don't disagree that [the Tenant] owes some money, but there was an agreement of work in lieu of rent.

The Assistant confirmed that the Tenant did not submit any evidence to support this claim. The Landlord said that he agreed to share the cost of rebuilding the fence with his neighbour, [T.]. He said that [T.] would supervise [the Tenant's] work on the fence, because [T.] has a business of doing commercial and residential repairs. The Landlord said:

I drove by the other day and the fencing is completed, but I have not received any hours from [T.] or [the Tenant] to know how many hours he put on, or how he wants to reduce his rent by the amount of hours he worked.

I find that the Parties were not prepared to include the Tenant's work on the fence in calculating how much the Tenant owes the Landlord for this proceeding. I will leave that for them to address privately.

In the hearing, the Landlord said that the Tenant has paid and owes him the following amounts.

Date Rent Due	Amount Owning	Amount Received	Amount Owning
Nov 1/21	\$1,500.00	\$35.00	\$1,465.00
Dec 1/21	\$1,500.00	\$0.00	\$1,500.00
Jan 1/22	\$1,500.00	\$0.00	\$1,500.00
Feb. 1/22	\$1,500.00	\$0.00	\$1,500.00
March 1/22	\$1,500.00	\$0.00	\$1,500.00
April 1/22	\$1,500.00	\$0.00	\$1,500.00
	TOTAL		\$8,965.00

The Tenant did not dispute that he owes the Landlord this much in unpaid rent; he merely said he was owed money by the Landlord for work he has done around the house and yard. As the Tenant did not include a claim or any documentation of this work, though, I have not considered it in my Decision.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Section 26 of the Act states: "A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the 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." There is no evidence before me that the Tenant had a right to deduct any portion of the rent from the monthly rent due to the Landlord.

Further, section 46 of the Act permits a landlord to take steps to end a tenancy when rent remains unpaid on any day after the day it is due by issuing a notice to end tenancy for unpaid rent. A tenant has five days after receipt of a 10 Day Notice to pay the overdue rent or dispute the notice by applying for dispute resolution. Failure to pay the overdue rent or dispute the notice results in the conclusive presumption that the tenancy ends on the effective date of the notice.

As noted above, I found that the Tenant was late in applying to cancel the 10 Day Notice, and I dismissed his claim without leave to reapply. I find that the Tenant has not paid his overdue rent, and that rent arrears of \$8,965.00, which remains outstanding.

Accordingly, I award the Landlord with **\$8,965.00** from the Tenant for unpaid rent, pursuant to sections 26, 46, and 67 of the Act. Given his success in this matter, I also award the Landlord with recovery of his **\$100.00** Application filing fee from the Tenant, pursuant to section 72 of the Act.

I find that this claim meets the criteria under section 72 (2) (b) of the Act to be offset against the Tenant's \$750.00 security deposit in partial satisfaction of the Landlord's monetary awards. I authorize the Landlord to retain the Tenant's **\$750.00** security deposit. I, therefore, award the Landlord with a **Monetary Order** for **\$8,315.00** from the Tenant, for the balance owing, pursuant to section 67 of the Act.

As rent was not paid when due, I find further that the Landlord is entitled to an order of possession. I, therefore, grant the Landlord an **Order of Possession** of the rental unit, and since the effective vacancy date on the 10 Day Notice has passed, the Order of Possession will be **effective two days after it is deemed served** on the Tenant, pursuant to section 55 of the Act.

The Tenant's application is dismissed wholly without leave to reapply.

Conclusion

The Tenant is unsuccessful in his Application to cancel the 10 Day Notice, as he applied

for dispute resolution late; therefore, the Tenant is conclusively presumed by section 46 (5) of the Act to have accepted that the tenancy ends on the effective date of the 10 Day Notice. The Tenant's application is dismissed wholly, without leave to reapply.

Pursuant to section 55 of the Act, I grant an **Order of Possession** to the Landlord effective **two days after service of this Order** on the Tenant. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible.

Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to section 67 of the Act, I grant the Landlord a **Monetary Order** of **\$8,315.00**. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible.

Should the Tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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 14, 2022

Residential Tenancy Branch