



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **TT: CNC, LRE, OLC**
 LL: OPR, OPC, MNRL-S, MNDCL-S, FFL

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the “Act”). The Tenants made one application (Tenants’ Application”) for:

- cancellation of a One Month Notice to End Tenancy for Cause dated January 19, 2022 (“1 Month Notice”) pursuant to section 47;
- an order to suspend or set conditions on the Landlord’s right to enter the rental unit pursuant to section 70; and
- an order for the Landlord to comply with the Act, the *Residential Tenancy Regulations* (the “Regulations”) and/or tenancy agreement pursuant to section 62.

The Landlord made one application (“Landlord’s Application”) for:

- an Order of Possession for pursuant to sections 46 and 55;
- a Monetary Order for unpaid rent pursuant to section 67;
- authorization to keep the Tenants’ security and/or pet damage deposits pursuant to section 38;
- an Order of Possession for cause pursuant to section 47; and
- an authorization to recover the filing fee of the Landlord’s Application from the Tenants.

The Landlord, the Landlord’s agent (“SM”) and the two Tenants (“KL” and “DL”) attended the hearing. I affirmed the Landlord and SM to tell the truth. The Tenants refused to give an affirmation to tell the truth.

SM stated the Landlord served the Landlord's Notice of Dispute Resolution Proceeding and the Landlord's evidence (collectively the "Landlord's NDRP Package") on each of the Tenants in separate packages by registered mail on February 25, 2022. SM submitted the tracking numbers for service of the Landlord's NDRP Package on each of the Tenants. I find the Landlord's NDRP Package was served on each of the Tenants in accordance with the provisions of sections 88 and 89 of the Act.

Preliminary Matter – Correction of Name of an Applicant

At the outset of the hearing, it was determined that the Tenants' Application misstated the first name of one of the two Tenants. I noted that the Tenancy Agreement and the Landlord's Application correctly stated the correct given name of DL. SM requested that I amend the Tenants' Application to remove the incorrect given name of DL stated in the Tenants' Application with the correct given name of DL.

Rule 4.2 of the *Residential Tenancy Branch Rules of Procedure* ("RoP") 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

The request of SM that I amend the Tenants' application to remove the incorrect given name of DL stated in the Tenants' Application and insert the correct given name of DL was reasonably foreseeable by the Tenants. As such, I amended the Tenants' Application to correct the given name of DL pursuant to Rule 4.2 of the RoP.

Preliminary Matter – Correction of Rental Address and Tenants' Addresses

At the outset of the hearing, I noted the street address and name of the city for the rental stated in the Tenants' Application did not match with the street address and city stated in the tenancy agreement, the 10 Day Notice and 1 Month Notice. SM requested that I amend the Tenants' Application to state the correct rental address and city in the Tenants' Application.

The request of SM that I amend the Tenants' application to correct the street address and city in the Tenants' Application was reasonably foreseeable. As such, I amended the Tenants' Application by inserting the correct street address pursuant to Rule 4.2 of the RoP.

Preliminary Matter – Request for Adjournment of Hearing

KL requested that I adjourn the hearing on the basis that the Tenants needed extra time so that they could consult with their lawyer at an appointment KL stated was scheduled for 1:00 pm on the day of this hearing. KL stated that she has been trying to find a lawyer and the Tenant have now found a lawyer willing to accept the Tenants' case. I asked the Landlord for her position on the Tenants' request and she stated she objected to an adjournment. The Landlord stated the Tenants have not paid the rent for the past three months and that the Tenants have been repeatedly late and, as a result, an adjournment would be prejudicial to her.

Rules 7.8 and 7.9 of the RoP state:

7.8 Adjournment after the dispute resolution hearing begins

At any time after the dispute resolution hearing begins, the arbitrator may adjourn the dispute resolution hearing to another time. A party or a party's agent may request that a hearing be adjourned. The arbitrator will determine whether the circumstances warrant the adjournment of the hearing.

7.9 Criteria for granting an adjournment

Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

The Landlord stated that the Tenants have not paid any rent for the past three months and they have been repeatedly late paying the rent. As such, the Landlord wanted to have the Landlord's Application heard now, rather than to be adjourned to a later date. I have considered the positions of the parties, and I note the Landlord's Application was filed on January 29, 2022. Although KL stated they wanted an adjournment so the Tenants required an adjournment in order to speak to a lawyer, I am not satisfied the Tenants took sufficient steps or measures to obtain representation, either by an agent, a friend, or advocate or legal counsel in a timely manner.

Based on the foregoing, I declined to adjourn the hearing, given the Tenants do not appear to have paid any rent for the past three months, the objection of the Landlord to an adjournment and the apparent neglect on the Tenants' part to secure advice and assistance in a timely manner.

Preliminary Matter – Disruptive Behavior of Tenants

As noted above, I refused the Tenants request that I adjourn the hearing. After I made that ruling, KL became disruptive and kept interrupting me and speaking in the background to RL. When I requested KL give an affirmation that she would tell the truth at the hearing, RL said it was "ridiculous" and KL stated the Tenants did not think it was fair they should have to proceed with the hearing without a lawyer. I warned the Tenants that I was proceeding with the hearing. I again asked KL to give an affirmation that she would tell the truth at the hearing. KL stated she would tell the truth but not without her lawyer. I told KL that the Tenant either participate in the hearing, or I would mute the Tenants line so that they could listen to the hearing. RL stated the Tenants wanted their lawyer and that "was the whole point". I again advised the Tenants that, if they did not participate in the hearing, then it was at their own risk. KL again stated that I had to give the Tenants the opportunity to speak to a lawyer. I told the Tenants again that I was not adjourning the hearing. I explained that an adjournment would have prejudiced the Landlord. I again attempted to explain to KL that the Tenants had three months to find a lawyer. The Tenant continued to interrupt me while I was speaking and saying it was her legal right to have a lawyer. I asked one more time if the Tenants were going to participate in the hearing and KL again stated, "I want my lawyer". I told the parties I was putting everyone on hold for three or four minutes to give the Tenants the opportunity to reconsider their position. When I returned to the hearing, the Landlord confirmed he was still on the line and KL confirmed the Tenants were still on the line but said the Tenants were going to talk to their lawyer. I again asked KL if the Tenants were going to participate in the hearing. Both KL and RL stated they wanted their lawyer. I

again told the Tenants they had the option to participate in the hearing or not participate in the hearing. KL stated the Tenants would not participate until they spoke to their lawyer. As the Tenants refused to participate in the hearing and continued to be disruptive, I placed their call on mute so that they could listen to the hearing.

Preliminary Matter – Service of Notice of Dispute Resolution Proceeding by Tenants

Rule 7.4 of the RoP states:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

As the Tenants did not participate in the hearing, their evidence was not presented as required by Rule 7.4 of the RoP. Based on the foregoing, the Tenants' Application is dismissed without leave to reapply. As such, I will not consider any of the evidence submitted by the Tenants in advance of the hearing when adjudicating the Landlord's Application.

Rule 6.6 of the RoP states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Notwithstanding the Tenants' Application has been dismissed, Rules 6.6 provide the Landlord bears the burden of proof it is more likely than not that either of the 10 Day Notice or 1 Month Notice is valid. Based on the foregoing, the Landlord must meet this burden even though the Tenants did not participate in the hearing.

Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession?
- a Monetary Order for unpaid rent?
- authorization to keep the Tenants' security and/or pet damage deposit(s)?
- recover the filing fee of the Landlord's Application from the Tenants?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of SM and the Landlord, 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.

SM stated the tenancy commenced on November 1, 2020 for a fixed term ending October 31, 2021, with rent of \$1,200.00 payable on the 1st day of each month. The Tenants were to pay a security deposit of \$600.00 and a pet damage deposit of \$600.00 by October 15, 2020. SM stated the Tenants paid the security and pet damage deposits and that the Landlord was holding the deposits in trust for the Tenants.

SM stated the 10 Day Notice was served on the Tenants on January 7, 2022 by registered mail. SM submitted a Canada Post tracking stub into evidence to corroborate his testimony of service of the 10 Day Notice on the Tenants. I find the Tenants were served with the 10 Day Notice in accordance with the provisions of section 88 of the Act.

SM stated the Tenants owed the Landlord a total of \$2,836.00 for rental arrears as of January 1, 2022. The Landlord stated that, as of the date of this hearing, the Tenants have rental arrears of \$2,2836.00 calculated as follows:

Date	Rent Owed	Paid	Balance
November 1, 2021	\$1,200.00	\$1,100.00	\$100.00
December 1 2021	\$1,200.00	\$0.00	\$1,300.00
January 1, 2022	\$1,218.00	\$0.00	\$2,518.00
January 18, 2022		\$2,518.00	\$0.00

February 1, 2022	\$1,218.00		1,218.00
February 6, 2022		\$818.00	\$400.00
February 26, 2022		\$1,218	-\$818.00
March 1, 2022	\$1,218.00		\$400.00
April 1, 2022	\$1,218.00		\$1,618.00
May 1, 2022	\$1,218.00		\$2,836.00
Total	\$8,490.00	\$5,654.00	\$2,836.00

The Landlord's Application also claims \$2, 436 for loss of revenue as a result of the Tenants overholding the rental unit after the effective date of the 10 Day Notice.

SM stated the Landlord served the 1 Month Notice on the Tenants by registered mail January 19, 2022. SM submitted the Canada Post tracking number for service of the 1 Month Notice on the Tenants. I find the 1 Month Notice was served on the Tenants in accordance with section 88 of the Act. The cause for ending the tenancy stated in the 1 Month Notice was the Tenant is repeatedly late paying rent. The details provided in the 1 Month Notice was "Tenants repeatedly late paying rent". SM stated the Tenants have been late paying the rent seven times starting January 1, 2022, as set out in the table above.

SM stated the Tenants have not vacated the rental unit.

Analysis

1. Landlords' Claim for Order of Possession

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]*.
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

- (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]

The undisputed testimony of SM was the Landlord served the 10 Day Notice on the Tenants by registered mail on January 7, 2022. I find the 10 Day Notice was served in accordance with section 88 of the Act. Pursuant to section 90 of the Act, the Tenants were deemed to have received the 10 Day Notice on January 12, 2022. Pursuant to section 46(4) of the Act, the Tenants had until January 17, 2022 to make an application for dispute resolution to dispute the 10 Day Notice. The records of the Residential Tenancy Branch do not disclose any application was made by the Tenants to dispute the 10 Day Notice.

Based on the undisputed testimony of SM, I find that monthly rent is \$1,200.00 and is due on the first of the month. I also accept SM's undisputed testimony the Tenants had rental arrears of \$2,518.00 as of January 1, 2022 and the Tenants paid \$2,18.00 on January 18, 2022.

The 10 Day Notice stated the effective date for move out of the rental unit by the Tenants was January 17, 2022. Section 46(1) of the Act provides the earliest date for move out for a Ten Day Notice is 10 days after the tenant is deemed to have received the Ten Day Notice. As the Tenants were deemed to have received the 10 Day Notice was January 12, 2022, the earliest effective date for move-out was January 22, 2022. Section 53 of the Act states:

- 53(1) If a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) or (3), as applicable.
- (2) If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.
- (3) In the case of a notice to end a tenancy, other than a notice under section 45 (3) *[tenant's notice: landlord breach of material term]*, 46 *[landlord's notice: non-payment of rent]* or 50 *[tenant may end tenancy early]*, if the effective date stated in the notice is any day other than the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, the effective date is deemed to be the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement
- (a) that complies with the required notice period, or
- (b) if the landlord gives a longer notice period, that complies with that longer notice period.

In accordance with the provision of section 53(2), the effective date of the 10 Day Notice is deemed to be changed to January 22, 2022. SM stated the Tenants have not vacated the rental unit. Pursuant to section 46(5) of the Act, the Tenants were conclusively presumed to have accepted that the tenancy ended on the deemed effective date of the 10 Day Notice, being January 22, 2022.

Subsections 55(2) and 55(4) of the Act 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.*

[emphasis in italics added]

I have reviewed the 10 Day Notice and find it complies with the section 52 form and content requirements. The Tenants did not make an application to dispute the 10 Day Notice. Based on the foregoing, pursuant to section 55(4)(a) of the Act, I order the Tenants provide the Landlord with vacant possession of the rental unit.

As I have ordered the Tenants to provide the Landlord with vacant possession of the rental unit pursuant to section 55(4)(a) of the Act, it is unnecessary for me to consider whether the Landlord has cause to end the tenancy pursuant to the 1 Month Notice.

2. Landlords' Claim for Unpaid Rent

Sections 26 of the Act states:

- 26 (1)** 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.

As stated above, I found the Tenants had rental arrears of \$2,518.00 as of January 1, 2022 but the Tenants paid \$2,518.00 on January 18, 2022. Pursuant to section 46(5)(a), the Tenants were conclusively presumed to have accepted the tenancy ended on the deemed effective date of the tenancy on January 22, 2022. Part B of *Residential Tenancy Branch Guideline 3* ("PG 3"):

B. Overholding tenant and compensation

Section 44 of the RTA (section 37 of the MHPTA) sets out when a tenancy agreement will end. A tenant is not liable to pay rent after a tenancy agreement has ended. If a tenant continues to occupy the rental unit or manufactured home site after the tenancy has ended (overholds), then the tenant will be liable to pay compensation for the period that they overhold pursuant to section 57(3) of the RTA (section 50(3) of the MHPTA). This includes compensation for the use and occupancy of the unit or site on a per diem basis until the landlord recovers possession of the premises. In certain circumstances, a tenant may be liable to compensate a landlord for other losses associated with their overholding of the unit or site, such as for loss of rent that the landlord would have collected from a new tenant if the overholding tenant had left by the end of the tenancy or for compensation a landlord is required to pay to new tenants who were prevented from taking occupancy as agreed due to the overholding tenant's occupancy of the unit or site.

Pursuant to section 44 of the Act and PG 3, the Tenants are not liable to pay rent after the tenancy agreement ended on January 22, 2022. However, the Landlord's Application seeks monetary compensation for monetary loss resulting from the Tenants overholding the rental unit after the tenancy ended on the deemed effective date of the 10 Day Notice. I find the Tenants owe the Landlord \$1,641.42, after crediting the Tenants for the two payments made by them in February 2022, as compensation for overholding the rental unit from February 1, 2022 to the date of this hearing, being May 2, 2022 calculated on a per diem basis as follows:

Date	Number of Days	Per Diem Rate	Total
February 1 to 28, 2022	28	\$42.857	\$1,200.00
March 1 to 31, 2022	31	\$38.709	\$1,200.00
April 1 to 30, 2022	30	\$40.000	\$1,200.00
May 1 to 2, 2022	2	\$38.709	\$77.42
Payment made February 6, 2022			-\$818.00
Payment made February 6, 2022			-\$1,218.00
Total			\$1,641.42

Pursuant to section 67 of the act, I order the Tenants to pay the Landlord \$1,641.42 for compensation for the Tenants overholding the rental unit after January 22, 2022 until

May 2, 2022. Pursuant to section 72(2) of the Act, the Landlord may retain the security and pet damage deposits of \$1,200.00 in partial satisfaction of the Monetary Order made above.

As stated in PG 3, the Landlord has the option of making another application for dispute resolution to make a monetary claim for loss of income in the event the Tenants overhold the rental unit after February 2, 2022.

3. Reimbursement of Filing Fees

As the Tenants' Application has been dismissed, they are not entitled to recover the filing fee of the Tenants' Application.

As the Landlord has been successful in the Landlord's Application, she may recover the \$100.00 filing fee for the Landlord's Application from the Tenants pursuant to section 72(1) of the Act.

Conclusion

Pursuant to section 55 of the Act, I order that the Tenants deliver vacant possession of the rental unit to the Landlord within two days of being served with a copy of this decision and attached orders by the Landlord. This Order of Possession 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 order the Tenants pay the Landlord \$541.42 representing the following:

Description	Amount
Compensation for Tenants Overholding Rental Unit	\$1,641.42
Landlord's Filing Fee	\$100.00
Security Credit	-\$1,200.00
Total	\$541.42

The Tenants' Application is dismissed in its entirety.

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: May 9, 2022

Residential Tenancy Branch