



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant: CNR, FFT

Landlord: OPR-DR, MNR-DR, FFL

Introduction

This hearing dealt with the Tenant's application under the *Residential Tenancy Act* (the "Act") for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent dated February 4, 2022 (the "10 Day Notice") pursuant to section 46; and
- authorization to recover the Tenant's filing fee from the Landlord pursuant to section 72 of the Act.

This hearing also dealt with the Landlord's cross-application under the Act for:

- an Order of Possession for the 10 Day Notice pursuant to sections 46 and 55;
- a Monetary Order of \$3,800.00 pursuant to sections 26 and 67; and
- authorization to recover the Landlord's filing fee from the Tenant pursuant to section 72 of the Act.

The Tenant, the Landlord, the Landlord's spouse GM, and the Landlord's advocate LM attended this hearing. They were each given a full opportunity to be heard, to present affirmed testimony, and to make submissions.

All attendees at the hearing were advised the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") prohibit unauthorized recordings of dispute resolution hearings. They confirmed that they were not recording this dispute resolution hearing.

Preliminary Matter – Service of Dispute Resolution Documents

The Landlord stated she received the Tenant's notice of dispute resolution proceeding package and documentary evidence (collectively, the "Tenant's NDRP Package") via email, though she did not provide her email address as an approved method of service. The Landlord acknowledged that she has had an opportunity to review the Tenant's

NDRP Package. Pursuant to section 71(2)(c) of the Act, I find the Landlord to have been sufficiently served with the Tenant's NDRP Package.

LM testified he sent the Landlord's notice of dispute resolution proceeding package and initial documentary evidence (collectively, the "Landlord's NDRP Package") to the Tenant by registered mail on February 25, 2022. The Landlord submitted a Canada Post registered mail receipt with a tracking number in support. This Canada Post tracking number is the first of two tracking numbers referenced on the cover page of this decision. LM testified the Landlord's NDRP Package was returned as unclaimed on March 30, 2022.

LM testified he sent additional documentary evidence (the "Landlord's Supplementary Evidence") to the Tenant by registered mail on April 22, 2022. The Landlord submitted the Canada Post registered mail receipt and tracking number in support. This second tracking number is also referenced on the cover page of this decision. LM confirmed the Landlord's Supplementary Evidence package has not been picked up by the Tenant.

The Tenant stated he was in the hospital for multiple days in March and April 2022, due to having suffered a minor stroke. The Tenant also stated he had no access to his mailbox because it had been broken into.

The Landlord testified she had not been informed by Canada Post of an issue with the mailbox, nor was she told about the Tenant being in hospital. The Landlord stated the Tenant had previously told her it was the Tenant's daughter who was in hospital with allergies. The Landlord provided further undisputed testimony about having seen the Tenant at the rental unit during times that the Tenant claimed to have been in the hospital with his daughter.

Residential Tenancy Policy Guideline 12. Service Provisions states:

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.

Policy Guideline 12 further states:

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. For example, if a party claimed to be away on vacation at the time of service, the arbitrator would expect to see evidence to prove that claim, such as airplane tickets, accommodation receipts or a travel itinerary. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

I note the Tenant did not provide any extrinsic or documentary evidence to corroborate his statements that he was in the hospital or that his mailbox was inaccessible. Based on the parties' testimonies, I find, on a balance of probabilities, that the Tenant deliberately failed to pick up the Landlord's NDRP Package and the Landlord's Supplementary Documents from Canada Post.

Accordingly, I find that the Landlord served the Tenant with the Landlord's NDRP Package and the Landlord's Supplementary Evidence in accordance with sections 88(c) and 89(1)(c) of the Act. Pursuant to section 90(a) of the Act, I find the Tenant is deemed to have received the Landlord's NDRP Package on March 2, 2022, and the Landlord's Supplementary Evidence on April 27, 2022.

Preliminary Matter – Amendment of Landlord's Application

LM testified that since the filing of the Landlord's application, the amount of rent owing by the Tenant has increased from \$3,800.00 to \$15,200.00, the latter of which corresponds to total rent owing for the months of February, March, April, and May 2022.

Rule 4.2 of the 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 have reasonably anticipated a request for an amendment to claim additional outstanding rent as of the date of the hearing, I amended the Landlord's application to indicate a revised monetary claim of \$15,200.00 for unpaid rent.

Issues to be Decided

1. Is the Tenant entitled to cancellation of the 10 Day Notice?
2. Is the Tenant entitled to recovery of the filing fee for the Tenant's application from the Landlord?
3. Is the Landlord entitled to an Order of Possession under the 10 Day Notice?
4. Is the Landlord entitled to a Monetary Order of \$15,200.00 for unpaid rent?
5. Is the Landlord entitled to recovery of the filing fee for the Landlord's application?

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 arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the parties' applications and my findings are set out below.

The Landlord submitted a copy of the parties' tenancy agreement into evidence. The agreement indicates the following particulars of the tenancy, which were confirmed by the parties during the hearing:

- The tenancy commenced on March 1, 2021 for a fixed term ending on February 28, 2022, and continued thereafter on a month-to-month basis.
- Rent is \$3,800.00 per month, due on the first day of each month.
- The Tenant paid a security deposit of \$1,900.00, which is held by the Landlord.

Copies of the 10 Day Notice were submitted into evidence. GM confirmed he served the Tenant in person on February 4, 2022 with the 10 Day Notice. The Landlord submitted a proof of service document signed by GM in support. In the Tenant's application, the Tenant confirmed receipt of the 10 Day Notice in person on February 4, 2022.

Therefore, I find the Landlord served the Tenant with the 10 Day Notice in accordance with section 88(a) of the Act.

The Landlord and LM testified that the Tenant has not paid any rent since January 31, 2022, when the Tenant made a partial payment for rental arrears owing prior to that

date. The Landlord's submitted evidence includes an Interac e-Transfer History printout showing rent payments received from the Tenant since April 2021.

On his application, the Tenant indicated he was disputing the 10 Day Notice because the "Landlord accepted rent". However, during the hearing, the Tenant acknowledged he did not pay rent. The Tenant did not dispute that he owed the Landlord rent for the months of February, March, April, and May 2022.

The Landlord and LM testified about many broken promises from the Tenant to pay rent, including having been told that the Tenant would soon receive an inheritance which would allow him to pay the overdue rent.

The Tenant confirmed he is still residing in the rental unit.

Analysis

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. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

1. Is the Tenant entitled to cancellation of the 10 Day Notice?

If a tenant does not pay rent when due, section 46 of the Act permits a landlord to take steps to end a tenancy by issuing a notice to end tenancy for unpaid rent.

Section 46(2) of the Act requires that a 10 day notice to end tenancy for unpaid rent must comply with section 52 of the Act in order to be effective. Section 52 states:

Form and content of notice to end tenancy

52 In order to be effective, a notice to end a tenancy must be in writing and must

- (a) be signed and dated by the landlord or tenant giving the notice,
- (b) give the address of the rental unit,
- (c) state the effective date of the notice,
- (d) except for a notice under section 45(1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,

(d.1) for a notice under section 45.1 [*tenant's notice: family violence or long-term care*], be accompanied by a statement made in accordance with section 45.2 [*confirmation of eligibility*], and
(e) when given by a landlord, be in the approved form.

In this case, I have reviewed the 10 Day Notice and find that it complies with the requirements of section 52 in form and content.

I note the reason given for ending the tenancy on the 10 Day Notice was that the Tenant “failed to pay rent due on: 31 January 2022 in the amount of \$3,800.00”, although rent is due on the first day of each month. I find the 10 Day Notice is not invalidated because of this discrepancy, given that the 10 Day Notice was issued on February 4, 2022, after the Tenant failed to pay rent on February 1, 2022. To the extent that a reviewing court would find such a discrepancy to affect the validity of the 10 Day Notice under section 52, I find it would be reasonable to amend this date on the 10 Day Notice pursuant to section 68(1) of the Act. I am satisfied, pursuant to section 68(1) of the Act, that the Tenant knew or should have known the 10 Day Notice was being issued for non-payment of rent due on February 1, 2022, and that it is reasonable to amend the 10 Day Notice in the circumstances.

Based on the parties’ evidence, I find the Tenant was served with the 10 Day Notice on February 4, 2022.

Section 46(4)(b) of the Act permits a tenant to dispute a 10 day notice to end tenancy for non-payment within 5 days of receiving such notice. Therefore, the Tenant had until February 9, 2022 to dispute the 10 Day Notice. The records of the Residential Tenancy Branch disclose that the Tenant submitted his application on February 9, 2022. I find the Tenant made his application within the 5-day dispute deadline stipulated under section 46(4)(b) of the Act.

However, even though the Tenant submitted his application on time, I find the Tenant has not provided any evidence or argument as to why he should be successful in disputing the 10 Day Notice.

Section 26(1) of the Act states that a tenant must pay rent when it is due, whether or not the landlord complies with the Act, the regulations, or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent.

The Tenant did not offer any evidence or testimony relating to a right under the Act to deduct all or a portion of the rent owing to the Landlord. Furthermore, it is undisputed that the Tenant has not paid rent to the Landlord since January 31, 2022.

I find the Landlord has established the grounds on which the 10 Day Notice was issued, namely, that the Tenant did not pay rent when it was due. I further find that the Tenant did not have a right under the Act to withhold payment of rent.

Accordingly, I conclude that the Tenant is not entitled to cancel the 10 Day Notice.

2. Is the Tenant entitled to recovery of the Tenant's filing fee?

The Tenant has not been successful in his application. Pursuant to section 72(1) of the Act, I dismiss the Tenant's claim for reimbursement of his filing fee.

3. Is the Landlord entitled to an Order of Possession?

Section 55(1) of the Act states:

Order of possession for the landlord

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

- (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

Having found the 10 Day Notice to comply with the requirements of section 52 and having dismissed the Tenant's application, I find the Landlord is entitled to an Order of Possession pursuant to section 55(1) of the Act.

I grant an Order of Possession to the Landlord effective two (2) days after service of the Order upon the Tenant.

4. *Is the Landlord entitled to a Monetary Order for unpaid rent?*

Pursuant to section 55(1.1) of the Act, the director must grant an order requiring the payment of unpaid rent when the notice to end tenancy complies with section 52 of the Act and the tenant's application to dispute the notice is dismissed.

Residential Tenancy Policy Guideline 3. Claims for Rent and Damages for Loss of Rent states as follows:

If a tenant has not vacated or abandoned the unit, or the conclusive presumption does not apply, (in other words the right of possession of the rental unit or manufactured home site is in issue at the dispute resolution hearing), the director will usually rely on section 68(2) of the RTA (section 61(2) of the MHPTA) to order that the date the tenancy ends is the date of the dispute resolution hearing, rather than the effective date shown on the notice to end tenancy.

If the director is satisfied upon reviewing submitted materials and hearing evidence as to an amount of unpaid rent owing, including rent owing since the time the notice to end tenancy was issued, the director must grant an order to the landlord for the amount of unpaid rent found to be owing.

In this case, the Tenant has applied to dispute the 10 Day Notice and the conclusive presumption does not apply. The Tenant has not vacated the rental unit.

Pursuant to section 68(2) of the Act, I order that for the purposes of calculating unpaid rent under section 55(1.1), the parties' tenancy is ended effective the date of the dispute resolution hearing, or May 19, 2022, rather than the effective date stated on the 10 Day Notice. Based on the Landlord's documentary evidence and the parties' oral testimonies, I am satisfied the Tenant owes additional rent to the Landlord, from the day that 10 Day Notice was issued, to the date of this hearing. I find that the total amount of rent owing by the Tenant from February to May 2022 is \$15,200.00.

In addition, section 67 of the Act states:

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62(3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director

may determine the amount of, and order that party to pay, compensation to the other party.

As I have found the Tenant to be in breach of section 26 of the Act and the parties' tenancy agreement for non-payment of rent, I find that the Landlord would also be entitled to compensation for the amount sought in the Landlord's amended application by virtue of section 67 of the Act.

Accordingly, pursuant to sections 55(1.1) and 67 of the Act, I allow the Landlord's monetary claim of \$15,200.00 for unpaid rent.

5. Is the Landlord entitled to recovery of the Landlord's filing fee?

As the Landlord has been successful in her application, I grant the Landlord's claim for recovery of the \$100.00 filing fee from the Tenant under section 72(1) of the Act.

Pursuant to section 72(2)(b) of the Act, I order that the Landlord is authorized to retain the \$1,900.00 security damage deposit held by the Landlord in partial satisfaction of the total sum awarded in this hearing.

The Monetary Order granted to the Landlord for the balance of the amount awarded is calculated as follows:

Item	Amount
February 2022 Rent	\$3,800.00
March 2022 Rent	\$3,800.00
April 2022 Rent	\$3,800.00
May 2022 Rent	\$3,800.00
Landlord's Filing Fee	\$100.00
Less Security Deposit	- \$1,900.00
Total Monetary Order for Landlord	\$13,400.00

Conclusion

The Tenant's application is dismissed in its entirety without leave to re-apply.

Pursuant to section 55(1) of the Act, I grant an Order of Possession to the Landlord effective two (2) days after service upon the Tenant. 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.

The Landlord is authorized to deduct the full amount of the Tenant's \$1,900.00 security deposit in partial satisfaction of the total sum awarded in this application.

Pursuant to sections 55(1.1) and 67 of the Act, I grant the Landlord a Monetary Order in the amount of \$13,400.00. 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 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 26, 2022

Residential Tenancy Branch