



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding LUIS SILVA HOLDINGS INC.  
and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes:** OPM MNRL-S FFL

### **Introduction**

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("the *Act*") for:

- a monetary order for monetary loss or money owed pursuant to section 67;
- an Order of Possession for a mutual agreement to end the tenancy, pursuant to section 55; and
- authorization to recover the filing fee for this application, pursuant to section 72.

MR appeared as agent for all the landlord in this hearing. Both parties and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of Rule 6.11 which prohibits the recording of a dispute resolution hearing by the attending parties. Both parties confirmed that they understood.

The landlord's agent testified that the home was purchased by new owners, and requested that the application be amended to include the names of the new owners. As no parties were opposed, the landlord's application was amended to include the names of the new owners.

The tenant confirmed receipt of the landlord's application for dispute resolution and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the tenant duly served with the Application and evidence. The landlord's agent testified that they were not served with the tenant's evidentiary materials. The landlord's agent agreed that these materials may be considered and admitted as the tenant was able to forward copies of these documents through email at the beginning of the hearing.

**Preliminary Issue – Amendment to Landlord’s Application**

Although the landlord had originally submitted a monetary claim for \$3,246.00 plus the filing fee, the landlord uploaded a new monetary order worksheet dated May 11, 2022 for a monetary claim of \$7,840.50.

I note that although a new monetary order worksheet was submitted, no formal amendments have been properly filed by the landlord in accordance with RTB Rules of Procedure and Residential Tenancy Policy Guideline #23.

Residential Tenancy Policy Guideline #23 sets out of the sequence of events that must be followed in amending an application, including the following steps:

- 1. the applicant completes an Amendment to an Application for Dispute Resolution (form RTB-42);*
- 2. the applicant submits this form and a copy of all supporting evidence to the Residential Tenancy Branch directly or through a Service BC office to allow service upon each other party as soon as possible, and in any event to each other party not less than 14 days before the date of the hearing;*
- 3. the Residential Tenancy Branch or Service BC accepts the Amendment to an Application for Dispute Resolution form submitted in accordance with the Rules of Procedure;*
- 4. the applicant serves each respondent with a copy of the Amendment to an Application for Dispute Resolution form with all supporting evidence as soon as possible, and in any event, so that it is received not less than 14 days before the date of the hearing; and*
- 5. the arbitrator, at the hearing, considers whether the principles of administrative fairness have been met through the amendment submission process and whether any party would be prejudiced by accepting the amendment(s), determines whether to accept the amendment(s) and records the determination in a written decision.*

As the landlord did not follow the specific steps as outlined above, I am unable to consider the claims listed on the updated Monetary Order Worksheet.

RTB Rules of Procedure 4.2 allows for amendments to be made in circumstances where the amendment 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 landlord’s agent testified that the tenant has not paid any rent since the application was filed. The landlord requested an amendment to reflect the unpaid rent of \$1,282.00 per month for the months of March 2022 to June 2022. The landlord’s agent notes that

this amount is for use and occupancy only as the tenant is now overholding. On this basis, I have accepted the landlord's request to amend their original application from \$3,246.00 to \$7,074.00 to reflect the unpaid rent that became owing by the time this hearing was convened.

**Issue(s) to be Decided**

Is the landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Is the landlord entitled to a monetary award for unpaid rent and money owed?

Is the landlord entitled to recover the filing fee?

**Background and Evidence**

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began in March of 2012. Monthly rent was set at \$1,264.00, payable on the first of month and increased to \$1,282.00 as of February 1, 2022. The landlord still holds a security deposit of \$532.50 for this tenancy.

The landlord is requesting an Order of Possession as well as a Monetary Order for unpaid rent and money owed. The landlord's agent testified that the parties had signed a Mutual Agreement to End Tenancy, and the tenancy was to end on February 28, 2022 but the tenant has not moved out. The landlord's agent confirmed that the tenant has only made a partial payment in the amount of \$600.00 towards the January 2022 rent, and has not paid anything since. The landlord's agent wanted it clearly noted that any payments after February 28, 2022 would be for use and occupancy only as the tenant was overholding after February 28, 2022, and that any payments would not have reinstated the tenancy which was to end on February 28, 2022.

The landlord's agent testified that the tenant was originally served with a 10 Day Notice to End Tenancy for Unpaid Rent on January 5, 2022, which was posted on the tenant's door, but the landlord had attempted to work with the tenant out of compassion for the tenant's circumstances instead of applying for an Order of Possession pursuant to the 10 Day Notice. The landlord's agent notes that the tenant has not paid any rent since the partial payment in January 2022, and that the landlord would have been successful in obtaining an Order of Possession for an earlier effective date if they had decided to file an application for an Order of Possession pursuant to that 10 Day Notice. The

landlord's agent also noted that the tenant was offered time to consider the signing of the Mutual Agreement before the tenant signed, and that compensation was offered to assist the tenant if they agreed to move out on the effective date of the Mutual Agreement, as summarized in the attachment to the Mutual Agreement dated January 14, 2022. The landlord submitted a copy of the Mutual Agreement as well as the signed attachment in their evidentiary materials.

The tenant does not dispute that they had signed the Mutual Agreement, but that they did so out of desperation. The tenant testified that they did not understand or appreciate the consequences of agreeing to sign the Mutual Agreement, and thought that the "deal would be null and void" if the tenant decided not to move out. The tenant testified that they have fallen under considerable hardship, and was only able to make a partial payment towards the January 2022 rent, and have not been able to make any payments since. The tenant testified that they felt the landlord wanted to end the tenancy in order to obtain higher rent.

The tenant testified that they were served with a 10 Day Notice to End Tenancy for Unpaid Rent on January 5, 2022, and although the tenant had 5 days to pay the balance or dispute the 10 Day Notice, the landlord's agent called the tenant the next day to make a proposal. The landlord's agent attended at the rental unit, and offered the tenant incentives if they agreed to sign the Mutual Agreement to End Tenancy. The tenant testified that as they feared homelessness, and agreed to the proposal. The tenant signed the Mutual Agreement to End Tenancy on January 14, 2022, but was unable to move out by February 28, 2022.

The tenant testified that they were frightened, and had nowhere to go. The tenant testified that they were under the impression that the landlord could only end the tenancy if they had applied for an Order of Possession pursuant to the 10 Day Notice, which the landlord did not do. The tenant testified that they felt misled. The tenant testified that they felt under pressure to sign the Mutual Agreement within 5 days of being served the 10 Day Notice or the landlord would file an application to end the tenancy pursuant to the 10 Day Notice. The tenant testified that they were unaware that the landlord could apply for an Order of Possession after the effective date of the Mutual Agreement has passed, and that any rent paid would be for use and occupancy only.

## **Analysis**

Section 44 of the *Residential Tenancy Act* states how a tenancy may end:

**44** (1) A tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
  - (i) section 45 [*tenant's notice*];
  - (i.1) section 45.1 [*tenant's notice: family violence or long-term care*];
  - (ii) section 46 [*landlord's notice: non-payment of rent*];
  - (iii) section 47 [*landlord's notice: cause*];
  - (iv) section 48 [*landlord's notice: end of employment*];
  - (v) section 49 [*landlord's notice: landlord's use of property*];
  - (vi) section 49.1 [*landlord's notice: tenant ceases to qualify*];
  - (vii) section 50 [*tenant may end tenancy early*];
- (b) 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) the landlord and tenant agree in writing to end the tenancy;
- (d) the tenant vacates or abandons the rental unit;
- (e) the tenancy agreement is frustrated;
- (f) the director orders that the tenancy is ended;
- (g) the tenancy agreement is a sublease agreement.

The landlord requests an Order of Possession as both parties had assigned a Mutual Agreement to End Tenancy effective February 28, 2022, but the tenant has not moved out. The tenant does not dispute that they had signed the Mutual Agreement, but argued that the Mutual Agreement is not valid as they had signed under pressure and duress, and that they did not fully understand the repercussions of signing the document.

I have considered the testimony and evidence before me, and it is clear that a Mutual Agreement was signed by both parties for the tenancy to end on February 28, 2022. I must now consider whether the Mutual Agreement is valid.

By signing the Mutual Agreement, the tenant faces the end of a tenancy, which is the case in this matter. The question is whether the proposal made by the landlord and agreed to by both parties was unconscionable.

In *Murray v. Affordable Homes Inc.*, 2007 BCSC 1428, the Honourable Madam Justice Brown set out the necessary elements to prove that a bargain is unconscionable. She said at p. 15:

### **Unconscionability**

[28] An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. (*Fountain v. Katona*, 2007 BCSC 441, at para. 9). To prove that the bargain was unconscionable, the complaining party must show:

- (a) an inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which leaves that party in the power of the stronger; and
- (b) proof of substantial unfairness of the bargain obtained by the stronger.

*Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 (B.C.C.A.).

[29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (*Warman v. Adams*, 2004 BCSC 1305, [2004] 17 C.C.L.I. (4th) 123 at para. 7).

[30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the presumption by providing evidence that the bargain was fair, just and reasonable. (*Morrison*, at 713).

[31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain

(**Warman** at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in **Morrison** has also been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (**Harry v. Kreutziger** (1978), 95 D.L.R. (3d) 231 at 241, 9 B.C.L.R. 166.)

I will apply the two part test to this matter. I have no doubts that the tenant was very distressed during the time when this Mutual Agreement was signed. The tenant was already served with a 10 Day Notice to End Tenancy for Unpaid Rent on January 5, 2022 after the tenant failed to pay the full January 2022 rent on time. The tenant felt like they had little choice considering their financial circumstances, and needed more time to come up with the funds. The tenant subsequently decided to agree to the offer on January 14, 2022 and signed the Mutual Agreement.

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for unpaid rent the tenant may, within five days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch or pay the outstanding rent. In this case, the landlord posted the 10 Day Notice on January 5, 2022. In accordance with sections 88 and 90 of the *Act*, the tenant is deemed served with the 10 Day Notice on January 8, 2022, 3 days after posting. The tenant had until January 13, 2022 to file an application to dispute the 10 Day Notice, or pay the outstanding rent in full. As the tenant failed to file an application for dispute resolution or pay the outstanding rent within the five days of service granted under section 46(4) of the *Act*, the tenant is conclusively presumed under section 46(5) of the *Act* to have accepted that the tenancy ended on the corrected effective date of the 10 Day Notice, January 18, 2022.

I find that the landlord's 10 Day Notice complies with section 52 of the *Act*. If the landlord had filed an application for an Order of Possession pursuant to that 10 Day Notice dated January 5, 2022, the landlord would have been entitled to a two (2) day Order of Possession against the tenant, pursuant to section 55 of the *Act* for failing to move out by the effective date of January 18, 2022.

The tenant signed the Mutual Agreement to End Tenancy on January 14, 2022 after having several days to think about the matter. I find the tenant to be credible when they said they did not understand the consequences of signing the Mutual Agreement and that they felt desperate. However, I find that the signing of the Mutual Agreement was a consideration offered by the landlord that had more benefit for the tenant than the landlord. As stated above, the tenant did not pay the outstanding rent or file an

application for dispute resolution by January 13, 2022, within the five days granted under section 46(4) of the *Act*. I find that the tenant was aware of these options as this as first page of the 10 Day Notice includes this information. The tenant did not sign the Mutual Agreement to end Tenancy until January 14, 2022. Even if the Mutual Agreement was not signed, the landlord would have been successful in ending this tenancy pursuant to the 10 Day Notice, which had a corrected effective date was January 18, 2022. By signing the Mutual Agreement to End Tenancy, the effective date was not only extended for over another month, the landlord offered multiple financial incentives to assist the tenant with the move, which included a free month of rent for February 2022, \$500.00 towards moving expenses, and an agreement that the landlord would not pursue any further action or seek further monetary damages if the tenant complied with the Mutual Agreement.

I note in this case, the tenant does not dispute that they have not paid any rent since the \$600.00 paid in January 2022, and therefore owe the landlord the remaining \$664.00 for January 2022, and \$6,410.00 for February to June 2022. By not applying for an Order of Possession pursuant to that 10 Day Notice dated January 5, 2022, the landlord risked the financial consequences of extending a tenancy where the tenant was already in arrears for unpaid rent, and which has proven to be the case. For these reasons, I do not find the landlord was at an advantage for proposing the Mutual Agreement. I find that the landlord was seeking a peaceful and compassionate resolution of this matter, in hopes that the tenant would accept the end of the tenancy and move out without the need for dispute resolution, and avoid further delay in an effort to mitigate losses.

In reviewing the Mutual Agreement and addendum, I do note that the addendum states that "In the event the tenants SM fails to move out of the residential suite on or before February 28, 2022, this agreement will be come null and void and the tenants will be held liable for any unpaid rent and monetary damages". I do not interpret this to mean that the Mutual Agreement to End Tenancy would be cancelled, and would be of no force or effect. I find that the landlord is referencing the terms and conditions listed in the addendum stipulating the offers and incentives provided by the landlord in exchange for the tenant's agreement to move out by February 28, 2022.

For all the above reasons, I do not find that the proposal and signing of the Mutual Agreement to End Tenancy to be unconscionable. I find the Mutual Agreement is valid, and as the tenant has not moved out by February 28, 2022, the landlord is entitled to a 2 day Order of Possession.

Section 26 of the *Act*, in part, states as follows:



### Rules about payment and non-payment of rent

**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.

The landlord provided undisputed evidence that the tenant continues to reside in the rental unit, and has not paid any rent since January 2022. I find that the landlord is therefore entitled a monetary order the unpaid rent and monies owed for overholding past February 28, 2022 for a total monetary order of \$7,074.00.

As the landlord was successful in their application, I allow the landlord to recover the filing fee.

The landlord continues to hold the tenant's security deposit of \$532.50. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain the tenant's deposit in partial satisfaction of the monetary claim.

### **Conclusion**

I grant an Order of Possession to the landlord effective **two (2) days after service on the tenant**. 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.

I issue a Monetary Order in favour of the landlord as set out in the table below. I allow the landlord to retain the tenant's deposits in partial satisfaction of the landlord's monetary award.

Item	Amount
Unpaid Rent for January 2022	\$664.00
Unpaid Rent February 2022-June 2022	6,410.00
Filing fee	100.00
Security Deposit Held by Landlord	-532.50
<b>Total Monetary Order</b>	<b>\$ 6,641.50</b>

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: June 14,, 2022

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Residential Tenancy Branch