



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1104976 B.C LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR-DR, MNR-DR, FFL

Introduction

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

- an Order of Possession for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent, pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 42 minutes. The landlord's two agents, "landlord TM" and "landlord JW," attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

This hearing began at 9:30 a.m. and ended at 10:12 a.m. I monitored the teleconference line throughout this hearing. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord's two agents and I were the only people who called into this teleconference.

The landlord's two agents provided their names and spelling. They confirmed that they were the leasing coordinators employed by the "management company," which is the agent of the owner. They said that the landlord company ("landlord") named in this application, owns the rental unit. They confirmed that they both had permission to represent the landlord and the management company at this hearing. Landlord JW provided the legal name of the landlord and the rental unit address. Landlord TM provided her email address for me to send this decision to the landlord after the hearing.

Rule 6.11 of the Residential Tenancy Branch (“RTB”) *Rules of Procedure* (“Rules”) does not permit recording of this hearing by any party. At the outset of this hearing, the landlord’s two agents both separately affirmed, under oath, that they would not record this hearing.

I explained the hearing process to the landlord’s two agents. They had an opportunity to ask questions, which I answered. I informed them that I could not provide legal advice to them or act as their agent or advocate. I notified them that my role as an Arbitrator was to make a decision regarding this application. They did not make any adjournment or accommodation requests. They confirmed that they were ready and prepared to proceed with this hearing.

Preliminary Issue – Direct Request Proceeding and Service

This hearing was originally scheduled as a direct request proceeding, which is a non-participatory hearing. A decision is made on the basis of the landlord’s paper application only, not any participation by the tenant. An “interim decision,” dated March 25, 2022, was issued by an Adjudicator for the direct request proceeding. The interim decision adjourned the direct request proceeding to this participatory hearing. The interim decision states the following at pages 2 and 3:

I have reviewed all documentary evidence and I find that the landlord’s name on the tenancy agreement does not match the landlord’s name on the Application for Dispute Resolution. There is also no evidence or documentation showing that the applicant is the owner of the rental property or is otherwise entitled to any orders that may result from this application.

I also note that the 10 Day Notice was issued on December 3, 2021. The Direct Request Worksheet indicates that there is outstanding rent for November 2021, December 2021, and February 2022.

I find I am not able to determine whether the tenant paid the rent for January 2022 and if so, if the applicant issued a receipt indicating that the payment was being accepted for “use and occupancy only.”

I find these discrepancies raise questions that can only be addressed in a participatory hearing.

By way of the interim decision, the landlord was required to serve the interim decision and notice of reconvened hearing to the tenant. Landlord JW stated that the tenant was served with the above documents on March 28, 2022, by way of registered mail to the rental unit, by email, and by posting to the rental unit door. Landlord JW provided a Canada Post tracking number verbally during this hearing. He said that the mail was delivered to the tenant on April 20, 2022. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the interim decision and notice of reconvened hearing on April 2, 2022, five days after its registered mailing.

I informed the landlord's two agents that posting to the rental unit door is not a permitted method of service for a monetary application, pursuant to section 89(1) of the *Act*. They confirmed their understanding of same.

Landlord TM testified that the tenant was personally served with the landlord's original direct request application for dispute resolution hearing package on March 2, 2022. The landlord provided a signed, witnessed proof of service from the landlord's agent with a hand delivery receipt signed by the tenant, indicating that she received the application on the above date. In accordance with section 89 of the *Act*, I find that the tenant was personally served with the landlord's original direct request application on March 2, 2022.

Landlord JW stated that the tenant was served with the landlord's outstanding rent balance from June 2022 document on June 6, 2022, by way of email. He stated that the landlord did not have the tenant's permission to serve her by email. I informed the landlord's two agents that I could not consider the above document at this hearing or in my decision because the landlord was unable to provide sufficient evidence that the tenant provided an email address for service, as required by section 88 of the *Act* and section 43 of the *Residential Tenancy Regulation*.

Landlord JW testified that the tenant was served with the landlord's two documents, including a June 2022 10 Day Notice and a consent form for landlord representation, on June 22, 2022, by way of posting to the tenant's rental unit door and by email. He stated that the landlord did not have the tenant's permission to serve her by email. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's above two documents on June 25, 2022, three days after its posting.

The landlord testified that the tenant was served with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated December 3, 2021 ("10 Day Notice"), to the tenant's rental unit door on the same date and the landlord's agent witnessed it. The landlord provided a signed, witnessed proof of service with this application. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's 10 Day Notice on December 6, 2021, three days after its posting.

Issues to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to a monetary order for unpaid rent?

Is the landlord entitled to recover the filing fee for this application?

Background and Evidence

Landlord TM testified regarding the following facts. This tenancy began on April 1, 2021, for a fixed term ending on March 31, 2022. Monthly rent in the current amount of \$1,625.00 is payable on the first day of each month. A security deposit of \$812.50 was paid by the tenant and the landlord continues to retain this deposit. A written tenancy agreement was signed by both parties and a copy was provided for this hearing. The written tenancy agreement is in the name of the landlord's management company, as is the 10 Day Notice. This application is in the name of the landlord owner. The tenant continues to reside in the rental unit.

The landlord's two agents stated the following facts. The landlord issued the 10 Day Notice, which has an effective move-out date of December 14, 2021, indicating that rent in the amount of \$1,712.00 was due on December 1, 2021. The landlord provided a copy of the notice. The tenant failed to pay rent of \$37.00 for November 2021, an NSF fee of \$25.00 for November 2021, rent of \$1,625.00 for December 2021, and an NSF fee of \$25.00 for December 2021, totalling \$1,712.00.

The landlord's two agents both claimed that there was an October late rent or NSF fee of \$25.00. Landlord TM stated that the tenant owed outstanding rent and late fees of \$87.00 for November 2021. Both landlord agents indicated in the landlord's application and at this hearing that the November rent and late fees totalled \$62.00.

Analysis

Burden of Proof

The landlord, as the applicant, has the burden of proof, on a balance of probabilities, to present this application, claims, and evidence. The *Act, Regulation, RTB Rules*, and Residential Tenancy Policy Guidelines require the landlord to provide evidence of its claims and prove its application, in order to obtain an order of possession and a monetary order.

The landlord received an application package from the RTB, including instructions regarding the hearing process. The landlord's two agents testified that the landlord served this application package to the tenant, as required, and as noted above. The landlord received a document entitled "Notice of Dispute Resolution Proceeding," dated March 25, 2022 ("NODRP"), from the RTB. This document contains the phone number and access code to call into this hearing.

The NODRP states the following at the top of page 2, in part (emphasis in original):

The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.

- *It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.*
- *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.*
- *Parties (or agents) must participate in the hearing at the date and time assigned.*
- *The hearing will continue even if one participant or a representative does not attend.*
- *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

The NODRP states that a legal, binding decision will be made in 30 days and links to the RTB website and the *Rules* are provided in the same document.

The landlord received a detailed application package from the RTB, including the NODRP, with information about the hearing process, notice to provide evidence to support this application, and links to the RTB website. It is up to the landlord to be aware of the *Act, Regulation, RTB Rules*, and Residential Tenancy Policy Guidelines. It is up to the landlord, as the applicant, to provide sufficient evidence of the claims, since it chose to file this application on its own accord.

Rule 6.6 of the RTB *Rules* states the following (my emphasis added):

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.

The following RTB *Rules* are applicable and state the following, in part:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent...

...

7.17 Presentation of evidence

Each party will be given an opportunity to present evidence related to the claim.

The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...

7.18 Order of presentation

The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...

I find that the landlord's two agents did not properly present the landlord's claims and evidence, as required by Rule 7.4 of the RTB *Rules*, despite having the opportunity to do so during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules*.

This hearing lasted 42 minutes and only the landlord's two agents attended the hearing, as the tenant did not attend. During this hearing, I provided the landlord's two agents with ample and additional time to look up their evidence online, search through their evidence, and provide clear testimony and evidence, but they failed to do so.

The landlord's two agents spent approximately 20 minutes looking up and providing information regarding service of documents and approximately 22 minutes looking up and providing information regarding the tenancy, tenancy agreement, the unpaid rent, the late and NSF fees, and the 10 Day Notice.

The landlord's two agents repeatedly stated that October late and NSF fees were included in the 10 Day Notice rent amount, despite the fact that the 10 Day Notice specifically states that only November and December rent and NSF fees were included in the rent amount. They repeatedly stated different amounts for October, November, and December rent, late and NSF fees, and when I tried to clarify these amounts, they kept changing their testimony.

I informed the landlord's two agents that I found their testimony to be very confusing, contradictory to the information in the landlord's online application, and frequently changing testimony that was inconsistent. I find that the landlord failed to comply with section 59(2)(b) of the *Act* and Rule 6.6 of the *RTB Rules*, as noted above.

Particulars of Landlord's Application

The landlord filed this application to obtain an order of possession for unpaid rent, against the tenant, based on the 10 Day Notice.

Pursuant to section 59(2)(b) of the *Act*, an application must include the full particulars of the dispute that is to be the subject of the dispute resolution proceedings. The purpose of the provision is to provide a tenant with notice and enough information to know the landlord's case so that the tenant can properly respond.

Pursuant to section 59(5)(a) of the *Act*, I can refuse to accept an application if it does not disclose a dispute that may be determined. The landlord is the applicant, and has the burden of proof, on a balance of probabilities, to provide sufficient particulars of this application, including any monetary amounts, to provide sufficient evidence of this application, and to prove this application at this hearing.

10 Day Notice, Unpaid Rent, and Filing Fee

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which landlord TM said was the first day of each month. Section 46 of the *Act* states that the landlord may only issue a 10 Day Notice for any day after the rent is due.

When I asked the landlord's two agents how they arrived at the amount in the 10 Day Notice of \$1,712.00, they stated that it included late and NSF fees for November and December 2021. Landlord JW indicated it was a mistake on the landlord's part to include late and NSF fees as part of rent in the 10 Day Notice, but claimed he was not told by the RTB not to include it.

I find that the landlord was unable to provide an exact breakdown for the unpaid rent and for which months the rent was owing, since it was calculated together with the late and NSF fees.

Therefore, I find that the tenant did not have notice of the proper amount of rent due. The 10 Day Notice provided the amount of \$1,712.00 due on December 1, 2021, which included both rent and late and NSF fees. I find that the tenant did not have an opportunity to pay the rent in order to cancel the notice because the rent information supplied by the landlord was incorrect.

Accordingly, I find that the landlord is not entitled to an order of possession based on the 10 Day Notice, and I dismiss this application without leave to reapply. The landlord's 10 Day Notice, dated December 3, 2021, is cancelled and of no force or effect.

During this hearing, I offered the landlord's two agents the option to withdraw their application with leave to reapply or their application would be dismissed with leave to reapply. However, upon further review of the landlord's application and evidence and based on the testimony of the landlord's two agents at this hearing, I exercise my discretion to dismiss the landlord's application for an order of possession based on the 10 Day Notice, dated December 3, 2021, without leave to reapply.

During this hearing, I informed the landlord's two agents that the landlord's 10 Day Notice could not include late and NSF fees, because it was not rent. I notified them that the 10 Day Notice specifies that only rent can be included in the rent section and only

utilities can be included in the utilities section of the notice. Therefore, this notice is deficient, and is cancelled and of no force or effect.

As the landlord was unsuccessful in this application, I find that it is not entitled to recover the \$100.00 filing fee from the tenant. I informed the landlord's two agents of my decision verbally during this hearing. They confirmed their understanding of same.

As the landlord failed to establish the proper amount of rent due and the landlord's two agents providing confusing and inconsistent testimony during this hearing, I dismiss the landlord's application for a monetary order for unpaid rent, with leave to reapply. I informed the landlord's two agents of my decision verbally during this hearing. They confirmed their understanding of same.

Conclusion

The landlord's application for a monetary order for unpaid rent is dismissed with leave to reapply.

The remainder of the landlord's application is dismissed without leave to reapply.

The landlord's 10 Day Notice, dated December 3, 2021, is cancelled and of no force or effect.

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: July 12, 2022

Residential Tenancy Branch