



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH POOL XV1 LP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNRL-S, 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;
- authorization to retain the tenant's security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 25 minutes. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

This hearing began at 11:00 a.m. and ended at 11:25 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 agent and I were the only people who called into this teleconference.

The landlord's agent provided her name and spelling. She confirmed that the landlord company ("landlord") named in this application owns the rental unit. She provided the rental unit address. She stated that she had permission to represent the landlord as an agent, at this hearing. She provided an 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 agent affirmed, under oath, that she would not record this hearing.

I explained the hearing process to the landlord's agent. She had an opportunity to ask questions, which I answered. She did not make any adjournment or accommodation requests.

The landlord's agent testified that the tenant was served with a copy of the landlord's application for dispute resolution hearing package on April 20, 2022, by way of registered mail. The landlord provided a Canada Post receipt and the landlord's agent confirmed the tracking number verbally during this hearing. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's application on April 25, 2022, five days after its registered mailing.

The landlord's agreed that the landlord received the RTB email with the landlord's application on April 12, 2022, to serve to the tenant by April 15, 2022. She claimed that since the landlord's agents do not work in the office every day, and they work different days, the landlord did not serve the tenant within the three days required. Although the landlord did not comply with the three-day deadline to serve their application to the tenant, as required by section 59 of the *Act* and Rule 3.1 of the *RTB Rules*, I find that the tenant had sufficient notice to attend this hearing on July 25, 2022, which occurred three months after the deemed service date of April 25, 2022.

The landlord's agent confirmed that the tenant was not served with the updated rent ledgers, that were uploaded as evidence by the landlord to the online RTB dispute site on June 14, 2022 and July 22, 2022. I informed her that I could not consider this evidence at the hearing or in my decision because it was not served to the tenant, as required by Rule 3.1 of the *RTB Rules*. She confirmed her understanding of same.

The landlord's agent testified that the landlord's Ten Day Notice to End Tenancy for Unpaid Rent or Utilities, dated February 9, 2022 ("10 Day Notice") was served to the tenant on February 9, 2022, both by way of regular mail and by leaving a copy in the tenant's mail slot or mailbox. The landlord provided a signed proof of service to confirm same. 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 February 12, 2021, three days after it was left in the tenant's mail slot or mailbox.

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 retain the tenant's security deposit?

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

Background and Evidence

While I have turned my mind to the landlord's documentary evidence and the testimony of the landlord's agent at this hearing, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the landlord's claims and my findings are set out below.

The landlord's agent testified regarding the following facts. This tenancy began on September 1, 2021. A written tenancy agreement was signed by both parties. Monthly rent in the current amount of \$1,993.00 is payable on the first day of each month. A security deposit of \$996.50 was paid by the tenant and the landlord continues to retain this deposit. The tenant continues to reside in the rental unit.

The landlord's agent stated the following facts. The landlord issued a 10 Day Notice for unpaid rent of \$1,993.00 due on February 1, 2022, to the tenant. Rent of \$1,989.50 was due on February 1, 2022, not \$1,993.00, as stated on the notice. The landlord indicated the wrong amount on the notice. The tenant was entitled to a credit of \$3.50 for an overpayment in rent dating back to September 2021. The 10 Day Notices are automatically generated by the landlord, who owns a number of other rental properties.

The landlord's agent testified regarding the following facts. The tenant paid full rent of \$1,993.00 for April, May, and June 2022, to the landlord. The tenant paid rent of \$1,996.00 in July 2022, which is an overpayment of \$3.00. The landlord did not issue any rent receipts, other documentation, or communicate to the tenant indicating "use and occupancy only" or that it was not reinstating the tenancy. The landlord issued the 10 Day Notice to the tenant in February 2022, the landlord served this application to the tenant in April 2022, and the landlord would have informed the tenant that the tenancy was not reinstated if the tenant had attended this hearing, but the tenant did not attend. The landlord's agent stated the following facts. The landlord seeks an immediate order of possession against the tenant. The landlord seeks a monetary order of \$1,986.50 for unpaid rent for February 2022, which includes a credit of \$3.50 dating back to September 2021, and an additional \$3.00 from an overpayment in rent for July 2022.

The landlord seeks to retain the tenant's security deposit of \$996.50 towards the unpaid rent and to recover the \$100.00 application filing fee.

Analysis

Burden of Proof

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

At the outset of this hearing, the landlord's agent confirmed that the landlord served an application package from the RTB to the tenant, as required. The landlord was provided with a four-page document entitled "Notice of Dispute Resolution Proceeding" ("NODRP") from the RTB, which includes 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 contains provisions that a legal, binding decision will be made in 30 days and that links to the RTB website and the *Rules* are provided in the same document. During this hearing, I informed the landlord's agent that I had 30 days to issue a written decision regarding this application.

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 its claims, since the landlord chose to file this application on its own accord.

Rules

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 agent did not properly present the landlord's evidence, as required by Rule 7.4 of the RTB *Rules of Procedure*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules of Procedure*.

This hearing 25 minutes so the landlord's agent had ample opportunity to present this application and evidence. Only the landlord's agent attended this hearing, as the tenant did not attend. During this hearing, I repeatedly asked the landlord's agent if she had any other information to present and provided her with multiple opportunities for same. The landlord's agent provided confusing and inconsistent testimony during this hearing. I frequently had to ask questions to clarify the inconsistent information provided on the landlord's documents, the online RTB dispute site, and the testimony of the landlord's agent.

Findings

Section 46(1) of the *Act* permits the landlord to issue a 10 Day Notice only after rent is unpaid and section 52(d) of the *Act* requires the landlord to state on a notice to end tenancy, the reason for issuing the notice. The landlord indicated that \$1,993.00 in rent was due on February 1, 2022, on the 10 Day Notice. However, the landlord's agent testified at this hearing that the outstanding rent at that time was actually \$1,989.50, and the landlord made an error on the notice.

As such, I find that the tenant did not have proper notice of the correct amount of rent due on February 1, 2022. I find that the tenant did not have an opportunity to pay the rent in order to cancel the 10 Day Notice because the rent amount supplied by the landlord, was incorrect. I find that the 10 Day Notice does not comply with section 52 of the *Act* by stating the incorrect amount of rent due.

Residential Tenancy Policy Guideline 11 discusses waiver, in part (my emphasis added):

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

*For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. **However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for "use and occupancy only," it could be implied that the landlord and tenant intend for the tenancy to continue.***

Intent may also be established by evidence as to:

- *whether the landlord specifically informed the tenant that the money would be for use and occupancy only;*

- *whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and*
- *the conduct of the parties.*

The landlord accepted the tenant's rent payments from March to July 2022, after the effective date on the 10 Day Notice of February 28, 2022. The landlord did not issue rent receipts for "use and occupancy only," or other documentation to tell the tenant that the tenancy was not reinstated. The landlord did not communicate to the tenant the above information and claimed that it was intending to do so during this hearing, but the tenant did not attend.

I find that the landlord did not provide sufficient documentary or testimonial evidence to show that the tenant's tenancy was not reinstated or that it was pursuing an end to this tenancy. Therefore, I find that the landlord waived its right to pursue the 10 Day Notice.

Accordingly, I find that the landlord's 10 Day Notice, dated February 9, 2022, is cancelled and of no force or effect. The landlord is not entitled to an order of possession and this claim is dismissed without leave to reapply. This tenancy will continue until it is ended in accordance with the *Act*.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which is the first day of each month, in this case. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act, Residential Tenancy Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

The landlord provided undisputed evidence that the tenant failed to pay rent of \$1,986.50 for February 2022. Therefore, I find that the landlord is entitled to a monetary order of \$1,986.50 in unpaid rent from the tenant.

The landlord continues to hold the tenant's security deposit of \$996.50. Over the period of this tenancy, no interest is payable on the deposit. As per the landlord's application and in accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain the tenant's entire security deposit of \$996.50 in partial satisfaction of the monetary award for unpaid rent. The landlord is provided with a monetary order of \$990.00 for the balance due.

As the landlord was only partially successful in this application, I find that it is not entitled to recover the \$100.00 filing fee from the tenant. This claim is dismissed without leave to reapply.

Conclusion

The landlord's 10 Day Notice, dated February 9, 2022, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I order the landlord to retain the tenant's entire security deposit of \$996.50 in partial satisfaction of the monetary award.

I issue a monetary order in the landlord's favour in the amount of \$990.00 against the tenant. The tenant must be served with this Order. 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.

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

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 25, 2022

Residential Tenancy Branch