



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #310067090: CNR

File #310071120: OPR-DR, MNR-DR, FFL

Introduction

The Tenants apply to cancel a 10-Day Notice to End Tenancy signed on January 18, 2022 (the “10-Day Notice”) pursuant to s. 46 of the *Residential Tenancy Act* (the “Act”).

The Landlord applies for the following relief under the *Act*:

- An order of possession pursuant to s. 55 after issuing the 10-Day Notice;
- A monetary order pursuant to s. 67 for unpaid rent; and
- Return of its filing fee pursuant to s. 72.

The Landlord’s application was filed as a direct request but was adjourned to a participatory hearing in light of the Tenant’s application.

K.G. appeared as agent for the Landlord (the “Agent”). The Tenants did not attend the hearing, nor did someone attend on their behalf.

Pursuant to Rule 7.1 of the Rules of Procedure, the hearing began as scheduled in the Notice of Dispute Resolution. As the Tenants did not attend, the hearing was conducted in their absence as permitted by Rule 7.3 of the Rules of Procedure.

The Agent affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The Agent confirmed that he was not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Agent advised that the 10-Day Notice was served on the Tenants by posting it to their door on January 18, 2022. The Landlord provides a proof of service form confirming service of the 10-Day Notice. I find that the 10-Day Notice was served in accordance with s. 88 of the *Act* by posting it to the Tenants' door on January 18, 2022. Pursuant to s. 90 of the *Act*, I deem that the Tenants received the 10-Day Notice on January 21, 2022.

The Agent further advised that the Notice of Dispute Resolution and evidence for the Landlord were served on each Tenant via registered mail sent on May 12, 2022. The Landlord provides registered mail receipts for the service of its application materials on the Tenants as proof of service. I find that the Landlord served its application materials on the Tenants in accordance with s. 89 of the *Act* by sending registered mail on May 12, 2022. Pursuant to s. 90 of the *Act*, I deem that the Tenants received the Landlord's application materials on May 17, 2022.

Preliminary Issue – Service of the Tenants' Application

Rule 3.5 of the Rules of Procedure requires applicants to demonstrate at the hearing service of their applications on the respondents. The Tenants did not attend. The Agent advised that the Landlord was never served with the Tenants' application or evidence.

I am unable to find that the Tenants' application was served. Policy Guideline #12 provides guidance with respect to the service provisions of the *Act*. It specifies that where one or more parties to an application have not been served, the matter may proceed, be adjourned, or dismissed with or without leave to reapply.

As the Tenants application was not served, I dismiss their application. I am cognizant that the Tenants application pertains to the cancellation of the 10-Day Notice, which has specific timeframes for filing to dispute notices. However, given my findings below, the dismissal is not prejudicial and adjourning their application would not be appropriate under the circumstances.

The hearing proceeded strictly on the basis of the Landlord's application.

Preliminary Issue – Amending the Landlord’s Application

At the outset of the hearing, I clarified with the Agent who, in fact, was the Landlord. The two applications list different names for the Landlord, which does not correspond with the Landlord as listed in the tenancy agreement or the 10-Day Notice.

The Agent confirmed that the corporate Landlord, as listed in the tenancy agreement, is the correct Landlord. I proposed the style of cause be amended to reflect the Landlord as stated in the tenancy agreement. No objection was raised by the Agent. Accordingly, I amend the application pursuant to Rule 4.2 of the Rules of Procedure such that the style of cause reflects the Landlord as listed in the tenancy agreement.

I further note that the Landlord seeks a greater amount than listed in their application. These circumstances are explicitly permitted by Rule 4.2 of the Rules of Procedure and amend the Landlord’s claim such that they may seek the amount of unpaid rent that they claim has accrued since filing their application.

Issues to be Decided

- 1) Is the Landlord entitled to an order of possession?
- 2) Is the Landlord entitled to an order for unpaid rent?
- 3) Is the Landlord entitled to the return of its filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The Agent confirmed the following details with respect to the tenancy:

- The Tenants took occupancy of the rental unit on September 16, 2021.
- Rent of \$1,450.00 is due on the first day of each month.
- The Landlord holds a security deposit of \$725.00 in trust for the Tenants.

A copy of the written tenancy agreement was put into evidence by the Landlord.

The Agent advised that the Tenants fell behind in their rent in December 2021. The Landlord provides a copy of its rent ledger, which indicates that the Tenants made a

payment of \$500.00 on December 9, 2021 and no other payment on the total rent due for December. There was a negative balance carried forward in December 2021 such that the total arrears after the payment of \$500.00 was \$941.33. The Agent says that the Landlord issued a 10-day notice to end tenancy in December 2021 but took a flexible approach with respect to its enforcement. The December 10-Day Notice is not before me.

The Agent advised that the 10-Day Notice was issued on the basis that rent for January 2022 was not paid when due, in addition to the arrears from December 2021. The 10-Day Notice lists the total amount owing as \$2,391.33.

The Agent advised that the Tenants made three payments on rent after the 10-Day Notice was issued:

- the first was a payment of \$600.00 on February 6, 2022;
- the second was a payment of \$2,391.33 on February 15, 2022; and
- the final payment was for \$500.00 paid on March 23, 2022.

These payments are reflected in the rent ledger.

However, the dates these amounts were received do not correspond with the Landlord's evidence. The ledger says the \$600.00 payment was received on February 2, 2022. The second payment of \$2,391.33 does show that February 15, 2022, though a rent receipt provided by the Landlord shows it was received on February 14, 2022. The final payment has a rent receipt showing March 23, 2022 but the ledger shows it was received on March 25, 2022.

The Agent directed me to the tenancy agreement, which specifies in clause 1 of the addendum that late rent is subject to a mandatory late fee. Though the late fee is not specified in the addendum, the Agent indicates that it is specified elsewhere in the tenancy agreement, specifically added in the margins of clause 3 of the agreement. The Landlord seeks the late fees from January 2022 to date.

The Agent advised that the Tenants have not made a payment on rent since the \$500.00 paid in late March 2022. The Agent further advised that the Tenants continue to reside within the rental unit. In total, the Agent says that unpaid rent including the filing fee to date is \$9,275.00.

I was advised by the Agent that the Landlord had previously applied for an order of possession, though that matter was adjourned with leave to reapply as the Landlord had failed to demonstrate service of its application materials on both Tenants.

Analysis

The Landlord seeks an order of possession and an order for unpaid rent.

Pursuant to s. 46(1) of the *Act*, where a tenant fails to pay rent when it is due, a landlord may elect to end the tenancy by issuing a notice to end tenancy that is effective no sooner than 10-days after it is received by the tenant.

I have reviewed the 10-Day Notice and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, sets out the grounds for ending the tenancy, and is in the approved form (RTB-30). The effective date, though stated correctly, is corrected by automatic application of s. 53 due to the 10-Day Notice's deemed receipt on January 21, 2022, such that the correct effective date is January 31, 2022.

When a 10-Day Notice to End Tenancy issued under s. 46 of the *Act* is received by a tenant, a tenant must, within 5-days, either pay the overdue rent or dispute the notice with the Residential Tenancy Branch. This is made clear at the very top of the 10-Day Notice to End Tenancy, which states:

HOW TO DISPUTE THIS NOTICE

You have **5 days** to pay rent and/or utilities to the landlord or file an Application for Dispute Resolution with the Residential Tenancy Branch online, in person at any Service BC Office or by going to the Residential Tenancy Branch Office at #400 - 5021 Kingsway in Burnaby. If you do not apply within the required time limit, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the effective date of this Notice.

In this case, the Tenants failed to do either within 5 days of receiving the 10-Day Notice, which is deemed to have been received on January 21, 2022. The payment of the outstanding amount was made on February 14, 2022, which is the dates specified in the rent receipt. Though I have dismissed the Tenants' application, I note that it was not filed until March 22, 2022.

I find that the Tenants failed to either pay the overdue amount or file to dispute the 10-Day Notice within 5 days of receiving the 10-Day Notice. I note that any application for more time to dispute the 10-Day Notice under s. 66 would be barred by s. 66(3). There is little doubt that the conclusive presumption under s. 46(5) of the *Act* applies. I find that the Tenants are conclusively presumed to have accepted the end of the tenancy and ought to have vacated the rental unit on the effective date of January 31, 2022.

As the Tenants continue to reside within the rental unit after the effective date, I find that the Landlord is entitled to an order of possession under s. 55 of the *Act*.

Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

Pursuant to s. 26(1) of the *Act*, 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 *Act* grants the tenant the right to deduct all or a portion of the rent. In the present circumstances, rent was not paid in accordance with the Tenancy Agreement and the Tenants had no lawful reason for withholding rent from the Landlord. I find that the Tenants breached their obligation to pay rent as set out in the Tenancy Agreement. This breach gives rise to the Landlord's claim for a monetary award for unpaid rent.

I note the discrepancy of the dates on which the amounts were stated to have been received by the Landlord. I do not find this to be relevant as the Landlord's evidence clearly confirms the receipt of the amounts described by the Agent at the hearing. I further note that the Agent advised that the total arrears to date (including filing fee) is \$9,275.00. This does not correspond with the rent ledger nor does it correspond with

the rent due and the payment history described by the Agent at the hearing. I place no weight on the Agent's claim that \$9,275.00 is currently owed.

I find that the Landlord has shown that rent and compensation in lieu of rent in the total amount:

Month	Rent Due	Rent Paid	Difference
December 2021	\$1,441.33	\$500.00	-\$941.33
January 2022	\$1,450.00	\$0.00	-\$1,450.00
February 2022	\$1,450.00	\$2,991.33	\$1,541.33
March 2022	\$1,450.00	\$500.00	-\$950.00
April 2022	\$1,450.00	\$0.00	-\$1,450.00
May 2022	\$1,450.00	\$0.00	-\$1,450.00
June 2022	\$1,450.00	\$0.00	-\$1,450.00
July 2022	\$1,450.00	\$0.00	-\$1,450.00
TOTAL OWED			\$7,600.00

I further find that the Tenants were late in paying rent, triggering the late payment penalty under clause 1 of the addendum, with the amount for the late payment being specified as \$25.00 in clause 3 of the tenancy agreement. I note this fee complies with s. 7 of the Regulations. The Agent advised that the Landlord only seeks the late fee from January 2022 onwards. Accordingly, I find that the Landlord has established their claim for late fees in the amount of \$175.00.

As the Tenants continue to reside within the rental unit, the Landlord could not have mitigated their damages under the circumstances. I find that the Landlord has established a monetary claim in the amount of \$7,775.00 (\$7,600.00 + \$175.00).

Pursuant to s. 72(2) of the *Act*, I direct that the Landlord withhold the security deposit of \$725.00 in partial satisfaction of the amount owed by the Tenants.

Conclusion

The Tenants are conclusively presumed to have accepted the end of the tenancy. The Landlord is entitled to an order of possession under s. 55 of the *Act*. I order that the Tenants provide vacant possession of the rental unit within **two (2) days** of receiving the order of possession.

The Landlord has established a monetary claim for unpaid rent and late fees in the amount of \$7,775.00.

As the Landlord was successful in its application, I find that it is entitled to the return of its filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Tenants pay the Landlord's \$100.00 filing fee.

I make a total monetary award taking the following into account:

Item	Amount
Total Unpaid Rent, Compensation in Lieu of Rent, and Late Fees	\$7,775.00
Landlord's Filing fee as per s. 72(1)	\$100.00
Less the security deposit to be retained by Landlord as per s. 72(2)	-\$725.00
Total	\$7,150.00

Pursuant to ss. 67 and 72 of the *Act*, I order that the Tenants pay **\$7,150.00** to the Landlord.

It is the Landlord's obligation to serve the monetary order and the order of possession on the Tenants. If the Tenants do not comply with the monetary order, it may be filed by the Landlord with the Small Claims Division of the Provincial Court and enforced as an order of that Court. If the Tenants do not comply with the order of possession, it may be filed by the Landlord with the Supreme Court of British Columbia 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: July 12, 2022

Residential Tenancy Branch