



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #310068323: MNRL-S, OPM, FFL

File #310069002: CNR

Introduction

The Landlords seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- An order of possession pursuant to s. 55 following an agreement in writing between the parties to end the tenancy;
- A monetary order pursuant to s. 67 for unpaid rent and seeks to claim that amount against the deposit; and
- Return of their filing fee pursuant to s. 72.

The Tenants file a cross-application seeking to an order pursuant to s. 46 of the *Act* cancelling a 10-Day Notice to End Tenancy.

K.W. and S.K. appeared as the Landlords. 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 Landlords 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 Landlords confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlords advise that they Tenants were served with their Notice of Dispute Resolution and their initial evidence by way of registered mail received by the Tenants on May 5, 2022. The Landlords provide tracking information of the registered mail packages. I find that the Notice of Dispute Resolution for the Landlords' application and their initial evidence were served in accordance with s. 89 of the *Act*.

Preliminary Issue – Service of the Landlord's Additional Evidence

The Landlords advise that additional evidence was served on the Tenants via registered mail sent on July 11, 2022. Rule 3.14 of the Rules of Procedure requires applicants to serve their evidence on all the named respondents at least 14 days before the hearing. The registered mail tracking information indicates that the evidence has not been retrieved.

Policy Guideline #12, which provides guidance on the service provisions of the *Act*, is clear that failing to retrieve evidence sent to the correct mailing address does not impact the deemed service receipt provisions under s. 90 of the *Act*. However, the issue is that deemed receipt of registered mail is 5 days after it had been sent. Given this, the Tenants would be deemed to have received the additional evidence on July 16, 2022, which is 13-days before the hearing, thus running afoul Rule 3.14.

I was advised that the Landlords had also sent the evidence via email on July 11, 2022. Section 43 of the Regulations permits service via email but only if email is provided as an address for service by the parties. The Landlords indicate that there was no pre-agreement that email was a method of service, though they did indicate that they were corresponding with the Tenants via email as late as July 10, 2022. The Landlords further advised that they attempted to confirm the Tenants receipt of the evidence after it had been sent. However, the Tenants ignored the request.

On balance, I find that pursuant to s. 71(2) of the *Act* the Tenants were sufficiently served with the Landlords' additional evidence. The Landlords provide undisputed affirmed testimony that they were corresponding via email as late as July 10, 2022. Though s. 43 of the Regulations may not have been followed explicitly, I find that that is a distinction of form over substance. The Tenants were corresponding with the Landlords via email the day prior to the evidence being sent by the Landlord. They clearly had access to their email. Pursuant to s. 44 of the Regulations, I deem that the Tenants received the Landlords' additional evidence on July 14, 2022.

Preliminary Issue – End of the Tenancy

The Landlords confirm that the Tenants vacated the rental unit on May 30, 2022 and that they were no longer seeking an order of possession.

As the tenancy is over, I find that the Landlords' claim under s. 55 and the Tenants' claim under s. 46 are moot. These two claims are dismissed without leave to reapply.

Preliminary Issue – Landlords' Claim

The Landlords advised that they were seeking additional amounts for damages to the rental unit at the end of the tenancy. I enquired whether they had filed an amendment seeking this amount as part of their claim. The Landlords advised that they retained a lawyer to assist them and it was their understanding that this has been done.

Rule 2.2 of the Rules of Procedure limits a claim to what is stated in the application. This rule is fundamental to ensuring a procedurally fair process by giving respondents notice of the claims being made against them.

Rule 4.1 of the Rules of Procedure permits amendments to an application prior to the hearing, provided the proper paperwork is filed with the Residential Tenancy Branch and the amendment is served on the respondents. Rule 4.2 of the Rules of Procedure permits amendments to claims 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".

Presently, no amendment as permitted by Rule 4.1 is on file for the Landlords' application. The Landlords seek compensation for damages to the rental unit without setting it out within the four corners of their application. I find that this runs afoul Rule 2.2. As this claim is not properly before me, I make no findings on it. If the Landlords' wish to advance that claim, they are free to do so by filing a separate application.

The Landlords testified to additional rent owed since they filed their application. I find that the additional rent claim could be reasonably anticipated as contemplated by Rule 4.2 given their claim for unpaid rent. I permit the Landlords amendment to their claim to seek the additional amount of unpaid rent.

Issues to be Decided

- 1) Are the Landlords entitled to an order for unpaid rent?
- 2) Are the Landlords entitled to the return of their 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 Landlords confirm the following details with respect to the tenancy:

- The Tenants took occupancy of the rental unit on December 1, 2019.
- The Landlords obtained vacant possession of the rental unit on May 30, 2022.
- Rent of \$1,500.00 was due on the first day of each month.
- A security deposit of \$750.00 and a pet damage deposit \$500.00 was paid by the Tenants. The Landlords confirm they still hold both deposits.

A copy of the tenancy agreement was put into evidence by the Landlords confirming these details.

The Landlords testified that the Tenants began to have issues paying rent in full beginning in September 2021. They advise the following amounts were paid by the Tenants:

Month	Rent Due	Rent Paid	Difference
September 2021	\$1,500.00	\$500.00	-\$1,000.00
October 2021	\$1,500.00	\$300.00	-\$1,200.00
November 2021	\$1,500.00	\$800.00	-\$700.00
December 2021	\$1,500.00	\$100.00	-\$1,400.00
January 2022	\$1,500.00	\$500.00	-\$1,000.00
February 2022	\$1,500.00	\$1,000.00	-\$500.00
March 2022	\$1,500.00	\$500.00	-\$1,000.00
April 2022	\$1,500.00	\$0.00	-\$1,500.00
May 2022	\$1,500.00	\$0.00	-\$1,500.00
Total Owed			-\$9,800.00

The Landlords testified that the Tenant S.W. had performed some maintenance work at the property and they had agreed to pay for these services in the amount of \$810.00. The Landlords advise that this amount should be credited to the Tenants from the amount they owe in unpaid rent.

Analysis

The Landlords seek an order for unpaid rent.

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 I accept the Landlords' undisputed testimony that rent was not paid in accordance with the tenancy agreement and that 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 Landlords' claim for a monetary award for unpaid rent.

I further accept the Landlord's undisputed testimony that the Tenants failed to pay rent in the amount of \$9,800.00 and that the Tenants are to be given a \$810.00 credit for services rendered at the property. I find that the Landlords have established a monetary claim in the amount of \$8,990.00 (\$9,800.00 - \$810.00). I further find that the Landlords could not have mitigated their damages under the circumstances as the Tenants continued to reside within the rental unit until May 30, 2022.

I direct that the Landlords retain the security deposit of \$750.00 and the pet damage deposit of \$500.00 in partial satisfaction of the total arrears.

Conclusion

The tenancy ended on May 30, 2022. The Tenants' claim to cancel a 10-Day Notice to End Tenancy and the Landlords' claim for an order of possession are no longer relevant. The Tenants' application is dismissed without leave to reapply. The Landlords' claim for an order of possession under s. 55 of the *Act* is dismissed without leave to reapply.

The Landlords have established a monetary claim for unpaid rent in the amount of \$8,990.00.

The Landlords were successful in their application. I find they are entitled to the return of their filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Tenants pay the Landlords' \$100.00 filing fee.

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

Item	Amount
Total Unpaid Rent	\$8,990.00
Filing fee to be paid by the Tenants pursuant to s. 72(1) of the <i>Act</i>	\$100.00
Less the security deposit and pet damage deposit to be retained by the Landlords as per s. 72(2) of the <i>Act</i>	-\$1,250.00
Total	\$7,840.00

Pursuant to ss. 67 and 72 of the *Act*, I order that the Tenants pay **\$7,840.00** to the Landlords.

It is the Landlords obligation to serve the monetary order on the Tenants. If the Tenants do not comply with the monetary order, it may be filed by the Landlords with 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: July 29, 2022

Residential Tenancy Branch