



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes

File #310068888: CNR, FFT

File #310069121: OPR-DR, MNR-DR, FFL

### Introduction

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

- An order pursuant to s. 46 cancelling a 10-Day Notice to End Tenancy signed on April 3, 2022 (the “10-Day Notice”); and
- Return of her filing fee pursuant to s. 72.

The Landlord files its own application seeking 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.

A.S. appeared as the Tenant. B.D. appeared as the Landlord’s agent.

The parties 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 parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlord’s agent advised that the Tenant was personally served with the 10-Day Notice on April 3, 2022. The Tenant acknowledges personally receiving the 10-Day Notice, though could not recall the date. The Landlord’s evidence includes a proof of service form confirming that the 10-Day Notice was personally served and A.D. witnessed service. I find that the Landlord personally served the 10-Day Notice in

accordance with s. 88 of the *Act* and that it was received on April 3, 2022 as confirmed by the proof of service provided by the Landlord.

The Landlord's agent advised that the Landlord's application and evidence was served via registered mail sent on April 21, 2022. The Landlord provides a copy of the registered mail tracking receipt. The Tenant denies receiving the Landlord's application materials. During the hearing, I confirmed with the Tenant that the rental unit address is the same as the address listed on the registered mail tracking receipt.

I confirmed that the parties consented to my reviewing the tracking information provided by the Landlord. It indicates that the package was delivered on April 30, 2022. The Tenant says that there were multiple people living in the house and that it may have been picked up by someone else.

I find that the Landlord's application was served in accordance with s. 89 of the *Act*, which permits service via registered mail to the address in which an individual resides. The tracking information shows that the application materials were retrieved on April 30, 2022, which is the date I find the Tenant received the application materials.

#### Preliminary Issue – Service of the Tenant's Application

The Tenant advised that her application materials were given to a third party to be delivered to the Landlord. The Tenant says that she was ill with COVID and asked the third party to serve the application. The Landlord's agent denies receiving the Tenant's application. The Tenant provides no statement or proof of service from the unnamed third party, who is said to have delivered to the Landlord.

Rule 3.1 of the Rules of Procedure requires applicants to serve the Notice of Dispute Resolution package on each named respondent. Rule 3.5 of the Rules of Procedure further requires applicants to be prepared to demonstrate service of their application materials at the hearing. Finally, Rule 3.14 of the Rules of Procedure permits additional evidence to be served by applicants, however, this must be delivered to the respondents at least 14 days prior to the hearing.

Presently, the Tenant provides a bare assertion that her application materials were given to a third party and that that third party served the evidence. There is no proof that this took place or corroborating evidence confirming service. The Landlord's agent denies that the application was ever served.

The bare assertion that the Tenant was ill is not relevant and does not excuse her clear obligation to serve her application materials. Further, it does not explain why service was not attempted in the months that followed her receipt of the Notice of Dispute Resolution.

The burden of proving service of her application rests with the applicant Tenant. I find that the Tenant has failed to demonstrate service of her application or evidence.

Policy Guideline #16 provides guidance with respect to the service provisions of the *Act*. It states the following when a party has not been served:

Where one or more parties on an application for dispute resolution have not been served, the Arbitrator's decision or order will indicate this. The matter may proceed, be adjourned, dismissed with or without leave to reapply.

Generally, when a party has not been served with an application, the application is dismissed with leave to reapply. However, the practical effect of doing so with the Tenant's application would all but trigger the conclusive presumption under s. 46(5) of the *Act*. Dismissing her application would be unduly prejudicial.

Adjourning the matter would also be inappropriate as the 10-Day Notice was served on April 3, 2022. The hearing took place over four months after the 10-Day Notice was served. Adjourning the matter would be unduly prejudicial to both parties given the additional delay that would result.

Despite the Tenant's failure to serve her application materials, I will consider her application cancelling the 10-Day Notice under s. 46 of the *Act*. The prejudice on the Landlord on not being given notice of the Tenant's application is offset by the fact that its application essentially mirrors that filed by the Tenant. The enforceability of the 10-Day Notice is at issue and the Landlord would not be entitled to an order of possession or order for unpaid rent if the 10-Day Notice was improperly issued.

The Tenant's claim for return of her filing fee under s. 72 is, however, dismissed without leave to reapply. I do so regardless of the outcome of the decision as the Tenant failed to serve her application in clear contravention of s. 89 of the *Act* and the Rules of Procedure.

With respect to the evidence the Tenant provided to the Residential Tenancy Branch but did not serve on the Landlord, I find that since it was not served it would be prejudicial on the Landlord to consider it. The Landlord did not have the benefit of reviewing the evidence prior to the hearing. The evidence provided by the Tenant is not included and shall not be considered.

Finally, at the end of the hearing the Tenant asked if evidence could be submitted after the hearing. I did not permit that as it would be procedurally unfair under the circumstances and be in clear contravention of Rule 3.14 of the Rules of Procedure.

The Tenant was free to make oral submissions, which will be considered in these reasons.

#### Preliminary Issue – Style of Cause for the Tenant’s Application

The Tenant’s application lists two individuals as the Landlord. However, the tenancy agreement lists a corporate entity as the Landlord.

At the outset of the hearing, I clarified with the Landlord’s agents who, in fact, was the Landlord. The Landlord’s 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. The Tenant raised no objections with respect to the amendment. Accordingly, I amend the Tenant’s 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.

#### Preliminary Issue – Landlord’s Claim

The Landlord claims unpaid rent in its application in the amount of \$4,500.00. Rule 2.2 of the Rules of Procedure limits a claim to what is stated in the application.

However, Rule 4.2 permits amendment of an application at the hearing in circumstances that can be reasonably 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 made submissions for additional amounts owing since filing the application.

I find that it is appropriate to amend the Landlord's claim pursuant to Rule 4.2 of the Rules of Procedure as the increased claim for unpaid rent could be reasonably anticipated and permit the Landlord to seek the additional amount.

### Issues to be Decided

- 1) Should the 10-Day Notice be cancelled?
- 2) If not, is the Landlord entitled to an order of possession?
- 3) Is the Landlord entitled to an order for unpaid rent?
- 4) 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 parties confirmed the following details with respect to the tenancy:

- The Tenant took occupancy of the rental unit on September 1, 2021.
- Rent of \$3,500.00 is due on the first day of each month.
- The Landlord holds a security deposit of \$1,750.00 and a pet damage deposit of \$1,750.00 in trust for the Tenant.

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

The Landlord's agent advised that the 10-Day Notice was served as the Tenant had failed to pay rent in February 2022, paid partial rent in March 2022 such that \$1,000.00 was left owing, and did not pay rent on April 1, 2022. A copy of the 10-Day Notice was put into evidence and lists that the amount owed was \$8,500.00 as of April 1, 2022.

The Landlord's agent further advised that the Tenant did make rent payments on April 8 and 9 totalling \$3,500.00. The Landlord's agent further testified that rent was paid in May 2022 but that no rent was paid in June, July, or August 2022.

The Landlord's documentary evidence includes a monetary order worksheet indicating that \$1,000.00 was owing for February 2022 and that rent had not been paid at all in March 2022. The Landlord's evidence includes rent receipts as follows:

- February 3, 2022 - \$2,500.00

- April 8, 2022 - \$3,000.00
- April 9, 2022 - \$500.00

The Landlord's evidence also includes Interac e-transfer receipts dated April 8, 2022 and April 9, 2022 corresponding with the amounts set out above on those same dates.

The Tenant acknowledges that she did not pay rent in February 2022 but says that there were several deficiencies with the rental unit, including toxic water, a rotting deck, door locks that did not function properly, a septic system issues, the furnace not functioning properly, and the toilet not functioning properly. She says that she fell through the deck and that the water testing was conducted, and the health authority raised issues with the septic system with the Landlord. The Tenant says that she spoke with the Landlord's owner in February 2022 and that they agreed that she did not have to pay rent for February 2022. She says there was no written agreement and that it was based on her discussion with the Landlord's owners.

The Landlord's agent denies any agreement between the Landlord and the Tenant that provided that rent for February 2022 did not need to be paid. The Landlord's agent further testified that Landlord's owners did attend the property to discuss maintenance issues with the Tenant. However, it was later discovered that the health authority had never been contacted and the Landlord's agent argued the Tenant lied about the issue.

The Tenant says that there was a dispute between the Landlord's owners and its agent and that the owner's asked that rent be paid to them directly rather than the agent. She says that she paid rent in March 2022. The Landlord's agent denies this.

The Tenant does acknowledge that she did not pay rent in June, July, and August 2022 as alleged by the Landlord's agent. She says that she did not do so due to the maintenance issues mentioned above.

The Tenant confirmed she continues to reside within the rental unit though is intending to move out by August 15, 2022.

### Analysis

The Tenant applies to cancel the 10-Day Notice. The Landlord seeks an order of possession and 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.

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.

When a tenant files an application disputing the 10-day notice to end tenancy, the onus of proving the notice was properly issued rests on the landlord.

Upon consideration of the information on file and Rule 6.6, I find that the Tenant filed her application disputing the 10-Day Notice on April 9, 2022. As mentioned above, the 10-Day Notice was received on April 3, 2022. I find that the Tenant failed to file her application disputing the 10-Day Notice within the 5 days permitted to her under s. 46(4) of the *Act*.

Both the Landlord's agent and the Tenant advised at the hearing that rent had not been paid in February 2022. However, this is directly contradicted by the Landlord's documentary evidence, which shows a rent receipt of \$2,500.00 dated February 3, 2022. The Landlord's agent says \$1,000.00 was left owing in March 2022. The Tenant says she paid that amount in full. The Landlord's monetary order worksheet says that no rent was paid in March 2022 and that \$1,000.00 was left owing from February 2022. The Landlord's agent provided no oral submissions explaining this discrepancy in the Landlord's documentary evidence.

To the extent that there is discrepancy, I prefer the uncontradicted evidence of the parties at the hearing that rent was not paid in February 2022. I put no weight on the

incorrectly dated rent receipt, which was neither presented at the hearing nor was the discrepancy in the Landlord's evidence explained.

Looking at rent for February 2022, I do not accept the Tenant's allegation that the Landlord's owners told her she did not have to pay rent in February 2022. I am cognizant that the burden of proving the 10-Day Notice is on the landlord. The Tenant raises the prospect of a potential oral agreement that rent not be paid, which would require her to provide some evidence to verify its existence. However, she advances this position on a bare allegation, which is directly contradicted by the Landlord's agent who says there was no agreement regarding rent in February 2022. A bare allegation without some form of documentary evidence, such as evidence of the alleged deficiencies, is merely an excuse without force of persuasion.

Given the conflicting oral testimony, I find that there was no agreement between the Tenant and the Landlord that rent for February 2022 did not need to be paid. In the absence of any evidence to the contrary, the obligation to pay rent as per the tenancy agreement stands, which the Tenant admits she did not pay. I find that rent for February 2022 was not paid.

The Landlord says that the Tenant paid \$2,500.00 in rent for March 2022. The Tenant says that she paid in full. The rent receipt in the Landlord's evidence is listed as \$2,500.00 for February 3, 2022, which was directly contradicted by the agent's affirmed testimony that no rent was paid in February. As mentioned above, I place no weight on that receipt. It is the Landlord's burden of proven what rent, if any, was paid for March 2022. Given the conflict in the Landlord's evidence I cannot make that finding what rent, if any, was paid or owed in March 2022.

The Landlord's documentary evidence is consistent with the agent's oral submissions that rent for April 2022 was paid on April 8, 2022 and April 9, 2022. This was not contradicted by the Tenant at the hearing. I find that rent for April 2022 was paid in full on April 9, 2022, which is supported by the Interac e-transfer receipts provided by the Landlord in its evidence.

When the 10-Day Notice was issued, it listed \$8,500.00 as owing on April 1, 2022. This amount is inconsistent both with my findings as set out above and with the submissions of the Landlord's agent at the hearing, who said February and April rent had not been paid and \$1000.00 was owed from March, which totals \$8,000.00. Despite this error in the 10-Day Notice, I am satisfied that Tenant was in arrears of rent on April 3, 2022 in



the amount of \$7,000.00. To the extent that there is an error I do not find it material and correct the notice pursuant to s. 68 of the *Act* on the basis that the tenant should have known that rent was due on the 1<sup>st</sup> and that she was in arrears when it was issued.

The 10-Day Notice was served on April 3, 2022. I find that the total arrears (or even rent due on April 1, 2022) were not paid within 5-days of the Tenant receiving the 10-Day Notice. Given this, s. 46(5) of the *Act* comes into effect and the Tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the rental unit on the effective date. In this case, the effective date was April 13, 2022.

As the Tenant is conclusively presumed to have accepted the end of the tenancy, I dismiss her application cancelling the 10-Day Notice. Correspondingly, I find that the Landlord is entitled to an order of possession as the Tenant continues to reside within the rental unit.

Dealing with the claim 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* permits the tenant the right to deduct all or a portion of the rent. Section 26 imposes a clear obligation on tenants to pay rent even in circumstances where a landlord has breached their obligation under s. 32 to maintain the property. In other words, the Tenants allegations that the property was not properly maintained is not relevant.

I find that the Tenant breached her obligation to pay rent under the tenancy agreement, s. 26 of the *Act*, and breached her obligation to vacate the rental unit despite being conclusively presumed to have accepted the end of the tenancy.

As mentioned above, I find that the Tenant failed to pay rent in February 2022. I cannot make a finding with respect to the Landlord's claim that \$1,000.00 was owed for March 2022 due the discrepancy of the Landlord's evidence respecting this amount. The amount claimed for March 2022 is dismissed without leave to reapply.

It is undisputed that the Tenant did not pay rent in June, July, and August 2022, which was the period in which she was overholding. I find that the Tenant's continued occupation of the rental unit after April 13, 2022 imposed a financial loss on the Landlord equivalent to the loss of rent payable under the tenancy agreement. I find that the Landlord could not have mitigated its damages under the circumstances as the Tenant continued to occupy the rental unit.

I find that the Landlord is entitled to a monetary order in the amount of \$14,000.00, representing the loss of rental income under the tenancy agreement for the months of February, June, July, and August 2022.

I exercise my discretion under s. 72(2) of the *Act* and direct that the Landlord retain the security deposit and pet damage deposit in partial satisfaction of the total amount owed by the Tenant.

### Conclusion

I dismiss the Tenant's application cancelling the 10-Day Notice. The Landlord is entitled to an order of possession under s. 55 of the *Act*. The Tenant shall provide vacant possession of the rental unit to the Landlord within **two (2) days** of receiving the order of possession.

The Landlord has established a monetary claim for unpaid rent in the amount of \$14,000.00.

The Landlord was largely 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 Tenant pay the Landlord's \$100.00 filing fee.

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

Item	Amount
Unpaid rent	\$14,000.00
Filing fee pursuant to s. 72(1)	\$100.00
Less the security deposit and pet damage deposit to be retained by the Landlord as per s. 72(2)	-\$3,500.00
<b>TOTAL</b>	<b>\$10,600.00</b>

Pursuant to ss. 67 and 72 of the *Act*, I order that the Tenant pay **\$10,600.00** to the Landlord.

It is the Landlord's obligation to serve the orders on the Tenant. If the Tenant does 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 Tenant does 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: August 05, 2022

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Residential Tenancy Branch