



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR-DR, MNR-DR, FFL

Introduction

On July 7, 2022, an Adjudicator appointed pursuant to the *Residential Tenancy Act* (the Act) adjourned the Landlord's application for dispute resolution to a participatory hearing. She did so on the basis of an ex parte hearing using the Residential Tenancy Branch's direct request process. The adjudicator adjourned the direct request for the following reasons:

I note that the landlord typed a tracking number on the Proof of Service form; however, I find the landlord has not submitted a copy of the Canada Post Registered Mail Receipt and printed tracking report per Residential Tenancy Policy Guideline #39 to confirm service of the 10 Day Notice to the tenant.

I find I am not able to confirm service of the 10 Day Notice to the tenant, which is a requirement of the Direct Request proceeding, and that a hearing is necessary to address this issue.

This hearing dealt with the Landlord's application under the Residential Tenancy Act (the "Act") for:

- an Order of Possession under a 10 Day Notice to End Tenancy for Unpaid Rent dated May 9, 2022 (the "10 Day Notice") pursuant to sections 46 and 55;
- a Monetary Order of \$2,400.00 for unpaid rent pursuant to sections 26 and 55; and
- authorization to recover the filing fee for this application from the Tenant pursuant to section 72.

The Landlord's agents LW and SM attended this hearing. They were given a full opportunity to be heard, to present affirmed testimony, and to make submissions.

The Tenant did not attend this hearing. I left the teleconference hearing connection open until 9:41 am in order to enable the Tenant to call into the hearing scheduled to

start at 9:40 am. I confirmed that the correct call-in numbers and participant access code had been provided in the notice of dispute resolution proceeding. I used the teleconference system to confirm that LW, SM, and I were the only ones who had called into the hearing.

All attendees at the hearing were advised the Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) prohibit unauthorized recordings of dispute resolution hearings.

Preliminary Matter – Service of Dispute Resolution Documents

SM confirmed the notice of dispute resolution proceeding package (the “NDRP Package”) was sent to the Tenant by registered mail on July 11, 2022. SM provided a Canada Post registered mail tracking number in support. That Canada Post tracking number is the first of three tracking numbers referenced in the cover page of this decision. Based on the foregoing, I find the Landlord served the Tenant with the NDRP Package in accordance with section 89(2)(b) of the Act. I find that pursuant to section 90(a) of the Act, the Tenant is deemed to have received the NDRP Package on July 16, 2022.

Records from the Residential Tenancy Branch indicate that the Landlord’s documentary evidence for this hearing was previously sent to the Tenant by registered mail along with the notice of direct request proceeding on June 12, 2022. The Landlord has submitted a receipt with tracking number. That tracking number is the second number referenced on the cover page of this decision. As such, I find that the Landlord has served the Tenant with the Landlord’s documentary evidence in accordance with section 88(c) of the Act. I find that pursuant to section 90(a) of the Act, the Tenant is deemed to have received the Landlord’s documentary evidence on June 17, 2022.

I note that tracking information for the above two registered mail packages show the Tenant did not pick up either of the packages from Canada Post. SM testified that the Tenant has been evading service.

Residential Tenancy Policy Guideline 12. Service Provisions states:

Where a document is served by Registered Mail or Express Post, with signature option, the refusal of the party to accept or pick up the item, does not override the deeming provision. Where the Registered Mail or Express Post, with signature

option, is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

I accept SM's testimony that the Tenant has been evading service. As such, I find the Tenant is deemed to have received the documents sent by the Landlord via registered mail as stated above.

Preliminary Issue – Amendment of Landlord's Application

SM submitted that the Landlord seeks to recover payment up to August 2022, since the Tenant has not left the rental unit and has made any payment during this time.

I note the Landlord's monetary claim on this application lists only \$2,400.00 for unpaid April and May 2022 rent. I find that the Landlord is seeking an amendment to this application in order to request monetary compensation for overholding by the Tenant under section 57 of the Act.

Rule 4.2 of the Rules of Procedure states:

4.2 Amending an application 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, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

Since the Tenant has not left the rental unit, I find the Tenant can reasonably anticipate the Landlord to seek additional payment for use and occupancy of the rental unit to the date of the hearing, or August 25, 2022. Accordingly, I allow the Landlord to amend his application to include a monetary claim for compensation for overholding by the Tenant up to August 25, 2022.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession?
2. Is the Landlord entitled to compensation for unpaid rent?
3. Is the Landlord entitled to compensation for overholding by the Tenant?

4. Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of this application and my findings are set out below.

This tenancy commenced on February 1, 2017 and was month-to-month. Rent was \$1,200.00 due on the first day of each month. The Landlord holds a security deposit of \$600.00 in trust for the Tenant.

The Landlord submitted a copy of the 10 Day Notice into evidence. The 10 Day Notice is dated May 9, 2022 and has an effective date of May 19, 2022. The 10 Day Notice states that the Tenant failed to pay rent of \$2,400.00 due on May 1, 2022. SM confirmed that the \$2,400.00 represents rent owing for April and May 2022.

SM further confirmed that:

- The Tenant is still residing in the rental unit.
- The Tenant did not pay from April to August 2022.
- A copy of the 10 Day Notice was sent to the Tenant via registered mail on May 9, 2022.

Analysis

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.

1. Is the Landlord entitled to an Order of Possession?

Section 26(1) of the Act states that a tenant must pay rent when due, whether or not the landlord complies with the Act, the regulations, or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent.

If a tenant does not pay rent when due, section 46 of the Act permits a landlord to take steps to end a tenancy by issuing a notice to end tenancy for unpaid rent.

Section 46(2) of the Act requires that the notice to end tenancy given by a landlord comply with section 52 of the Act in order to be effective. Section 52 states:

Form and content of notice to end tenancy

- 52 In order to be effective, a notice to end a tenancy must be in writing and must
- (a) be signed and dated by the landlord or tenant giving the notice,
 - (b) give the address of the rental unit,
 - (c) state the effective date of the notice,
 - (d) except for a notice under section 45(1) or (2) [*tenant's notice*], state the grounds for ending the tenancy,
 - (d.1) for a notice under section 45.1 [*tenant's notice: family violence or long-term care*], be accompanied by a statement made in accordance with section 45.2 [*confirmation of eligibility*], and
 - (e) when given by a landlord, be in the approved form.

In this case, I have reviewed a copy of the 10 Day Notice and find that it complies with the requirements of section 52 in form and content.

I am satisfied based on SM's confirmation under oath that a copy of the 10 Day Notice was sent to the Tenant via registered mail on May 9, 2022. The tracking number for this package is the third number referenced on the cover page of this decision. Tracking information for this package shows that it was not picked up by the Tenant. As stated above, I find that the Tenant has been evading service. I find that the Tenant is deemed to have received the 10 Day Notice on May 14, 2022 pursuant to section 90(a) of the Act. I find that this resolves the proof of service issue highlighted by the Adjudicator in the July 7, 2022 interim decision.

Section 46(4) of the Act permits a tenant to dispute a 10 day notice to end tenancy for unpaid rent within 5 days after receiving such notice. Therefore, the Tenant had until May 19, 2022 to dispute the 10 Day Notice. In this case, the Tenant did not apply to dispute the 10 Day Notice by May 19, 2022 or at all.

Section 46(5) of the Act states that if a tenant who has received a notice under section 46 does not pay the rent or make an application for dispute resolution in accordance with section 46(4), the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date.

I find that, pursuant to section 46(5) of the Act, the Tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the 10 Day Notice, which is May 19, 2022.

Furthermore, sections 55(2)(b) and 55(4) of the Act states as follows:

Order of possession for the landlord

55 [...]

(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

[...]

(b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired; [...]

[...]

(4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 *[Resolving Disputes]*,

(a) grant an order of possession, and

(b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

In this case, I have found the 10 Day Notice was deemed served on May 14, 2022, the time for disputing the 10 Day Notice expired on May 19, 2022, and the Tenant did not pay rent or make an application for dispute resolution. Accordingly, I conclude that the Landlord is entitled to an Order of Possession pursuant to sections 55(2)(b) and 55(4)(a) of the Act.

As the effective date stated on the 10 Day Notice has passed, I grant an Order of Possession to the Landlord effective two (2) days after service of the Order upon the Tenant.

2. Is the Landlord entitled to compensation for unpaid rent?

Based on the Landlord's testimony and evidence, I find that the Tenant did not pay rent when due on April 1, 2022 or May 1, 2022. Pursuant to section 55(4)(b) of the Act, I order that the Tenant pay to the Landlord \$2,400.00 for unpaid rent for April and May 2022.

3. Is the Landlord entitled to compensation for overholding by the Tenant?

Section 57(3) of the Act states that a landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

Section 57(1) of the Act defines an “overholding tenant” as a tenant who continues to occupy a rental unit after the tenant's tenancy is ended.

Based on the Landlord's testimony, I find that the Tenant is an overholding tenant under section 57(1) of the Act, and that the Landlord is entitled to compensation for the Tenant's use of the rental unit up to and including the date of the hearing.

Pursuant to section 57 of the Act, I order that the Tenant pay to the Landlord \$3,367.74 (equivalent to \$1,200.00 × 2 months + \$1,200.00 x 25/31 days) as compensation for overholding to August 25, 2022.

4. Is the Landlord entitled to recover the filing fee?

The Landlord has been successful in this application. I grant the Landlord's claim for recovery of the \$100.00 filing fee under section 72(1) of the Act.

Pursuant to section 72(2)(b) of the Act, I order that the Landlord is authorized to retain the \$600.00 security deposit held by the Landlord in partial satisfaction of the total sum awarded on this application.

The Monetary Order granted to the Landlord for the balance of the amount awarded is calculated as follows:

Item	Amount
Unpaid Rent for April and May 2022	\$2,400.00
Compensation for Overholding to August 25, 2022 (\$1,200.00 × 2 months + \$1,200.00 x 25/31 days)	\$3,367.74
Filing Fee	\$100.00
Less Security Deposit	- \$600.00
Total Monetary Order for Landlord	\$5,267.74

Conclusion

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlord effective two (2) days after service upon the Tenant. The Tenant must be served with this Order as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

The Landlord is authorized to retain the Tenant's \$600.00 security deposit in partial satisfaction of the sum awarded in this application.

Pursuant to sections 55 and 57 of the Act, I grant the Landlord a Monetary Order in the amount of **\$5,267.74**. The Tenant must be served with this Order as soon as possible. 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.

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 25, 2022

Residential Tenancy Branch