



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, CNR, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the One Month Notice to End Tenancy for Cause, pursuant to section 47;
- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent, pursuant to section 46; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord, another landlord not named in this application and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord was represented by counsel.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email address for service of this Decision and Orders.

The tenant testified that the landlord was personally served with a copy of this application for dispute resolution but could not recall on what date. No proof of service documents were entered into evidence.

Counsel submitted that the landlord was not served with the tenant's application for dispute resolution and that the landlord received a copy of the Notice of Dispute

Resolution Proceedings from the Residential Tenancy Branch (the “Branch”) after calling the Branch regarding a Direct Request Application. The Branch Dispute Management System notes that the landlord called into the Branch on June 10, 2022 and was provided a courtesy copy of the Notice of Dispute Resolution Proceedings.

Rule 3.1 of the Residential Tenancy Branch Rules of Procedure (the “Rules”) states:

The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

- a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;
- b) the Respondent Instructions for Dispute Resolution;
- c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and
- d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

Rule 3.5 of the Rules states:

At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.

Section 89(1) of the *Act* states that an application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;

- (c)by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d)if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
- (e)as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

I find that the tenant has not proved, on a balance of probabilities, that the landlord was served with a copy of the tenant's Application for Dispute Resolution as no proof of service documents were entered into evidence and counsel submitted that the landlord was not served. The tenant's application for the return of the filing fee is dismissed without leave to reapply, and the remainder of the tenant's application for Dispute Resolution is dismissed with leave to reapply, for failure to prove service.

Section 55(1) and section 55(1.1) of the *Act* states that if the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice, the director must grant the landlord an order of possession and an order requiring the payment of the unpaid rent if the notice to end tenancy is a 10 Day Notice to End Tenancy for Unpaid Rent.

Pursuant to sections 55(1) and 55(1.1) of the *Act*, even though the tenant's application for dispute resolution was dismissed, the landlord is entitled to have the merits of the notices to end tenancy heard.

The tenant testified that he did not submit evidence for consideration in this hearing.

Both parties agree that the landlord personally served the tenant with the landlord's evidence on September 18, 2022. I find that the tenant was served with the landlord's evidence in accordance with section 88 of the *Act*. The landlord's evidence is accepted for consideration.

Issues

1. Is the landlord entitled to an Order of Possession for Cause, pursuant to section 55(1) of the *Act*?
2. Is the landlord entitled to an Order of Possession for Unpaid Rent, pursuant to section 55(1) of the *Act*?
3. Is the landlord entitled to a Monetary Order for Unpaid Rent, pursuant to section 55(1.1) of the *Act*?

Background/Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 1, 2018 and the tenant is still residing at the subject rental property. Monthly rent in the amount of \$2,050.00 is payable on the first day of each month. A security deposit of \$900.00 and a pet damage deposit of \$900.00 were paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that the landlord personally served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") and a One Month Notice to End Tenancy for Cause (the "One Month Notice") on May 16, 2022. The tenant filed this Application for Dispute Resolution on May 19, 2022.

The 10 Day Notice was entered into evidence, is signed by the landlord, is dated May 16, 2022, gives the address of the rental unit, states that the effect date of the notice is May 26, 2022, is in the approved form, #RTB-30, and states that the landlord is ending the tenancy because the tenant failed to pay rent in the amount of \$16,244.00 due on May 16, 2022.

The landlord entered into evidence a ledger which states that as of May 1, 2022 the tenant owed \$16,170.00 in unpaid rent and that no payment of rent was received by the landlord between May 1, 2022 and June 30, 2022. Counsel submitted that as of September 1, 2022, the tenant owes \$18,170.00 in unpaid rent. The ledger entered into

evidence states same. The landlord also entered into evidence e-transfer rent confirmations from the tenant to the landlord which accord with the dates and amounts recorded in the ledger

The landlord testified that the 10 Day Notice should have read that as of May 16, 2022 the tenant owed \$16,170.00 in unpaid rent and that the amount of outstanding rent as stated on the 10 Day Notice (\$16,244.00) was a calculation error.

Both parties agree that on August 9, 2022 both parties signed a document titled "RELEASE AND MUTUAL AGREEMENT TO END TENANCY ("AGREEMENT"). The aforementioned AGREEMENT was entered into evidence. The AGREEMENT states:

WHEREAS:

- A. On October 20, 2018, the Tenant and Landlord entered into a residential tenancy agreement (the "Tenancy Agreement") whereby the Tenant agreed to rent a downstairs rental unit [address of subject rental property] (the "Rental Unit") for \$1,800/month;
- B. On May 16, 2022, the Landlord served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice") totalling \$26,244 (the "Arrears") as well as a 1 Month Notice to End Tenancy for repeatedly late rent;
- C. The Tenant made an application for dispute resolution with the Residential Tenancy Branch (the "RTB") disputing the Notice, the hearing for which is scheduled for September 29, 2022;
- D. The Tenant has since been accused of taking personal property of the Landlord from the upstairs level at the address of the Rental Unit which is occupied by the Landlord (the "Landlord's Property
- E. The Tenant and Landlord (each a "Settling Party" and collectively the "Settling Parties") wish to enter into this Agreement to settle these disputes arising between them related to the Tenancy Agreement and Rental Unit and to end the Tenancy;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants herein and other good and valuable consideration, the receipt and

sufficiency of which is hereby acknowledged, the Settling Parties covenant and agree as follows:

Mutual Agreement to End Tenancy

1. The Settling Parties mutually agree to terminate the Tenancy Agreement an irrevocable and conclusively accept that the Tenancy ended per the Notice.
2. The Tenant shall surrender vacant possession and all keys and access devices of the Rental Unit to the Landlord by August 26, 2022. After the Tenant surrenders vacant possession and all keys and access devices of the Rental Unit to the Landlord, the Tenant shall also withdraw their application for dispute resolution.
3. The Tenant agrees that the Landlord may keep all the Tenant's security deposits.
4. The Tenant agrees to leave the Rental Unit in a professionally cleaned state upon delivering vacant possession.
5. The Tenant reaffirms his previous agreement that he shall not smoke in or around the Rental Unit or residential property at any time.
6. The Tenant may keep a storage pod or similar moving vessel on the residential property until August 26, 2022 for the purposes of removing his personal property from the Rental Unit. If any of the Tenant's storage pod or similar moving vessel remains on the residential property after August 26, 2022, then they may be removed and/or disposed of by the Landlord without further notice to the Tenant.
7. If the Tenant does not return vacant possession as require in paragraph 2, the Landlord may present this agreement to the RTB as irrevocable and conclusive proof that the Tenancy ended per the Notice.

Return of the Landlord's Property

8. The Tenant agrees to immediately return the Landlord's Property to the Landlord, including, but not limited to, coffee cups, Merton Motors glass beer stein, Hudson Bay towel, other towels, plates, cutlery, knives, and a Lone Tree Cider glass.

Release of Tenant's Debt for Rent

9. In exchange for vacant possession of the rental unit per paragraph 2, the Landlord releases the Tenant from their debt for the Arrears and any other unpaid over-holding rent since the Notice was served.
10. If the Tenant does not return vacant possession per paragraph 2, the release at paragraph 6 shall be void and the Landlord may present this agreement to the RTB as irrevocable and conclusive proof that the Tenant owes the Landlord the Arrears plus all unpaid over-holding rent since the Notice was served.

General Conditions

11. The Settling Parties hereby acknowledge that they have had the full opportunity to obtain independent legal advice before voluntarily signing this Agreement.
12. The Settling Parties agree to execute and deliver such further documents and take such further action as any other Settling Party hereto may from time to time reasonably request to more effectively carry out the intent and purpose of this Agreement.
13. The Settling Parties may sign this Agreement in one or more counterparts, each of which shall be deemed an original, and all of which shall constitute one instrument.
14. If any part or provision of this Agreement or its application to any circumstance is restricted, prohibited or unenforceable, such part or provision will be ineffective only to the extent of such restriction, prohibition or unenforceability, and the remainder of the Agreement will remain in full force and effect.
15. This Agreement sets forth the entire agreement between the Settling Parties and supersedes all prior agreements or understandings, written or oral, between the Settling Parties pertaining to the subject matter hereof. No other promises, agreements, covenants, warranties or representations of any kind whatsoever shall be binding upon the Settling Parties concerning this subject matter unless except as expressly set out in this Agreement or separately agreed to in writing by the Settling Parties.

16. Each Settling Party warrants that the person executing this Agreement on its behalf is authorized to do so.

Counsel submitted that section 10 of the AGREEMENT contains a typo and that it should refer to the release is paragraph 9, not paragraph 6.

Both parties agree that the tenant did not provide the landlord with vacant possession of the subject rental property on August 26, 2022 and is still residing in the subject rental property.

The tenant testified that he was pressured into signing the above agreement by the landlord. No details beyond the above statement were provided by the tenant. Counsel submitted that the tenant was not pressured into signing the tenancy agreement. Counsel submitted that he was copied on email exchanges between the parties and that at no point did the tenant raise any issues with his willingness to sign the AGREEMENT.

The tenant testified that he does not owe any money in unpaid rent and that he is up to date on his rent payments. No evidence to substantiate the above testimony was entered into evidence. The tenant testified that the landlord illegally raised the rent in 2020 and that he has been paying this increase. The tenant testified that he paid the landlord between \$2,080.00 and \$3,000.00 per month for usage. The tenant testified that he thought this was rent but it was being charged in addition to rent. No documentary evidence was provided.

The landlord testified that the rent of \$2,050.00 has been the same since 2018 and that he has not increased the tenant's rent. The landlord testified that since serving the 10 Day Notice and the One Month Notice, the landlord has texted the tenant after each e-transfer, that the rent is accepted for "use and occupancy only". The landlord testified that the tenant must have gotten confused about what this means. The landlord testified that he has not charged the tenant additional fees over and above the agreed rent of \$1,050.00.

The One Month Notice was entered into evidence, is signed by the landlord, is dated May 16, 2022, gives the address of the rental unit, states that the effect date of the notice is June 30, 2022, is in the approved form, #RTB-33, and states the following ground for ending the tenancy:

Tenant is repeatedly late paying rent

Counsel submitted that the tenant has been late paying rent five or six times in 2022. The tenant testified that he was late paying rent at least five times in 2022. The ledger states that the tenant was late paying rent or failed to pay rent at all, every month thus far in 2022.

Counsel submitted that the landlord never found the late payment of rent acceptable and entered into evidence several emails from the landlord to the tenant demanding payment.

Analysis

Based on the testimony of the tenant and the submissions of counsel, I find that the tenant was personally served with the 10 Day Notice on May 16, 2022.

The parties provided conflicting testimony regarding the amount of money owed by the tenant to the landlord for unpaid rent. The landlord's testimony is supported by the ledger and e-transfers entered into evidence. The tenant's testimony is not so supported, and the specific dates and amount of rent payments were not provided by the tenant, just general statements about a range of amounts that were paid during the tenancy. I find that the tenant's testimony did not bear an air of reality.

I also find that the tenant's testimony is unsupported by the AGREEMENT, in which the tenant agreed to move out of the subject rental property in exchange for the landlord releasing the tenant from their debt for arrears and over-holding. I find that had the tenant not had arrears, the tenant would not have signed an agreement in which he agreed to move out in exchange for the release of said arrears.

I find that the AGREEMENT, signed by both parties, supports the testimony of the landlord and the submissions of counsel and do not support the tenant's testimony.

Pursuant to my above findings, I prefer the landlord's testimony over that of the tenant.

Based on the ledger and e-transfers entered into evidence, I find that on May 16, 2022 the tenant owed \$16,170.0 in unpaid rent and that no rent was paid to the landlord within five days of the tenant's receipt of the 10 Day Notice. Based on the ledger and e-transfers entered into evidence, I find that as of today's date, September 29, 2022, the

tenant owes \$18,170.00 in unpaid rent. I accept the landlord's testimony that no additional "usage fees" over and above rent were charged to the tenant and that the landlord issued use and occupancy receipts for rent received from the tenant. I accept the landlord's testimony that rent has not been increased since 2018.

The tenant testified that he was pressured into signing the AGREEMENT. This was contested by counsel.

Duress involves coercion of the consent or free will of a party entering into a contract. To establish duress, it is not enough to show that a contracting party took advantage of a superior bargaining position; for duress, there must be coercion of the will of the contracting party and the pressure must be exercised in an unfair, excessive or coercive manner. *Lei v. Crawford*, 2011 ONSC 349 (CanLII), (approved *Jestadt v. Performing Arts Lodge Vancouver*, 2013 BCCA 183)

In this case I am unable to find the essential elements necessary to form the defence of duress. It may be that to the tenant the landlord had the superior bargaining position, but the tenant had already applied to dispute both notices to end tenancy and both parties were clearly aware of today's hearing. The tenant was free not to have signed the AGREEMENT and to have waited for today's hearing. I find that the tenant's testimony that he was pressured into signing the AGREEMENT is not enough to establish that the tenant was under duress when he signed the AGREEMENT.

Upon review of the AGREEMENT, and in particular section 7 of the AGREEMENT, I find that the 10 Day Notice was never rescinded and is still a live issue.

Upon review of the AGREEMENT, in particular sections 9- 10, I find that the landlord only agreed to release the tenant from their unpaid rent debt if the tenant moved out in accordance with the AGREEMENT, on August 26, 2022. As the tenant did not abide by the terms of the AGREEMENT, and did not move out on August 26, 2022, the landlord did not release the tenant from said debt and that debt may be dealt with in these proceedings.

Section 68(1) of the *Act* states:

68 (1) If a notice to end a tenancy does not comply with section 52 [*form and content of notice to end tenancy*], the director may amend the notice if satisfied that

(a) the person receiving the notice knew, or should have known, the

information that was omitted from the notice, and
(b) in the circumstances, it is reasonable to amend the notice.

The 10 Day Notices state that as of May 16, 2022, the tenant owed \$16,244.00 in unpaid rent. The landlord testified that this was a calculation error and that as of May 16, 2022, the tenant actually owed \$16,170.00.

I find that the tenant knew or should have known the amount of rent he owed to the landlord. In the circumstances I find that it is reasonable to amend the Notice to state the correct amount owing on May 16, 2022, that being \$16,170.00. I find that as the tenant did not attempt to pay either amount within 5 days of receiving the Notice, the tenant is not prejudiced by this amendment. Pursuant to section 68 of the *Act*, I amend the 10 Day Notice to state that the tenant owed \$16,170.00 in unpaid rent.

Upon review of the amended 10 Day Notice I find that it meets the form and content requirements of section 52 of the *Act* because it:

- is signed and dated by the landlord,
- gives the address of the subject rental property,
- state the effective date of the notice,
- states the ground for ending the tenancy, and
- is in the approved form, RTB Form #32.

Section 46(1) of the *Act* states that a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

Section 46(4) of the *Act* states that within 5 days after receiving a notice under this section, the tenant may

- (a) pay the overdue rent, in which case the notice has no effect, or
- (b) dispute the notice by making an application for dispute resolution.

As the tenant did not pay the unpaid rent within five days of receiving the 10 Day Notice, I uphold the 10 Day Notice, in accordance with section 46(1) of the *Act*.

Section 55(1) and section 55(1.1) of the *Act* state:

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an

order of possession of the rental unit if

(a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and

(b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

(1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 [*landlord's notice: non-payment of rent*], and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

Since I have dismissed the tenant's application, upheld the 10 Day Notice and found that the 10 Day Notice meets the form and content requirements of section 52 of the *Act*, the landlord is entitled to a two-day Order of Possession pursuant to section 55(1) of the *Act*.

Since I have dismissed the tenant's application, upheld the 10 Day Notice and found that the 10 Day Notice meets the form and content requirements of section 52 of the *Act*, the landlord is entitled to a Monetary Order for unpaid rent pursuant to section 55(1.1) of the *Act*.

Residential Tenancy Guideline #3 states:

Compensation for overholding under section 57 of the RTA (section 50 of the MHPTA) is not considered rent since overholding only occurs after a tenancy has ended....

If a tenant has not vacated or abandoned the unit, or the conclusive presumption does not apply, (in other words the right of possession of the rental unit or manufactured home site is in issue at the dispute resolution hearing), the director will usually rely on section 68(2) of the RTA (section 61(2) of the MHPTA) to order that the date the tenancy ends is the date of the dispute resolution hearing, rather than the effective date shown on the notice to end tenancy. If the director is satisfied upon reviewing submitted materials and hearing evidence as to an amount of unpaid rent owing, including rent owing since the time the notice to end tenancy was issued, the director must grant an order to the landlord for the amount of unpaid rent found to be owing.

Pursuant to Residential Tenancy Policy Guideline #3 and section 55(1.1) of the *Act*, I order that the tenancy ends today, September 29, 2022 and that the landlord is entitled to all rent currently outstanding totalling \$18,170.00.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenant's security and pet damage deposits totalling \$1,800.00.

As I have determined that the landlord is entitled to an Order of Possession pursuant to the 10 Day Notice, I decline to consider if the landlord is also entitled to an Order of Possession pursuant to the One Month Notice.

Conclusion

Pursuant to section 55(1) of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenant**. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

Pursuant to section 55(1.1) of the *Act*, I grant a Monetary Order to the landlord under the following terms:

Item	Amount
Unpaid rent	\$18,170.00
Less security and pet damage deposits	-\$1,800.00
TOTAL	\$16,370.00

The landlord is provided with this Order in the above terms and 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: September 29, 2022

Residential Tenancy Branch