



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, RP, PSF, OLC, LRE, RR, MNDCT, FF
OPR-DR, FF

Introduction

This hearing convened as a result of cross applications. In the Tenant's Application filed on May 5, 2022, they sought the following relief:

- an Order canceling a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities issued on June 7, 2022 (the "Notice");
- an Order that the Landlord:
 - make repairs, emergency and otherwise to the rental unit;
 - provide services or facilities as required by law;
 - comply with the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, or the residential tenancy agreement;
 - be restricted from entering the rental unit;
- Monetary compensation from the Landlord in the amount of \$37,200.00 and an Order permitting the Tenant to reduce their rent for services or facilities not provided; and
- recovery of the filing fee

In the Landlord's Application for Dispute Resolution filed on July 7, 2022, the Landlord sought an Order of Possession and monetary compensation based on the Notice and to recover the filing fee.

The hearing of the parties' applications was scheduled for 9:30 a.m. on September 13, 2022. Both parties called into the hearing. The Tenants, A.L. and G.L. were in attendance, as was the Landlord. The Landlord was assisted by a translator, S.B. who was also the Landlord's daughter in law.

All in attendance were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

Preliminary Matter—Tenants' Late Evidence

During the hearing the Landlord stated that she received the Tenants' evidence in digital format on September 1, 2022, 12 days prior to the hearing. A review of Branch records indicates the Tenants did not file their evidence until August 30, 2022, less than 14 days prior to the hearing.

Rules of procedure in courts and administrative tribunals relating to the timely exchange of evidence are designed to prevent what is commonly called "trial by ambush": a situation where one party is not afforded a reasonable opportunity to respond to the other's evidence. To ensure fairness decision makers may exclude evidence which is delivered outside the applicable rules or adjourn a hearing to provide the non-offending party the opportunity to respond.

Hearings before the Residential Tenancy Branch are governed by the *Residential Tenancy Branch Rules of Procedure*; the following *Rules* apply to the service of evidence in such proceedings:

1.1 Objective

The objective of the Rules of Procedure is to ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants.

3.1 Documents that must be served

The applicant must, within 3 days of the hearing package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following:

- a) the application for dispute resolution;
- b) the notice of dispute resolution proceeding letter provided to the applicant by the Residential Tenancy Branch;
- c) the dispute resolution proceeding information package provided by the Residential Tenancy Branch;
- d) a detailed calculation of any monetary claim being made;

- e) a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and
- f) any other evidence, including evidence submitted to the Residential Tenancy Branch with the application for dispute resolution, in accordance with Rule 2.5 [*Documents that must be submitted with an application for dispute resolution*].

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the Arbitrator will apply Rule 3.17.

3.15 Respondent's evidence

To ensure fairness and to the extent possible, the respondent's evidence must be organized, clear and legible.

The respondent must ensure documents and digital evidence that are intended to be relied on at the hearing are served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. In all events, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than 7 days before the hearing.

In the event that evidence is not available when the respondent submits and serves their evidence, the Arbitrator will apply Rule 3.17 [*Consideration of new and relevant evidence*].

See also Rules 3.7 [*Evidence must be organized, clear and legible*] and 3.10 [*Digital evidence*]

3.16 Respondent's proof of service

At the hearing, the respondent must be prepared to demonstrate to the satisfaction of the Arbitrator that each applicant was served with all their evidence, as required by the Act.

3.17 Consideration of new and relevant evidence.

Evidence not provided to the other party and the Residential Tenancy Branch in accordance with Rules 3.1, 3.2, 3.10, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the Arbitrator that it is new and relevant evidence and that it was not available at the time that their application was filed or when they served and submitted their evidence.

The Arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

If the Arbitrator decides to accept the evidence, the other party will be given an opportunity to review the evidence. The Arbitrator must apply Rule 6.3 [*Whether to adjourn the dispute*]

7.8 Adjournment after the dispute resolution hearing begins

At any time after the dispute resolution hearing begins, the arbitrator may adjourn the dispute resolution hearing to another time.

A party or a party's agent may request that a hearing be adjourned.

The arbitrator will determine whether the circumstances warrant the adjournment of the hearing.

7.9 Criteria for granting an adjournment

Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:

- the oral or written submissions of the parties;
- the likelihood of the adjournment resulting in a resolution;
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
- whether the adjournment is required to provide a fair opportunity for a party to be heard; and
- the possible prejudice to each party.

The Tenants alleged they provided their evidence to the Landlord by registered mail at the time they filed their Application. A review of branch records confirms the Tenants

failed to submit any evidence at the time of filing, and did not file the Notice to End Tenancy until June 8, 2022, over a month after the original application was filed. Branch records indicate that the overwhelming majority of their evidence was filed less than 14 days prior to the hearing.

On balance, I find it more likely the Tenants failed to serve the Landlord with their evidence until shortly before the hearing as this was the same time they filed their evidence at the branch. I therefore find the Tenants failed to serve their evidence on the Landlords in accordance with the *Rules of Procedure*. I further find this evidence is not “new and relevant” as provided for in *Rule 3.17* as I find this evidence could have been filed at the time of filing the Tenants’ Application. I therefore find this evidence to be inadmissible.

A notice to end tenancy for non payment of rent has been issued, and the question of the validity of that notice is before me. I find that an adjournment of the parties’ applications is not appropriate as this would significantly prejudice the Landlord.

I also note that the majority of the Tenants’ evidence relates to the condition of the rental unit and the Tenants’ claim for monetary compensation from the Landlord; this evidence is not relevant to the payment of rent, nor is it relevant to the validity of the notice to end tenancy.

Rule 1.1 provides that Arbitrators must ensure a fair, efficient and consistent process for resolving disputes for landlords and tenants. *Rule 2.3* provides that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply. Hearings before the Residential Tenancy Branch are scheduled on a priority basis. Time sensitive matters such as a tenant’s request for emergency repairs or the validity of a notice to end tenancy are given priority over monetary claims. It is my determination that the priority claim before me is the validity of the Notice and whether this tenancy should continue, or end. I also find that this claim is not sufficiently related to the Tenants’ monetary claim; accordingly I exercise my discretion and dismiss the Tenants’ monetary claim with leave to reapply.

For reasons which will become clear, I dismiss the balance of the Tenants’ claims without leave to reapply.

I have reviewed all oral and written evidence before me that met the requirements of the *Rules* and is relevant to the issues and findings in this matter. However, not all details of the respective submissions and or arguments are reproduced here and only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. Is the Landlord entitled to an Order of Possession and monetary compensation based on the Notice?
3. Should the Landlord recover the filing fee?

Background and Evidence

The Landlord testified that the tenancy began September 1, 2021. The rental unit is a single family dwelling and the monthly rent is \$2,775.00 payable on the 1st of the month. The Tenants paid a \$1,400.00 security deposit and a pet damage deposit in the amount of \$500.00.

The Landlord issued a 10 Day Notice to End Tenancy on June 7, 2022 which indicated the sum of \$2,775.00 was outstanding. The Landlord stated that at the time the notice was issued, the Tenants did not pay rent for May or June, however, at the time they still believed the Tenants would pay the June rent such that only one month was noted as owing on the Notice.

The Landlord testified that the Tenants did not pay the outstanding rent within five days of receiving the Notice. The Landlord further testified that following the issuance of the Notice, the Tenants unilaterally “amended the rent on their own” and paid \$2,250.00 for July 2022, \$2,200.00 August 2022 and \$2,200.00 September \$2,250.00, such that at the time of the hearing the sum of \$7,225.00 was owing.

May 2022	\$2,775.00
June 2022	\$2,775.00
July 2022	\$525.00
August 2022	\$575.00

September 2022	\$575.00
TOTAL OWING	\$7,225.00

The Landlord confirmed that there was no order from the Residential Tenancy Branch authorizing the Tenants to reduce their rent. The Landlord further confirmed that the Tenants did not offer to make any emergency repairs, nor did they undertaken any such repairs and provide the Landlord with receipts for these repairs.

In response to the Landlord's testimony the Tenant A.L. testified that they moved into the rental property September 1, 2021. He confirmed that the rental house is a single family dwelling for which they paid \$2,775.00 per month.

In terms of the May and June rent payments, the Tenant testified as follows:

- He stated he paid the May 2022 rent to the Landlord by registered mail with the Notice of Application and all evidence in support of their claim. He further claimed that he sent this registered mail package to the Landlord on May 8, 2022.
- The Tenant also claimed that they paid the June 2022 rent by cheque on June 8, 2022, when the Landlord attended to fix the laundry. He stated that he was aware he was late paying the rent, but this was due to the fact that he was not able to work due to his mother's injury falling down the stairs at the rental unit.
- The Tenant then testified that both the May and June cheques were in the registered mail package and the Landlord did not pick up the mail such that they did not cash the cheques which were contained in the registered mail package.

The Tenant confirmed that they paid \$2,250.00 for the July 2022 rent. He stated that he decided to reduce his rent because the Landlord did not attend to repairs at the rental and his mother was injured when she fell down the stairs at the rental unit. He confirmed he did not have the Landlord's consent to reduce his rent but claimed that he was advised by the Rental board to reduce his rent to \$2,200.00. The Tenant also stated they paid \$2,200.00 in August and September 2022 and confirmed that the sum of \$7,225.00 was owing for rent as of the date of the hearing.

In reply to the Tenant's testimony, the Landlord stated that the Tenants did not pay the rent with a registered mail package nor was any such package sent. The Landlord

testified that on September 1, 2022 she received a USB stick from the Tenant and at that time she found out a dispute had been filed.

Analysis

The Landlord issued the Notice pursuant to Section 46 of the *Act* which provides as follows:

Landlord's notice: non-payment of rent

46 (1)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.

(2)A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.

(3)A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.

(4)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.

(5)If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a)is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b)must vacate the rental unit to which the notice relates by that date.

(6)If

(a)a tenancy agreement requires the tenant to pay utility charges to the landlord, and

(b)the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,

the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

A tenant must pay rent when rent is due; this requirement is set forth in section 26 of the *Act* which reads as follows:

Rules about payment and non-payment of rent

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

I accept the Landlord's testimony that she did not receive rent for May and June 2022. I do not accept the Tenant A.L.'s testimony in this regard. He initially stated that he paid the May rent at the time he served the Landlord with his evidence and Notice of Application. He also testified that he paid the June rent at the time the Landlord attended the rental unit. He then stated that he paid both the May and June rent by cheque at the same time when he sent a registered mail package to the Landlord with his application and evidence. This evidence was contradictory. As previously noted, I find it more likely the Tenants served their evidence on the Landlord at the end of August, less than two weeks prior to the date set for the hearing.

Further, the Tenant testified that an employee of the Residential Tenancy Branch told him to reduce his monthly rent. As this is wholly inconsistent with section 26 of the *Act*, I do not accept the Tenant's testimony in this regard. For these reasons, where the testimony of the Tenant, A.L. and the Landlord conflict, I prefer the testimony of the Landlord. I accept the Landlord's testimony that she did not receive rent from the Tenants for May and June 2022.

There are only four occasions when a tenant has the right to withhold rent:

1. When the Landlord accepts a security deposit over and above the allowable amount (section 19(2));
2. When the Landlord accepts rent over and above the allowable amount (section 43(5));
3. When an Arbitrator authorizes a Tenant to withhold rent (section 72(2)(a)); and,
4. When the Tenant makes emergency repairs under the circumstances prescribed in section 33 of the *Act*

The evidence before me indicates the Tenants were withholding rent as a means to compel the Landlord to make repairs to the rental unit, and because the Tenant, G.L. fell down the stairs at the rental unit. While the Tenants may have a valid monetary claim against the Landlord, they must not withhold rent in anticipation that they may receive funds from the Landlord. Withholding rent as a means to compel the Landlord to make repairs to the rental unit, or because the Tenants believe the Landlord should pay them for losses incurred or injuries sustained at the rental unit, does not meet the narrow circumstances provided above. In the case before me I find the Tenants had no legal authority to withhold rent.

I find the Tenants failed to pay their May and June rent when the rent was due and, without legal authority, reduced their rent payment for July August and September. I find the Tenants have failed to comply with section 26 of the *Act*.

I therefore dismiss the Tenants' claim for an order canceling the Notice. I have reviewed the Notice and find it complies with section 52 of the *Act*. Accordingly, the Landlord is granted an Order of Possession pursuant to section 55. The Order shall be effective two days after service on the Tenants. The Order must be served on the Tenants and may be filed and enforced in the B.C. Supreme Court.

The undisputed evidence before me is that the sum of \$7,225.00 was outstanding for rent. I therefore find the Landlord is entitled to recover this sum from the Tenants and I award them monetary compensation for this sum.

As the Landlord has been successful in their application, I award them recovery of the filing fee.

Conclusion

The Tenants' request for an Order canceling the Notice is dismissed without leave to reapply. I find the Landlord has proven the tenancy should end for the reasons set forth in the Notice.

The Tenants' claim for recovery of the filing fee is dismissed without leave to reapply.

The Tenants' claim for monetary compensation in the amount of \$37,200.00 is dismissed with leave to reapply. As discussed during the hearing the Tenants are

encouraged to seek legal advice regarding their monetary claim and the jurisdiction of the Residential Tenancy Branch.

As the tenancy is ending, the balance of the Tenants' claims for the following:

- an Order that the Landlord:
 - make repairs, emergency and otherwise to the rental unit;
 - provide services or facilities as required by law;
 - comply with the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, or the residential tenancy agreement, and,
 - be restricted from entering the rental unit

are dismissed without leave to reapply. These matters are only relevant in a continuing tenancy.

The Landlord's Application is granted. The Landlord is granted an Order of Possession and monetary compensation in the amount of \$7,325.00 for unpaid rent and recovery of the filing fee. Pursuant to section 72 of the *Act* I authorize the Landlord to retain the Tenants' \$1,400.00 security and \$500.00 pet damage deposit towards the amounts awarded and I grant the Landlord a Monetary Order for the balance due in the amount of **\$5,425.00**. This Order must also be served on the Tenants and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

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 21, 2022

Residential Tenancy Branch