



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPR-DR, MNR-DR, FFL, CNR, OLC**

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows

The tenant applied as follows:

- For cancellation of the landlords’ 10 Day Notice to End Tenancy (“10 Day Notice”) pursuant to section 46 of the Act
- For an order requiring the landlord to comply with the Act, regulations or the tenancy agreement pursuant to section 62 of the Act

The landlord applied as follows:

- For a monetary order for unpaid rent pursuant to section 67 of the Act
- For an order of possession pursuant to section 55 of the Act
- For reimbursement of the filing fee pursuant to section 72 of the Act

Both parties attended the hearing with the landlords being represented by agents KP and CP. The tenant, TW appeared along with advocates AH, DS, and AR. All parties were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses.

Both parties confirmed they were not recording the hearing pursuant to Rule of Procedure 6.11. The parties were affirmed.

The tenant confirmed receipt of the 10 Day Notice dated September 3, 2022, with an effective date of September 13, 2022. Pursuant to section 89 of the Act the tenant is found to have been served with the notice in accordance with the Act

The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the Act.

Preliminary Issue

At the second date of the hearing, the landlord produced a table in evidence. The table had been provided in evidence previously and was acknowledged as received by the tenant. The last line in the table was new information but was reproduced with the added information at the request of the tenant's advocates. I therefore will consider the information in the table as it is not new evidence, except for the last line, which was requested to be provided by the tenant. The landlord clarified in the hearing that the information in the last line is information for November 2022, not October 2022 as stated in the table. The tenant agreed.

Issue(s) to be Decided

1. Is the 10 Day Notice to End Tenancy for Unpaid Rent valid and enforceable against the tenant? If so, is the Landlord entitled to an Order of Possession?
2. Is the landlord entitled to a Monetary Order for unpaid rent?
3. Is the tenant entitled to an order requiring the landlord to comply with the Act, regulations or tenancy agreement?
4. Is the landlord entitled to reimbursement for filing fees?

Background and Evidence

The hearing commenced on November 10, 2022, and was adjourned to November 15, 2022, to ensure that the evidence provided by the parties was accurate.

The tenancy commenced September 1, 2019, on a month-to-month basis. Rent is currently \$690.20 per month due on the first day of the month and a security deposit of \$340.00 is being held in trust. The tenant still occupies the rental unit.

The landlord stated that they took over the building in November 2021 from a previous landlord. At that time the current landlord had been mistakenly advised by the previous landlord that the tenant's rent included utilities. Therefore, the new landlord switched the utilities account from the tenant's name into the landlord's name in November 2021 and started paying the utilities. The tenant was not immediately made aware of the change. The landlord paid the utilities for the rental unit for November and December 2021, and January 2022. In November 2021 the hydro bill was \$121.35, in January 2022 it was \$350.24, and in February 2022 it was \$77.69 for a total of \$549.80. All bills were for the period when the utilities were in the landlord's name and were for the tenant's rental unit.

Once the landlord discovered the error, arrangements were made to have the utilities placed back into the tenant's name. He then claimed from the tenant the amount owing for the utilities he paid for the tenant's rental suite.

During the period from November 2021 to September 2022 the tenant's rent payments were irregular. In some months the tenant paid no rent, in others he made partial rent payments, and in others he paid more than the rent due for that month. In February 2022 the landlord waived \$80.00 from the tenant's rent. In March 2022 the landlord believed that the tenant had a pet and had not paid a pet deposit, therefore he added \$340.00 for a pet deposit to the amount owed by the tenant to the landlord. The landlord produced a table in evidence showing the amounts of rent payments, utilities payments, rent waived, and the pet deposit, broken down by month:

Unit 1 - Nadina - As of November 10, 2022 - assuming funds received was first transferred to rent and then to pet deposit and utilities owed.

Date	Total Rent Owed	Rent Paid	Rent waived off	Pet deposit owed	Rent balance owing/(Surplus)	Utilities owed	Utilities paid	Utilities Balance owing	Total rent and Utilities owing/surplus
Nov-21	680	680			0	121.35	0.00	121.35	121.35
Dec-21	680	380			300		0.00	121.35	421.35
Jan-22	680	1580			-600	350.24	0.00	471.59	-128.41
Feb-22	680	0.00	80		0	77.69	0	549.28	549.28
Mar-22	680	680		340	340	0	0	549.28	889.28
Apr-22	680	680			340	0	0	549.28	889.28
May-22	690.2	400			630.2	0	0	549.28	1179.48
Jun-22	690.2	700			620.4	0	0	549.28	1169.68
Jul-22	690.2	680			630.6	0	0	549.28	1179.88
Aug-22	690.2	1530			-209.2	0	0	549.28	340.08
Sep-22	690.2	850			-369	0	0	549.28	180.28
Oct-22	690.2	850			-528.8		0	549.28	20.48
Oct-22	690.2				161.4		0	549.28	710.68

Note: For both the above and below table, the payment made in September 2022 was made on September 21, 2022 which was an advance payment for October 2022 rent. As of September 3, 2022 (date the 10 days notice of unpaid rent was issued, the amount owed by tenant was \$1,030.28 (\$340.08 August amount owing + \$690.20 September rent owed).

The table was supplied by the landlord at the request of the tenant's advocates after the first hearing was adjourned. Based on the table, as of September 1, 2022, the tenant

was in arrears on rent and utilities. The landlord clarified that the number in the last column for August 2022 was the amount owed by the tenant as of August 31, 2022. That amount included the pet deposit. , As of September 1, 2022, the tenant owed \$690.28 in unpaid rent and utilities. The tenant did not pay that amount on September 1, 2022. The landlord therefore issued the 10 Day Notice on September 3, 2022.

The tenant, through his advocates, disagreed with the landlord's accounting and they stated that as of September 1, 2022, the tenant had overpaid on rent and utilities. The tenant agreed that the landlord was correct in the amount of rent and utilities owing and agreed that the tenant's payments from November 2021 through September 2022 were accurately recorded. The tenant stated that while it is correct that the tenant had a pet at one time and had not paid a deposit, once the landlord advised the tenant of a need to pay a pet deposit, he gave the pet away and no longer had a pet. This is not disputed by the landlord. The tenant's advocates also stated that the tenant received disability assistance, and as of August 2022 the government started making his rent payments directly to the landlord on the tenant's behalf.

The parties agreed that the rent for the rental unit was initially \$680.00 per month and increased to \$690.20 per month in May 2022. The government is currently paying \$850.00 a month in rent to the landlord near the end of every month. The first payment made directly to the landlord by the government was made in August 2022 and was for rent for September 2022. The government has also paid \$850.00 in rent for October and November 2022, and the landlord's table is current to November 2022.

Analysis

RTB Rules of Procedure 6.6 states, "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. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy." In this case, the landlord has the burden of proving the validity of the 10 Day Notice served on the tenant.

The landlord has the onus to prove that the tenant had an outstanding rent balance in the amount of \$1,030.28 as of September 3, 2022, the date the 10 Day Notice was served. The landlord included the pet deposit in his calculations. The tenant stated he

does not have a pet. The landlord did not provide evidence to establish the tenant had a pet. Therefore, the pet deposit cannot be included in calculations of rent and utilities owing. Additionally, section 46 of the Act states in part:

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.

Section 1 of the Act defines rent as follows:

"rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

- (a)a security deposit;
- (b)a pet damage deposit

Therefore, the landlord is not entitled to include a pet deposit as rent owing.

Section 46(6) of the Acts states:

46(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.

The landlord has not produced evidence of a written demand to the tenant to pay utilities. Therefore, he cannot treat the utilities owing as unpaid rent for the purposes of issuing the 10 Day Notice.

I have recalculated the amount of rent owing excluding the pet deposit and utilities.

Date	Owed	Paid	Balance
1-Nov-21	\$680.00		\$680.00
November, 2021		\$680.00	\$0.00
1-Dec-21	\$680.00		\$680.00
December, 2021		\$380.00	\$300.00
1-Jan-22	\$680.00		\$980.00
January, 2022		\$1,580.00	-\$600.00
1-Feb-22	\$680.00		\$80.00
February, 2022		\$80.00	\$0.00
1-Mar-22	\$680.00		\$680.00
March, 2022		\$680.00	\$0.00
1-Apr-22	\$680.00		\$680.00
April, 2022		\$680.00	\$0.00
1-May-22	\$690.20		\$690.20
May, 2022		\$400.00	\$290.20
1-Jun-22	\$690.20		\$980.40
June, 2022		\$700.00	\$280.40
1-Jul-22	\$690.20		\$970.60
July, 2022		\$680.00	\$290.60
1-Aug-22	\$690.20		\$980.80
August, 2022		\$1,530.00	-\$549.20
1-Sep-22	\$690.20		\$141.00
25-Sep-22		\$850.00	-\$709.00
1-Oct-22	\$690.20		-\$18.80
October, 2022		\$850.00	-\$868.80
1-Nov-22	\$690.20		-\$178.60
		Total	-\$178.60

On September 1, 2022 the tenant did not owe \$1,030.28 in unpaid rent. Section 52 of the Act requires that the 10 Day Notice adhere to form and content requirements. Specifically, section 52(d) requires that the notice state the grounds for ending the tenancy. This necessarily implies that the notice gives accurate grounds for ending the tenancy. The landlord included a pet deposit and unpaid utilities on the 10 Day Notice as included in the amount of rent owing. Neither of these amounts can be included under the Act as they do not fit within the definition of rent. Therefore, I find that the 10 Day Notice issued does not comply with the form and content requirements of section 52 of the Act.

The tenant's application to cancel the 10 Day Notice is granted. I dismiss the landlord's application for a monetary order, order of possession and for reimbursement of the filing fee.

Conclusion

The tenant's application is granted. The tenancy shall continue until it is ended in accordance with the Act. The landlord's application for a monetary order, for an order of possession, and for reimbursement of the filing fee is dismissed.

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: November 29, 2022

Residential Tenancy Branch