



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

TT: CNR FFT

LL: OPR-DR MNR-DR FFL

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the “Act”). The Tenant made one application (“Tenant’s Application”) for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent and/or Utilities dated August 22, 2022 (“10 Day Notice”) pursuant to section 46; and
- authorization to recover the filing fee for the Tenant’s Application from the Landlord pursuant to section 72.
-

The Landlord made one application (“Landlord’s Application”) for:

- an Order of Possession pursuant to sections 46 and 55;
- a monetary order for unpaid rent under sections 55 and 67; and
- authorization to recover the filing fee for the Landlord’s Application from the Tenant pursuant to section 72.

Two of the Landlord’s agents (“LB” and “CS”) and the Tenant attended this hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure* (“RoP”). The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

LB stated the Landlord served the Notice of Dispute Resolution Proceeding and its evidence (collectively the “Landlord’s NDRP Package”) for the Landlord’s Application on the Tenant by registered mail on September 13, 2022 as well as by email. LB submitted into evidence a copy of the Canada Post receipt and tracking stub for service of the

Landlord's NDRP Package on the Tenant to corroborate her testimony. The Tenant stated he did not receive the Landlord's NDRP Package but stated he received it by email. I reviewed the Canada Post tracking site and found the Landlord's NDRP Package was delivered. Based on the foregoing, I find the Landlord's NDRP Package was served on the Tenant by registered mail in accordance with the provisions of section 89 of the Act and sufficiently served on the Tenant by email pursuant to section 71(2)(b) of the Act.

LB stated the Landlord served a copy of an updated ledger for the rental unit on the Tenant by registered mail on January 5, 2023 as well as by email.. LB provided the Canada Post tracking number for service of the Landlord's additional evidence to corroborate her testimony. The Tenant stated he did not receive the Landlord's additional evidence by registered mail but stated he received it by email. I reviewed the Canada Post tracking site and found the package was received on January 5, 2022 and that a final notice was delivered to the address on January 10, 2020 for pickup within 10 days or it will be returned to sender. I find the Landlord's additional evidence was served on the Tenant by registered mail in accordance with the provisions of section 89 of the Act. I find, pursuant to section 90, the Tenant was deemed to have received the Landlord's evidence on January 10, 2022. I also find the Landlord's additional evidence was sufficiently served on the Tenant by email pursuant to section 71(2)(b) of the Act. As the additional evidence was new and relevant to the proceedings, and as the Tenant acknowledged he received it by email, I will admit the Landlord's additional evidence for these proceedings.

The Tenant stated he served evidence on the Landlord by email but could not provide the date. Although the Tenant did not provide any evidence the Landlord had consented in writing to service of documents under the Act by email, LB acknowledged the Landlord received the Tenant's evidence. As such, I find the Tenant's evidence was sufficiently served on the Landlord pursuant to section 71(2)(b) of the Act.

Preliminary Matter – Service of Tenant's Notice of Dispute Resolution Proceeding

The Tenant stated he served the Landlord with the Notice of Dispute Resolution ("Tenant's NDRP") for the Tenant's Application by email. LB denied the Landlord received the Tenant's NDRP. LB stated the Tenant told her that he was making an application for dispute resolution. However, LB stated the Landlord never received the Tenant's NDRP by email or any other method of service.

Rule 3.1 of the RoP states:

3.1 Documents that must be served with the Notice of Dispute Resolution Proceeding Package

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*].

See Rule 10 for documents that must be served with the Notice of Dispute Resolution Proceeding Package for an Expedited Hearing and the timeframe for doing so.

[emphasis in italics added]

Service of a Notice of Dispute Resolution Proceeding must be made in accordance with the provisions of section 89(1) of the Act which states:

- 89(1) 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*];
- (f) by any other means of service provided for in the regulations.

The Tenant's NDRP is a document that must be served on the Landlord pursuant to section 89(1) of the Act. The Tenant served the Tenant's NDRP by email. Email is not a method of service permitted by section 89(1) of the Act. LB denied the Landlord received the Tenant's NDRP by email or by any other method of service. I find, on a balance of probabilities, that the Tenant did not serve the Tenant's NDRP on the Landlord in accordance with the provisions of section 89(1) of the Act. As such, I dismiss the Tenant's Application in its entirety without leave to reapply. Notwithstanding that I have dismissed the Tenant's Application, the Landlord must nevertheless demonstrate the 10 Day Notice is valid.

Issues to be Decided

Is the Landlord entitled to:

- an Order of Possession?
- a monetary order for unpaid rent pursuant to section 55(1.1) of the Act?
- reimbursement of the filing fee for the Landlord's Application from the Tenant?

Background and Evidence

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

LB submitted into evidence a signed copy of the tenancy agreement and addendum dated March 30, 2020 (collectively the "Tenancy Agreement"). The parties agreed the tenancy commenced on May 1, 2020, for a fixed term ending April 30, 2021, with rent of \$1,500.00 payable on the 1st day of each month. The Tenant was to pay a security

deposit of \$750.00 and a pet damage deposit of \$750.00 by March 30, 2020. LB stated the Landlord received the security and pet damage deposits and that the Landlord was holding them in trust for the Tenant. Based on the foregoing, I find there is a residential tenancy between the Landlord and the Tenant and that I have jurisdiction to hear the Landlord's Application. As noted above, I have dismissed the Tenant's Application without leave on the basis the Tenant failed to demonstrate, on a balance of probabilities, that he served the Tenant's NDRP on the Landlord.

Paragraph 3(a) of the Tenancy Agreement stated in part:

LATE PAYMENTS are subject to a \$25 administration fee. In ADDITION, each returned cheque and pre-authorized debt (PAD), including NSF, is subject to a service charge of \$25.00. These charges are subject to change, to reflect increases in costs.

LB stated the 10 Day Notice was served on the Tenant in person on August 22, 2022. LB submitted into evidence a signed and witnessed Proof of Service on Form RTB-34 certifying service of the 10 Day Notice was served on the Tenant in person on August 22, 2022. The Tenant admitted he was served with the 10 Day Notice. Based on the foregoing, I find the 10 Day Notice was served by the Landlord on the Tenant in accordance with the provisions of section 88 of the Act.

The 10 Day Notice stated the Tenant had rental arrears totaling \$19,725.00 as of August 22, 2022. LB stated that in addition to the rental arrears of \$19,725.00 owing by the Tenant as of August 22, 2022, the Tenant has not paid the rent for the months of September 2022 through to January 2023 inclusive and owes additional rental arrears of \$7,500.00. LB submitted into evidence an updated ledger for the rental unit that documents the Tenant has rental arrears of \$26,975.00 and bank charges of \$250.00 or a total of \$27,225.00 that have accrued from February 2021 to January 2023, calculated as follows:

Date	Rent Owed	Rent Paid	Returned Payment Charge	Balance
January 1, 2021	\$1,500.00			\$1,500.00
January 6, 2021		\$1,500.00		\$0.00
February 1, 2021	\$1,500.00			\$1,500.00
February 5, 2021		\$1,500.00		\$0.00
February 10, 2021		-\$1,500.00*	\$50.00	\$1,550.00
February 20, 2021		\$1,525.00		\$25.00
March 1, 2021	\$1,500.00			\$1,525.00
March 3, 2021		\$1,500.00		\$25.00
April 1, 2021	\$1,500.00			\$1,525.00
April 3, 2021		\$1,500.00		\$25.00
May 1, 2021	\$1,500.00			\$1,525.00
May 4, 2021		\$1,500.00		\$25.00
June 1, 2021	\$1,500.00			\$1,525.00
June 3, 2021		\$1,500.00		25.00
July 1, 2021	\$1,500.00			\$1,525.00
July 3, 2021		\$1,500.00		\$25.00
August 1, 2021	\$1,500.00			\$1,525.00
August 3, 2021		\$1,500.00		\$25.00
August 10, 2021		-\$1,500.00*	\$50.00	\$1,575.00
September 1, 2021	\$1,500.00			\$3,075.00
September 3, 2021		\$1,500.00		\$1,575.00
September 8, 2021		-\$1,500.00*	\$50.00	\$3,125.00
October 1, 2021	\$1,500.00			\$4,625.00
October 5, 2021		\$1,500.00		\$3,125.00
October 8, 2021		-\$1,500.00*	\$50.00	\$4,675.00
November 1, 2021	\$1,500.00			\$6,175.00
November 3, 2021		\$1,500.00		\$4,675.00
November 6, 2021		-\$1,500.00*	\$50.00	\$6,225.00
December 1, 2021	\$1,500.00			\$7,725.00
January 1, 2022	\$1,500.00			\$9,225.00
February 1, 2022	\$1,500.00			\$10,725.00
March 1, 2022	\$1,500.00			\$12,225.00
April 1, 2022	\$1,500.00			\$13,725.00
May 1, 2022	\$1,500.00			\$15,225.00
June 1, 2022	\$1,500.00			\$16,725.00
July 1, 2022	\$1,500.00			\$18,225.00

August 1, 2022	\$1,500.00			\$19,275.00
September 1, 2022	\$1,500.00			\$21,225.00
October 1, 2022	\$1,500.00			\$22,725.00
November 1, 2022	\$1,500.00			\$24,225.00
December 1, 2022	\$1,500.00			\$25,725.00
January 1, 2023	\$1,500.00			\$27,225.00
Total:	\$37,500.00	\$10,525.00	\$250.00	\$27,225.00

* Returned Payments

The Tenant disputed the Landlord's claim that the payments for the months of September 2021, October 2021, November 2021 and November 2022 were returned. The Tenant stated the rental payments were made by him using a third-party service called ClickPay. The Tenant submitted into evidence copies of redacted statements from his financial institution ("Bank Statements") that showed \$1,500.00 was withdrawn from his financial institution covering the period for each of the months of September 2021, October 2021, November 2021 and December 2022. The Tenant did not dispute the Landlord's claims for unpaid rent for any of the other months listed above nor did the Tenant submit any evidence that he made the payments for those other months.

Analysis

1. Order of Possession

Sections 46 and 53 of the Act state:

- 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.

The 10 Day Notice was served on the Tenant in person on August 22, 2022. Pursuant to section 46(4), the Tenant had 5 days, or until August 27, 2022, within which to make an application for dispute resolution to dispute the 10 Day Notice. The records of the RTB indicate the Tenant's Application was filed on August 22, 2022. As such, I find the Tenant's Application was filed within the 5-day dispute period required by section 46(4) of the Act. As noted above, I have dismissed the Tenant's Application on the basis that the Tenant's NDRP was not served on the Landlord as required by Rule 3.1 of the RoP.

Section 26 of the Act states:

- 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.

Pursuant to section 26(1) of the Act, a tenant must pay rent when it is due whether the landlord complies with the *Act*, the Regulations, or the tenancy agreement unless the Act grants the tenant the right to deduct all or a portion of the rent. Other than for disputing the Landlord's claim that he did not pay the rent for September 2021, October 2021, November 2021 and November 2022, the Tenant did not claim he had any other right under the Act to deduct all or any portion of the rent.

The Landlord has claimed \$250.00 for charges incurred as a result of the return of five payments of rent. Section 7 of the *Residential Tenancy Regulations* ("Regulations") states:

- 7(1) A landlord may charge any of the following non-refundable fees:
- (a) direct cost of replacing keys or other access devices;
 - (b) direct cost of additional keys or other access devices requested by the tenant;
 - (c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
 - (d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
 - (e) subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between

- rental units within the residential property, if the tenant requested the move;
 - (f) a move-in or move-out fee charged by a strata corporation to the landlord;
 - (g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.
- (2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

The Tenancy Agreement provides the Landlord may charge for each returned cheque or pre-authorized debt or for insufficient funds. Section 1 of the Act defines rent as:

"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;
- (c) *a fee prescribed under section 97 (2) (k)* [regulations in relation to fees];

[emphasis in italics added]

Although the tenancy agreement provides the Landlord may charge for each returned cheque, pre-authorized debtor for insufficient funds, the Landlord may not include those fees as part of the rental arrears claimed by the Landlord in the Landlord's Application. As such, I find the Landlord is not entitled to \$250.00 of the \$27,225.00 it has claimed for rental arrears and the Landlord's claim for rental arrears must be reduced to \$26,975.00. As the Landlord's Application does not include a separate claim for compensation for the return charges, I will not consider the \$250.00 for payment return charges during this hearing. The Landlord has the option of making a new application for dispute resolution to make a claim for the return charges incurred by the Landlord.

The Act is unequivocal that the obligation to pay rent rests solely with the Tenant. The Tenant disputed the Landlord's claim for unpaid rent for the months of September 2021, October 2021, November 2021 and November 2022 totalling \$6,000.00. However, the Tenant did not dispute the Landlord's claims for unpaid rent for any of the other months nor did the Tenant submit any evidence to demonstrate he paid the rent for the other months. Based on the foregoing, I find the Landlord has proven, on a balance of probabilities, that the Tenant has rental arrears of at least \$20,975.00. As such, I find there was a valid reason for the Landlord. serving the Tenant with the 10 Day Notice. Based on the above, I find there is no basis upon which to cancel the 10 Day Notice.

Sections 55(1) and 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.

I have reviewed the 10 Day Notice and find that it complies with the form and content requirements of section 52 of the Act. Section 55(1) of the Act provides that, where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with section 52 of the Act, then I must grant the landlord an Order of Possession. The parties agreed the Tenant has not vacated the rental unit. As such, pursuant to section 55(1) of the Act, I must grant the Landlord an Order of Possession for the rental unit. Pursuant to section 68(2)(a), I find the tenancy ended on January 16, 2023.

As noted above, I have found the Tenant owes the Landlord at least \$20,975.00 for rental arrears. The Tenant must compensate the Landlord this amount. Pursuant to section 55(1.1) of the Act, if a tenant's application is in relation to non-payment of rent and the application is dismissed, then the director must grant an order requiring payment of the unpaid rent. As such, pursuant to section 55(1.1) of the Act, I must order the Tenant pay the Landlord \$20,975.00 in satisfaction of the rental arrears.

Pursuant to an Interim Decision dated January 22, 2023 ("Interim Decision"), I ordered the Tenant to submit to the RTB, no later than January 30, 2023, copies of the Bank Statements that are not redacted except for the bank account number. On January 31, 2023, I verified from the records of the RTB that the Tenant did not submit the Bank Statements as requested in the Interim Order. In the Interim Order, I warned the Tenant that I may draw an adverse inference if he did not submit the Bank Statements as requested. I note, however, that the records of the RTB indicate the Tenant had the time to make an Application for a Review Consideration ("Review Application") of my Interim Decision. The Review Application was dismissed by the arbitrator who considered it on January 16, 2023. As the Tenant has not submitted the Bank Statements as requested in the Interim Decision, I find the Tenant has not demonstrated, on a balance of probabilities, that he paid the rent for the months of September 2021, October 2021, November 2021 and November 2022. As such, I find the Tenant owes the Landlords an additional four months of rent at \$1,500.00 per month, or \$6,000.00. Pursuant to section 55(1.1) of the Act, I must order the Tenant pay the Landlord an additional \$6,000.00 in satisfaction of the additional rental arrears for September 2021, October 2021, November 2021 and November 2022.

Pursuant to section 72(2) of the Act, the Landlord may retain the security deposit of \$750.00 and pet damage deposit of \$750.00 in partial satisfaction of the monetary order made above.

As the Landlord has been successful in the Landlord's Application, pursuant to section 72 of the Act, I award the Landlord \$100.00 for the filing fee of the Landlord's Application.

Conclusion

The Tenant's Application is dismissed in its entirety.

The Tenant is ordered to deliver vacant possession of the rental unit to the Landlord within two days of being served with a copy of this decision and attached Order by the

Landlord that were issued pursuant to my Interim Decision dated January 22, 2023. This Order of Possession may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

The Tenant is ordered to pay the Landlord \$25,575.00 representing the following:

Description	Amount
Rental Arrears	\$26,975.00
Filing Fee of Landlord's Application	\$100.00
Less Security Deposit	-\$750.00
Less Pet Damage Deposit	-\$750.00
Total	\$25,575.00

The Landlord is granted a Monetary Order for \$19,575.00, dated January 22, 2023, pursuant to my Interim Decision dated January 22, 2023. The Landlord is granted an additional Monetary Order for \$6,000.00, dated January 31, 2023, issued pursuant to this decision dated January 31, 2023.

It is the Landlord's obligation to serve the Monetary Orders on the Tenant. If the Tenant does not comply with either or both of the monetary orders, they may be filed with the Small Claims Division of the Provincial Court and enforced as orders 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: January 31, 2023

Residential Tenancy Branch