



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNRL-S, FFL

Introduction

The Landlord seeks the following relief under the *Residential Tenancy Act* (the “*Act*”):

- an order of possession pursuant to s. 55 after issuing a 10-Day Notice to End Tenancy signed on December 14, 2022 (the “10-Day Notice”);
- a monetary order pursuant to ss. 38 and 67 seeking compensation for unpaid rent by claiming against the deposit; and
- return of the filing fee pursuant to s. 72.

J.E. appeared as the Landlord’s agent. The Tenant did not attend, nor did someone attend on his behalf.

The Landlord’s agent affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Landlord’s agent advises that the Notice of Dispute Resolution and the Landlord’s evidence was served on the Tenant via registered mail sent on January 10, 2023. The Landlord provides a copy of the registered mail receipt as proof of service. I find that the Landlord served its application materials in accordance with s. 89 of the *Act*. Pursuant to s. 90 of the *Act*, I deem that the Tenant received the Landlord’s application materials on January 15, 2023.

Pursuant to Rule 7.1 of the Rules of Procedure, the hearing began as scheduled in the Notice of Dispute Resolution. As the Tenant did not attend, the hearing was conducted in their absence as permitted by Rule 7.3 of the Rules of Procedure and concluded at 9:10 AM without participation of the Tenant.

Issues to be Decided

- 1) Is the Landlord entitled to an order of possession?
- 2) Is the Landlord entitled to an order for unpaid rent?
- 3) Is the Landlord entitled to its filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The Landlord's agent confirms the following aspects with respect to the tenancy:

- The Tenant moved into the rental unit on March 1, 2019.
- Rent of \$1,014.00 is currently due on the 1st day of each month following a rent increase effective January 1, 2023. Prior to this date, rent was due in the amount of \$994.50.
- The Tenant paid a security deposit of \$490.00 to the Landlord.

The Landlord provides in its evidence a copy of the tenancy agreement and a notice of rent increase signed on September 20, 2022 effective on January 1, 2023.

The Landlord's agent advises that the 10-Day Notice was served on the Tenant by leaving a copy in his mailbox on December 14, 2022. I am provided with a copy of the 10-Day Notice in the Landlord's evidence, which lists its effective date of December 27, 2022 and unpaid rent of \$2,068.25 due on December 1, 2022.

The agent explains that the Tenant had three preauthorized payments that were dishonoured due to insufficient funds in 2022, occurring on February 1, 2022, July 1, 2022, and September 1, 2022. The agent further explains that the Tenant made payment of \$995.00 in July 2022. The Landlord provides a copy of a rent ledger with respect to the tenancy as proof of the payment history. The agent further advises that rent for January 1, 2023 and February 1, 2023 was paid in full, though rent was received for use and occupancy only.

The agent testifies that NSF charges were incurred by the Landlord for the three preauthorized payments that were dishonoured, which were \$36.75 each. I am directed

to clause 10 of the tenancy agreement with respect to the authorization to charge NSF charges to the Tenant.

The agent further advises that the Tenant has not made payment on the arrears listed within the 10-Day Notice nor has he aware if the Tenant filed an application disputing the notice. I am told that the Tenant continues to reside within the rental unit.

Analysis

The Landlord seeks an order of possession. Section 26 of the *Act* requires tenants to pay rent on time unless they have a legal right to withhold some of the rent. Section 46(1) of the *Act* allows landlords to end a tenancy if the tenant does not pay rent on time by issuing a 10 Day Notice to End Tenancy for Unpaid Rent.

I accept the Landlord's undisputed evidence that the 10-Day Notice was left in the Tenant's mailbox on December 14, 2022. I find that this was done in accordance with s. 88 of the *Act*. Pursuant to s. 90 of the *Act*, I deem that the Tenant received the 10-Day Notice on December 17, 2022.

As per s. 46(2) of the *Act*, all notices issued under s. 46 must comply with the form and content requirements set by s. 52 of the *Act*. I have reviewed the 10-Day Notice and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, states the correct effective date, sets out the grounds for ending the tenancy, and is in the approved form (RTB-30).

Pursuant to s. 46(4) of the *Act*, a tenant has 5 days from receiving a 10-day notice to end tenancy to either pay the overdue rent or file an application to dispute the notice. This is made clear at the very top of the 10-day notice to end tenancy, which states:

HOW TO DISPUTE THIS NOTICE

You have **5 days** to pay rent and/or utilities to the landlord or file an Application for Dispute Resolution with the Residential Tenancy Branch online, in person at any Service BC Office or by going to the Residential Tenancy Branch Office at #400 - 5021 Kingsway in Burnaby. If you do not apply within the required time limit, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the effective date of this Notice.

In this case, I accept the Landlord's undisputed evidence that the Tenant did neither. Given this, s. 46(5) comes into effect and the Tenant is conclusively presumed to have accepted the end of the tenancy and must vacate the rental unit on the effective date. In this case, the effective date is December 27, 2022.

As the Tenant continues to reside within the rental unit after the effective date has passed, I find that the Landlord is entitled to an order of possession pursuant to s. 55 of the *Act*. I accept that rent was received for January and February 2023 for use and occupancy only.

The Landlord also seeks an order for unpaid rent. Under s. 67 of the *Act*, the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

Review of the Landlord's ledger demonstrates inconsistencies with the evidence presented by the agent at the hearing. I am told February 2022 rent was unpaid. The ledger shows that this is true but that the Tenant also made a \$980.00 cash payment on March 16, 2022, which was in addition to paying rent on March 1, 2022. The ledger further shows that rent of August 2022 may not have been paid, though the agent made no mention of this at the hearing. Further, for reasons that were unexplained, the ledger shows that two pre-authorized rent payments were charged in September 2022, though both were dishonored and returned. Based on the ledger, the Tenant does not appear to have paid rent for September 2022, though the ledger makes it appear he was charged rent twice for the same month.

I am struck by the inconsistencies between the ledger and the testimony given to me by the agent at the hearing, in which he neither mentioned the \$980.00 cash payment nor

explained why Tenant appears to have been charged rent twice for September 2022. Though I am satisfied that September 2022 rent was likely unpaid, which would support the issuance of the 10-Day Notice, I cannot make a finding on the specific amount for the arrears as I am uncertain on whether I should rely upon the ledger or the agent's testimony. All this is to say that this is the Landlord's claim, it bears the burden of proving it. Based on the inconsistent evidence in this regard, I find that the Landlord has failed to do so as it has failed to accurately quantify its claim.

I dismiss its claim for unpaid rent without leave to reapply as it has failed to prove its claim.

Conclusion

The Landlord is entitled to an order of possession pursuant to s. 55 of the *Act*. The Tenant shall give vacant possession of the rental unit to the Landlord within **two (2) days** of receiving the order.

The Landlord has failed to properly quantify its claim. The claim under s. 67 of the *Act* for unpaid rent is dismissed without leave to reapply.

The Landlord has had mixed success in this application. I find it is not entitled to its filing fee and hereby dismiss its claim under s. 72 of the *Act* without leave to reapply.

It is the Landlord's obligation to serve the order of possession on the Tenant. If the Tenant does not comply with the order of possession, it may be filed by the Landlord with the Supreme Court of British Columbia 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: February 07, 2023

Residential Tenancy Branch