



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, AS, OLC, FFT (Tenants)
ET, OPR, MNRL, FFL (Landlord)
CNR, AS, OLC, FFT (Tenants)

Introduction

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties (the “Applications”).

The Tenants filed applications September 20, 2022, and October 06, 2022, and applied as follows:

- For compensation for monetary loss or other money owed
- To be allowed to assign or sublet where the Landlord's permission has been unreasonably withheld
- For an order that the Landlord comply with the Act, regulation and/or the tenancy agreement
- To recover the filing fee
- To dispute a 10 Day Notice to End Tenancy Issued for Unpaid Rent or Utilities dated October 05, 2022 (the “Notice”)

The Landlord filed their application October 05, 2022, and applied as follows:

- For an Order of Possession pursuant to section 56 of the *Residential Tenancy Act* (the “Act”)
- For an Order of Possession based on the Notice
- To recover unpaid rent
- To recover the filing fee

The Tenants and Landlord appeared at the hearing. The Landlord appeared at the hearing with Legal Counsel. I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties provided affirmed testimony.

Pursuant to rule 2.3 of the Rules, I told the parties at the outset that I would consider the Notice, unpaid rent, filing fees and request for an Order of Possession pursuant to section 56 of the *Act* and dismiss the remaining requests because they are not sufficiently related to the Notice and unpaid rent. The remaining requests are dismissed with leave to re-apply. This decision does not extend any time limits set out in the *Act*.

Both parties submitted evidence prior to the hearing. I confirmed service of the hearing packages and evidence. The only issue that arose was in relation to an Amendment filed by the Tenants; however, I am not considering the Amendment for the same reasons noted above and therefore service of the Amendment is not an issue.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all evidence provided. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession pursuant to section 56 of the *Act*?
2. Should the Notice be cancelled?
3. Is the Landlord entitled to an Order of Possession based on the Notice?
4. Is the Landlord entitled to recover unpaid rent?
5. Is either of the parties entitled to recover the filing fee?

Background and Evidence

A written tenancy agreement was submitted, and the parties agreed it is accurate. The tenancy started September 01, 2022. Rent is \$4,995.00 per month due on the 31st day of each month. The Tenants paid a \$2,495.00 security deposit and \$2,500.00 for a “furnishings deposit”.

Legal Counsel confirmed the Landlord sought an Order of Possession pursuant to section 56 of the *Act* for unpaid rent.

The Notice was submitted. The Notice states that the Tenants failed to pay \$4,995.00 in rent due September 30, 2022. The Notice submitted does not have an effective date; however, Tenant J.S. advised that their copy does.

The parties agreed the Notice was served on the Tenants, and received, October 05, 2022.

The Landlord testified that the Tenants failed to pay October rent, and this is reflected in the Notice. The Landlord testified that the Tenants have not paid any rent since being issued the Notice.

The Tenants agreed they did not pay October rent and have not paid rent since the Notice was issued.

I read the six reasons tenants can withhold rent under the *Act* to the Tenants and asked if any applied. The Tenants testified that the Landlord charged an additional security deposit of \$2,500.00. The Tenants acknowledged that none of the other reasons applied.

The Landlord agreed they charged the Tenants a \$2,495.00 security deposit and \$2,500.00 deposit for furniture.

The Landlord testified that \$24,975.00 in rent is currently outstanding. The Tenants agreed \$24,975.00 minus the \$2,500.00 deposit for furniture is outstanding.

The Landlord sought an Order of Possession effective on two days notice to the Tenants. The Tenants advised they have never lived at the rental unit.

The Landlord sought to keep the security deposit towards unpaid rent.

Analysis

Unpaid rent is not a basis to end a tenancy pursuant to section 56 of the *Act* and this request is dismissed without leave to re-apply.

Section 26(1) 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.

Section 46 of the *Act* allows a landlord to end a tenancy when tenants fail to pay rent. The relevant portions of section 46 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...

(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.

There are only six reasons tenants can withhold rent:

1. When a landlord collects a security or pet damage deposit that is above the permitted amount (section 19(2) of the *Act*)
2. When section 33 of the *Act* in relation to emergency repairs applies
3. When the landlord imposes a rent increase that is above the amount allowed by law (section 43(5) of the *Act*)

4. When the landlord issues the tenant a notice to end tenancy under section 49 of the *Act* for landlord's use of property (section 51 of the *Act*)
5. When an arbitrator has ordered that the tenants can withhold rent (section 65(1)(f) of the *Act*)
6. When the landlord consents to the tenants withholding rent

There is no issue that the Tenants must pay \$4,995.00 per month in rent by the 31st day of each month pursuant to the written tenancy agreement.

The parties agreed the Tenants paid a \$2,495.00 security deposit and \$2,500.00 furniture deposit. The Landlord was not allowed to charge a separate furniture deposit, and this is considered part of the security deposit. I find the Tenants paid a \$4,995.00 security deposit. The Landlord was only allowed to charge \$2,497.50 as a security deposit. The Tenants overpaid \$2,497.50 for the security deposit and were permitted to withhold this amount from rent. Therefore, the Tenants only owed \$2,497.50 for October rent.

The Tenants did not submit that they had any other authority under the *Act* to withhold rent as it relates to the six reasons tenants can withhold rent outlined above.

I find the Tenants were required to pay \$2,497.50 by the end of September for October rent pursuant to section 26(1) of the *Act* and that section 46(3) of the *Act* did not apply to this amount.

I find the Tenants failed to pay \$2,497.50 of October rent because the parties agreed on this. Given this, the Landlord was entitled to serve the Tenants with the Notice pursuant to section 46(1) of the *Act*.

There is no issue that the Notice was served on the Tenants, and received, October 05, 2022.

I have reviewed the Notice and, considering the Tenants' copy had an effective date, I find the Notice complies with section 52 of the *Act* in form and content as required by section 46(2) of the *Act*. I note that the incorrect amount of rent owing does not invalidate the Notice because the Tenants still owed \$2,497.50 in rent when the Notice was issued.

The Tenants had five days from receipt of the Notice on October 05, 2022, to pay the outstanding rent or dispute the Notice pursuant to section 46(4) of the *Act*.

There is no issue that the Tenants did not pay the outstanding rent because the parties agreed on this.

The Tenants disputed the Notice October 06, 2022, in time. However, the Tenants agreed they did not pay rent and did not point to authority under the *Act* to withhold \$2,497.50 in rent for October. The Tenants therefore did not provide a valid basis for disputing the Notice and their dispute is dismissed without leave to re-apply.

Section 55(1) of the *Act* states:

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...and

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

I have found the Notice complies with section 52 of the *Act*. I have also dismissed the Tenants' dispute of the Notice. Therefore, pursuant to section 55(1) of the *Act*, I issue the Landlord an Order of Possession effective two days after service on the Tenants.

The Landlord testified that \$24,975.00 in rent is currently outstanding. I understand this amount to be for October 2022 to February 2023 because the Notice was issued for October rent, and this is what was discussed during the hearing. Further, the Landlord's Monetary Order Worksheet in evidence starts with rent owing for October 2022. The Tenants agreed with the amount of outstanding rent minus the \$2,500.00 overpayment for the furniture deposit. I find the Tenants owe the following rent:

- October 2022 - \$4,995.00
- November 2022 - \$4,995.00
- December 2022 - \$4,995.00
- January 2023 - \$4,995.00

- February 01 to 09, 2023 - \$1,477.97 ($\$4,995.00 \times 12 \text{ months} = \$59,940.00 / 365 \text{ days} = \$164.21 \dots \times 9 \text{ days}$)
- **Total owed = \$21,457.97**

Pursuant to section 72(2)(b) of the *Act*, the Landlord can keep the \$4,995.00 paid as a security deposit towards unpaid rent. I note that the security deposit has gained interest in 2023 and therefore the Landlord is considered to hold a \$5,005.14 security deposit.

The Tenants are not entitled to recover their filing fees because they have not been successful in their applications.

The Landlord is entitled to recover their \$100.00 filing fee pursuant to section 72(1) of the *Act* because they have been successful in their application.

In total, the Tenants owe the Landlord \$16,552.83 and the Landlord is issued a Monetary Order in this amount pursuant to section 67 of the *Act*.

Conclusion

The Landlord is issued an Order of Possession effective two days after service on the Tenants. This Order must be served on the Tenants and, if the Tenants do not comply with this Order, it may be filed and enforced in the Supreme Court as an order of that Court.

The Landlord is entitled to \$21,557.97. The Landlord can keep the \$5,005.14 security deposit. The Landlord is issued a Monetary Order for \$16,552.83. This Order must be served on the Tenants and, if the Tenants do not comply with the Order, it may be filed in the Provincial Court (Small Claims) 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 *Act*.

Dated: February 07, 2023

Residential Tenancy Branch