



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      CNR-MT, CNC, FFT

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice"), pursuant to section 46;
- more time to dispute the 10 Day Notice, pursuant to section 66;
- cancellation of the One Month Notice to End Tenancy for Cause (the "One Month Notice"), pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant and an agent for the landlord (the "agent") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

The tenant testified that he personally served the landlord with his application for dispute resolution and evidence but could not recall on what date. The tenant testified that the landlord was also served documents via email. No proof of service documents were entered into evidence.

The agent testified that the only document personally served by the tenant was the Respondent Instruction for Dispute Resolution sheet. The agent testified that the tenant emailed her and informed her that he filed for dispute resolution and asked her if she would like printed copies of the documents for this dispute resolution. The agent testified that she said yes but the tenant never provided the documents. The agent entered into evidence the above email conversation dated November 24, 2022.

The agent testified that she called the Residential Tenancy Branch as was provided a copy of the tenant's application for dispute resolution. The dispute management system confirmed the above testimony.

Rule 3.5 of the Residential Tenancy Branch Rules of Procedure (the "Rules") states:

At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.

Rule 3.14 of the Rules states:

... 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 directly or through a Service BC Office not less than 14 days before the hearing.

I find that the tenant has not proved, on a balance of probabilities, that he emailed the landlord a copy of his application for dispute resolution and evidence or served them personally because no serving email or other proof of service documents were entered into evidence. I dismiss the tenant's application for dispute resolution for failure to prove service in accordance with Rule 3.5. I exclude the tenant's evidence from consideration for failure to prove service in accordance with Rule 3.14.

### Preliminary Issue- Continuance of Hearing

Section 55(1) of the *Act* states that 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.

In *M.B.B v. Affordable Housing Charitable Association*, 2018 BCSC 2418 ("*M.B.B.*"), the court found that when an application to cancel a notice to end tenancy is dismissed, the landlord is not automatically entitled to an Order of Possession if the notice to end tenancy complies with section 52 of the *Act*. The court find that in such a case, the issues raised in the application must be resolved on their merits in some way.

Pursuant to *M.B.B.* the merits of the application were heard. The landlord consented to hearing pursuing despite the lack of service.

### Issues

1. Is the landlord entitled to an Order of Possession for unpaid rent, pursuant to section 46 and 55 of the *Act*?
2. Is the landlord entitled to an Order of Possession for cause, pursuant to sections 47 and 55 of the *Act*?

### Evidence and Analysis

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and agent's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on June 8, 2020 and is currently ongoing. Monthly rent in the amount of \$1,624.00 is payable on the first day of each month. An additional parking fee is payable on the first day of each month. A

security deposit of \$800.00 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Both parties agree that:

- the landlord posted the 10 Day Notice to the tenant's door on November 2, 2022.,
- the tenant did not pay November 2022's rent on November 1, 2022,
- the tenant paid November 2022's rent in full on November 2, 2022.

The 10 Day Notice states that the tenant failed to pay rent in the amount \$1,724.00 due on the first day of each month and a late rent fee of \$75.00 due on November 2, 2022.

The tenancy agreement addendum states at section 2:

COLLECTION OF RENT: The Landlord will collect the rent on the 1st day of each month at the rental unit and perform a monthly inspection of the unit to ensure that the rental unit is in a good condition for the Tenant's enjoyment and safety. \$25 NSF Fee \$75 late rent fee.

Section 46(1) of the *Act* states that 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.

Parking fees and late rent fees are not rent and a tenancy cannot be ended via a 10 Day Notice for failure to pay parking fees or late rent fees.

Section 46(4) states that if within 5 days after receiving a notice under this section, if the tenant pays the overdue rent, the notice has no effect.

I find that the landlord served the 10 Day Notice on the tenant pursuant to section 88 of the *Act*. Since the tenant paid the outstanding rent within five days of receiving the 10 Day Notice, I find that the 10 Day Notice is of no force or effect, pursuant to section 46(4) of the *Act*. I find that the tenant was not required to dispute the 10 Day Notice as it was void because rent was paid within five days of receipt of the 10 Day Notice. I find

that the tenant did not need more time to file to dispute the 10 Day Notice as he was not required to dispute it at all because it was void as of November 2, 2022.

The agent testified that the tenant refused to pay the \$75.00 late fee and that when the landlord realized that the maximum late fee was only \$25.00 they asked the tenant to pay \$25.00.

Both parties agree that the tenant agreed to add the \$25.00 late fee to his payment of the following month's rent, that being December 2022's rent. The agent testified that this was not acceptable and that the tenant was advised of same via email on November 9, 2022. The November 9, 2022 email to the tenant states:

You still have not given us the late rent fee of \$25. As you are aware from our previous conversation you have five days to pay the rent and late fee. Late rent fee has not been paid it is November 9. It is way overpassed five days.

The agent testified that the One Month Notice was posted on the tenant's door on November 9, 2022. The tenant testified that he received the Notice on November 9, 2022.

The Notice was entered into evidence, is signed by the landlord, is dated November 9, 2022, gives the address of the rental unit, states that the effect date of the notice is December 15, 2022, is in the approved form, #RTB-33, and states the following grounds for ending the tenancy:

- Breach of material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;

The Details of Cause section of the Notice states:

As agreed on rental contract rent is due on the 1<sup>st</sup> of each month. November rent was not paid on-time. November 2<sup>nd</sup>, Notice of 10 days RTB 30 was served. Rent was paid but late rent payment fee has still not been paid. As you are aware you have been given more than 5 days to pay. Besides the notice we spoke via email letting you know that the RTB-30 is not cancelled until full payment is received. You acknowledged and agreed to pay within 5 days, unfortunately late rent fee is outstanding. Breach of Rental agreement signed June 8-2020

The agent entered into evidence an email from the tenant to the landlord dated November 10, 2022 which states:

On a without prejudice basis

1.) Will you cancel the RTB 30 and RTB 33 for a payment of \$25?

On November 11, 2022 the agent responded:

Both notices RTB 30 & RTB 33 are valid. We have made an exception and pushed up the move out date on the notice to December 15<sup>th</sup>. If you decide to stay until the move out date you can e-transfer half months rent on December 1<sup>st</sup>.

Both parties agree that the \$25.00 late fee was paid to the landlord on November 16, 2022.

Section 7(1)(d) of the *Residential Tenancy Regulation* (the "*Regulation*") states that a landlord may charge 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. Section 7(2) of the *Regulation* states that a landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

Section 5 of the *Act* states:

**5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that section 2 of the addendum seeks to contract out of section 7(1)(d) of the *Regulation* by charging a late rent fee over and above the permitted amount. Pursuant to section 5 of the *Act*, find that the \$75.00 late fee portion of section 2 of the addendum is void and unenforceable.

The tenancy agreement and addendum does not contain a term permitting the landlord to charge a \$25.00 late fee and so the landlord is not permitted to charge one pursuant to section 7(1)(d) of the *Regulation*. The landlord cannot end the tenancy for breach of a

term that is not in existence. I find that the landlord has not proved that the tenant has breached a material term of the tenancy agreement.

Residential Tenancy Policy Guideline 8 states that to end a tenancy agreement for breach of a material term the party alleging the breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

I find that even if the tenancy agreement contained a term that permitted the \$25.00 late fee, the landlord has not complied with the requirements set out above. I find that the landlord did not inform the tenant in writing that the late payment of the late fee was a material term of the tenancy agreement. The November 9, 2022 email does not mention a breach of a material term or provide the tenant with a reasonable period to make the payment, it simply refers to the five day time period having lapsed.

It appears that the five days referred to by the agent is the five days the tenant had to pay the unpaid rent after being served with the 10 Day Notice. I find that the November 9, 2022 email is not providing the tenant with 5 additional days to pay the late rent fee. I find that a reasonable deadline to pay the fee or face the end of the tenancy was not provided to the tenant in writing. I find that the landlord has not met the requirements set out in Residential Tenancy Policy Guideline 8 to evict the tenant for breach of a material term.

I find that the One Month Notice is cancelled and of no effect because the landlord has not proved, on a balance of probabilities, that the tenant breached a material term and that the landlord complied with the requirements of Residential Tenancy Branch Policy Guideline #8.

### Conclusion

The One Month Notice is cancelled and of no force or effect.

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: March 30, 2023

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Residential Tenancy Branch