



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Tenant: CNR, RP
Landlord: OPC, MNRL-S, FFL

Introduction

This was a cross application hearing that dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the 10 Day Notice to End Tenancy, pursuant to section 46; and
- an Order for regular repairs, pursuant to section 32.

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

- an Order of Possession for Cause, pursuant to sections 47 and 55;
- a Monetary Order for unpaid rent, pursuant to section 26;
- authorization to retain the tenants' security deposit, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 9:40 a.m. in order to enable the tenants to call into this teleconference hearing scheduled for 9:30 a.m. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

The landlord was advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. The landlord testified that they are not recording this dispute resolution hearing.

The landlord confirmed their email address for service of this Decision.

Preliminary Issue- Service

The landlord testified that the tenants served them with the tenants' application for dispute resolution via registered mail. I find that the landlord was served in accordance with section 89 of the *Act*.

The landlord testified that the tenants were served with the landlord's application for dispute resolution and evidence via email on February 15, 2023 at 6:18 a.m. The landlord testified that the tenants signed RTB Form 51 allowing the landlord to serve the tenants via email. RTB Form 51 was entered into evidence, is signed by the landlord and both tenants and provided one email address for both tenants to be served at. RTB Form 51 was not dated by the parties. The landlord testified that RTB Form 51 was signed on October 4, 2021, at the same time the tenancy agreement was signed. The tenancy agreement was entered into evidence and is dated October 4, 2021.

I accept the landlord's undisputed testimony that RTB Form 51 was signed on October 4, 2021. I find that pursuant to sections 89(1)(f) and 88(j), the landlord was permitted to serve the tenants at the email address provided on RTB Form 51.

The February 15, 2023 serving email was not entered into evidence. I permitted the landlord 24 hours to upload the February 15, 2023 email, which the landlord did. The February 15, 2023 email shows that the tenants were with the landlord's application for dispute resolution and evidence at the email address provided by the tenants for service. I find that this admittance of the February 15, 2023 email does not prejudice the tenants because they have a copy of the February 15, 2023 email and they agreed to accept service at that email address.

Preliminary Issue- Failure to Attend

Rule 7 of the Residential Tenancy Branch Rules of Procedure provides in part as follows:

The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator. If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

The tenants failed to attend this hearing. Pursuant to Rule 7 of the Residential Tenancy Branch Rules of Procedure, I dismiss the tenants' application without leave to reapply.

Section 55(1) and section 55(1.1) of the *Act* states that if the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice, the director must grant the landlord an order of possession and an order requiring the payment of the unpaid rent.

Issues

1. Is the landlord entitled to an Order of Possession for unpaid rent?
2. Is the landlord entitled to a Monetary Order for unpaid rent?
3. Is the landlord entitled to an Order of Possession for Cause?
4. Is the landlord entitled to retain the tenants' security deposit?
5. Is the landlord entitled to recover the filing fee for this application from the tenants?

Evidence/Analysis

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

The landlord provided the following undisputed testimony. This tenancy began on October 1, 2021. Monthly rent in the amount of \$1,250.00 is payable on the first day of each month. A security deposit of \$675.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The landlord testified that the tenant was served with a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") on November 14, 2022 via email. The tenants filed to dispute the 10 Day Notice on November 18, 2022. The tenants' application for dispute resolution states that they received the 10 Day Notice on November 14, 2022. Based on the landlord's undisputed testimony and the tenants' application for dispute

resolution, I find that the tenants received the 10 Day Notice via email on November 14, 2022. I find that the above service was completed in accordance with section 88(j) of the *Act*.

The landlord testified that the 10 Day Notice was served because the tenants did not pay November 2022's rent in full on November 1, 2022, when it was due. The Notice states that the tenant owes \$565.00 in unpaid rent that was due on November 1, 2022.

The landlord's original application for dispute resolution sought \$1,226.93 in unpaid rent. The landlord testified that this sum also included late rent fees and outstanding water utilities. The ledger entered into evidence states same. The landlord testified that the amount of outstanding rent, utilities and late fees has increased since this application for dispute resolution was filed.

I requested the landlord to upload an updated ledger, which the landlord did. The original ledger states that as of February 1, 2023 the tenants owed \$1,226.93 in unpaid rent, late fees and water utilities. The updated ledger states that as of February 1, 2023, the tenants owed \$1,482.63 in unpaid rent, late fees and water utilities. The recording of rent charges and payments did not differ between the ledgers, the difference was the recording of late fees and utility fees. In the updated ledger, additional late fees and utility charges have been added. I find, on a balance of probabilities that the ledgers provide an accurate recording of rent due and paid; however, the landlord retroactively added in additional charges for late rent and utilities. The updated ledger lists 10 late rent charges of \$25.00 each totalling \$250.00.

The ledgers state that the tenant did not pay the outstanding rent stated on the 10 Day Notice until November 23, 2022. I accept the ledgers as an accurate accounting of rent paid. The updated ledger shows that the last payment of rent made by the tenants occurred on January 21, 2023. No rent has been received whatsoever towards February, March or April 2023's rent.

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.

Section 46(4) of the *Act* states that 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.

Based on the landlord's undisputed testimony and the ledgers entered into evidence, I find that the tenant did not pay November 2022's rent in full on the first of the month when it was due. I further find that the tenants did not pay their outstanding November 2022 rent until November 23, 2022 which is more than five days after they received the 10 Day Notice. Pursuant to my above findings and section 46 of the *Act*, I uphold the Notice.

Section 55(1) and section 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.

Upon review of the 10 Day Notice, I find that it meets the form and content requirements of section 52 of the *Act* because it:

- is signed and dated by the landlord,
- gives the address of the subject rental property,
- states the effective date of the notice,
- states the ground for ending the tenancy, and
- is in the approved form, RTB Form #30.

Since I have dismissed the tenant's application, upheld the Notice and found that the Notice meets the form and content requirements of section 52 of the *Act*, the landlord is entitled to a two-day Order of Possession pursuant to section 55(1) of the *Act*.

Since I have dismissed the tenant's application, upheld the Notice and found that the Notice meets the form and content requirements of section 52 of the *Act*, the landlord is entitled to a Monetary Order for unpaid rent pursuant to section 55(1.1) of the *Act*.

The updated ledger states that as of April 5, 2023 the tenant owes a total of \$4,097.70 in unpaid rent, late fees and utilities. The landlord's application for dispute resolution seeks recovery of unpaid rent pursuant to section 26 of the *Act* and pursuant to section 55(1.1) of the *Act*, the landlord is entitled to a monetary order for unpaid rent. Late fees are not rent and cannot be collected under either provision. The landlord is at liberty to file a monetary claim for damages including late fees but the late fee claim cannot be heard in this application as it is not properly before me.

Utility charges can be considered unpaid rent under the *Act*. The updated ledger added the following utility charges on the following dates:

- January 25, 2022- \$40.78,
- March 25, 2022- \$22.01,
- May 25, 2022- \$11.93,
- July 25, 2022- \$15.29,
- November 25, 2022- \$65.69, and
- March 7, 2023- \$40.07.

Both ledgers listed the below utility charge:

- January 4, 2023- \$11.93.

The total of all utility charges listed on the updated ledger is \$207.70.

The tenancy agreement states that "water/sewer included up to \$100 per month – tenant pays any excess". The landlord testified that the water charges are for water utilities that went over and above \$100.00 each month. No water utility bills were entered into evidence.

Policy Guideline 16 states that it is up to the party who is claiming compensation to provide evidence to establish that compensation is due.

In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the *Act*, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;

- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

I find that the landlord has not proved, on a balance of probabilities the value of the water utilities owed by the tenant because no bills or receipts for same were entered into evidence. As the value of the alleged loss has not been proved, I find that the landlord's claim for utilities fails.

Residential Tenancy Guideline #3 states:

Compensation for overholding under section 57 of the RTA (section 50 of the MHPTA) is not considered rent since overholding only occurs after a tenancy has ended....

If a tenant has not vacated or abandoned the unit, or the conclusive presumption does not apply, (in other words the right of possession of the rental unit or manufactured home site is in issue at the dispute resolution hearing), the director will usually rely on section 68(2) of the RTA (section 61(2) of the MHPTA) to order that the date the tenancy ends is the date of the dispute resolution hearing, rather than the effective date shown on the notice to end tenancy. If the director is satisfied upon reviewing submitted materials and hearing evidence as to an amount of unpaid rent owing, including rent owing since the time the notice to end tenancy was issued, the director must grant an order to the landlord for the amount of unpaid rent found to be owing.

Pursuant to Residential Tenancy Policy Guideline #3 and section 68(2) of the *Act*, I order that the tenancy ends on the date of this hearing, April 11, 2023 and that the landlord is entitled to unpaid rent accrued during the tenancy up until April 11, 2023 pursuant to section 55(1.1) of the *Act*. If the landlord suffers further loss due to the tenants overholding, the landlord is at liberty to file an application for dispute resolution seeking damages for overholding.

The updated ledger states that as of the end of March 2023 the tenants owed \$2,822.70 in unpaid rent utilities and late fees. As I am not awarding damages for utilities and late fees, to calculate the amount of rent owed I deducted the total charges for utility and late fees from the total stated as owing on the updated ledger (\$2,822.70 – \$457.70 (total of utilities and late fees listed in the updated ledger) = \$2,365.00. I find that the

landlord is entitled to \$2,365.00 in unpaid rent accrued during the tenancy up to the end of March 2023.

Pursuant to the updated ledger and the undisputed testimony of the landlord, I find that the tenants have not paid any money towards April 2023's rent. I find that the landlord is entitled to per diem rent for April 1-11, 2023 pursuant to the following calculation:

$$\begin{aligned} \$1,250.00 \text{ (rent)} / 30 \text{ (days in April 2023)} &= \$41.67 * 11 \text{ (days tenancy ongoing in} \\ \text{April 2023)} &= \$458.37 \end{aligned}$$

As I have determined that this tenancy will end pursuant to the 10 Day Notice I decline to consider if this tenancy would also end in accordance with the One Month Notice as the matter is moot.

As the landlord was the successful party in these applications for dispute resolution, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit due to the tenant. I find that the landlord is entitled to retain the tenant's entire security deposit in the amount of \$625.00 in part satisfaction of the landlord's monetary claim.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective **two days after service on the tenants**. Should the tenants and all other occupants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
Unpaid rent accrued during the tenancy up until March 30, 2023	\$2,365.00
Per diem rent for April 1-11, 2023	\$458.37
Filing Fee	\$100.00

Less security deposit	-\$625.00
TOTAL	\$2,298.37

The landlord is provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court 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: April 12, 2023

Residential Tenancy Branch