



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR-DR, MNR-DR, FFL
 CNR-MT, LRE

Introduction

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

- More time to cancel a Notice to End Tenancy
- Cancellation of the 10 Day Notice to End Tenancy dated February 3, 2023 (the "First Notice").
- An Order to restrict or suspend the landlord's right to enter

The tenant filed an amendment on March 9, 2023 seeking to cancel a 10 Day Notice to End Tenancy for Unpaid Rent dated March 2, 2023 (the "Second Notice").

This hearing also dealt with the landlord's two applications for dispute resolution pursuant to the *Act*. On February 14, 2023 the landlord filed an application (the "First Application") for:

- An Order of Possession for Unpaid Rent pursuant to the First Notice
- A Monetary Order for unpaid rent
- Authorization to recover the filing fee for this application from the tenants

On March 20, 2023 the landlord filed a second application (the "Second Application") for:

- An Order of Possession for Unpaid Rent pursuant to the Second Notice
- A Monetary Order for unpaid rent, pursuant to section 67
- Authorization to recover the filing fee for this application from the tenants

The tenants 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 confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

The tenants testified that they served the landlord with their application for dispute resolution and evidence via registered mail on February 14, 2023. No proof of service documents were entered into evidence. The tenants testified that they served the landlord with their amendment via registered mail but did not know on what date. No proof of service document were entered into evidence. The agent testified that the landlord did not receive any of the above documents from the tenants.

I find that the tenants have not proved that they served the landlord with their application for dispute resolution, evidence or amendment because they did not provide any proof of service documents and the agent submitted that the landlord did not receive them. I therefore dismiss the tenants’ application for dispute resolution and amendment, with leave to reapply, for failure to prove service as set out in Rule 3.5 of the Residential Tenancy Branch Rules of Procedure (the “Rules”) and section 89 of the *Act*. I exclude the tenants’ evidence from consideration for failure to prove service as set out in rule 3.5 of the Rules and section 88 of the *Act*.

The agent testified that the landlord served the tenants with the First Application and evidence via registered mail on March 10, 2023. The agent testified that the landlord served the tenants with the Second Application and evidence via registered mail on April 6, 2023. The tenants testified that they received both of the above-described mailings, though they did not know on what dates. I find that the tenants were served in accordance with sections 88 and 89 of the *Act* as receipt was confirmed.

Preliminary Issue – Amendment

The landlord filed an amendment to his First Application on May 25, 2023, 10 clear days before this hearing.

Rules 4.3 and 4.6 of the Residential Tenancy Branch Rules of Procedure (the “Rules”) states that an amendment should be submitted to the Residential Tenancy Branch and served on the opposing party at least 14 days before the hearing.

I find that the landlord’s amendment was not served in accordance with rules 4.3 and 4.6 of the Rules. I find that it would be procedurally unfair to hear the landlord’s amended claims, except for their claim for additional unpaid rent, because the tenants were not provided with a fair opportunity to respond to those claims. The landlord’s May 25, 2023 amended claims, except for the claim for additional unpaid rent, are dismissed with leave to reapply.

With regard to unpaid rent, rule 4.2 of the Rules states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

Pursuant to section 64 of the *Act*, I amend the landlord’s claim to include a claim for all outstanding rent.

Issue to be Decided

1. Is the landlord entitled to an Order of Possession based on the First Notice?
2. Is the landlord entitled to an Order of Possession based on the Second Notice?
3. Is the landlord entitled to a Monetary Order for unpaid rent?
4. Is the landlord entitled to recover the filing fees for the First Application and the Second Application?

Evidence and Analysis

While I have turned my mind to the documentary evidence of the landlord 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 tenants’ and agent’s claims and my findings are set out below.

Both parties agreed to the following facts:

- This tenancy began on September 1, 2019
- Monthly rent in the amount of \$1,861.00 is payable on the first day of each month,
- A security deposit of \$900.00 and a pet damage desposit of \$450.00 were 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 agent testified that the First Notice was served on the tenants in person on February 3, 2023. The agent entered into evidence a witnessed proof of service document stating that the First Notice was posted on the tenants' door on February 3, 2023. The tenants testified that they are not sure when or how the First Notice was served but that they most likely received it.

Based on the witnessed proof of service document and the agent's testimony, I find that the agent personally attached the First Notice to the door of the subject rental property on February 3, 2023. I find that the tenants were deemed served with the First Notice on February 6, 2023.

The agent testified that the Second Notice was served on the tenants via registered mail on March 2, 2023. A registered mail receipt for same was entered into evidence. The landlord entered into evidence delivery confirmations for the above mailings which show that the packages were picked up on March 6, 2023. Tenant JO testified that he did not receive the Second Notice, then later testified that he was not sure, then later testified that he refused entry. Tenant RO testified that they most likely received the Second Notice. The tenants' amended their application to dispute the Second Notice on March 9, 2023.

Based on the registered mail receipt and the delivery confirmations entered into evidence, I find that the tenants received the Second Notice on March 6, 2023. As the tenants filed to dispute the Notice on March 9, 2023, I find that they very clearly received it.

The agent testified that the tenants have paid no rent for February, March, April, May or June 2023. Tenant JO testified that they paid ½ of February 2023's rent "right away" and paid the second half "later that month". The tenants did not know the dates

February 2023's rent was allegedly paid. The First Notice states that the tenants owe \$1,861.00 in unpaid rent.

The tenants testified that they withheld rent from March to June because the landlord destroyed their hydro meter. The tenants testified that one of their parents is an electrician and fixed the hydro meter the same day it was broken. The tenants testified that they have not received a bill for this work or paid any money for this work.

The agent testified that he has no idea what the tenants are talking about.

Throughout this hearing I found the tenants testimony to be vague and unreliable. In particular tenant JO's testimony changed frequently and neither tenant was able to provide specific date of alleged rent payments. Where there is a conflict between the tenants' testimony and the agent's testimony that is not resolved by documentary evidence, I prefer the testimony of the agent. I found the agent's testimony to be clear and detailed.

The First Notice states that as of February 3, 2023 the tenants owed \$1,861.00 in unpaid rent. I find, on a balance of probabilities, that had the tenants paid ½ of rent "right away", then by the time the First Notice was served, the amount of rent stated on the First Notice as owing would be less than one full months' rent. Based on the First Notice and the agent's testimony I find that the tenants have not paid any rent from February to June 2023, contrary to section 26 of the *Act*. I find that the tenants were not entitled to withhold rent, even if the landlord did not comply with the *Act*, as they did not incur a loss for the alleged emergency repair.

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.

In this case the tenants did not pay the overdue rent within five days of receiving the First Notice or the Second Notice. I therefore find that the landlord is entitled to two-day Order of Possession for nonpayment of rent, in accordance with section 46 and 55 of the *Act*.

Pursuant to sections 26 and 67 of the *Act*, I award the landlord a Monetary Order for unpaid rent as follows:

February 2023: \$1,861.00

March 2023: \$1,861.00

April 2023: \$1,861.00

May 2023: \$1,861.00

June 1-5 on a per diem basis: $\$1,861.00 \text{ (rent)} / 30 \text{ (days in June)} =$
 $\$62.03 \text{ (daily rate)} * 5 \text{ (day of tenancy in June)} = \310.15

Total: \$7,754.15

The landlord has leave to apply for additional damages for any day the tenant overholds the subject rental property past June 5, 2023.

As the landlord was successful in this application for dispute resolution, I find that the landlord is entitled to recover one of the \$100.00 filing fees from the tenants. I find that in filing two applications for dispute resolution and paying two filing fees, the landlord failed to mitigate his damages. The landlord could have amended the First Application to include all claims made in the Second Application thereby eliminating the cost of the Second Application's filing fee.

Conclusion

The tenants' applications for dispute resolution are dismissed with leave to reapply.

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 fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I award the landlord \$7,854.15. The tenants must be served with this Monetary 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: June 07, 2023

Residential Tenancy Branch