

DECISION

Introduction

This hearing dealt with the Tenants' Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) under section 46 of the Act

It also dealt with the Landlord's Application under the Act for:

- an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) under sections 46 and 55 of the Act
- a Monetary Order based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) under sections 46 and 55 of the Act
- authorization to recover the filing fee for this application from the tenants under section 72 of the Act

The landlord and legal counsel attended the hearing. The tenants did not attend the hearing. The hearing began at 9:30am and ended at 9:55am.

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

I am satisfied that copies addressed to each of the tenants were posted on the door of the rental unit on October 22, 2023, in accordance with the Act.

Service of Evidence

I am satisfied that all evidence relied upon (the rental agreement, the addendum, and the 10 Day Notice) was in the possession of the tenants.

Issues to be Decided

Is the 10 Day Notice valid? If yes, should the landlord be granted an order of possession.

Should the landlord be granted a monetary order for unpaid rent?

Should the landlord be authorized to recover the filing fee?

Background and Evidence

Evidence was provided showing that this tenancy began on September 15, 2023, with a monthly rent of \$3,800.00, due on the first of the month, and with a security deposit in the amount of \$1,900.00. Rent for the September 2023 was on a pro-rata basis (\$2,050.00) because the tenants only had the rental unit for 16 out of 30 days. The security deposit was never paid by the tenants. The tenancy agreement provided for regular "pre-payment" of rent in an addendum:

ADDENDUM - Additional Terms to the Residential Tenancy Agreement Basement – 12304 Coldstream Creek Road Vernon (*Property*)

WHEREAS as a material inducement for the Landlord entering into the Tenancy Agreement with the Tenant for the rental unit, due to the Tenant(s)' credit history, the Tenant(s) have proposed, and the Landlord has accepted, payments and pre-payments of rent (the "**Rent Payments**") on the following basis:

Payment Date:	Amount:	Nature of Payment:
September 29, 2023	\$2050.00	Rent: September 15-30, 2023
September 29, 2023	\$3,800.00	Rent: October 2023
October 13, 2023	\$3,800.00	Rent: November 2023
November 1, 2023	\$3,800.00	Rent: December 2023
December 1, 2023	\$3,800.00	Rent: January 2024
January 1, 2024	\$3,800.00	Rent: February 2024
January 4, 2024	\$15,200.00	Rent: March 2024 (\$3,500.00) Rent: April 2024 (\$3,500.00) Rent: May 2024 (\$3,500.00) Rent: June 1-15, 2024 (\$1,750.00)

NOW THEREFORE, the Landlord and the Tenant(s) hereby agree as follows with respect to the Rent Payments:

1. The Tenant(s) will make the Rent Payments to the Landlord on the Payment Dates and in the Amounts set out in the table above. This is a material term of the Tenancy Agreement.
2. Where rent for any calendar month (or portion thereof) is prepaid, the Tenant(s) will permit the Landlord to deduct such rent from the monies the Landlord is holding on behalf of the Tenant(s).
3. Any pre-paid rent is not intended to be, or supplement or replace, a security deposit or pet deposit.
4. The Landlord will return any unapplied, pre-paid rent to the Tenant(s) if the Tenant(s) lawfully terminate their tenancy of the rental unit prior to June 15, 2023.

The landlord said that the addendum was proposed by the tenants because of their credit history and to induce the landlord into entering into an agreement.

The tenants did not pay rent in October 2023. The landlord served a 10 Day Notice by posting it on the door on October 6, 2023. The 10 Day Notice uses form RTB-30, is signed and dated by the landlord, provides an effective date of October 16, 2023, provides the address of the rental unit, and states that \$5,700.00 in unpaid rent is owing as of October 1, 2023. At the hearing, the landlord's counsel gave evidence that he meant to write \$5,850 (October rent plus \$2,050 for September).

The tenants filed for dispute resolution on October 11, 2023. The tenants made no payments following receipt of the 10 Day Notice.

Analysis

Is the 10 Day Notice valid? If yes, should the landlord be granted an order of possession.

Section 46 of the Act states that upon receipt of a 10 Day Notice the tenant must, within five days, either pay the full amount of the arrears as indicated on the 10 Day Notice or dispute the 10 Day Notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch.

I find that the 10 Day Notice was deemed served on October 9, 2023, and that the tenants filed for dispute resolution within 5 days.

I must consider what the agreement between the parties was and whether it is enforceable, in order to determine what, if anything, was owed when the 10 Day Notice was issued.

I find that the addendum is unenforceable because it is inconsistent with the Act. I make this finding despite the fact that it was proposed by the tenants. Section 5 provides that parties cannot contract out of the Act. The addendum is inconsistent with the Act because of section 13(2)(v), which states as follows:

Requirements for tenancy agreements

13 (2) A tenancy agreement must comply with any requirements prescribed in the regulations and must set out all of the following:

[...]

(v) the day in the month, or in the other period on which the tenancy is based, on which the rent is due;

This means that rent can only be due on a day in the period in question. In other words, in a monthly tenancy, rent for October can only be due on a day in October, November on a day in November, and so on. The addendum provides that the tenants make two payments in October (one relating to November rent) and 5 payments in January (totaling \$19,000).

I also find that the addendum requiring pre-payment of rent is unconscionable. Allowing such terms in rental agreements – whether proposed by landlords or tenants – goes completely against the protective purpose of the Act.

I find that what is left of the agreement between the parties is the standard terms of the Act, which provide that rent is payable on a monthly basis on the first of the month.

I accept the landlord's evidence that rent in the amount of \$2,050.00 was owing for September 2023 and \$3,800 was owing for October 2023 and that these amounts were not paid.

The tenants' application to cancel the 10 Day Notice is dismissed. The 10 Day Notice is valid. The landlord is granted an Order of Possession.

Should the landlord be granted a monetary order for unpaid rent?

During the hearing, the landlord sought to increase their monetary claim to reflect the tenants' failure to pay monthly rent in November 2023, the additional month of unpaid rent waiting for this hearing.

Residential Tenancy Branch Rules of Procedure, Rule 4.2, 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. I allow the amendment as this was clearly rent that the tenants would have known about and resulted since the landlord submitted the application.

The landlord is entitled to unpaid rent for September, October and November 2023. The total amount owing is \$9,500.00.

Should the landlord be authorized to recover the filing fee?

The landlord was successful and is entitled to recover the filing fee in accordance with section 72 of the Act.

Conclusion

The tenants' application is dismissed without leave to reapply.

I grant an Order of Possession to the landlord **effective on November 27, 2023 after service of this Order on the tenants**. Should the tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I grant the landlord a Monetary Order in the amount of **\$9,600.00** under the following terms:

Monetary Issue	Granted Amount
Unpaid rent	\$9,500.00
Filing fee	\$100.00
Total Amount	\$9,600.00

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 Act.

Dated: November 16, 2023

Residential Tenancy Branch