



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

This hearing dealt with two applications application pursuant to the *Residential Tenancy Act* (the “**Act**”). The landlord’s application for

- an order of possession for non-payment of rent pursuant to section 55;
- a monetary order for unpaid rent in the amount of \$5,400 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And tenant KG’s application for:

- the cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the “**Notice**”) pursuant to section 46; and
- more time to make an application to cancel the Notice pursuant to section 66.

Neither tenant attended this hearing, although I left the teleconference hearing connection open until 11:29 am in order to enable them to call into this teleconference hearing scheduled for 11:00 am. 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.

Preliminary Issue – Service

The landlord’s application was reconvened from an *ex parte*, direct requestion proceeding. In an interim decision dated August 18, 2021, the landlord was ordered to serve the tenants with a copy of the interim decision, notice of reconvened hearing, and other documents. The landlord testified he did this on August 21, 2021, by posting them on the door of the rental unit. I find that this is sufficient to constitute proper service.

Tenant KG made his application on August 9, 2021. The landlord testified that he was not aware of this application and that KG never served him with the notice of dispute resolution package or supporting evidence.

Despite it not being served on the landlord, I found it appropriate to proceed with KG’s application, as in order to dispute the application to cancel the Notice, the landlord must

prove the same facts, bears the same evidentiary burden on the same standard of proof as his own application. Additionally, as I will discuss shortly, the tenant's non-attendance at this hearing is a sufficient basis to dismiss their application for an extension of time without leave to reapply. In the circumstances, I do not find it appropriate to dismiss KG's application with leave to reapply or to adjourn it to be heard at a later date due to defective service.

Preliminary Issue – Tenants' Non-Attendance

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

So, despite tenant KG having made the application to dispute the Notice, the landlord must show it is more likely than not that the Notice is valid.

However, KG bears the evidentiary burden to prove that he is entitled to an extension of time in which he could dispute the Notice. By failing to attend this hearing, I find that he has failed to discharge his evidentiary burden. Pursuant to Rule of Procedure 7.4, he (or his agent) must attend the hearing and present his evidence for it to be considered. As this did not occur, I have not considered any of the documentary evidence submitted by KG to the Residential Tenancy Branch in advance of the hearing.

I dismiss his application for an extension of time, without leave to reapply.

I also note that section 66(3) of the Act only permits an arbitrator to extend a time limit to make an application to dispute a notice to end tenancy up to the effective date of that notice. In this case, the effective date of the Notice was July 13, 2021, and KG applied to dispute the Notice on August 9, 2021. As such, even if the tenant had attended the hearing, I would not have been able to grant the relief sought.

Preliminary Issue – Spelling of KG's Middle Name

The landlord advised me that he inadvertently misspelled KG's middle name on the application. He stated the correct spelling of KG's middle name can be found on the Notice and the tenancy agreement (both of which were submitted into evidence). As such, and as KG's middle name listed on the application is not, to my knowledge, a name that is regularly used, I order that the application be amended so as to correctly spell KG's middle name (correct spelling on the cover of this decision).

Preliminary Issue – Amendment to Increase Monetary Claim

At the hearing the landlord sought to further amend his application to reflect subsequent payments made by the tenant and additional arrears that have accrued since the landlord's application was made.

Rule of Procedure 4.2 states:

4.2 Amending an application at the hearing

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.

In this case, the landlord stated that the tenants' current arrears balance is \$3,900 (as opposed to \$5,400 when the application was made). I find that the amendment to the landlord's monetary claim should have been reasonably anticipated by the tenants. Therefore, pursuant to Rule 4.2, I order that the landlord's application be amended to reduce the claim from \$5,400 to \$3,900.

Issues to be Decided

Is the landlord entitled to:

- 1) an order of possession;
- 2) a monetary order for \$3,900;
- 3) recover the filing fee?

Are the tenants entitled to an order cancelling the Notice?

Background and Evidence

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

The parties entered into a written tenancy agreement starting January 1, 2021 to rent the rental unit, which is located on the upper floor of a single detached house. Monthly rent is \$2,300 and is payable on the first of each month. The tenants paid the landlord a security deposit of \$1,100, which the landlord continues to hold in trust. I note that on the amount recorded for the payment of the security deposit is slightly obscured on the tenancy agreement. It could be read either as \$1,150 or \$1,100. The landlord testified that he had initially sought a deposit of \$1,150, but stated that he later advised the tenants that \$1,100 would be sufficient, and altered the tenancy agreement accordingly by overwriting the “5” with a “0”. I accept this testimony.

The landlord testified that the tenants failed to pay any rent for the months of May, June, or July 2021 when rent was due. On July 3, 2021, the landlord posted the Notice on the door of the rental unit. It specified an effective date of July 13, 2021, and specified arrears of \$5,400 were owed. The landlord testified that, following the receipt of the Notice, the tenants paid \$1,500 on July 7, 2021, \$2,300 on July 17, 2021, and \$500 on July 20, 2021.

The landlord testified that the tenants continued to pay their rent late and in irregular amounts. He testified that, since May 1, 2021, the tenants’ made payments as follows:

Date	Owed	Paid	Balance
01-May-21	\$2,300	\$0	\$2,300
01-Jun-21	\$2,300	\$0	\$4,600
01-Jul-21	\$2,300	\$0	\$6,900
07-Jul-21	\$0	\$1,500	\$5,400
17-Jul-21	\$0	\$2,300	\$3,100
20-Jul-21	\$0	\$500	\$2,600
01-Aug-21	\$2,300	\$0	\$4,900
25-Aug-21	\$0	\$3,000	\$1,900
26-Aug-21	\$0	\$300	\$1,600
31-Aug-21	\$0	\$2,300	-\$700
01-Sep-21	\$2,300	\$0	\$1,600
30-Sep-21	\$0	\$2,300	-\$700
01-Oct-21	\$2,300	\$0	\$1,600
01-Nov-21	\$2,300	\$0	\$3,900
06-Nov-21	\$0	\$2,300	\$1,600
01-Dec-21	\$2,300	\$0	\$3,900
Total	\$18,400	\$14,500	\$3,900

While I did not notice this during the hearing, in preparing this decision I noticed that the credits and debits to the tenant’s account the landlord testified to at the hearing do not

accord with the amount of arrears set out on the Notice. Based on the payments set out above, it would seem that the tenants were \$6,900 in arrears on July 3, 2021. However, the Notice specifies arrears of \$5,400 as of July 3, 2021

Analysis

Based on the tenancy agreement and the undisputed testimony of the landlord, I find that the tenants were required to pay monthly rent of \$2,300 on the first of each month.

I find it more likely than not that the landlord misspoke at the hearing or misremembered the exact date of the first payment of \$1,500 (recorded above as being made on July 7, 2021). I find that this payment likely occurred shortly prior to the issuing of the Notice, rather than shortly after. This would account for the amount of arrears on the Notice being \$5,400 as opposed to \$6,900 that the above payment schedule would indicate.

In all other respects, I accept the landlord's undisputed evidence that the tenants made payments on the dates and in the amounts specified above. I find that as of the date of the hearing, the tenants are in rental arrears of \$3,900. They must pay the landlord this amount.

I find that the landlord served the tenants with the Notice on July 3, 2021 by posting it on the door of the rental unit. Per section 90 of the Act, the Notice is deemed to have been served three days later (that is, July 6, 2021).

Sections 46(4) and (5) of the Act state:

Landlord's notice: non-payment of 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.
- (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
 - (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
 - (b) must vacate the rental unit to which the notice relates by that date.

The tenants did not dispute the Notice until August 9, 2021, over 30 days after the Notice was deemed served, and over three weeks after the corrected effective date of the Notice (July 16, 2021).

As such, I find the tenants are conclusively presumed to have accepted that the tenancy ended on the corrected effective date of the Notice.

I have reviewed the Notice and find that it complies with the section 52 form and content requirements.

As such, the landlord is entitled to an order of possession. At the hearing, the landlord stated that he did not want to evict the tenants right before Christmas. As such, I order the tenants to provide the landlord with vacant possession of the rental unit by December 31, 2021 at 1:00 pm.

Pursuant to section 72(1) of the Act, as the landlord has been successful in the application, he may recover their filing fee from the tenants.

Pursuant to section 72(2) of the Act, the landlord may retain the security deposit in partial satisfaction of the monetary orders made above.

Conclusion

I dismiss KG's application to cancel the Notice.

Pursuant to sections 67 and 72 of the Act, I order that the tenants pay the landlord \$2,900, representing the following:

Description	Amount
Rent Arrears (as of December 1, 2021)	\$3,900.00
Security Deposit Credit	-\$1,100.00
Filing Fee	\$100.00
Total	\$2,900.00

Pursuant to section 55 of the Act, I order that the tenants deliver vacant possession of the rental unit to the landlord by December 31, 2021 at 1:00 pm.

The landlord must serve the tenants with a copy of this decision and attached orders as soon as possible after receiving it from the Residential Tenancy Branch.

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: December 6, 2021

Residential Tenancy Branch