



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

<u>Parties</u>	<u>File No.</u>	<u>Codes:</u>
(Tenant)	310060647	CNR, MNDCT, OLC
(Landlord)	310061995	MNR-DR, OPR-DR, FFL

Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* (“Act”) by the Parties.

The Tenant applied for:

- an Order to cancel the 10 Day Notice to End Tenancy for Unpaid Rent dated January 21, 2022;
- \$4,000.00 compensation for monetary loss or other money owed; and
- an Order for the Landlord to Comply with the Act or tenancy agreement.

The Landlord applied for:

- an Order of Possession for unpaid rent, further to having served the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent;
- a request for a Monetary Order of \$2,000.00 for outstanding unpaid rent from the Tenant; and
- recovery of her \$100.00 application filing fee.

The Tenant and the Landlord appeared at the teleconference hearing and gave affirmed testimony, although the Tenant arrived 13 minutes late. I had explained the hearing process to the Landlord and gave her an opportunity to ask questions about the hearing process. The Tenant’s late arrival and quarrelsome behaviour in the hearing put things off course, somewhat, therefore, I dealt with the Tenant’s concerns as best I could.

The Tenant immediately requested an adjournment of the hearing, because he said he was concerned about his health and said he was on the way to the hospital. However, the Tenant continued to participate as a willing participation in the hearing, which caused me to overlook his request for an adjournment. Further, the Tenant seemed more concerned about having a chance to submit a specialist's report about his sleep loss that he said was caused by noise in the residential property. The specialist's report would not be available until at least mid-May, according to the Tenant; however, the specialist's report related to the Tenant's monetary claim, which I severed from the proceedings, as noted below.

I explained to the Parties that Residential Tenancy Branch ("RTB") Rule of Procedure ("Rules") 2.3 authorizes me to dismiss unrelated disputes contained in a single application. I said that in this circumstance, the Tenant had indicated different matters of dispute on the application, the most urgent of which is the application to set aside a 10 Day Notice. I said I found that not all the claims on the application were sufficiently related to be determined during this proceeding, and that I would, therefore, only consider the Tenant's request to set aside the 10 Day Notice in the hearing. I advised that therefore, the Tenant's other claims are dismissed, with leave to re-apply, depending on the outcome of this hearing.

The Tenant did not seem to understand this explanation, therefore, I tried to explain it in other ways, and to assure him that he was allowed to reapply for the monetary order.

During the hearing, the Tenant and the Landlord were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Rules; however, only the evidence relevant to the issues and findings in this matter are described in this decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary Matters

The Parties provided their email addresses in their applications, and they confirmed these addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

When a tenant applies to cancel a notice to end tenancy issued by a landlord, section 55 of the Act requires me to consider whether the landlord is entitled to an order of possession. This is the case if I dismiss the tenant's application and if the notice to end tenancy is compliant with section 52 of the Act, as to form and content.

The onus to prove their case is on the person making the claim. Usually, this is the person who applies for dispute resolution. However, in some situations, 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. As such, the burden of proof is on the Landlord for the Tenant's claim.

Pursuant to Rule 4.2 and section 64 (3) (c) of the Act, I amend the Landlord's application to correct the amount of the Monetary Order sought, to reflect the ongoing failure of the Tenant to pay his monthly rent owing. I find no prejudice to the Tenant, as he is aware of how much rent he has or has not paid, so he could have anticipated that the Landlord would claim reimbursement for the full amount of rent owing. Accordingly, I find it reasonable to amend the amount of the Monetary Order sought by the Landlord from the Tenant from **\$2,000.00 to \$10,000.00**.

Issue(s) to be Decided

- Should the 10 Day Notice be cancelled or confirmed?
- Is the Landlord entitled to an order of possession?
- Is the Landlord entitled to a monetary order, and if so, in what amount?
- Is the Landlord entitled to recovery of the Application filing fee?

Background and Evidence

Prior to the Tenant's appearance at the hearing, the Landlord confirmed that the fixed-term tenancy began on November 20, 2021, with a monthly rent of \$2,000.00, due on the first day of each month. The Landlord confirmed that the Tenant paid her a security deposit of \$1,000.00, and no pet damage deposit. The Landlord confirmed that she still

holds the \$1,000.00. The Tenant's testimony in the hearing was consistent with these details.

The Parties both submitted copies of the 10 Day Notice, which was signed and dated January 21, 2022, and which has the rental unit address. The 10 Day Notice was served by attaching a copy of it to the rental unit door on January 21, 2022, with an effective vacancy date of January 31, 2022, which is automatically corrected by the Act to February 4, 2022. The 10 Day Notice was served on the grounds that the Tenant failed to pay \$2,000.00 when it was due on January 1, 2022.

The Parties agreed that the Tenant has not paid the Landlord any rent since November 2021, and that he has, therefore, accrued \$10,000.00 in unpaid rent owing to the Landlord.

The Tenant said that he did not pay his rent, because the residential property is too noisy while he tries to sleep in the day. He said he applied for compensation for this disturbance; however, he applied after he was served with the eviction notice. Further, I advised him that his monetary claim had been severed from this proceeding, as noted above. The Tenant continued to speak about this claim, despite my explanations.

The Tenant also said that he had explained to the Landlord that he had expected to be paid for a project in December, but that this payment did not materialize. The Tenant said that the Landlord should have been more understanding and cooperative in these circumstances.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Section 46 (1) of the Act outlines the grounds on which to issue a 10 Day Notice for non-payment of rent:

Landlord's notice: non-payment of rent

46 (1) 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.

...

(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.

The Tenant applied to dispute the 10 Day Notice within the required timeline.

I reviewed all relevant documentary evidence and oral testimony before me and pursuant to sections 88 and 90 of the Act, I find that the Tenant was properly served with the 10 Day Notice on January 24, 2022, three days after it was posted on the rental unit door. I also find that the 10 Day Notice was in the approved form and is valid, pursuant to section 52 of the Act.

Section 26 of the Act states that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations, or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent. [emphasis added]

The Tenant did not provide any evidence indicating that he had a right under the Act to deduct all or a portion of the \$2,000.00 in rent he owed the Landlord for January 2022. Therefore, I find that the Tenant did not have a right to withhold any rent owing to the Landlord in January 2022. As such, the Tenant's application to cancel the 10 Day Notice is dismissed without leave to reapply, pursuant to sections 46, and 62 of the Act.

In the hearing, the Landlord said that she was owed \$10,000.00 in unpaid rent as of April 1, 2022. The Tenant confirmed that this was true. Accordingly, pursuant to section 67 of the Act, I award the Landlord **\$10,000.00** from the Tenant for unpaid rent, pursuant to sections 26, 46, and 67 of the Act.

Accordingly, I find that the Landlord is entitled to an Order of Possession pursuant to section 55 of the Act. As the effective date of the 10 Day Notice has passed and the undisputed evidence before me is that the Tenant has not paid rent for December 2021 through April 2022, the Order of Possession will be effective two days after service of the Order on the Tenant.

Given her successful application, I also award the Landlord recovery of the \$100.00 Application filing fee pursuant to section 72 of the Act for a total monetary award of **\$10,100.00**.

I find that this claim meets the criteria under section 72 (2) (b) of the Act to be offset against the Tenant's security deposit of **\$1,000.00** in partial satisfaction of the Landlord's monetary award. I authorize the Landlord to retain \$1,000.00 of the Tenant's

security deposit and I grant her a **Monetary Order** of **\$9,100.00** for the remaining amount owed.

Conclusion

The Tenant is unsuccessful in his application to cancel the 10 Day Notice, as he confirmed that he has failed to pay rent to the Landlord since November 2021, without a right under the Act to deduct all or a portion of the rent. The Tenant's application to cancel the 10 Day Notice is dismissed without leave to reapply. The Tenant's claim for an Order for the Landlord to Comply with the Act or tenancy agreement is no longer relevant, since the tenancy has ended, therefore, this claim is dismissed without leave to reapply. The Tenant's claim for compensation for monetary loss other money owed is dismissed with leave to reapply.

The Landlord is successful in her application. Pursuant to section 55 of the Act, I grant the Landlord an Order of Possession effective **two days after service of this Order** on the Tenant. The Landlord is provided with this Order in the above terms and the Tenant must be served with this Order as soon as possible.

Should the Tenant fail to comply with this order, it may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

The Landlord is also awarded a Monetary Order of **\$9,100.00**, based on five months of unpaid rent and recovery of the **\$100.00** Application filing fee, less the **\$1,000.00** security deposit, which the Landlord is authorized to retain.

This Order must be served on the Tenant by the Landlord and may be filed in the Provincial Court (Small Claims) 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 29, 2022

Residential Tenancy Branch