



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes Tenants: CNL-MT, FFT | CNR, FFT
Landlord: OPR-DR, MNR-DR, FFL

Introduction

This hearing was convened as a result of the parties' applications under the *Residential Tenancy Act* (the "Act").

The Tenants applied for:

- cancellation of a Two Month Notice to End Tenancy for Landlord's Use of Property dated October 20, 2022 (the "Two Month Notice") pursuant to section 49 of the Act;
- more time to dispute the Two Month Notice pursuant to section 66 of the Act;
- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 4, 2023 (the "10 Day Notice") pursuant to section 46 of the Act; and
- authorization to recover the filing fees for the Tenants' applications from the Landlord pursuant to section 72 of the Act.

The Landlord applied for:

- an Order of Possession of the rental unit based on the 10 Day Notice pursuant to section 55 of the Act;
- compensation of \$3,000.00 for unpaid rent pursuant to sections 55 and 67 of the Act; and
- authorization to recover the filing fee for the Landlord's application from the Tenants pursuant to section 72 of the Act.

The Landlord, the Landlord's agent LW, and the Tenants attended this hearing. They were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

All attendees were informed that the Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”) prohibit unauthorized recordings of dispute resolution hearings.

Preliminary Matter – Service of Dispute Resolution Materials

The Landlord confirmed receipt of the Tenants’ notice of dispute resolution proceeding package and evidence regarding the Tenants’ application to dispute the Two Month Notice (collectively, the “Tenants’ First NDRP Package”). I find the Landlord was served with the Tenants’ First NDRP Package in accordance with sections 88 and 89 of the Act.

The Landlord indicated that he did not receive the Tenants’ notice of dispute resolution proceeding package and evidence regarding the Tenants’ application to dispute the 10 Day Notice (collectively, the “Tenants’ Second NDRP Package”). The Tenants submitted a registered mail tracking number in support of service (referenced on the cover page of this decision). One of the Tenants, OL, testified that he had texted the Landlord’s agent LW about the registered mail package. Tracking records indicate that this package was sent on January 6, 2023 and was available for pickup from January 11, 2023 until February 5, 2023. OL confirmed that both packages were sent to the same address. The Landlord and LW did not clearly explain why the second package was not picked up. According to Residential Tenancy Policy Guideline 12. Service Provisions, when a document served by registered mail is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing. Pursuant to section 90(a) of the Act, I find the Landlord is deemed to have received the Tenants’ Second NDRP Package on the fifth day after mailing, or January 11, 2023.

The Tenants confirmed receipt of the Landlord’s notice of dispute resolution proceeding package and evidence (collectively, the “Landlord’s NDRP Package”). I find the Tenants were served with the Landlord’s NDRP Package in accordance with sections 88 and 89 of the Act.

Preliminary Matter – Tenants’ Application for Extension of Time

The Tenants submitted their application to dispute the Two Month Notice on December 15, 2022, although the Tenants had received the Two Month Notice in person on October 25, 2022. The Tenants had informed the Landlord’s agent on November 6,

2022 that they might leave the rental unit by December 31, 2022 and move out of province. According to the Tenants, they found a December 9, 2022 Craigslist ad listing the rental unit for rent on or around December 15, 2022, which prompted them to make their application. The Tenants submitted a link (no longer accessible) and screenshot of the Craigslist ad into evidence. The screenshot indicates that the unit was to be available starting on January 15, 2023.

Under section 49(8)(a) of the Act, a tenant who receives a two month notice to end tenancy for landlord's use of property has the right to dispute such a notice within 15 days after receiving it, unless the arbitrator extends that time limit pursuant to section 66 of the Act. If a tenant does not dispute the notice in time, they are presumed to have accepted the notice and must vacate the rental unit by the effective date.

Section 66(1) of the Act states that a time limit established by the Act may only be extended in "exceptional circumstances". According to Residential Tenancy Branch Policy Guideline 36. Extending a Time Period, "exceptional" means that the reason for failing to do something at the time required is very strong and compelling. The party putting forward the reason must have some persuasive evidence to support the truthfulness of what is said.

In this case, I find the Tenants have submitted evidence to demonstrate exceptional circumstances for extending the time limit. Furthermore, I find the Tenants submitted their application prior to the effective date of the Two Month Notice. As such, I allow the Tenants more time to make their application to dispute the Two Month Notice pursuant to section 66(1) of the Act.

Issues to be Decided

1. Are the Tenants entitled to cancel the Two Month Notice and the 10 Day Notice?
2. Is the Landlord entitled to an Order of Possession?
3. Is the Landlord entitled to compensation for unpaid rent?
4. Are the parties entitled to reimbursement of their filing fees?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments

relevant to the issues and findings in this matter are reproduced here. The principal aspects of the parties' applications and my findings are set out below.

This tenancy commenced on January 1, 2021 for a fixed term ending on December 31, 2022 and was to continue thereafter on a month-to-month basis. Rent is \$1,500.00 due on the first day of each month. The Tenants paid a security deposit of \$750.00.

The Landlord testified that in fall of 2022, he discussed with the Tenants about needing to use the rental unit for his family. The Landlord testified that his parents arrived in BC last year and needed a place to live. The Landlord submitted his parents' flight booking confirmation into evidence.

According to the Landlord, the Tenants requested him to provide formal notice, so the Landlord hired LW as his property manager to prepare the paperwork.

LW testified he had a phone call with the Tenants about the Landlord's parents wanting to move in by January 1, 2023. LW stated he was told that new year time would be difficult for the Tenants, so he offered to negotiate with the Landlord for one more month and for the parties to sign a mutual agreement to end tenancy. According to LW, he understood the Tenants to have preferred a mutual agreement to end tenancy over a two month notice to end tenancy with an earlier effective date. LW emailed a draft mutual agreement to end tenancy to the Tenants on or around October 19, 2022, with an effective date of January 31, 2023. The Tenants refused to sign the mutual agreement to end tenancy and expressed that they did not in fact agree to this. LW indicated that was fine, and he issued the Two Month Notice to the Tenants instead.

The Tenants acknowledged receipt of the Two Month Notice in person on October 25, 2022. The Two Month Notice is signed by LW on behalf of the Landlord and has an effective date of January 1, 2023. It states the reason for ending the tenancy is that the rental unit will be occupied by the "father or mother of the landlord or landlord's spouse".

LW confirmed he was told that the Tenants would be moving on time, but then received the Tenants' application for dispute resolution and evidence including the Craigslist ad. The Landlord and LW both denied that they had posted the Craigslist ad. They argued that the ad must be fake because it includes the unit number for the rental unit in the subject line. Both the Landlord and LW indicated that they would not have done this. LW testified that he sometimes writes the building number when listing a property, but would never write the unit number so as to protect the owner's privacy. LW submitted

screenshots of his Craigslist account to show that he has not listed the rental unit on the Landlord's behalf. The Landlord stated he doesn't know who posted the ad.

According to the Landlord, it was fine for the Tenants to not pay the last month's rent if they accepted the Two Month Notice, but the Tenants disputed the notice and then "took advantage" for six months. The Landlord and LW submitted that the Tenants still need to pay rent if they apply for dispute resolution and want to stay.

The Landlord issued the 10 Day Notice to the Tenants on January 4, 2023. This notice is signed by LW on behalf of the Landlord and states that the Tenants failed to pay rent of \$3,000.00 due on January 1, 2023. The Landlord and LW confirmed that this amount represents unpaid rent of \$1,500.00 for the months of December 2022 and January 2023. The Tenants acknowledged receipt of the 10 Day Notice attached to their door on January 4, 2023.

LW testified that he sent a few reminder emails to the Tenants at the beginning of each month but never received a response. The Landlord confirmed that he did not receive any payment of rent from the Tenants since December 2022, for a total amount owing of \$9,000.00 (\$1,500.00 × 6 months).

The Landlord also submitted evidence indicating that his parents are currently staying with the Landlord and his spouse in the Landlord's two-bedroom home.

In response, the Tenants argued that the Landlord did not issue the Two Month Notice in good faith. OL testified that the Landlord had mentioned his parents moving in but had also mentioned a four month notice to end tenancy, which is for renovations. OL stated it was odd that the Landlord had tried to make the Tenants sign a mutual agreement to end tenancy. OL testified that he started to question the Landlord's intention. OL stated the Tenants stumbled upon the Craigslist ad for the rental unit when they were looking for another unit. OL stated the Tenants were shocked that the Landlord was probably not acting in good faith, so they decided to dispute the Two Month Notice.

OL stated that the Tenants did pay the rent, which was paid via e-transfer to "Cricket Management" at accounting@cricketmgt.com. OL stated that the Tenants' "initial contract" was signed with Cricket Management. OL acknowledged that at some point the Tenants were also sending e-transfers directly to the Landlord. OL stated that after the Tenants submitted their dispute, they reverted back to sending rent to Cricket

Management to “protect” the Tenants. OL stated that the Tenants did not want the Landlord to come back to the Tenants saying that he did not receive rent, as the intent was to send rent to Cricket Management. OL stated that as a result, the Tenants reverted to what was “agreed” in the contract.

According to OL, the Tenants paid Cricket Management rent of \$3,000.00 on December 30, 2022, representing rent for December 2022 and January 2023, as well as monthly rent on February 1, March 1, and April 1, 2023. OL acknowledged that the Tenants had not yet paid rent due on May 1, 2023. OL stated that he has bank statements supporting the payments made.

In response, the Landlord explained that he had signed up with Cricket Management for property management services in December 2020. The Landlord stated that Cricket Management went bankrupt in April 2021 and had lost its license. The Landlord stated that since then, the Tenants paid monthly rent to the Landlord directly via e-transfer until the parties’ dispute. The Landlord stated that Cricket Management had emailed all of their landlords and tenants to inform everyone that it was bankrupt and could not accept further payments.

Upon questioning, OL acknowledged he was unsure whether the tenancy agreement states that the Tenants were required to pay rent to Cricket Management. When asked as to whether the Tenants had informed the Landlord about their decision to revert to paying the rent to Cricket Management, OL suggested the Landlord was told by way of the Tenants’ dispute resolution application.

Analysis

1. Are the Tenants entitled to cancel the Two Month Notice and the 10 Day Notice?

For the reasons that follow, I find the Tenants have not paid rent to the Landlord and the 10 Day Notice is to be upheld. As such, I do not find it necessary to also consider whether the Tenants are entitled to cancel the Two Month Notice.

Section 26(1) of the Act states that a tenant must pay rent when it is due, 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.

If a tenant does not pay rent when due, section 46 of the Act permits a landlord to take steps to end a tenancy by issuing a notice to end tenancy for unpaid rent.

Section 52 of the Act states that in order to be effective, a notice to end tenancy given by a landlord must:

- be in writing
- be signed and dated by the landlord giving the notice
- give the address of the rental unit
- state the effective date of the notice
- state the grounds for ending the tenancy, and
- be in the approved (Residential Tenancy Branch) form.

I have reviewed the 10 Day Notice and find that it complies with the requirements of section 52 of the Act in form and content. I find the Tenants were served with the 10 Day Notice on January 4, 2023 in accordance with section 88(g) of the Act.

Section 46(4)(b) of the Act permits a tenant to dispute a 10 day notice to end tenancy for non-payment of rent or utilities, or pay the outstanding amount in full, within 5 days of receiving such a notice. Records of the Residential Tenancy Branch indicate the application to dispute the 10 Day Notice was submitted on January 4, 2023. I find this application was made within the time limit stipulated under section 46(4)(b) of the Act.

Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, Rule 6.6 of the Rules of Procedure places the onus on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

In this case, the Landlord asserts that he has not received any rent since December 2022 and that Cricket Management has been bankrupt since April 2021. The Tenants' position is that they paid rent to Cricket Management as agent for the Landlord on December 30, 2022 as well as February 1, March 1, and April 1, 2023.

Given the conflicting evidence, I find it is necessary to assess the parties' credibility. The Court in *Faryna v. Chorny* (1951-52), W.W.R. (N.S.) 171 (B.C.C.A.) at p. 174 (as cited in *Bray Holdings Ltd. v Black*, 2000 BCSC 738 at para. 24) states:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must

reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

(emphasis underlined)

Based on the evidence presented, I do not find OL's testimony that the Tenants paid rent to accounting@cricketmgt.com from December 2022 to April 2023 to be credible. I find the Tenants did not submit any screenshots showing the date and amount for any e-transfers sent to that email address.

In addition, I find OL's testimony about an initial contract with Cricket Management or a contractual requirement to pay rent to Cricket Management to be inconsistent with the evidence submitted. I have reviewed the tenancy agreement between the Landlord and the Tenants, which is signed and dated December 16, 2020. I find Cricket Management is not a party to this agreement. I further find that this agreement, which is in the standard Residential Tenancy Branch form without an addendum, does not contain any term referencing Cricket Management or accounting@cricketmgt.com. I find there is no contractual obligation for the Tenants to pay rent to Cricket Management as the Landlord's agent.

I accept the Landlord's testimony that he used Cricket Management's services initially but later switched to receiving rent directly from the Tenants via e-transfer. I find this version of events is consistent with the Tenants' acknowledgement that they had at some point e-transferred rent to the Landlord directly, prior to making these applications. I find the Tenants have the Landlord's e-transfer information and could have continued e-transferring rent to the Landlord, but deliberately chose not to do so.

I do not find the reason given by OL for reverting payment back to Cricket Management to be credible or persuasive. In my view, the simplest way to "protect" the Tenants would be to pay rent to the Landlord as normal and retain proof of that payment. I find that contrary to OL's claim, sending payment to a third party instead of the Landlord directly is what opens up the Tenants to a claim that the Landlord did not receive the rent, which defeats the very purpose of what OL claims the Tenants are trying to achieve.

Furthermore, I find there is no evidence that the Landlord had directed the Tenants to pay rent to Cricket Management as of December 2022. I find there is no evidence to suggest that the Tenants had communicated to the Landlord about reverting payment to Cricket Management prior to the Tenants making these applications. I conclude there is insufficient evidence of any reasonable basis for the Tenants to believe that they could discharge their obligation to pay rent to the Landlord by sending payments to Cricket Management as of December 2022.

Both the Landlord and LW testified under oath that the Landlord has not received any rent from the Tenants since December 2022.

Based on the foregoing, I prefer the evidence of the Landlord and LW, and I conclude that the Tenants did not pay rent to the Landlord from December 2022 to May 2023.

I note the Tenants' position is that they paid the rent, and therefore did not argue any legal reason under the Act to withhold payment of rent to the Landlord. I note that under section 51(1.1) of the Act, a tenant who receives a two month notice to end tenancy for landlord's use may withhold the last month's rent. However, I note I would not find this provision to apply in the circumstances in any event, because the Tenants had disputed the Two Month Notice and therefore December 2022 was no longer the last month of the tenancy.

In sum, I find the Tenants did not pay rent as stated in the 10 Day Notice and did not have a legal reason under the Act to withhold payment of rent to the Landlord.

I conclude the Landlord has established the grounds for ending this tenancy under the 10 Day Notice. Accordingly, the Tenants' claim to cancel the 10 Day Notice is dismissed without leave to re-apply.

2. Is the Landlord entitled to an Order of Possession?

Section 55(1) of the Act states that 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:

- the landlord's notice to end tenancy complies with section 52 of the Act in form and content; and
- during the dispute resolution proceeding, the director dismisses the tenant's application or upholds the landlord's notice.

Having found the 10 Day Notice to comply with requirements of section 52 of the Act and having dismissed the Tenants' claim to cancel the 10 Day Notice, I find the Landlord is entitled to an Order of Possession under section 55(1) of the Act.

Pursuant to section 55(1) of the Act, I grant an Order of Possession to the Landlord effective two (2) days after service of the Order upon the Tenants.

3. Is the Landlord entitled to compensation for unpaid rent?

Pursuant to section 55(1.1) of the Act, the director must grant an order requiring the payment of unpaid rent when the notice to end tenancy complies with section 52 of the Act and the tenant's application to dispute the notice is dismissed.

According to Residential Tenancy Policy Guideline 3. Claims for Rent and Damages for Loss of Rent, 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.

I find it is not disputed that the Tenants continue to occupy the rental unit. Pursuant to section 68(2)(a) of the Act, I order that this tenancy is ended the date of this hearing, or May 1, 2023.

I am satisfied that as of the date of the hearing, the Tenants owe unpaid rent of \$9,000.00 (\$1,500.00 × 6 months) to the Landlord for the period from December 1, 2022 to May 1, 2023. I do not pro-rate rent for the month of May 2023 as I find rent is paid on a monthly, not daily, basis, and is due on the first day of the month.

Pursuant to section 55(1.1) of the Act, I order the Tenants to pay the Landlord the sum of \$9,000.00.

4. Are the parties entitled to reimbursement of their filing fees?

The filing fee is a discretionary award that is generally granted to an applicant who has been successful in their application. Since the Tenants have not been successful disputing the 10 Day Notice and it was not necessary to consider the Two Month Notice,

I decline to order reimbursement of the Tenants' filing fees under section 72(1) of the Act.

The Landlord has been successful in establishing that the 10 Day Notice should be upheld and that unpaid rent is owing. As the Landlord's own application sought relief similar to those that have been granted to the Landlord on the basis of the application to cancel the 10 Day Notice, I allow the Landlord's claim for reimbursement of his filing fee under section 72(1) of the Act.

Pursuant to section 72(2)(b) of the Act, I authorize the Landlord to retain the Tenants' \$750.00 security deposit in partial satisfaction of the total amount awarded to the Landlord in this decision.

The Monetary Order granted to the Landlord for the balance is calculated as follows:

Item	Amount
Unpaid Rent from December 1, 2022 to May 1, 2023 (\$1,500.00 × 6 months)	\$9,000.00
Filing Fee	\$100.00
Less Security Deposit	- \$750.00
Total Monetary Order for Landlord	\$8,350.00

Conclusion

The Landlord is successful in proving the grounds for ending the tenancy under the 10 Day Notice and establishing that the Tenants owe \$9,000.00 in unpaid rent. The Landlord's claim to recover his filing fee is granted.

The Tenants' application to cancel the 10 Day Notice is dismissed in its entirety without leave to re-apply. The Tenants' application to cancel the Two Month Notice is dismissed without leave to re-apply on the basis that it is moot.

Pursuant to section 55(1) of the Act, I grant an Order of Possession to the Landlord effective **two (2) days** after service upon the Tenants. 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 Supreme Court of British Columbia and enforced as an Order of that Court.

The Landlord is authorized to retain the Tenants' **\$750.00** security deposit in partial satisfaction of the total amount awarded to the Landlord in this decision.

Pursuant to sections 55(1.1) and 72(1) of the Act, I grant the Landlord a Monetary Order in the amount of **\$8,350.00** for the balance. 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 of British Columbia 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: May 03, 2023

Residential Tenancy Branch