



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes MT, DRI, CNR, MNSD, OPT, LAT, RR, FF

### Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- more time to make an application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 66;
- cancellation of the landlord's 10 Day Notice pursuant to section 46;
- a determination regarding his dispute of an additional rent increase by the landlord pursuant to section 43;
- authorization to obtain a return of all or a portion of his security deposit pursuant to section 38;
- authorization to change the locks to the rental unit pursuant to section 70;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an Order of Possession of the rental unit pursuant to section 54; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that he received the landlord's 10 Day Notice on June 10, 2012. The landlord confirmed that he received a copy of the tenant's dispute resolution hearing package sent to him by the tenant by registered mail on July 5, 2012. I am satisfied that the above documents and the parties' written evidence has been served to one another.

At the hearing, the parties confirmed that a decision was issued by Dispute Resolution Officer (DRO) M. Gelfand on June 15, 2012 with respect to the tenant's claim for a monetary award for reimbursement of his hydro payments during this tenancy (RTB File # 123456).

The landlord said that he has not paid the \$250.00 monetary Order awarded to the tenant in DRO Gelfand's decision. He confirmed that he was not asking for anything with respect to the tenant's current application as he intended to apply for dispute

resolution himself in the near future. Although he disputed all of the tenant's application and maintained that the correct monthly rent as of October 1, 2011 should be set at \$900.00, he reiterated that he was not seeking anything specific at this hearing.

At the commencement of the hearing, I noted that there was no need for an extension of time to be granted to the tenant to dispute the landlord's 10 Day Notice as the Residential Tenancy Branch (the RTB) received his application to cancel that Notice within the five-day time period for doing so.

#### Issues(s) to be Decided

Should the tenant's application to cancel the landlord's 10 Day Notice be allowed? What is the correct monthly rent for this tenancy? Is the tenant entitled to any form of monetary award arising out of this tenancy? Is the tenant entitled to a monetary award for the return of any portion of his security deposit? Should any other orders be issued in response to the tenant's application? Is the tenant entitled to recover his filing fee from the landlord?

#### Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs on the tenant's DVD, court documents, petitions to the court, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

This tenancy commenced as one-year fixed term tenancy on April 1, 2011. According to the terms of the Residential Tenancy Agreement (the Agreement) entered into evidence by the tenant, monthly rent for a 12-month fixed term was set at \$800.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$400.00 security deposit paid on February 26, 2011.

The parties agreed that they signed an Addendum to the Agreement on February 26, 2011. The first provision of this Addendum reads as follows:

- 1. As agreed the rental shall increase to the regular \$900 per month on October 1<sup>st</sup> 2011.*

At the end of this Addendum, there was a statement that "The parties hereby indicate by their signatures below that they have read and agree with the Addendum and agree it constitutes part of the Agreement dated 26<sup>th</sup> February 2011." The tenant testified that there was an oral agreement between the parties that the landlord would only charge the additional \$100.00 monthly fee by October 1, 2011 if the tenant did not take proper care of the grounds and look after the property adequately. The tenant said that the

landlord did not request this additional fee until it was identified in the landlord's 10 Day Notice as unpaid rent. The landlord's agent denied that there was an oral agreement, noting that the provisions of the Addendum identified \$900.00 as the regular monthly rent as of October 1, 2011. The landlord and his male agent noted that the tenant had repeatedly asked for consideration of his financial circumstances which resulted in the landlord's willingness to accept less from the tenant for the initial six months of this fixed term tenancy. The landlord's male agent testified that he and the landlord took no action to enforce the additional \$100.00 in monthly rent that the landlord considered due as of October 1, 2011 until the tenant stopped paying his monthly rent and advised that he no longer considered the landlord to be the owner of this property. The tenant's concerns about the ownership of the property were raised in the context of a dispute between the landlord and a company that held the second mortgage on this property. The landlord and his male agent testified that the tenant was advised repeatedly that the landlord's dispute with the holder of the second mortgage on this property had no effect on the tenant's responsibility to pay monthly rent to the landlord as per the terms of the original Agreement. The landlord and the landlord's agent testified that the landlord remains the registered title holder for this property and the tenant's landlord for the purposes of the Act.

The tenant testified that he had been advised that the property was in the process of foreclosure procedures by the lawyer acting for the second mortgagee. He testified that as of April 15, 2012, the landlord was no longer the owner of this property, having lost ownership of the property as a result of his failure to pay mortgage payments to the second mortgagee. The tenant testified that he is entitled to a monetary award equivalent to one-half month's rent for his payment of all of his rent to the landlord for April 2012, when the landlord did not in fact own the property for the last half of that month.

As support for his position, the tenant submitted into written evidence a copy of a June 28, 2012 letter to him from the lawyer representing the second mortgagee. Although the landlord had received both pages of this letter, the RTB only received the first page of this letter. The tenant agreed to send the second page of this letter to the RTB by fax by 4:00 p.m. on the day following this hearing. As the RTB did not receive the second page of this letter by that time and date, I have proceeded without this evidence. The lawyer for the second mortgagee advised the tenant that he was acting for CHI Ltd. the holder of the second mortgage on this rental property. In his letter, he noted the following:

*...Our client also holds a registered Assignment of Rents charge, which applied to all rent monies which are being, or should be, paid by tenant(s) residing in, or operating, in*

*the mortgaged property. We enclose for your reference a copy of the Assignment of Rents portion of the Mortgage as registered against the tile to the property.*

*Default has occurred under the mortgage held by CHI, and the Assignment of Rents has therefore become enforceable.*

*We hereby give you notice that CHI now exercises its rights under the Assignment of Rents as enclosed with this letter, and appoints BM as its agent to collect the rents. What this means to you is that from this date on, until further notice from the writer, in writing, you must pay the full amount of the rent due from you on account of your tenancy in the above-noted premises, directly to our offices as follows:...*

The only enclosure entered into written evidence by the tenant was a copy of Page 4 of Form E of the Schedule of the *Land Title Act* outlining payment provisions when a mortgagee has full power and authority to collect rents from a property. Written evidence was also entered with respect to the second mortgagee's April 11, 2012 Petition to the Supreme Court of B.C. and various mortgage documents between the second mortgagee and the landlord.

#### Analysis- Tenant's Application to Cancel the 10 Day Notice

The tenant testified that he disagreed with the \$2,600.00 identified as owing in the landlord's 10 Day Notice. The landlord said that the \$2,600.00 identified as owing in that Notice included \$800.00 for May 2012, \$800.00 for June 2012, and 10 months of underpayment of rent because the tenant had failed to honour his commitment to increase his rent to \$900.00 as of October 1, 2011.

Although the matter of the underpayment of rent was clearly at issue, the tenant explained that he did not pay rent for May and June 2012 because of his concern that the landlord had lost ownership of the property through foreclosure. However, the tenant testified that he did not receive any written request from the lawyer representing the second mortgagee to assign rents to him until he was handed that lawyer's June 28, 2012 letter. Whether or not the foreclosure proceedings have been finalized and the lawyer for the holder of the second mortgage has obtained a court order enabling the assignment of rents, the tenant still was responsible for paying rent owed for May and June 2012 within 10 days of receiving the 10 Day Notice. By his own admission, he did not do so within 10 days of receiving that Notice. Although he testified that he paid the outstanding rent for May and June 2012 on July 4 or 5, 2012 by cash to the lawyer representing the second mortgagee, he did not enter into written evidence a copy of any receipt issued for that cash payment. He said that he would have to return to that lawyer to obtain a receipt. He also said that his July rent remains outstanding.

I find that there is undisputed evidence that the tenant did not pay his May and June 2012 rent on time or within 10 days of receiving the 10 Day Notice. Based on his failure to enter into written evidence a copy of a written receipt for his cash payment to the lawyer representing the second mortgagee, the only evidence that the tenant has paid any rent since April 2012 is the tenant's oral testimony that he paid his May and June 2012 rent on July 4 or 5, 2012. I would expect that a cash payment to a lawyer's office representing a second mortgagee would have required the issuance of a receipt and that the tenant would recognize that this was important written evidence that would affect his application. His failure to provide this written evidence when he provided other less crucial evidence calls into question whether this payment has actually occurred. Nevertheless, any payment that was made on July 4 or 5, 2012 was well past the 10 day time period following his receipt of the 10 Day Notice. Consequently, I dismiss the tenant's application to cancel the 10 Day Notice, with the effect that this tenancy ended on the corrected effective date of the 10 Day Notice. In this case, this required the tenant to vacate the premises by June 23, 2012. As the landlord made no application or oral request for an Order of Possession, none has been issued.

#### Analysis – Disputed Rent Increase

Although I have dismissed the tenant's application to cancel the 10 Day Notice, a number of monetary and non-monetary issues remain in dispute.

I have carefully considered both the written and sworn oral testimony with respect to the tenant's application that the landlord has not followed the requirements of the *Act* in attempting to claim an unauthorized rent increase of \$100.00 per month as of October 1, 2011. On this point, there is conflicting oral and written evidence. The Agreement identifies 12 monthly payments of \$800.00 for this one-year fixed term tenancy. This is clearly at odds with the first provision in the signed Addendum to that Agreement establishing that the parties agreed that the "regular" rent of \$900.00 would be established as of October 1, 2011. I give little weight to the tenant's assertion that there was an oral agreement that this higher rent would only be required if he did not look after the grounds of the rental proper adequately. No such mention of this provision is included in the Addendum and the best evidence of issues in dispute is the written terms of their contract, in this case the Addendum to the Agreement. However, there is no dispute that the landlord did not take any action to try to enforce this provision of the Addendum and only requested the additional \$100.00 payment when the landlord's agent commenced taking action "to protect" the landlord's interests. This action was in response to the tenant's questions about the foreclosure and other interpersonal issues that were arising between the tenant and the landlord's agents.

Under these circumstances, I find on a balance of probabilities that the correct monthly rent during this entire tenancy to date is \$800.00. I find that the wording of the Agreement and the Addendum to that Agreement is confusing and inconsistent. While one document establishes \$800.00 as the monthly rent for the full 12-month term of the initial fixed term tenancy, the other refers to the regular rent as \$900.00 which was to take effect as of October 1, 2011. My decision on this issue relies in part on the legal principle of “*contra proferentem*”, a rule courts use when interpreting contracts. In plain English, this term means that if there is an ambiguous clause in a contract it will be interpreted against the party responsible for drafting the clause. My decision also rests on the inaction of the landlord and the landlord’s agents in taking action to enforce the terms of the first provision of the Agreement. By waiting until many months after October 1, 2011 and after the expiration of the initial fixed term tenancy agreement, I find that the landlord has acquiesced in accepting that the \$800.00 monthly rent paid by the tenant through April 2012 represented the correct monthly rent owed in accordance with the Agreement.

As of April 1, 2012 and in accordance with the terms of the Agreement, this tenancy converted to a periodic tenancy. The landlord has not commenced the process for requesting either the standard allowable annual increase in monthly rent or any additional rent beyond the standard allowable increase. As such, I find that the correct monthly rent from the start of this tenancy is \$800.00.

#### Analysis – Tenant's Application for a Monetary Award

Although the tenant identified \$3,102.46 as the amount of the monetary Order he was seeking in this application, he did not complete the portion of the application for dispute resolution that would indicate that he was seeking a monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement. He did note that he was seeking a reduction in rent for repairs, services or facilities agreed upon but not provided. He also provided an itemized breakdown of his monetary request which included the following items:

<b>Item</b>	<b>Amount</b>
Hydro Owed to Tenant from January 4, 2012 to April 13, 2012	\$1,920.04
Reduction in Rent for Hydro used (14 months @ \$50.00 = \$700.00)	700.00
Lawnmower Repairs	300.00
Filing Fee	50.00
Registered Mail	52.42
Photocopy Charge	40.00

Gas	40.00
<b>Total of Above Items</b>	<b>\$3,102.46</b>

In addition, the tenant identified items in his written evidence and at the hearing (e.g., Rebate of ½ of April 2012 Rent) where he was attempting to obtain additional compensation from the landlord.

The tenant has not properly submitted his claim for a monetary award. However, I am satisfied that his inclusion of the items listed in the table above in the Details of the Dispute section of the application for dispute resolution and his stated request in that application that he was seeking a monetary award of \$3,102.46 alerted the landlord that the tenant was seeking a sizeable monetary award. It also gave the landlord a proper opportunity to respond to the tenant's application. For that reason, I allow the tenant's application to seek a monetary award.

As noted at the hearing, the tenant's application for a monetary award for the recovery of his hydro costs is a reiteration of the same application considered by DRO Gelfand on June 15, 2012. On that occasion, the tenant properly identified that he was seeking a monetary award for losses arising out of his tenancy. DRO Gelfand described his application as seeking "reimbursement of a recent Hydro bill for \$1920.04." This is the same amount identified in the Details of the Dispute in this application. I find that this matter was clearly the subject of DRO Gelfand's decision. In her decision, DRO Gelfand allowed the tenant a monetary award of \$200.00 for the landlord's part of the electrical consumption on the property. As this matter and the tenant's claim for reimbursement of \$700.00 for reduction in rent for hydro used by the landlord have already been considered in a final and binding decision of another DRO, I find that the legal principle of *res judicata* prevents me from considering this portion of the tenant's application. This legal principle means that the the matter has already been conclusively decided and cannot be decided again.

Turning to the tenant's claim for reimbursement of lawnmower repairs, I find that the tenant has failed to demonstrate that these repairs were authorized by the landlord or his agents. The landlord and his agents submitted oral and written evidence that these repairs were neither authorized nor even effective as the lawnmower remains malfunctioning. The tenant confirmed that he had no written authorization from the landlord or his agents to conduct these repairs and to bill the landlord accordingly. These repairs cannot be considered emergency repairs under the *Act*. The only result from a failure to repair the landlord's lawnmower would be that the grass would continue to grow uncut. I dismiss this portion of the tenant's claim without leave to reapply.

I dismiss the remainder of the tenant's application for a monetary award outlined in the above-noted table without leave to reapply. His applications for recovery of mailing, photocopying and gas costs are not recoverable under the *Act*.

Analysis – Other Items

As the tenant has not yet vacated the rental unit, I dismiss his application to recover his security deposit with leave to reapply after he yields vacant possession of the rental unit.

I dismiss the tenant's application to recover his filing fee as he has been for the most part unsuccessful in his application for dispute resolution. My decision to dismiss the tenant's application to cancel the 10 Day Notice renders moot the remainder of the tenant's applications for the issuance of orders against the landlord.

Conclusion

I dismiss the tenant's application to cancel the landlord's 10 Day Notice without leave to reapply.

I order that the correct monthly rent during this tenancy to date is set at \$800.00.

I dismiss the tenant's applications for a monetary award and for authorization to reduce rent for repairs, services or facilities agreed upon but not provided without leave to reapply. I dismiss the tenant's application for an Order of Possession and to be granted authorization to change the locks to the rental unit without leave to reapply. I dismiss the tenant's application to recover his filing fee without leave to reapply.

I dismiss the tenant's application to recover his security deposit with leave to reapply.

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: July 18, 2012

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Residential Tenancy Branch