

Decision

Dispute Codes: OPR, MNR, MNSD, FF

Introduction

This is the Landlords' application for an Order of Possession; a Monetary Order for unpaid rent and late fees; to apply the security deposit towards their monetary award; and to recover the cost of the filing fee from the Tenant.

Both parties appeared at the Hearing and gave affirmed evidence.

Issue(s) to be Decided

Are the Landlords entitled to an Order of Possession and a Monetary Order for unpaid rent and late fees, pursuant to sections 55 and 67 of the *Residential Tenancy Act* (the "Act")?

Background and Evidence

The Landlord XL gave the following testimony:

- She personally served the Tenant with the 10 Day Notice to End Tenancy for Unpaid Rent at the rental unit on December 21, 2009.
- She personally served the Tenant with the Application for Dispute Resolution and hearing package at the rental unit on January 6, 2010.
- There is a written tenancy agreement. The tenancy started on March 1, 1999. The monthly rent is currently \$660.96, due on the first day of the month. The Tenant paid a security deposit to the Landlord in the amount of \$275.00 on February 18, 1999.

- The Tenant paid the Landlord \$960.00 towards unpaid rent on January 27, 2010. The Landlord provided the Tenant with a receipt for the payment, but did not explain to the Tenant that she was not reinstating the tenancy.
- The Tenant has been repeatedly late in paying rent.

The Tenant gave the following testimony:

- The Tenant admitted being behind in her rent, but did not understand how the Landlords arrived at the calculation for unpaid rent.

Analysis

There are a number of ways a landlord can seek to end a tenancy. In this Application for Dispute Resolution, the Landlords seek to end the tenancy based on a Notice to End Tenancy for unpaid rent in the amount of \$1,951.70 due on December 20, 2009.

The *Residential Tenancy Act* (the “Act”) defines rent, as follows:

“rent” means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

- (a) a security deposit;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) [*regulations in relation to fees*];

(my emphasis)

Fees prescribed under Section 97(2)(k) of the Act include administration fees for return of a tenant’s cheque (NSF fees) and fees for late payment of rent. Therefore, I find these fees are not included in the definition of “rent” and cannot be included in a calculation of unpaid rent.

The Landlords provided a document in evidence, indicating rent payments made by the Tenant from September 1, 2006 to January 1, 2010. An excerpt of the document indicates payment and charges as follows:

Date dd-mm-yyyy	Description	Debit	Credit	Balance
02-11-2009	Rent – Deposit Batch #376 – PAP		\$1,000.00	\$1,220.74
01-11-2009	Assistant Manager for November 2009		\$295.00	\$2,220.74
01-11-2009	Rent for November 2009	\$660.96		\$2,515.74
01-10-2009	NSF item – late charge – 01-10-2009	\$45.00		\$1,854.78
01-10-2009	NSF item – returned charge – 01-10-2009	\$45.00		\$1,809.78
01-10-2009	NSF item – PAP – 01-10-2009	\$800.00		\$1,764.78
08-10-2009	NSF item – late charge – 08-10-2009	\$35.00		\$964.78
08-10-2009	NSF item – returned charge – 08-10-2009	\$35.00		\$929.78
08-10-2009	NSF item – cheque – 08-10-2009	\$300.00		\$894.78
03-10-2009	Repayment of returned item – deposit batch #370		\$300.00	\$594.78

Based on this entire document, for the period of September, 2006 to December, 2009, I calculate the Tenant has paid a total of \$1,095.00 in late fees and NSF charges. These charges range as follows:

- from \$20.00 per item (for a total of \$40.00), to
- \$30.00 per item (for a total of \$60.00), to
- \$35.00 per item (for a total of \$70.00), to
- \$45.00 per item (for a total of \$90.00).

These different charges are applied indiscriminately and with no explanation. The tenancy agreement, a copy of which was entered in evidence, allows for late fees at the rate of 2% of one month's rent or \$35.00, whichever is greater. It also allows for NSF charges of 2% of one month's rent or \$35.00, whichever is greater.

The Section 7 of the *Residential Tenancy Regulation* states:

Non-refundable fees charged by landlord

7 (1) A landlord may charge any of the following non-refundable fees:

- (a) direct cost of replacing keys or other access devices;
- (b) direct cost of additional keys or other access devices requested by the tenant;
- (c) a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
- (d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
- (e) subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;
- (f) a move-in or move-out fee charged by a strata corporation to the landlord;
- (g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

(my emphasis)

I further find that the provision for payment of late fees and NSF fees in the tenancy agreement does not comply with the provisions of the *Residential Tenancy Regulation* and therefore the late fees and NSF charges against the Tenant are unenforceable.

The Landlords kept a running balance of outstanding arrears, but did not supply documentary evidence with respect to those calculations before September 1, 2006. This tenancy began in 1999, and there is no evidence with respect to how much of the arrears prior to September, 2006 were for late fees and NSF fees.

The Landlords have calculated unpaid rent to include late fees and NSF charges. However, having found that the NSF and late fees charged by the Landlords are:

- a) not valid, and
- b) not rent,

I have calculated that at least \$1,095.00 of the amount claimed by the Landlords is not “rent” as defined by the Act. Therefore, I find that the Landlords have not provided sufficient evidence to prove the amount of rent that was due and owing on December 20, 2009.

The Notice to End Tenancy discloses \$1,951.70 was due in unpaid rent on December 20, 2009. At least \$1,095.00 of that sum was not for rent, which leaves a maximum balance owing of \$956.70. The Tenant paid the Landlord \$960.00 on January 27, 2010, and I find that the Landlord reinstated the tenancy on that day when she accepted the Tenant’s payment.

Therefore, I do not find that the Tenant owes the Landlords rent and the Landlords’ application is dismissed in its entirety.

Conclusion

The Landlords’ application is dismissed in its entirety. The tenancy remains in full force and effect. The Tenant does not owe the Landlord any rent as at December, 2009.

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*.

February 12, 2010

Date of Decision
