



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, FF

Introduction

This hearing was convened by way of conference call in response to an application made by the landlord for an Order of Possession for unpaid rent or utilities, for a monetary order for unpaid rent or utilities, for an order permitting the landlord to keep all or part of the pet damage deposit or security deposit, and to recover the filing fee from the tenant for the cost of this application.

The landlord attended the conference call hearing, gave affirmed testimony and provided evidence in advance of the hearing to the Residential Tenancy Branch and to the tenant. However, despite being served with the Landlord's Application for Dispute Resolution and notice of hearing documents in person on February 28, 2012, the tenant did not attend. The landlord provided affirmed testimony that the landlord personally handed the documents to the tenant on that date, and I find that the tenant has been served in accordance with the Residential Tenancy Branch.

All evidence and testimony provided have been reviewed and are considered in this Decision.

Issue(s) to be Decided

- Is the landlord entitled to an Order of Possession for unpaid rent or utilities?
- Is the landlord entitled to a monetary order for unpaid rent or utilities?
- Is the landlord entitled to keep all or part of the pet damage deposit or security deposit in full or partial satisfaction of the claim?

Background and Evidence

This fixed term tenancy began on October 15, 2010 and expires on October 13, 2013, and the tenant still resides in the rental unit. Rent in the amount of \$2,250.00 per month is payable in advance on the 1st day of each month. On October 15, 2010 the landlord collected a security deposit from the tenant in the amount of \$1,125.00 and no pet

damage deposit was collected. A copy of the tenancy agreement was provided as evidence for this hearing.

The landlord testified that the tenant was very regular paying rent until August, 2011 when the tenant's rent cheque was returned by the financial institution for insufficient funds. The landlord provided a document entitled "Statement of Account" with respect to rental payments expected and paid. The document shows, and the landlord testified that the tenant made 2 payments in September, 2011 to the landlord totalling \$4,600.00 which included an N.S.F. fee of \$100.00. That payment covered the rent for August and September, 2011 and the N.S.F. fee. The tenant only paid \$1,200.00 for October on the 28th of the month, and in November, 2011 the tenant made 2 payments totalling \$2,300.00. December's rent cheque was also returned for insufficient funds.

On January 15, 2012 the landlord personally served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities and provided a copy of the 2-page form for this hearing. The notice is dated January 15, 2012 and contains an expected date of vacancy of January 30, 2012. The notice states that the tenant failed to pay rent in the amount of \$4,500.00 that was due on December 1, 2011.

Since the issuance of the notice to end tenancy, the tenant made several payments to the landlord. January's rent was paid in two payments of \$1,250.00 and \$1,000.00 on the 27th and 30th of the month, respectively. On February 6, 2012 the tenant deposited \$300.00 into the landlord's account and on February 9, 2012 the tenant endorsed a third party cheque in the amount of \$732.81 and gave that to the landlord. The document shows that including rent for the month of March, 2012 the tenant is in arrears of rent the amount of \$6,717.29. However, the tenant also paid \$600.00 on February 27, 2012 and \$1,100.00 on March 12, 2012. The landlord claims a monetary order for \$5,017.19, and an Order of Possession.

Analysis

Firstly, with respect to the landlord's application for an Order of Possession, I refer to Residential Tenancy Policy Guideline 11 "Amendment and Withdrawal of Notices," and to Residential Tenancy Branch Fact Sheet RTB 124. Both documents provide parties with information about reinstating tenancies and copies are attached to this Decision for the benefit of both parties. The general rule is that if a landlord accepts rent after the issuance of the notice to end tenancy, the landlord must make it clear to the tenant that the money is being accepted for use and occupancy only and does not stand to reinstate the tenancy. If the landlord cannot prove that the acceptance of rent money does not act as a waiver of the notice, the landlord cannot be successful in obtaining an

Order of Possession. In this case, the tenant made several payments to the landlord after the issuance of the notice to end tenancy, and the landlord did not issue a receipt or any other documentation that stated that the money was being accepted for use and occupancy only and that the intent was not to reinstate the tenancy, and therefore, I find that the landlord has reinstated the tenancy. In order to prevent a reinstatement in the future, the landlord must issue a receipt for payments made after the issuance of a notice to end tenancy, and that receipt should clearly state, "For Use and Occupancy Only." The landlord is at liberty to issue another 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. If the tenant does not pay the rent within 5 days or dispute the notice, the tenant will be conclusively presumed to have accepted that the tenancy ends on the effective date of the notice. Alternatively, the landlord may issue a 1 Month Notice to End Tenancy for repeated late rental payments.

With respect to the unpaid rent, the regulations state that a landlord may charge a fee for late rent payments or for cheques returned for insufficient funds if a clause to that effect is contained in the tenancy agreement, however, that amount may not exceed \$25.00 in addition to any fees the landlord's financial institution charges the landlord. In this case, the tenancy agreement clearly states that a fee of \$25.00 is payable for late fees or N.S.F. fees. The landlord testified that the landlord's financial institution does not charge a fee for returned cheques, and therefore, I find that the landlord has overcharged the tenant by \$75.00 for late fees for the month of August, 2011. I further find that the tenant is in arrears of rent the sum of \$5,117.19 which includes late fees for the months of August, 2011 through March, 2012 and the landlord is entitled to keep the security deposit in partial satisfaction of that claim and a monetary order for the balance due of \$3,992.19. The following represents the payments expected, received and late payments that apply to this tenancy:

MONTH	DESCRIPTION	DEBIT (RENT DUE)	CREDIT (RENT PAID)	BALANCE DUE
Aug, 2011	Late Pmt Fee	\$25.00		\$2,275.00
Sept, 2011	Rent Due	\$2,250.00		\$4,525.00
Sep 9	Payment		\$1,700.00	\$2,825.00
Sep 15	Payment		\$2,900.00	\$(75.00)
Sep, 2011	Late Pmt Fee	\$25.00		\$(50.00)
Oct, 2011	Rent Due	\$2,250.00		\$2,200.00

Oct 28	Payment		\$1,200.00	\$1,000.00
Oct, 2011	Late Pmt Fee	\$25.00		\$1,025.00
Nov, 2011	Rent Due	\$2,250.00		\$3,275.00
Nov. 4	Payment		\$1,800.00	\$1,475.00
Nov 8	Payment		\$500.00	\$975.00
Nov, 2011	Late Pmt Fee	\$25.00		\$1,000.00
Dec, 2011	Rent Due	\$2,250.00		\$3,250.00
Dec, 2011	Payment		\$2,250.00	\$1,000.00
Dec, 2011	Cheque Ret'd	\$2,250.00		\$3,250.00
Dec, 2011	Late Pmt Fee	\$25.00		\$3,275.00
Jan, 2012	Rent Due	\$2,250.00		\$5,525.00
Jan 27	Payment		\$1,250.00	\$4,275.00
Jan 30	Payment		\$1,000.00	\$3,275.00
Jan, 2012	Late Pmt Fee	\$25.00		\$3,300.00
Feb, 2012	Rent Due	\$2,250.00		\$5,550.00
Feb 6	Payment		\$300.00	\$5,250.00
Feb 9	Payment		\$732.81	\$4,517.19
Feb 27	Payment		\$600.00	\$3,917.19
Feb, 2012	Late Pmt Fee	\$25.00		\$3,942.19
Mar, 2012	Rent Due	\$2,250.00		\$6,192.19
Mar 12	Payment		\$1,100.00	\$5,092.19
Mar, 2012	Late Pmt Fee	\$25.00		\$5,117.19

TOTALS		\$20,450.00	\$15,332.81	
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Since the landlord has been partially successful with the application, the landlord is also entitled to recovery of the \$50.00 filing fee for the cost of this application.

Conclusion

For the reasons set out above, the landlord's application for an Order of Possession is hereby dismissed.

I further order the landlord to keep the security deposit in the amount of \$1,125.00 and I grant the landlord a monetary order for the balance due of \$3,992.19.

This order is final and binding on the parties and may be enforced.

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: March 15, 2012.

Residential Tenancy Branch