



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CAPREIT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, FF

Introduction

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

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 1112 in order to enable the tenant to connect with this teleconference hearing scheduled for 1100. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The agent testified that the landlord served the tenant with the dispute resolution package on 23 February 2015 by registered mail. The landlord provided me with a Canada Post tracking number that showed the same. On the basis of this evidence, I am satisfied that the tenant was deemed served with dispute resolution package pursuant to sections 89 and 90 of the Act.

The agent testified that the landlord served the tenant with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) on 6 February 2015. On the basis of this evidence, I am satisfied that the tenant was deemed served with 10 Day Notice pursuant to sections 88 and 90 of the Act.

Preliminary Issue – Amendment to Landlord's Application

Paragraph 64(3)(c) allows me to amend an application for dispute resolution.

The agent asked that I exercise my discretion to amend the landlord's application to include the correct legal name of the landlord. The agent had inadvertently made a typographical error in the landlord's application by omitting the last letter of the landlord's name. I granted this amendment as there is no undue prejudice to the tenant.

At the hearing, the agent asked to amend this application to include unpaid rent for March as well as \$25.00 fees for each of late rent and a cheque returned by the bank. As the tenant reasonably ought to have known that the landlord would claim these amounts if the tenant did not pay March's rent, I have allowed the amendment as there is no undue prejudice to the tenant.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent? Is the landlord entitled to a monetary award for unpaid rent? ? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

On 16 May 2014, the tenant and landlord signed a tenancy agreement. In June 2014, the tenant began occupying the rental unit. Monthly rent of \$880.00 is due on the first. The agent testified that the landlord continues to hold the tenant's security deposit in the amount of \$440.00, which was collected 16 May 2014.

The landlord provided me with a copy of the tenancy agreement. Clause 10 pertains to the late fee and returned cheque fee:

ARREARS: Late payment, returned or non-sufficient funds (N.S.F.) cheques are subject to an administrative fee of not more than \$25.00 each, plus the amount of any service fees charged by a financial institution to the Landlord...

On 6 February 2015, the landlord issued the 10 Day Notice to the tenant. The 10 Day Notice was dated 6 February 2015 and set out an effective date of 19 February 2015. The 10 Day Notice set out that the tenant failed to pay \$880.00 in rent that was due on 1 February 2015.

The agent testified that the landlord has not received any payments from the tenant since January 2015. The agent testified that the tenant has not submitted any receipts for emergency repairs to the landlord. The agent testified that there are no previous orders of the Residential Tenancy Branch in relation to this tenancy.

The landlord claims for \$1,910.00:

Item	Amount
Unpaid February Rent	\$880.00
Unpaid March Rent	880.00
Late Fees (Feb & March x \$25.00)	50.00
Returned Cheques (Feb & March x 25.00)	50.00
Filing Fee	50.00
Total Monetary Order Sought	\$1,910.00

Analysis

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

The tenant failed to pay the outstanding rent within five days of receiving the 10 Day Notice. The tenant has not made application pursuant to subsection 46(4) of the Act within five days of receiving the 10 Day Notice. In accordance with subsection 46(5) of the Act, the tenant's failure to take either of these actions within five days led to the end of his tenancy on the effective date of the notice. In this case, this required the tenant to vacate the premises by 19 February 2015. As that has not occurred, I find that the landlord is entitled to a two-day order of possession.

The agent has provided sworn and uncontested testimony that the tenant has unpaid rental arrears totaling \$1,760.00. I find that the landlord has proven its entitlement to the rent arrears. The landlord is entitled to a monetary order for the unpaid rent.

Paragraphs 7(1)(c) & (d) of the *Residential Tenancy Regulations* (the Regulations) set out the collection of non-refundable fees in relation to returned cheques and late fees:

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

[emphasis added]

Pursuant to subsection 7(2) of the *Regulations* a late fee charge may only be applied if the tenancy agreement provides for that fee. Subsection 5(1) of the Act prohibits contracting out of the provisions of the Act and Regulations. Any term that attempts to contract out is of no effect.

The tenancy agreement contained this clause:

ARREARS: Late payment, returned or non-sufficient funds (N.S.F.) cheques are subject to an administrative fee of not more than \$25.00 each, plus the amount of any service fees charged by a financial institution to the Landlord...

[emphasis added]

Paragraph 7(1)(d) of the Regulations uses the singular article “an” in relation to the fee. Unlike the tenancy agreement, the provision does not include the word “each”. I find that the use of the singular article “an” in paragraph 7(1)(d) of the Regulations and the exclusion of a word such as “each”, “per”, or “both” that would denote that the fee could be applied in the plural is intentional. I find that paragraph 7(1)(d) of the Regulations permits a charge of up to \$25.00 only for late payment of rent, a returned check, or late payment of rent and a returned cheque.

As the provision attempts to contract out of the Regulations, pursuant to subsection 5(1) of the Act, the provision is of no force and effect. The result is that there is no clause that provides for a late fee as required by subsection 7(2) and no late fee, of any amount, is collectable. Thus, I dismiss the landlord’s monetary claim in respect of the late fees and returned cheque fees.

The agent testified that the landlord continues to hold the tenant’s \$440.00 security deposit, plus interest, paid on 16 May 2014. Over that period, no interest is payable. Although the landlord’s application does not seek to retain the security deposit, using the offsetting provisions of section 72 of the Act, I allow the landlord to retain the security deposit in partial satisfaction of the monetary award.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$50.00 filing fee paid for this application.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$1,370.00 under the following terms:

Item	Amount
Unpaid February Rent	\$880.00
Unpaid March Rent	880.00
Offset Security Deposit	-440.00
Recover Filing Fee	50.00
Total Monetary Order	\$1,370.00

The landlord is provided with these orders in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) fail to comply with these orders, these orders may be filed in the Small Claims Division of the Provincial Court and enforced as orders of that Court.

The landlord is provided with a formal copy of an order of possession. Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: March 24, 2015

Residential Tenancy Branch

