



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, 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, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenant pursuant to section 72.

The landlord's application sets out a claim in the amount of \$3,650.00:

Item	Amount
Unpaid March Rent	\$1,400.00
Unpaid May Rent	1,400.00
Unpaid June Rent	1,400.00
March NSF Fee	50.00
May NSF Fee	50.00
June NSF Fee	50.00
Retain Security Deposit	-700.00
Total Monetary Order Sought	\$3,650.00

The tenant did not attend this hearing, although I waited until 1404 in order to enable the tenant to connect with this teleconference hearing scheduled for 1330. 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 (including 38 pages of evidence) on 11 June 2015 by registered mail. The agent provided me with a Canada Post tracking number that showed the same. The agent testified that the package was sent to the rental unit, where the tenant was still residing. The agent testified that the package was returned to sender as the tenant failed to retrieve the mailing.

Pursuant to *Residential Tenancy Policy Guideline*, “12. Service”, refusal of the party to either accept or pick up the registered mail, does not override the deemed service provision. On this basis, I am satisfied that the tenant was deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act on 16 June 2015, the fifth day after its mailing.

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 10 April 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 the 10 Day Notice pursuant to sections 88 and 90 of the Act.

Preliminary Issue – Order to Send Evidence to RTB

The agent testified that he submitted 38 pages of evidence to the Residential Tenancy Branch by fax. I could not locate a copy of the landlords' evidence.

Rule 3.19 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) provides that I may direct that evidence be submitted after the commencement of a hearing. As the agent testified that he served the tenant with all of this evidence, there is no undue prejudice to the tenant by my acceptance of this evidence after the hearing. I ordered that the landlord resubmit their documentary evidence by fax.

I received the faxed evidence at 1542 on 24 July 2015.

Preliminary Issue – Amendment to Landlord's Application

At the hearing the agent asked to amend the landlord's application to include a rent loss for July and an NSF fee for the returned cheque. The agent testified that the tenant did not vacate the rental unit until on or about 13 July 2015.

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

As the tenant reasonably ought to have known that this amount was owed if she continued to occupy the rental unit, I have allowed the amendment as there is no undue prejudice to the tenant.

This amendment brings the landlord's total claim to \$5,100.00:

Item	Amount
Unpaid March Rent	\$1,400.00
Unpaid May Rent	1,400.00
Unpaid June Rent	1,400.00
March NSF Fee	50.00
May NSF Fee	50.00
June NSF Fee	50.00
Unpaid July Rent	1,400.00
July NSF Fee	50.00
Retain Security Deposit	-700.00
Total Monetary Order Sought	\$5,100.00

Pursuant to paragraph 8(b) of the *Residential Tenancy Regulation* (the Regulations), an application for a monetary order in excess of \$5,000.00 requires payment of a \$100.00 fee. The landlord has paid a fee of \$50.00. I asked the agent if the landlord would prefer to pay the enhanced fee or cap her application at \$5,000.00. The agent indicated that the landlord would abandon her application in excess of \$5,000.00.

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 and losses arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? 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.

This tenancy began 1 November 2014 on a month-to-month basis. The parties entered into a tenancy agreement dated 1 November 2014. I was not provided with a copy of this tenancy agreement. Monthly rent of \$1,400.00 was due on the first. The agent

testified that the landlord continues to hold the tenant's security deposit in the amount of \$700.00, which was collected 17 October 2014.

The landlord provided me with a 10 Day Notice dated 5 March 2015. The 10 Day Notice did not have an effective date. The 10 Day Notice set out that the tenant had failed to pay \$1,400.00 that was due 1 March 2015.

The landlord provided me with a 10 Day Notice dated 7 April 2015. The 10 Day Notice did not have an effective date. The 10 Day Notice set out that the tenant had failed to pay \$1,400.00 that was due 1 March 2015.

The landlord provided me with a 10 Day Notice dated 7 April 2015. The 10 Day Notice set out an effective date of 15 May 2015. The 10 Day Notice set out that the tenant had failed to pay \$1,400.00 that was due 1 March 2015 and \$1,400.00 that was due 1 May 2015.

I was provided with three returned payments summaries:

1. returned 4 March 2015 in the amount of \$1,400.00;
2. returned 5 May 2015 in the amount of \$1,400.00; and
3. returned 3 June 2015 in the amount of \$1,400.00.

The agent testified that the tenancy agreement contained a clause requiring a payment of an administrative fee of not more than \$50.00 plus the cost of the returned cheque.

The agent testified that he was not aware of any reason why the tenant would be permitted to deduct any amount from rent. The agent testified that the landlord has not received any payments from the tenant since the issuance of the last 10 Day Notice. The agent testified that there are no outstanding orders of this Branch in respect of this tenancy.

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 15 May 2015. The agent testified that the tenant vacated the rental unit on or about 13 July 2015. I find that the tenancy ended 13 July 2015 and possession of the rental unit returned to the landlord. Accordingly, I dismiss the landlord's application for an order of possession as the issue is moot: The landlord has possession of the rental unit and is entitled to conduct herself accordingly.

The agent has provided sworn and uncontested testimony that the tenant has unpaid rental arrears totaling \$5,600.00. 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.

Subsection 7(1) of the Regulations provides that a landlord may charge an administration fee of \$25.00 for the return of a rent cheque. Pursuant to subsection 7(2) a late fee charge may only be applied if the tenancy agreement provides for that fee. Section 5 of the Act prohibits landlords and tenants from contracting out of the Act or Regulations: terms which purport to do this are of no effect.

The tenancy agreement provides for a fee of no more than \$50.00. Because the landlord contravened subsection 7 of the Regulations by providing for a fee in excess of \$25.00, the clause of the tenancy agreement that relates to the fee for a returned cheque is of no effect. The result is that there is no clause that provides for a returned cheque as required by subsection 7(2) and fee, of any amount, is collectable. Thus, I dismiss the landlord's monetary claim in respect of the returned cheque fees.

The landlord applied to keep the tenant's security deposit. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

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

The landlord is has possession of the rental unit as the tenant has vacated.

I issue a monetary order in the landlord's favour in the amount of \$4,950.00 under the following terms:

Item	Amount
Unpaid March Rent	\$1,400.00
Unpaid May Rent	1,400.00

Unpaid June Rent	1,400.00
Unpaid July Rent	1,400.00
Retain Security Deposit	-700.00
Recover Filing Fee	50.00
Total Monetary Order Sought	\$4,950.00

The landlord is provided with this order 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 this order, this order may be filed in the Small Claims Division of the Provincial Court 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 subsection 9.1(1) of the Act.

Dated: July 27, 2015

Residential Tenancy Branch

