



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 553 HOLDINGS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, MNSD, MNDC, FF

Introduction

This hearing was scheduled to deal with a landlord's application for an Order of Possession for unpaid rent and a Monetary Order for unpaid rent, late fees and NSF fees; and, authorization to retain the security deposit. The tenant did not appear at the hearing. The landlord provided a registered mail receipt, including tracking number, to show the hearing package was sent to the tenant via registered mail using the rental unit address on February 16, 2017. I was satisfied the tenant was duly notified of this proceeding and I continued to hear from the landlord without the tenant present.

At the outset of the hearing I determined that the tenant has since vacated the rental unit. Further, the landlord has already been provided an Order of Possession pursuant to a hearing that was held on March 7, 2017 to deal with the tenant's application to cancel the 10 Day Notice to End Tenancy for Unpaid Rent (file number provided on cover page of this decision). Accordingly, I do not provide an Order of Possession with this decision.

The landlord requested that the monetary claim be amended to include loss of rent for March 2017 since the tenant told the landlord that she would be holding possession of the unit until the hearing date of March 7, 2017 and the landlord did not regain possession of the unit until that date. In these circumstances I found the landlord's request for amendment to be reasonable and non-prejudicial since the tenant retained the benefit of continued occupation of the unit into March 2017. Therefore, I permitted the amendment.

Issue(s) to be Decided

1. Is the landlord entitled to recovery unpaid and/or loss of rent, late fees and NSF fees as claimed?
2. Is the landlord authorized to retain the tenant's security deposit?

Background and Evidence

The one year fixed term tenancy started on September 15, 2016 and the tenant paid a security deposit of \$410.00. The tenant was required to pay rent of \$820.00 on the first day of every month. Term number 15 of the addendum to the tenancy agreement provides as follows:

15. The charge for late rent is \$25.00. The charge for (NSF) insufficient funds is \$45.00.

The landlord did not receive rent for January 2017 and February 2017. On February 2, 2017 the landlord posted a 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") on the door of the rental unit. The 10 Day Notice indicates rent of \$1,710.00 was outstanding as of February 1, 2017 and an effective date of February 12, 2017.

The landlord explained that \$1,710.00 is calculated as rent for January 2017 and February 2017 plus a \$45.00 NSF for the February 2017 rent payment that did not go through and a \$25.00 late charge for January 2017.

The tenant had filed to dispute the 10 Day Notice and a hearing was scheduled for March 7, 2017. The tenant told the landlord she would remain in possession of the rental unit until the hearing date of March 7, 2017. On March 7, 2017 the tenant did not appear for her hearing and the landlord was provided an Order of Possession. The landlord attended the property on March 7, 2017 and found the tenant's abandoned property outside, the door to the rental unit open, and the keys left on the counter.

The landlord seeks to recover unpaid rent for January 2017 and February 2017 as well as loss of rent for March 2017 since the tenant retained possession of the unit until March 7, 2017. The landlord testified that as of the date of this hearing the landlord has not yet secured replacement tenants for the rental unit. In addition, the landlord seeks to recover a \$25.00 late charge for January 2017 and an NSF fee of \$45.00 for February 2017.

The landlord testified that rent payments were taken by automatic debit but the tenant had asked that the January 2017 rent payment be taken later, on January 6, 2017. The landlord agreed but then forgot to process the payment on January 6, 2017. When the landlord asked the tenant about the payment at the end of January 2017 the tenant indicated the payment would not go through. The landlord attempted to withdraw the February 2017 rent payment but the bank rejected the withdrawal due to insufficient

funds. The landlord provided a copy of the electronic funds transfer returned item list dated February 3, 2017 as evidence.

I noted that the NSF fee of \$45.00 exceeds the amount a landlord may charge a tenant for an administrative fee under the Regulations. The landlord responded by stating that their bank charges them \$45.00 for returned items. The landlord did not provide proof of the charge the landlord incurred from its bank.

Analysis

The tenant had filed to dispute the 10 Day Notice that was issued to her on February 2, 2016 and an Arbitrator hearing that case determined that the tenancy came to an end on February 15, 2017. The landlord was provided an Order of Possession under that proceeding and the tenant has vacated the rental unit. It is before me to determine whether the landlord is entitled to recovery unpaid rent for January 2017 and February 2017 and loss of rent for March 2017, plus a late fee and an NSF fee.

Under section 26 of the Act a tenant is required to pay rent when due in accordance with their tenancy agreement. I accept the unopposed evidence before me that the tenant was required to pay and the landlord was entitled to receive rent of \$820.00 every month until the fixed term expired on September 30, 2017. The landlord did not receive rent for January 2017 or February 2017 and I find the landlord entitled to recover unpaid rent for those months as requested.

Where a tenant ends a fixed term before the expiry date of the fixed term the tenant may be held responsible to pay rent for the remainder of the fixed term. I accept the unopposed evidence before me that despite failure to pay rent and receiving a 10 Day Notice the tenant remained in possession of the rental unit until March 7, 2017 when the landlord found the tenant had vacated or abandoned the unit. I also accept that the landlord was unable to secure replacement tenants for March 2017 because the tenant had disputed the 10 Day Notice and remained in possession of the unit until the hearing date of March 7, 2017. Accordingly, I find the tenant's actions resulted in the landlord's loss of rent for March 2017 and I award the landlord loss of rent for March 2017 as requested.

As for the landlord's request to recover a late charge of \$25.00 and an NSF fee of \$45.00 I provide the following finding and reasons.

Section 7 of the Residential Tenancy Regulations provides for the non-refundable fees a landlord may charge a tenant.

Section 7 is reproduced below, with my emphasis underlined:

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.

Section 6 of the Act provides that if a term in the tenancy agreement conflicts with or violates the Act or the Regulations the term is not enforceable. I find that term 15 of the addendum is not enforceable since it conflicts with section 7(1)(d) of the Regulations. As provided in section 7(1)(d) a landlord must not charge an administrative fee for returned cheques in excess of \$25.00 but term 15 of the tenancy agreement addendum provides for a charge of \$45.00. Therefore, I decline to award the landlord any fees based upon an unenforceable term.

The landlord stated during the hearing that its bank charges \$45.00 for returned items. A landlord may recover the cost charged by their bank for returned payments under section 7(1)(c); however, the landlord did not provide evidence to corroborate that its bank charged \$45.00 for the tenant's returned rent payment. Therefore, I find the landlord's entitlement to an NSF fee of \$45.00 under section 7(1)(c) has not been sufficiently established.

I authorize the landlord to retain the tenant's security deposit in partial satisfaction of the rent owed to the landlord.

I award the landlord recovery of the \$100.00 filing fee paid for this application.

In light of the above, the landlord is provided a Monetary Order calculated as follows:

Unpaid Rent: January and February 2017	\$1,640.00
Loss of Rent: March 2017	820.00
Filing fee	100.00
Less: security deposit	<u>(410.00)</u>
Monetary Order	\$2,150.00

Conclusion

The landlord has been authorized to retain the tenant's security deposit and has been provided a Monetary Order for the balance of \$2,150.00 to serve and enforce upon the tenant.

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 21, 2017

Residential Tenancy Branch