



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPM MNSD MNDC MNR FF

Introduction

This hearing dealt with the landlords' application pursuant to the *Residential Tenancy Act* ("the *Act*") for an Order of Possession for:

- for an Order of Possession to end the tenancy, pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67;
- authorization to retain the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38;
- a monetary order for compensation for money owed or losses under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72 .

While the landlord, KA, attended the hearing by way of conference call, the tenants did not. The landlord was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

KA testified that the tenants were served with the landlords' application for dispute resolution hearing package and evidence on September 15, 2017 by way of registered mail. The landlords provided a Canada Post tracking in their evidence. In accordance with sections 88, 89 and 90 of the *Act*, I find that the tenants were deemed served with the landlords' application and evidence on September 20, 2017, five days after its registered mailing.

KA indicated in the hearing that the tenants had moved out on September 23, 2017. As the tenancy has now ended, the landlord withdrew their application for an Order of Possession.

Preliminary Issue—Amendment to Landlords' Application

The landlord, KA, indicated in the hearing that she was seeking a monetary order for damages and submitted new evidence which was not part of the original application, and was not served to the tenants. The landlords did not make any applications to amend the original monetary application of \$6,500.00.

Rule 4.6 states the following:

As soon as possible, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by the applicable Act and these Rules of Procedure.

The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.

In any event, a copy of the amended application and supporting evidence must be received by the by the respondent(s) not less than 14 days before the hearing.

The landlords had submitted new evidence to support an increased monetary claim for damages after the tenants had moved out. As no amendments were received in accordance with RTB Rule 4.6, and the respondents have the right to review and respond to the amendment and supporting evidence, the new evidence and increased monetary claim for damages arising out of this tenancy will be excluded, and not considered as part of this application

Issue(s) to be Decided

Are the landlords entitled to monetary compensation for unpaid rent and losses?

Are the landlords entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested?

Are the landlords entitled to recover their filing fee for this application?

Background and Evidence

The landlord, KA, testified regarding the following facts. This fixed tenancy began on June 3, 2017, with monthly rent set at \$2,700.00, payable on the third day of each month. The landlords hold a security deposit in the amount of \$1,350.00 for this

tenancy. The tenants signed a Mutual Agreement to End Tenancy on August 6, 2017, agreeing to vacate the property at 5:00 P.M. on August 31, 2017. The landlords included a copy of the Mutual Agreement in their evidence. The tenants moved out on September 23, 2017. The tenants did not provide a forwarding address to the landlords, sending a text message to the landlords on September 23, 2017 that they had moved out.

The landlord, KA, testified that the tenants failed to pay the full rent for the months of August and September 2017 totalling \$5,400.00, plus their share of utilities in the amount of \$350.00.

The landlords are also seeking \$10.00 per day in late fees as required by Condition 2 of the Addendum to the Tenancy Agreement. The landlords included a copy of the written tenancy agreement in their evidence, with an attached 24 condition Addendum. Condition 2 of the Addendum reads: *"The rent is due in full on or before the 3rd day of each month. Any amount of late rent will carry a late fee of \$20.00, or \$10 per day until fully paid, whichever is greater."*

The landlords seek a monetary order as follows:

| Item | Amount |
|---------------------------------------|-------------------|
| Unpaid Rent for August 2017 | \$2,700.00 |
| Unpaid Rent for September 2017 | 2,700.00 |
| Unpaid Utilities (70% of bill) | 350.00 |
| Late Fees (\$10/day x 61 days) | 610.00 |
| Recovery of Filing Fee | 100.00 |
| Less Security Deposit | -1,350.00 |
| Total Monetary Order Requested | \$5,110.00 |

Analysis

The landlord, KA, provided undisputed evidence that the tenants failed to pay the outstanding rent and utilities in the amount of \$5,750.00. Therefore, I find that the landlord is entitled to \$5,750.00 in outstanding rent and utilities for this tenancy.

The landlords also applied to recover \$610.00 in late fees as required by a condition of the attached addendum to the tenancy agreement.

Section 7 of the *Residential Tenancy Act Regulation* sets \$25.00 as the limit for NSF and late fees as summarized below:

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

(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.

Section 5 of the *Act* states as follows:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

In this case, the landlords had required the tenants to enter into a tenancy agreement that contained additional terms contained in an attached addendum. I find the additional term that required the tenants to pay a late fee of the greater of \$20.00 or \$10.00 per day is an attempt by the landlords to contract out of the *Act*, and therefore is of no effect. Accordingly, I find the landlords are entitled to a late fee of \$25.00, which is the maximum allowable amount under the *Act* and *Regulation*.

The landlords continue to hold the tenants' security deposit of \$1,380.00. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlords to retain the tenants' security deposit in partial satisfaction of the monetary claim.

As the landlords were successful in their application, I find that they are entitled to recover the filing fee for this application.

Conclusion

The landlords withdrew their application for an Order of Possession as the tenants had moved out.

I issue a \$4,525.00 Monetary Order in favour of the landlords, under the following terms, which allows the landlords to recover the unpaid rent, utilities and late fee, the filing fee for this application, and also allows the landlords to retain the tenants' security deposit in partial satisfaction of the monetary claim.

| Item | Amount |
|--------------------------------|-------------------|
| Unpaid Rent for August 2017 | \$2,700.00 |
| Unpaid Rent for September 2017 | 2,700.00 |
| Unpaid Utilities (70% of bill) | 350.00 |
| Late Fee | 25.00 |
| Recovery of Filing Fee | 100.00 |
| Less Security Deposit | -1,350.00 |
| Total Monetary Order | \$4,525.00 |

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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 30, 2017

Residential Tenancy Branch