Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes   OPRM, FFL

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution by Direct Request seeking an order of possession and a monetary order.

The adjudicator who reviewed the landlord's Direct Request found grounds to have the matter adjudicated through the participatory hearing process in her Interim Decision dated February 1, 2019.

The hearing was conducted via teleconference and was attended by the landlord's agent and both tenants.

While the tenants provided testimony that they had not received the landlord's evidence or notification of the Direct Request – which was the adjudicator's concern in the Interim Decision – they did not indicate that they had not received the landlord's evidence for this participatory hearing.

Both parties had submitted evidence and referred to evidence submitted by each other during the hearing.

At the outset of the hearing, I requested clarification on the landlord's Application as I was aware that the parties, in a previous hearing, had reached a settlement agreement for the end of the tenancy. As such, the landlord confirmed he no longer required an order of possession. Therefore, I amend the landlord's Application to exclude the issue of possession.

In addition, the landlord clarified that he had received payment of rent for the month of January 2019 in the amount of $1,040.00 plus a $20 late payment fee. As such, the landlord submitted that he no longer was seeking compensation in the amount of $1,065.00 but only seeking $5.00 from the late payment fee. I amend the landlord's monetary claim to be reduced to $5.00.

Issue(s) to be Decided

The issue to be decided is whether the landlord is entitled to a monetary order for a portion of a late payment fee, pursuant to terms of the tenancy agreement.

Background and Evidence

The landlord submitted a copy of a tenancy agreement signed by the parties on June 15, 2016 for a month to month tenancy beginning on June 15, 2016 with a monthly rent of $1,000.00 due on the 31st of each month with a security deposit of $500.00 paid. The agreement also stipulates that there is a 15-page addendum including 13 additional terms, which included park rules.

Article 5 on page 5 of the addendum indicates that rent must be paid on or before the first day of each month. I note this is different the date stated as the date the rent is due on page 2 of the tenancy agreement itself.

Article 8 on page 6 of the addendum states (the original total amount was noted as $50.00 but is stroked out and $25.00 is written in pen but not initialed by either party):

> "The Tenant agrees that if payment of rent and any additional Charges due are not received by the Landlord on the first day, The Tenant Shall pay $5.00 per day, Beginning the 2nd of each month as a late fee to a Maximum amount of $50.00 $25.00 Per Month. NSF Fee $45.00 plus late fees." [Reproduced as written]

The landlord also submitted into evidence a copy of a Notice of Rent Increase showing rent increase from $1,000.00 per month to $1,040.00 effective January 2018.

The landlord submitted that the tenants never paid rent prior on December 31, 2018 for the month of January 2019 and so on January 2, 2019 he served the tenants with a 10 Day Notice to End Tenancy for Unpaid Rent by registered mail.

The parties agreed the payment of rent has been facilitated by electronic transfer where the landlord is notified that a deposit has been made to the landlord's account. The landlord submitted that he had not received any payment for the tenants for this rent and late payment fees until February 4, 2019 at which time the tenants transferred $1,060.00.

The landlord submitted that because the payment of rent was over a month after the date it was due the total amount of late fees was the maximum allowed under the tenancy agreement or $25.00 but that the tenants only paid $20.00.

The tenants submitted testified that they paid the landlord rent by way of electronic transfer on January 4, 2019 but that the landlord failed to accept it and that they repeatedly asked the landlord to cancel the transfer, so they could reissue the transfer. The tenants testified the landlord refused to do so.

The tenants stated further that when the electronic transfer expired they immediately sent through a second payment on February 4, 2019. The tenants provided documentary evidence in support of their testimony, including an email notification of an Interac e-Transfer dated January 4, 2019 in the amount of $1,040.00. The tenants also provided contact information for the bank manager and I tried to call him into the hearing, but he was not available at the time.

The landlord submitted that he never received payment notification on January 4, 2019 and that rent for the month of January 2019 was not received until he received the payment of February 4, 2019. The landlord submitted that since the payment was not received until a month later than due it was subject to the maximum late fee charged of $25.00.

In support of his position the landlord submitted a copy of a tenant ledger and a print out from his own internal system showing payments received, among other times, on November 23, 2018 and February 4, 2019 but no other payments are noted as received in between those dates.

Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act,* regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

The landlord relies upon the terms of the tenancy agreement requiring the payment of a late payment fee of $5.00 per day to a maximum of $25.00. To reach the maximum, payment of rent would have to be at least 5 days late.

The landlord submitted that he did not receive payment for rent for January until February 4, 2019 thus qualifying for the maximum. The tenant submitted that they attempted to pay the rent in the approved manner on January 4, 2019 but that the landlord refused to accept it. The tenants agreed that the landlord was entitled to late payment fees in the amount of $20.00 because they were only 4 days late.

While both parties provided documentary evidence in support of their position I find the tenants have provide documentation directly from the electronic transfer service provider confirming that a payment email was sent to the landlord. However, from the landlord's testimony his documentary was from his own internal system.

As such, I find the documentary evidence submitted by the tenants was provided by an independent third-party report and not from an internal source that they had control over, in opposition to that relied upon by the landlord's internal report. As a result, I prefer the tenants' evidence confirming they attempted to make payment on January 4, 2019 and through no fault of their own the landlord failed to receive or accept the transfer.

In these circumstances I find it is reasonable to limit the landlord's claim for late payment fees to the minimum or to the amount owed if rent were paid on January 4, 2019 or 4 days of late fees. As such, I find the landlord has failed to establish entitlement of an additional day of late charges.

As the landlord is not successful in his claim, I find he is <u>not</u> entitled to recovery of the filing fee for this Application for Dispute Resolution.

<u>Conclusion</u>

Based on the above, I dismiss the landlord's Application for Dispute Resolution in its entirety, without leave to reapply.

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 08, 2019

Corrected Date: April 11, 2019

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Residential Tenancy Branch