



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Pemberton Holmes Property Management As Agent for the
Landlord and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPRM-DR

Introduction

This participatory hearing was ordered pursuant to an Interim Decision issued by an Adjudicator on April 16, 2019 upon consideration of the landlord's application for an Order of Possession and Monetary Order for unpaid rent under the Direct Request procedure.

Both parties appeared or were represented at the participatory hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

At the participatory hearing, the landlord requested the monetary claim be amended to reflect that the tenant remains in possession of the rental unit and the landlord has incurred additional loss of rent as a result. I find the landlord's request to reasonably foreseeable in the circumstances and I permitted the monetary claim to be amended to include unpaid and/or loss of rent up to and including the month of June 2019.

Issue(s) to be Decided

1. Is the landlord entitled to an Order of Possession for unpaid rent?
2. Is the landlord entitled to a Monetary Order for unpaid and/or loss of rent for the months of March 2019 through June 2019 and if so, what is the monthly rent?
3. Is the landlord entitled to an award for late fees and NSF fees as requested?

Background and Evidence

The parties executed multiple tenancy agreements every year. The first tenancy agreement commenced on March 1, 2013 and the landlord collected a security deposit of \$625.00. The last tenancy agreement signed by the parties provides that the tenancy

would start on March 1, 2018 for a one year fixed term ending on February 29, 2019 and it required the tenant to vacate the rental unit upon expiry of the fixed term even though the reason for requiring the tenant to vacate was not specified. Under the last executed tenancy agreement, the tenant was required to pay rent of \$1,425.00 on the first day of every month.

In late November 2018 the landlord sent to the tenant another one year fixed term tenancy agreement that provides for a monthly rent of \$1,515.00. In the same package, the landlord included a Notice of Rent Increase indicating the rent of \$1,425.00 was increasing by \$35.00 per month to \$1,515.00 starting on March 1, 2019. The tenant received these documents and did not sign the new tenancy agreement.

On or about March 1, 2019 the landlord attempted to withdraw \$1,515.00 from the tenant's bank account. The attempted withdrawal was dishonoured due to insufficient funds.

On March 19, 2019 the landlord put a 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") in the door frame of the rental unit. The 10 Day Notice indicates rent of \$1,515.00 was outstanding as of March 1, 2019 and has a stated effective date of April 2, 2019.

The tenant acknowledged that he received the 10 Day Notice in the door frame on or about March 19, 2019. The tenant did not file to dispute the 10 Day Notice or pay any rent for March 2019.

On March 27, 2019 the landlord entered the rental unit and had a discussion with the tenant about the outstanding rent. The tenant indicated to the landlord that he would e-transfer the outstanding rent to the landlord; however, the tenant did not make the payment. During the hearing, the tenant stated he decided not to make the payment as he was uncertain as to whether the landlord would still evict him if he made the payment.

On or about April 1, 2019 the landlord made another attempt to withdraw \$1,515.00 from the tenant's bank account but the payment was rejected due to insufficient funds.

The landlord proceeded to file the Application for Dispute Resolution by Direct Request on April 8, 2019 seeking an Order of Possession and a Monetary Order for unpaid rent in the amount of \$1,515.00 for each of the months of March 2019 and April 2019, plus late fees and NSF fees for both months.

As provided in the Interim Decision, the maximum annual rent increase for 2019 is 2.5%, or \$41.00 per month in this case, and increasing the rent by \$90.00 per month exceeded the allowable rent increase unless the tenant had given written consent to increase the rent by that amount. Evidence showing the tenant had provided written consent to increase the rent to \$1,515.00 had not been included in the documents provided for the Direct Request procedure and a participatory hearing was ordered to further determine whether the rent had been lawfully increased.

At the participatory hearing, the landlord's agent stated her assistant made an error in completing the Notice of Rent Increase and that the total new rent should have read \$1,460.00 (\$1,425.00 + \$35.00).

I noted that the 10 Day Notice indicated rent of \$1,515.00 was owed as of March 1, 2019. The landlord's agent stated that in completing the 10 Day Notice she relied upon the unsigned tenancy agreement that has a stated monthly rent of \$1,515.00. No explanation was provided as to the reason the landlord changed the tenant's ledger to indicate the monthly rent was \$1,515.00 per month starting March 1, 2019 or the reason the landlord attempted to withdraw \$1,515.00 from the tenant's bank account on March 1, 2019 and April 1, 2019.

The tenant stated that the landlord has made multiple attempts to withdraw \$1,515.00 from his bank account, each time resulting in NSF charges by his bank.

The tenant stated that he had planned to move out of the rental unit by March 1, 2019 as his fixed term tenancy came to an end and his roommate had moved out. The tenant did not provide any reason as to why he has retained possession of the rental unit and has not paid any rent for multiple months except to say he was confused.

Analysis

Under section 26 of the Act, a tenant is required to pay rent when due in accordance with their tenancy agreement, even if the landlord has violated the Act, regulations or tenancy agreement, unless the tenant has a legal right to withhold rent.

The Act underwent significant changes in December 2017 including prohibiting a landlord from requiring a tenant to vacate the rental unit at the end of a fixed term except in very limited and specific circumstances and unless one of those exceptions applied the tenancy would continue. The most recent executed tenancy agreement

indicates the tenant would have to vacate the rental unit at the end of fixed term; however, there is nothing to indicate the reason requiring the tenant to vacate met one of the circumstances permitted. Accordingly, I find the landlord was not in a position to require the tenant to vacate the rental unit on February 28, 2019 and the tenancy was to continue. Considering the tenant continued to occupy the rental unit in March 2019 I find the tenant acted in such a way that is consistent with expecting the tenancy to continue. Since the tenant did not execute a new fixed term tenancy agreement, the tenancy continued on a month to month basis from March 1, 2019 onwards.

The amount of rent payable by the tenant starting March 1, 2019 would remain at \$1,425.00 unless the tenant lawfully increased the rent by way of a valid Notice of Rent Increase. I find the Notice of Rent Increase served upon the tenant in November 2018 is invalid and unenforceable as the new rent stated on the Notice exceeds the annual allowable amount. I do not amend the Notice of Rent Increase to reflect that correct sum of \$1,460.00 as I find the landlord's actions were consistent with the landlord's attempts to increase the rent to \$1,515.00 without written consent to do so. Therefore, I set aside the Notice of Rent Increase and I find the tenant's monthly rent obligation remained at \$1,425.00.

In this case, the tenant continued to occupy the rental unit throughout March 2019, April 2019 and May 2019 and did not pay any rent to the landlord. Where a tenant does not pay rent the landlord is at liberty to serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent. When a tenant receives a 10 Day Notice the tenant has five days to pay the outstanding rent to nullify the 10 Day Notice or the tenant has five days to dispute the 10 Day Notice by filing an Application for Dispute Resolution. If a tenant does not pay the outstanding rent or dispute the 10 Day Notice within five days then, pursuant to section 46(5) of the Act, the tenant is conclusively presumed to have accepted the tenancy will end and must vacate the rental unit by the effective date of the 10 Day Notice.

The landlord put a 10 Day Notice in the door frame of the rental unit and this method of delivering a document does not comply with section 88 of the Act. In order to consider a document "posted", as submitted by the landlord in its Application, it must be "affixed" to the door or another conspicuous place. Nevertheless, the tenant acknowledged he received the 10 Day Notice and I deem him sufficiently served with the 10 Day Notice pursuant to the authority afforded me under section 71 of the Act.

Although the amount indicated on the 10 Day Notice is incorrect, the tenant made no attempt to pay any rent to the landlord to nullify the 10 Day Notice. Had the tenant paid

or attempted to pay \$1,425.00 to the landlord within five days of receiving the 10 Day Notice I would have found the 10 Day Notice to be nullified, but he did not. Nor, did the tenant file to dispute the 10 Day Notice. Therefore I find the tenant is conclusively presumed to have accepted that the tenancy would end due to unpaid rent and I find the tenancy ended on the stated effective date of April 2, 2019.

Having found the tenancy ended on April 2, 2019 and the tenant continues to occupy the rental unit I find the landlord entitled to an Order of Possession. Considering the tenant has remained in possession of the rental unit for multiple months without paying rent I find it reasonable and appropriate to issue an Order of Possession effective two (2) days after service upon the tenant.

As for the landlord's monetary claim, I find the landlord entitled to unpaid rent of \$1,425.00 based on the tenancy agreement for each of the months of March 2019 and April 2019. Since the tenant has remained in possession of the rental unit until at least the date of the hearing I further award the landlord loss of rent of \$1,425.00 for the month of May 2019 and the first half of June 2019. If the landlord suffers a loss of rent for days after June 15, 2019 the landlord may make another Application for Dispute Resolution to seek additional damages or loss.

As for the landlord's request for an award for late fees and NSF fees, I make no award to the landlord as it is unclear as to whether the withdrawals would have been rejected had the landlord withdrawn the correct amount of \$1,425.00 per month. I do, however, award the landlord recovery of the \$100.00 filing fee paid for this application.

Having heard the landlord continues to try to withdraw \$1,515.00 from the tenant's bank account and the tenancy is over, **I ORDER the landlord to cease attempts to make withdrawals from the tenant's bank account effective immediately.** As I informed the parties during the hearing, if the landlord has made inappropriate attempts to withdraw monies from the tenant's bank account resulting in NSF charges for the tenant may file his own Application for Dispute Resolution seeking compensation from the landlord.

The landlord did not request authorization to retain the tenant's security deposit and it remains in trust for the tenant to be administered in accordance with the Act.

In light of all of the above, I provide the landlord with a Monetary Order calculated as follows.

Unpaid rent – March 2019	\$1,425.00
Unpaid rent – April 2019	1,425.00
Loss of rent – May 2019	1,425.00
Loss of rent – June 1 – 15, 2019	712.50
Filing fee	<u>100.00</u>
Monetary Order for landlord	\$5,087.50

Conclusion

The landlord is provided an Order of Possession effective two (2) days after service upon the tenant.

The landlord is provided a Monetary Order in the sum of \$5,087.50 to serve and enforce upon the tenant.

The tenant's security deposit remains in trust for the tenant, to be administered in accordance with the Act.

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: June 05, 2019

Residential Tenancy Branch