



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding INTERLINK REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPRM-DR, FFL

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the *Act*), I was designated to hear an application regarding the above-noted tenancy. The landlord applied for:

- an order of possession for unpaid rent, pursuant to sections 46 and 55 of the *Act*;
- a monetary order for unpaid rent, pursuant to sections 26 and 67 of the *Act*; and
- recovery of the filing fee, pursuant to section 72 of the *Act*.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 11:28 AM to enable the tenants to call into this teleconference hearing scheduled for 11:00 AM. The landlord's representative ES attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord's representative and I were the only ones who had called into this teleconference.

I accept ES's testimony that the tenants were served with the notice of hearing, interim decision and evidence (the Materials) by registered mail on November 02, 2019, in accordance with section 89 of the *Act* (the tracking numbers are reproduced on the cover of this decision).

Section 90 of the *Act* provides that a document served in accordance with Section 89 of the *Act* is deemed to be received if given or served by mail, on the 5th day after it is mailed. Given the evidence of registered mail I find the tenants are deemed to have received the Materials on November 07, 2019.

Preliminary Issue – Amendment of Claim

At the hearing ES sought to amend her application claiming \$8,920.00 to include a claim for November and December 2019 rent which she testified remains outstanding. She requested to increase her monetary claim to \$10,720.00.

Section 4.2 of the Rules states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the application for Dispute Resolution was made, the application may be amended at the hearing.

I find that the increase in the landlord's monetary claim should have been reasonably anticipated by the tenants. Therefore, pursuant to section 4.2 of the Rules and section 64 of the Act, I order that the landlord's application be amended to include a claim for November and December 2019 rent.

Issues to be Decided

Is the landlord entitled to:

- an order of possession for non-payment of rent;
- a monetary order for unpaid rent in the amount of \$10,720.00; and
- authorization to recover the filing fee for this application from the tenants?

Background and Evidence

While I have considered the documentary evidence and the testimony of the landlord's representative, not all details of her submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claim and my findings are set out below.

The parties entered into a written tenancy agreement starting March 01, 2014. The agreement lists monthly rent as \$875.00 and ES testified rent is due the first of the month. The tenants paid the landlord a security deposit of \$437.50 which the landlord currently holds in trust. The rent has not been increased over the duration of the tenancy.

ES testified:

- On October 05, 2019 she hand delivered the tenants a 10 Day Notice to End Tenancy (the “**Notice**”) with an effective date of October 15, 2019;
- Realtor KY witnessed the service of the Notice to the tenants;
- The tenants have not vacated the rental unit;
- The fee for late payment of rent is \$25.00 and is part of the tenancy agreement;

The landlord submitted the following documents:

- The Notice;
- Proof of service of the Direct Request Proceeding application and of the Notice;
- A copy of the registered mail receipt containing the tracking number for the Direct Request Proceeding application;
- A direct request worksheet indicating a balance of rent owed on October 01, 2019 of \$8,920.00;
- A ledger indicating a balance of rent and late fees owed on October 01, 2019 was \$8,920.00. The ledger indicated the tenants pay their rent in cash;
- The written tenancy agreement.

The tenants have not filed an application with the Residential Tenancy Branch to dispute the Notice.

Analysis

I have reviewed all documentary evidence and find the tenants were duly served with the Notice on October 05, 2019 in accordance with section 88 of the Act. The Notice is valid pursuant to section 52 of the Act. The tenants have not disputed the Notice and are conclusively presumed under sections 46(5) and 53(2) of the Act to have accepted that the tenancy ended on the effective date of the Notice, October 15, 2019.

Section 26 of the Act requires that a tenant pay rent when it is due under the tenancy agreement.

I accept ES uncontroverted evidence that the tenants have been in arrears since July 2016 and the total amount owing, including late fees and November and December 2019 rent is \$10,720.00.

Although the Residential Tenancy Regulation section 7 allows for a landlord to charge a fee for late payment of rent, Policy Guideline #4 states “A clause in a tenancy

agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment". The landlord's ledger indicates the tenant pays rent in cash. The landlord failed to provide any evidence to demonstrate the \$25.00 fee is related to costs incurred as a result of the tenant's late payment of rent.

In the landlord's ledger I have identified 38 instances of the landlord charging \$25.00 late fees (total \$950.00) since July 2016 as part of the \$10,720.00 claim. I am dismissing \$950.00 of the landlord's monetary claim because in the absence of any explanation from the landlord as to the costs incurred from late payment of rent, I find the late fees are a form of penalty.

As explained in section D.2 of Policy Guideline #17, the Residential Tenancy Act provides that where an arbitrator orders a party to pay any monetary amount or to bear all or any part of the cost of the application fee, the monetary amount or cost awarded to a landlord may be deducted from the security deposit held by the landlord and the monetary amount or cost awarded to a tenant may be deducted from any rent due to the landlord. I order the landlord to retain the tenants' security deposit of \$475.00 in partial satisfaction of the unpaid rent.

As the landlord was successful in this application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for this application.

In summary:

Landlord's monetary claim for unpaid rent and late fees	\$10,720.00
Minus penalty (38 x \$25.00)	-\$950.00
Allowed monetary claim for unpaid rent	\$9,770.00
Minus tenants' security deposit	-\$475.00
Landlord's filing fee	\$100.00
Total monetary award	\$9,395.00

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this order** on the tenants. Should the tenants fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

Pursuant to sections 67 and 72 of the *Act*, I authorize the landlord to retain the tenants' security deposit of \$470.00 in partial satisfaction of unpaid rent and grant the landlord a monetary order in the amount of \$9,395.00.

The landlord is provided with this order in the above terms and the tenants must be served with **this order** as soon as possible. Should the tenants 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: December 17, 2019

Residential Tenancy Branch