



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent in the amount of \$9,583 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 2:04 pm in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 pm. The landlord's residential manager ("**ZB**") 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 ZB and I were the only ones who had called into this teleconference.

ZB testified she served that the tenant with the notice of dispute resolution form and supporting evidence package via registered mail on April 16, 2021. She testified she sent it to the tenant's mother's house, where she was advised by the tenant's mother the tenant had moved to after the tenancy ended. She provided a Canada Post tracking number confirming this mailing which is reproduced on the cover of this decision. I find deem that the tenant was served with this package on April 21, 2021, five days after ZB mailed it, in accordance with sections 88, 89, and 90 of the Act.

Issues to be Decided

Is the landlord entitled to:

- 1) a monetary order for \$9,583;
- 2) recover the filing fee; and
- 3) retain the security deposit in partial satisfaction of the monetary orders made?

Background and Evidence

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

The parties entered into a written tenancy agreement starting November 1, 2015. At the end of the tenancy, monthly rent was \$1,853. The tenant paid the landlord a security deposit of \$825, which the landlord continues to hold in trust for the tenant. A move-in and move-out condition inspection report was completed.

The tenancy agreement contains the following term:

1. ARREARS. (a) Late payments (after midnight on the 1st of the month) are subject to a minimum service charge of \$25.00. (b) Non-sufficient funds and returned cheque (N.S.F.) are subject to an additional minimum service charge of \$25.00 each, or the then current rate charged for such services by the Royal Bank of Canada, main branch, Vancouver, British Columbia, whichever is greater. Notwithstanding a service charge, failure to pay rent on the due date shall be a fundamental breach of this Agreement.

ZB testified that the tenant lost his job at the beginning of the COVID-19 pandemic, and rapidly fell behind in his rent payments. She testified that he made rent payments when he was able, and that the provincial or federal government made contributions to his rent as well. She testified that he vacated the rental unit on February 28, 2021.

The landlord submitted a ledger showing all debits and credits to the tenant's account throughout the tenancy. During the hearing, I asked ZB some questions about certain charges contained in the ledger but was unable to obtain satisfactory answers. For example, the ledger shows offsetting charges of \$1,553 and -\$1,553 throughout the tenancy. ZB was unable to tell me what these charges represented.

ZB testified that the landlord's accountants prepared and maintained the ledger during the tenancy, and she is confident that it accurately reflects the debits and credits to the tenant's account. She testified that the landlord did not charge the tenant the late payment service charge (the "**late fee**") or the non-sufficient funds and returned cheque service charge (the "**NSF fee**") for some months during the early months of the COVID-19 pandemic. ZB testified that the tenant pre-authorized the landlord to make monthly withdrawals from his bank account. She also testified that whenever the tenant made a payment, the landlord applied it to the oldest arrears, rather than those from the month in which the payment was made.

The ledger shows that the tenant owes \$9,583 in arrears, as follows:

Date	Owed	Paid	Balance	Description
01-Mar-20	\$1,853.00		\$1,853.00	Rent owed
01-Mar-20		\$1,808.00	\$45.00	Payment
01-Apr-20	\$1,853.00		\$1,898.00	Rent owed
06-Apr-20	\$25.00		\$1,923.00	NSF fee
07-Apr-20	\$25.00		\$1,948.00	Late fee
09-Apr-20		\$500.00	\$1,448.00	Payment
01-May-20	\$1,853.00		\$3,301.00	Rent owed
04-May-20		\$500.00	\$2,801.00	Payment
08-May-20	\$25.00		\$2,826.00	Late fee
12-May-20		\$300.00	\$2,526.00	Payment
01-Jun-20	\$1,853.00		\$4,379.00	Rent owed
04-Jun-20		\$1,553.00	\$2,826.00	Payment
04-Jun-20		\$600.00	\$2,226.00	Payment
01-Jul-20	\$1,853.00		\$4,079.00	Rent owed
01-Aug-20	\$1,853.00		\$5,932.00	Rent owed
06-Aug-20	\$25.00		\$5,957.00	NSF fee
07-Aug-20	\$25.00		\$5,982.00	Late fee
25-Aug-20		\$125.00	\$5,857.00	Payment
01-Sep-20	\$1,853.00		\$7,710.00	Rent owed
02-Sep-20	\$25.00		\$7,735.00	NSF fee
09-Sep-20	\$25.00		\$7,760.00	Late fee
01-Oct-20	\$1,853.00		\$9,613.00	Rent owed
02-Oct-20	\$25.00		\$9,638.00	NSF fee
03-Oct-20	\$25.00		\$9,663.00	Late fee
01-Nov-20	\$1,853.00		\$11,516.00	Rent owed
01-Nov-20		\$1,853.00	\$9,663.00	Payment
01-Dec-20	\$1,853.00		\$11,516.00	Rent owed
01-Dec-20		\$1,853.00	\$9,663.00	Payment
21-Dec-20	\$100.00		\$9,763.00	RTB "FF"
01-Jan-21	\$1,853.00		\$11,616.00	Rent owed
05-Jan-21	\$25.00		\$11,641.00	NSF fee
07-Jan-21	\$25.00		\$11,666.00	Late fee
27-Jan-21	\$100.00		\$11,766.00	RTB "FF"
01-Feb-21	\$1,853.00		\$13,619.00	Rent owed
01-Feb-21		\$1,853.00	\$11,766.00	Payment
03-Feb-21		\$2,308.00	\$9,458.00	Payment
05-Feb-21	\$25.00		\$9,483.00	Late fee
23-Feb-21	\$100.00		\$9,583.00	"RTB FF"
Total			\$9,583.00	

ZB did not state what the three “RTB ‘FF’” charges of \$100 each represented. I did not notice these charges until I was preparing this decision, so I did not have an opportunity to ask ZB about them. I note that “RTB” is a common abbreviation for the Residential Tenancy Branch, and that the Branch charges a filing fee of \$100 each time a party files an application.

Additionally, aside from the current application, the landlord has filed four other applications against the tenant with the Branch, as follows:

- 1) File 310010194 – filed July 9, 2020, dismissed with leave to reapply on November 6, 2020
- 2) File 310021831 – filed November 17, 2020, dismissed with leave to reapply on December 14, 2020
- 3) File 310026760 – filed January 22, 2021 and withdrawn by landlord January 25, 2021
- 4) File 310028218 – filed January 28, 2021, order of possession and filing fee granted Feb 24, 2021

I note that each of the “RTB FF” charge are recorded roughly one month after one of these files was adjudicated or withdrawn (except for the final application, for which the landlord was awarded recovery of the filing fee).

Analysis

Section 26 of the Act states:

Rules about payment and non-payment of rent

26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Based on the tenancy agreement, and ZB’s testimony, I find that the tenant was obligated to pay monthly rent of \$1,853 as of March 1, 2020. I find that the tenancy agreement authorized the landlord to levy a \$25 late fee and a \$25 NSF fee.

I accept ZB’s testimony, supported by the ledger, that the tenant (or a government entity on behalf of the tenant) made payments to the landlord as indicated in the ledger. However, I am not satisfied that all charges in the ledger were validly levied against the tenant.

Section 7 of the *Residential Tenancy Regulation* (the “**Regulation**”) states:

Non-refundable fees charged by landlord

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

- (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;
- [...]

(2) A landlord must not charge the fee described in paragraph (1) (d) or (e) unless the tenancy agreement provides for that fee.

The landlord did not provide any evidence as to whether their financial institution charged them a service fee for the return of the tenant's cheques. Indeed, ZB's evidence was that the tenant paid rent by pre-authorized withdrawals. As such, the landlord is not entitled to levy any charges pursuant to section 7(1)(c) of the Regulation.

The landlord is permitted to charge a single \$25 fee for late payment of rent, per section 7(1)(d) of the Regulation. As such, I find that the landlord's practice of charging the tenant a \$25 late fee and a \$25 NSF fee to be a breach of the Regulation. The Regulation does not permit an NSF fee to be charged, unless the tenant has bounced a cheque, and the landlord's financial institution has charged the landlord for this. There is no evidence before me to show that this was the case.

As such, the following charges contained in the ledger submitted into evidence are not permissible:

Date	Owed	Description
06-Apr-20	\$25.00	NSF fee
06-Aug-20	\$25.00	NSF fee
02-Sep-20	\$25.00	NSF fee
02-Oct-20	\$25.00	NSF fee
05-Jan-21	\$25.00	NSF fee
Total	\$125.00	

Additionally, based on my review of the ledger and the landlord's dispute history with the tenant, I find it more likely than not that the charges recorded in the ledger labeled "RTB 'FF'" represent debits to the tenant's accounts for filing fees the landlord incurred when making applications to the Residential Tenancy Branch. The acronym used in the ledger is a reasonable abbreviation for "Residential Tenancy Branch Filing Fee" and the charges recorded in the ledger are proximate to when the landlord discovered that they were not being awarded the return of their filing fee.

As such, I find that the following charges recorded in the ledger represent charges by the landlord to recover filing fee paid to the Residential Tenancy Branch:

Date	Owed	Description
21-Dec-20	\$100.00	RTB FF
27-Jan-21	\$100.00	RTB FF
23-Feb-21	\$100.00	RTB FF
Total	\$300.00	

There is no basis in the Act which allows a landlord to unilaterally charge a tenant for the cost of making an application at the Residential Tenancy Branch. Section 72 of the Act grants an arbitrator the discretion to award a landlord the return of the filing fee from the tenant, in the event the landlord was successful in their application (as was the case with the landlord's January 28, 2021 application). Any provision in a tenancy agreement that allows for the filing fee to be charged to the tenant is an attempt to contract out of the Act by depriving the presiding arbitrator of their discretion under section 72.

Section 5 of the Act states:

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.

As such, I find that any charges on the tenants account for Residential Tenancy Branch filing fees are invalid, and the tenant is not liable for paying them. In total, I find that the tenant is \$9,158 in rental arrears (\$9,583 recorded in the ledger, less \$125 in NSF fee charges and less \$300 in RTB filing fee charges). I order the tenant to pay the landlord this amount.

Pursuant to section 72(1) of the Act, as the landlord has not been completely success in its application, I decline award it the filing fee.

Pursuant to section 72(2) of the Act, the landlord may retain the security deposit in partial satisfaction of the monetary orders made above.

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the tenant pay the landlord \$8,333, representing the arrears owing (\$9,158) less the security deposit (\$825).

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: August 31, 2021