



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH POOL VII LP C/O METCAP LIVING MANAGEMENT
INC and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNRL, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was filed by the Landlord on September 2, 2022, under the *Residential Tenancy Act* (the Act), seeking:

- An Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (10 Day Notice);
- Recovery of unpaid rent or utilities; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call at 9:30 A.M. (Pacific Time) on January 23, 2023, and was attended by the Tenant S.F. (Tenant), who was also acting as an agent for the Tenant A.E.S., and an agent for the Landlord L.M. (Agent). All testimony provided was affirmed. As the Tenant acknowledged service of the Notice of Dispute Resolution Proceeding (NODRP), and stated that there are no concerns regarding the service date or method, the hearing proceeded as scheduled. The parties were provided the opportunity to present their evidence orally and in written and documentary form, to call witnesses, and to make submissions at the hearing.

The parties were advised that pursuant to rule 6.10 of the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over me and one another and to hold their questions and responses until it was their opportunity to speak. The parties were also advised that pursuant to rule 6.11 of the Rules of Procedure, recordings of the proceedings are prohibited, except as allowable under rule 6.12, and confirmed that they were not recording the proceedings.

Although I have reviewed all evidence and testimony before me that was accepted for consideration as set out above, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses confirmed in the hearing.

Preliminary Matters

Preliminary Matter #1

The Tenant acknowledged receipt of the majority of the documentary evidence before me from the Landlord, however, they denied receipt of documentary evidence allegedly sent to them by the Agent via email on the morning of the hearing. Residential Tenancy Branch (Branch) records show that two documents were uploaded to the online dispute access site on behalf of the Landlord at 9:00 A.M. on January 23, 2023, only 30 minutes prior to the hearing. The Agent stated that these documents, which are an updated ledger and a ledger summary of amounts currently owed, were also emailed to the Tenant but the Tenant denied receipt, even after attempting to locate this email during the hearing.

Despite the above, the Tenant agreed to the acceptance and consideration of this documentary evidence after I advised them of what the documents were and what information was contained in them.

Preliminary Matter #2

Although the parties were advised of their ability to engage in settlement discussions pursuant to section 63 of the Act, the Agent stated that they are not authorized by the Landlord to agree to a settlement. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Branch under Section 9.1(1) of the Act.

Preliminary Matter #3

At the hearing the Agent stated that the amount of outstanding rent and fees owed has increased since the time the Application was filed in September of 2022, and that the

Tenant now owes \$7,197.18 in outstanding rent, parking fees, and NSF fees. As a result, they sought an amendment to the total amount of the monetary claim.

Rule 4.2 of the Rules of Procedure 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 without the need for an Amendment to an Application for Dispute Resolution to be submitted or served.

I find that the Tenants can reasonably have been expected to know that the Landlord would seek at this hearing the recovery of any additional amounts owed for rent and parking fees not paid since the Application was filed and the recovery of any subsequently incurred NSF fees. As a result, I have amended the amount of the monetary claim accordingly.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession based on the 10 Day Notice?

Is the Landlord entitled to recovery of unpaid rent or utilities?

Is the Landlord entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the one-year fixed-term tenancy commenced on January 1, 2021, and that the fixed-term was set to end on December 31, 2021. The tenancy agreement states that rent in the amount of \$2,193.00 is due each month, and although the tenancy agreement does not specify a date upon which rent is due, the parties agreed at the hearing that it was to be paid on the first, which is in line with a pre-authorized debit form also submitted. Although the ledgers submitted show two rent increases during the course of the tenancy, only the rent increase showing for January of 2023 increasing rent from \$2,225.89 to \$2,270.40 was disputed by the Tenant. The Tenant stated that they never received a Notice of Rent Increase (NORI) in accordance with the Act and regulations for the January 2023 rent increase and I note that no NORI documents were submitted by the Landlord or Agent for my review with regards to either rent increase. At the hearing the Agent denied knowledge of this rent increase and stated that they do not

have a record of it before them, and therefore it must only be on the physical/hardcopy file.

The parties agreed that three parking stalls had also been rented to the Tenants, and although the three separate parking agreements submitted did not specify how much parking was, the parties agreed at the hearing that it was \$60.00 per month, per spot. The parties agreed that in September of 2022 the number of parking spots rented to the Tenants was reduced to two, and although the Tenant argued that this was further reduced to one as of December 2022, the Agent disagreed.

The Agent stated that the Tenants' pre-authorized debit was charged and then returned for insufficient funds on July 1, 2022. The Agent stated that the Tenants were therefore charged an NSF fee in the amount of \$25.00, and taking into account a \$20.00 credit that had been owed to the Tenants since February 1, 2021, according to the ledger, the Tenants were deemed to owe \$2,410.89 broken down as follows:

- \$180.00 for parking (\$60.00 x3);
- \$2,205.89 for July 2022 rent (\$2,225.89, less the \$20.00 credit owed); and
- \$25.00 for an NSF fee.

The Agent stated that as the Tenants did not pay this amount, the 10 Day Notice was completed and sent to the Tenants by registered mail on July 29, 2022. The Tenant stated that they were unsure if this was ever received, so the Agent provided me with the registered mail tracking number and with the consent of the parties I tracked the package. Tracking information shows that the registered mail associated with the tracking number provided was sent on July 29, 2022, that it was first out for delivery on August 4, 2022, that a notice card was left on that date when it could not be delivered, and that the registered mail was subsequently delivered/received on August 10, 2022. The Tenant reluctantly agreed that the 10 Day Notice was therefore received but called into question its poor quality, stating that they were "shocked" by the lack of quality of the document.

The 10 Day Notice in the documentary evidence before me is on the 2021 version of the form, is signed and dated July 29, 2022, has an effective date of August 13, 2022, and states that \$2,410.89 in rent was due as of July 1, 2022, which remains unpaid. The Agent stated that the Tenants neither paid the amounts owed nor sought cancellation of the 10 Day Notice by filing an application for dispute resolution with the Branch within 5 days after they were deemed to have received the 10 Day Notice, and therefore the Landlord is entitled to an Order of Possession.

The Tenant denied failing to pay July rent within the required time period, stating that it was paid on August 1, 2022. Although the Agent agreed that the Tenants paid rent on August 1, 2022, they stated that this was for August, not July, as rent and parking fees for August were due that day.

While the parties agreed that the Tenants have also failed several times since the issuance of the 10 Day Notice to pay the rent and fees owed, they disagreed about the amount currently owed. The Agent stated that the Tenants currently owe \$7,197.18 in outstanding rent, parking fees and NSF fees broken down as follows:

- \$20,077.52 for rent;
- \$1,200.00 for parking; and
- \$75.00 for NSF fees.

Although the Tenant agreed that some amount is owing, and acknowledged that they have not yet seen the updated rent ledger sent to them the morning of the hearing, they thought that they were only two months behind and owed “just north of \$5,000.00”.

Analysis

Based on the documentary evidence and testimony before me for consideration, I am satisfied that a tenancy to which the Act applies exists between the parties. Although the 10 Day Notice would have been deemed to have been served on the Tenants pursuant to section 90(a) of the Act on August 3, 2022, five days after I am satisfied that it was sent by registered mail, tracking information obtained during the hearing with the consent of the parties indicates that the first attempt to deliver the item was on August 4, 2022. As a result, I find this to be the deemed service date as it would be illogical to deem the registered mail received prior to the earliest date of attempted delivery. I am also satisfied that it was subsequently received by the Tenants on August 10, 2022.

I am also satisfied that rent at the time the 10 Day Notice was sent was \$2,225.89, and that some amount of rent was owed at that time. However, I am not satisfied that the amount shown on the 10 Day Notice as outstanding rent is correct. While I agree that the Tenants owed \$2,410.89 on September 29, 2022, I find that not all of this constitutes rent for the purpose of section 46 of the Act. As parking fees charged separately from rent under separate parking agreements and NSF fees are neither the amount of rent owed under the tenancy agreement, nor utility charges that a landlord is permitted under section 46(6) of the Act to treat as unpaid rent for the purpose of

section 46, I therefore find that the Landlord was not entitled to list these amounts as unpaid rent on the 10 Day Notice. As a result, I am satisfied based on the documentary evidence before me from the Landlord that only \$2,205.89 in rent was outstanding as of September 29, 2022, the date the 10 Day Notice was authored and mailed.

The ledgers submitted by the Agent list \$2,405.89 under the payment column on August 1, 2022. Although the Agent argued that this was for August and not July, I disagree for the following reasons. First, when a balance is carried forward on an account, amounts paid are customarily attributed to back-owed debt first, regardless of the payment date. Any residual amounts remaining after back owed debts are paid would then be attributed to the current billing period. Second, the amount paid on August 1, 2022, matches the amount owed according to the ledger as of July 31, 2022, for rent, parking fees, and the NSF fee, less the \$20.00 credit (\$2,405.89), which is different from the amount that would have been due on August 1, 2022, for August rent and parking fees (\$2,385.89). As a result, I find that the Tenants paid the back owed rent, parking fees, and the NSF fee on August 1, 2022, not the rent and parking fees owed for August of 2022.

The Agent argued at the hearing that the 10 Day Notice should still be valid, regardless of this payment, as conclusive presumption under section 46(5) of the Act should apply. I disagree. While I acknowledge that the Tenants did not dispute the 10 Day Notice, I find that they were not required to do so as they had already paid the outstanding rent amount owed by the time the 10 Day Notice was deemed served. While I appreciate that this payment was not received within 5 days after the date the Tenants were deemed to have received the 10 Day Notice on August 4, 2022, I find that penalizing the Tenants for paying the overdue amount prior to this on August 1, 2022, and in the time period between when the 10 Day Notice was unknowingly authored and mailed to them, and the date it was deemed received, would be illogical, manifestly unfair to the Tenants, and contrary to the purpose of the Act. As a result, I dismiss this argument by the Agent and I deem the 10 Day Notice to be cancelled and of no force and effect as of August 1, 2022, pursuant to section 46(4) of the Act because I am satisfied that by the time it was deemed served on the Tenants, the Tenants had already paid the amounts owed in relation to the 10 Day Notice.

Further to this, I find that had the Landlord or their agents served the Tenants with the 10 Day Notice for July's outstanding rent in a timely manner, there would have been no confusion with regards to whether the payment made on August 1, 2022, was for July or

August and therefore whether it impacted the validity and enforceability of the 10 Day Notice.

I will now turn to the matter of the monetary claims. While the Tenant argued that they reduced the number of parking stalls rented from two to one as of December 2022, the Agent denied this. No documentary evidence in support of this testimony was submitted by the Tenant. In contrast, the Agent submitted parking agreements and ledgers showing that parking fees for two stalls continued to be owed by the Tenants in December of 2022 and January of 2023. I therefore dismiss the Tenant's claim that one of the parking agreements was cancelled effective December 1, 2022.

Although the Agent sought recovery of \$75.00 in NSF fees (3 x \$25.00), section 7(1)(d) and 7(2) of the regulation state that an administration fee of not more than \$25.00 for the return of a tenant's cheque by a financial institution or for late payment of rent may only be charged if the tenancy agreement provides for that fee. The Agent made no arguments at the hearing that a term of the tenancy agreement permits them to charge the Tenants an NSF fee and having reviewed the tenancy agreement in the documentary evidence before me, I have located no such term. As a result, I find that the Landlord is not entitled under the Act and regulations to charge the Tenants a fee for either late payment of rent, or for the return of a cheque or EFT payment by a financial institution. Although section 7(1)(c) of the Act permits a landlord to charge a tenant a service fee charged to them by a financial institution for the return of a tenant's cheque, no arguments were made at the hearing that the \$25.00 NSF's fee charged to the Tenants are the actual service fees charged to the landlord by their financial institution for the returned EFT payments, nor was any documentary evidence submitted by or on behalf of the Landlord to support a finding to that affect, such as bank records. As a result, I find that the Landlord was not entitled to charge the Tenants these amounts and I dismiss their claim for recovery of these amounts without leave to reapply.

Although the ledger indicates that rent was increased from \$2,225.89 to \$2,270.40, effective January 1, 2023, the Tenant denied receipt of a NORI. At the hearing the Agent denied knowledge of the rent increase stating that no NORI documentation is in the database and therefore the NORI must be hardcopy only. I also note that no NORI documentation was submitted. As a result, I find that the Landlord has failed to satisfy me that rent was properly increased in accordance with the Act in January of 2023, and I therefore find that it was not. As a result, I find that rent remains at \$2,225.89.

Although the Tenant stated at the hearing that they thought they owed “just north of \$5,000”, not the \$7,197.18 claimed by the Agent, they provided no documentary evidence in support of this position. In contrast the Agent provided detailed ledgers and a ledger summary of the amounts owed. While I find that the ledgers and the ledger summary are good evidence of the amounts owed, I am however concerned that the Landlord charged the Tenants \$100.00 on September 2, 2022, the date of the Application for “1app – RTB-30”. From the ledger it appears to me that the Landlord has charged the Tenants \$100.00 for the cost of the filing fee, which is not a fee they are permitted to charge the Tenants under the Act or regulations. This amount is claimed as part of the Application under “rent” and is in addition to the separate claim made for recovery of the \$100.00 filing fee. The Landlord is cautioned that they cannot double-dip by attempting to claim this amount as part of outstanding rent and fees owed while simultaneously claiming separately for recovery of the filing fee. The Landlord is also cautioned that while an Arbitrator may award recovery of a filing fee to one party by another as part of dispute resolution proceedings under section 72(1) of the Act, a filing fee is not a fee that a landlord is permitted to charge a tenant under section 6 or 7 of the regulations and therefore cannot simply be charged to a tenant as a matter of course by a landlord. Landlords who wish to recover a filing fee paid for an Application for Dispute Resolution must seek recovery of this amount in their Application for Dispute Resolution should they wish to recover it.

I am also concerned that the initial EFT payment amount listed under the payment column in the ledger for July 1, 2022, is in the amount of \$2,405.89, as this amount was not owed until after the EFT was returned for insufficient funds and an NSF fee was improperly charged by the Landlord. As a result, I am unsure if only the \$2,385.89 owed for July rent and parking fees as of July 1, 2022, was paid and rejected via EFT and this is simply an accounting/transcription error in the ledger, or if the incorrect amount was charged and rejected. As a result, I strongly encourage the Landlord to ensure that the ledgers kept are accurately reflecting amounts owed and paid.

Notwithstanding the above, I am satisfied based on the ledgers, ledger summary, and the testimony of the parties that the Tenants owed \$7,077.67 as of the date of the hearing for outstanding rent and parking fees as follows:

- The \$7,297.18 in outstanding rent and fees as shown in the ledger, less:
 - The \$44.51 unlawful rent increase in January of 2023;
 - The \$75.00 in unpermitted NSF fees; and
 - The \$100.00 improperly charged to the Tenants in the ledger for the cost of the filing fee.

As the Landlord was at least partially successful in their Application, I also grant them recovery of the \$100.00 filing fee pursuant to section 72(1) of the Act. Pursuant to section 67 of the Act I therefore grant the Landlord a Monetary Order in the amount of \$7,297.18 and I order the Tenants to pay this amount to the Landlord.

Conclusion

The Landlord's Application for an Order of Possession based on the 10 Day Notice is dismissed without leave to reapply and I order that the 10 Day Notice is cancelled and of no force or effect. However, I forewarn the Tenants that the Landlord is not prevented as a result of this decision or the Act from serving a new 10 Day Notice to end Tenancy for Unpaid Rent or Utilities based on the current amount of outstanding rent, not including parking or other fees, and/or a One Month Notice for Cause due to repeated late payment of rent, if applicable, should they choose to do so.

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order in the amount of **\$7,297.18**. 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 Act.

Dated: February 1, 2023

Residential Tenancy Branch