

Residential Tenancies Tribunal

Applications: 2022 No. 0973 NL

Decision 22-0973-00

Jaclyn Casler
Adjudicator

Introduction

1. The hearing was called at 11:07 AM on 07 December 2022 via teleconference.
2. The applicant, [REDACTED], as represented by [REDACTED], hereinafter referred to as "the landlord", participated in the hearing.
3. The respondent, [REDACTED], hereinafter referred to as "tenant1", participated in the hearing, the other respondent, [REDACTED], hereinafter referred to as "tenant2" did not participate.
4. An affidavit of service was provided by the landlord confirming that both tenants were served by registered mail (L#1). A review of the tracking number provided confirmed that tenant1 picked up her package, but tenant2 did not. Because subsection 42(6) of the *Residential Tenancies Act* considers items served by registered mail, to be served 5 days after the registered mail is sent, I find that both tenants were properly served notice of the landlord's claim.
5. The details of the claim was presented as a fixed term rental agreement that started 01 July 2022. Monthly rent was set at \$835.00, including heat and lights, and a security deposit in the amount of \$626.25 was collected. A copy of the written rental agreement was provided.
6. In a proceeding under the *Residential Tenancies Act*, the applicant has the burden of proof. This means the applicant has the responsibility to prove that the outcome they are requesting should be granted. The standard of proof, in these proceedings, is referred to as the balance of probabilities which means the applicants have to establish that their account of events is more likely than not to have happened.

Issues before the Tribunal

- The landlord is seeking the following:
- An order for payment of rent in the amount of \$885.00;
- An order for payment of late fees in the amount of \$55.00;
- An order for vacant possession; and
- An order to retain the security deposit in the full amount of \$626.25 against monies owing.

Legislation and Policy

7. The jurisdiction of the Director of Residential Tenancies is outlined in sections 46 and 47 of the *Residential Tenancies Act, 2018* (the *Act*).
8. Also relevant and considered in this case are sections 2, 14, 15, 19, 31 and 32 of the *Act* and rule 29 of *The Rules of the Supreme Court, 1986*.

Preliminary Matters

9. The tenants are sisters. Of note is that tenant1 is identified as a co-signer on the lease and never resided in the rental premises. Tenant1 testified that she had been trying to help her sister tenant2, and that she does not know where her sister is currently. Tenant1 expressed concern for tenant2 and worried that the son of tenant2 was negatively impacting her sister.
10. Consequently, tenant2 was not present or represented at the hearing and I was unable to reach her by telephone because no phone number was available. This Tribunal's policies concerning notice requirements and hearing attendance have been adopted from the *Rules of the Supreme Court, 1986*.
11. According to Rule 29.05(2)(a) respondents to an application must be served with claim and notice of the hearing 10 clear days prior to the hearing date and, where the respondent fails to attend the hearing, Rule 29.11(1) states that the hearing may proceed in the respondent's absence so long as she has been properly served. Because I determined in paragraph 4, that both tenants were properly served, and because any further delay in these proceedings would unfairly disadvantage the landlord, I proceeded with the hearing in absence of tenant2.
12. The landlord amended her application at the hearing and stated that she is now seeking a total claim of rent in the amount of \$2,730.00 and that she is also seeking to claim the full value of late fees in the amount of \$75.00.

Issue 1: Payment of Rent (\$2,730.00)

Landlord's Position

13. The rental premises is located at [REDACTED]. The tenant resided in unit [REDACTED]. The landlord estimated that there are maybe [REDACTED] units in the building, and testified that the building is primarily for seniors.
14. The landlord submitted a copy of current rental ledger (L#3) and testified that the tenants owe \$2,730.00 in rent as of the day of the hearing. She reviewed the ledger and testified that this amount includes three \$50.00 NSF charges because monies were withdrawn each month between October 2022 and December 2022 by automatic deposit and then found NSF. The landlord testified that this \$50.00 charge is a corporate charge that was recently implemented, and that she does not know actual amount charged by the bank for NSF payments.
15. The landlord testified that the hearing was the first time she became aware the rental premises was likely abandoned by the tenant. She testified that she previously understood it to be occupied by tenant2 and referred to a signature received from tenant2 on 14 October 2022 (L#4). The landlord also testified that she last communicated with tenant2 sometime in November when tenant1 attended to the rental premises and contacted the landlord. The landlord stated that she has not been provided with the keys to the rental unit.

Tenant's Position

16. Tenant1 testified that she contacted the landlord and informed her that rent would not be coming from tenant2 and that she best issue a termination notice. After the October termination notice was issued, tenant1 testified that she thought the matter (the tenancy agreement) was dealt with and that she would not be liable for any additional rent payments.
17. Tenant1 testified that she has continued to visit the rental premises regularly for the past "6 or 7 weeks" since she discovered that her sister, tenant2 seemingly abandoned her possessions and disappeared (vacated the rental unit). Tenant1 testified that she has been told by neighbours of the rental unit, how they have not seen tenant2 in many weeks. Tenant1 also testified that she contacted the landlord on multiple occasions to communicate these discoveries. Tenant1 testified that she has cleaned and organized the rental unit.
18. The tenant's husband appeared as a witness, [REDACTED]. He testified to confirm tenant1's account of multiple attempts to communicate with the landlord and provide updates on the whereabouts of tenant2. The witness also corroborated the timeline put forward by tenant1 in support of tenant2 having vacated after the October termination notice was issued. Tenant1 and the witness sought guidance on how much time they have to pay monies outstanding. Tenant1 acknowledged that she still has keys, and that she does not know the location of keys provided to tenant2.

Analysis

19. I accept that tenant1 is identified as a “co-signer” on the rental agreement that permitted tenant2 to reside in the rental premises. I reviewed the rental agreement provided and I note that tenant1 has signed as a “co-signor” and not as a tenant. Her sister, tenant2, has signed as a tenant. The *Residential Tenancies Act 2018*, does not define “co-signor”, but I note that “Tenant” is defined in 2(m)(ii) of the Act as:

(ii) a person other than a landlord who enters into a rental agreement for the purpose of renting a residential premises for use or occupation by another person, and
20. Consequently, I accept that tenant1 can be found liable for rent and other relevant expense because her signature on the lease agreement enabled tenant2 to secure appropriate housing.
21. Regarding the landlord’s entitlement to rent, there was a dispute between the landlord and tenant1 on communications that may or may not have occurred between them regarding the whereabouts of tenant2. Tenant1 testified that she informed the landlord of her concerns with tenant2’s ability to pay, along with news of tenant2’s later disappearance. The landlord however, denied being previously informed of the disappearance of tenant2. This is relevant to the determination of rent owing because rent can only be awarded on reasonable grounds, that balance the obligation of a tenant to provide notice with the landlord’s obligation to mitigate losses under section 10(1)(4) of the *Act*.
22. Consequently, I am forced to determine whether the landlord is entitled to rent up to the date identified on the termination notice of 25 October 2022 (because this is the date that tenant1 believed her sister vacated) or whether I believe that the landlord is entitled to rent to the day of the hearing. This was difficult because neither party provided verifiable documentation (such as email records, text message records, or phone logs) to support either side. There was however a witness, the husband of tenant1, who testified in support of the argument that tenant2 vacated after the termination notice was issued, and that tenant1 had communicated as much to the landlord.
23. Consequently, I find that tenant1 successfully countered the landlord’s claim for rent in the amount of \$2,730.00 because she established on the balance of probabilities that the landlord was likely informed of her concerns with the whereabouts of tenant2 in real time. As such, I find that the landlord is only entitled to rent through to the end of October 2022 in the amount of \$835.00.
24. This means that I am not awarding rent as requested by the landlord for either November or through to the date of the hearing in December (07 December 2022) because I was not convinced that the landlord attempted to mitigate their losses by taking back their unit through abandonment and appropriately dealing with abandoned possession of tenant2.

25. Regarding the landlord's claim for NSF fees, because I am not recognizing the claims for rent for November or December, I am also not recognizing the NSF fees for those periods. I am only considering the NSF fee for October 2022. Based on my review of the rent ledger, a \$50.00 charge is debited as a "returned check charge" and I note that is in the rental agreement signed on 27 June 2022, the NSF fee is identified as \$25.00. Because the landlord did not know how much her bank actually charges for NSF fees, I will award the landlord compensation for October 2022 NSF charge in the amount of \$25.00 only as that is the amount from the recently signed rental agreement.

Decision

26. The landlord's claim for rent succeeds in the amount of \$860.00 (e.g., \$835.00 + \$25.00).

Issue 2: Payment of Late Fees (\$75.00)

Landlord's Position

27. The landlord has assessed late fees in the amount of \$75.00 because she has not received rent for October 2022 and the date of the hearing is 07 December 2022.

Tenant's Position

28. Tenant1 did not specifically comment on the landlord's claim for compensation for late fees.

Analysis

29. Section 15 of the Residential Tenancies Act, 2018 states:

Fee for failure to pay rent

15. (1) Where a tenant does not pay rent for a rental period within the time stated in the rental agreement, the landlord may charge the tenant a late payment fee in an amount set by the minister.

30. The minister has prescribed the following:

Where a tenant has not paid the rent for a rental period within the time specified in the Rental Agreement, the landlord may assess a late payment fee not to exceed:

- (a) \$5.00 for the first day the rent is in arrears, and***

(b) \$2.00 for each additional day the rent remains in arrears in any consecutive number of rental payment periods to a maximum of \$75.00.

31. As stated in paragraph 23, I found that the landlord is entitled to payment of rent. Because rent for October 2022 has been late since at least 02 October 2022, I find that the landlord is entitled to a payment of the maximum fee of \$75.00 set by the minister.

Decision

32. The landlord's claim for late fees succeed in the amount of \$75.00.

Issue 3: Vacant Possession of Rented Premises

Landlord's Position

33. The landlord submitted a copy of a termination notice issued on 12 October 2022 and delivered to tenant2 on 14 October 2022 (L#4). The landlord referred to proof of signature from tenant2 that was received on that date. The notice was a standard notice of termination under Section 19 of the *Residential Tenancies Act, 2018* and the stated move out date was 25 October 2022.
34. According to the landlord's records, the tenant owed \$885.00 in rent on the day the termination notice was issued. The landlord testified that the notice was issued as standard practice in response to non-payment of rent, and denied issuing it on request or recommendation from tenant1.
35. The landlord is seeking an order for vacant possession of the rented premises because arrears remain on the account and prior to the hearing, the landlord testified that she previously understood the rental premises to be occupied by tenant2.

Tenants' Position

36. Tenant1 testified that she encouraged the landlord to issue the termination notice after she informed the landlord that rent would not be forthcoming from tenant2. As previously noted in paragraphs 17 and 18, tenant1 and her husband, the witness, testified that they understood that tenant2 vacated after being issued the termination notice, however, they were not certain of an exact date. Tenant1 stated during the hearing that she would be removing certain possessions belonging to tenant2 from the rental premises.

Analysis

37. Section 19 of the *Residential Tenancies Act, 2018* states:

Notice where failure to pay rent

19. (1) Notwithstanding subsection 18(2) and paragraph 18(3)(b),

...

(b) where the residential premises is

(i) rented from month to month,

(ii) rented for a fixed term, or

(iii) a site for a mobile home, and

the amount of rent payable by a tenant is overdue for 5 days or more, the landlord may give the tenant notice that the rental agreement is terminated and that the tenant is required to vacate the residential premises on a specified date not less than 10 days after the notice is served on the tenant.

(2) Notwithstanding subsection (1), where the tenant pays the full amount of the overdue rent, including a fee under section 15, before the date specified in the notice under paragraph (1)(a) or (b), the rental agreement is not terminated and the tenant is not required to vacate the residential premises.

38. According to the landlord's records, on 14 October 2022, the day the termination notice was issued, there were arrears on the rent record in the name of tenant2 in the amount of \$885.00. As the notice meets all the requirements set out in this section of the Act, and as it was properly served, it is a valid notice.
39. That said, it was also discussed during the hearing that tenant1 believed tenant2 to have vacated the premises shortly after being served the notice and that she informed the landlord of her findings. Consequently, the landlord was only awarded rent for the month of October 2022 because the landlord was understood to have been informed that the unit was abandoned. Section 31 of the Act allows landlords to take back possession of their units without requiring an order of possession. I will nonetheless issue the requested order of vacant possession because a valid termination notice was served on 14 October 2022.

Decision

40. The landlord's claim for an order for vacant possession of the rented premises succeeds.
41. The tenants shall pay to the landlord any costs charged to the landlord by the Office of the High Sheriff should the landlord be required to have the Sheriff enforce the attached Order of Possession.

Issue 4: Security Deposit \$626.25

Relevant Submissions

42. The rental ledger provides evidence of a \$626.25 security deposit (L#3).

Analysis

43. Section 14, sub 10, 12 and 14 of the *Residential Tenancies Act, 2018* states:

(10) Where a landlord believes he or she has a claim for all or part of the security deposit,

(a) the landlord and tenant may enter into a written agreement on the disposition of the security deposit; or

(b) the landlord or the tenant may apply to the director under section 42 to determine the disposition of the security deposit.

(12) A landlord who does not make an application in accordance with subsection

(11) shall return the security deposit to the tenant.

(14) Where a landlord does not make an application under subsection (11), he or she is not prohibited from making an application under section 42 other than an application with respect to a claim against the security deposit.

44. As the amount owing to the landlord for rent is in excess of the security deposit collected, I find that the landlord is entitled to retain the full amount of the \$626.25 security deposit.

Decision

45. The landlord shall retain the full value of the \$626.25 security deposit.

Issue 5: Hearing Expenses

46. The landlord claimed the \$20.00 expense of applying for this hearing along with the cost of \$29.77 for serving two individuals by registered mail. As her claim has been partially successful, the tenants shall pay this expense of \$49.77 (e.g., \$20.00 + \$29.77).

Summary of Decision

47. The landlord is entitled to the following:

- To retain the full value of the \$626.25 security deposit.
- An order for vacant possession of the rented premises.
- An order for payment from the tenants in the amount of \$358.52 determined as follows:
 - a) Rent..... \$860.00
 - b) Late Fees..... \$75.00
 - c) Hearing Expenses \$49.77
 - d) **LESS Security Deposit.....(\$626.25)**
 - e) Total..... **\$358.52**
- The tenants shall also pay to the landlord any costs charged to the landlord by the Office of the High Sheriff should the landlord be required to have the Sheriff enforce the attached Order of Possession.

08 December 2022

Date

Jaclyn Casler
Residential Tenancies Tribunal