Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: MNDC, MNSD, FF

Introduction

This hearing dealt with the landlords' application for a Monetary Order for compensation for damage or loss under the Act, regulations or tenancy agreement, retention of the security deposit and recover of the filing fee. Both parties appeared at the hearing and had an opportunity to be heard and respond to the other party's submissions.

Issue(s) to be Decided

1. Whether the parties entered in to a tenancy agreement.
2. The landlords' entitlement to compensation from the tenants under the Act, regulations or tenancy agreement, if any.
3. Retention of the security deposit.
4. Award of the filing fee.

Background and Evidence

I heard considerable verbal testimony from both parties concerning the anticipated rental of a rental unit owned by the landlords. Upon hearing the testimony of both parties and upon review of the evidence before me, I make the following findings. In June 2008 the landlord advertised the rental unit for rent and on June 21, 2008 the tenants viewed the property. On the same date, the tenants completed an application form and wrote a $2,000 deposit cheque to the landlord, which was dated for June 26, 2008. On June 23, 2008 the parties spoke over the telephone. During that conversation, the tenants expressed concerns about the landlord and the landlord

offered to disregard the tenants' application; however, by the end of the conversation, all the parties agreed that they wished to proceed with the tenancy and that they would meet with each other on June 27, 2008 to finalize the documentation. On June 25, 2008 the tenants made an offer to purchase on a different house. On June 27, 2008 the tenants met with the landlord and informed the landlord they would not be renting the rental unit. On June 27, 2008 the landlord tried to deposit the tenants' deposit cheque; however, it was returned for "stop payment".

The landlord was of the position that the parties had entered in to a verbal tenancy agreement during the telephone conversation of June 23, 2008. The landlord testified that the tenancy was to commence July 7, 2008 for $2,000.00 per month. The landlord also accommodated the needs of the tenants by buying a dehumidifier and a lawn mower for their use. The landlord testified that the rental unit was re-rented August 15, 2008 for $2,000.00 per month; however renovations had to be done in order to find a replacement tenant for $2,000.00 per month. The landlord is claiming compensation for loss of rent from July 7, 2008 – August 15, 2008 in the amount of $2,500.00; return of the security deposit of $2,000.00; bank charges of $7.00 for the stop payment; and the filing fee of $50.00. The landlords' claim totals $4,557.00.

The tenant was of the position that there was no verbal tenancy agreement formed during the conversation of June 23, 2008. The tenant pointed to section 13 of the Act which requires tenancy agreements to be in writing and that the application form does not meet the criteria of a tenancy agreement. The tenants found the landlords' request that a deposit cheque accompany the application form to be odd; however they provided one as requested. The tenants put a stop payment on the deposit cheque because the landlord refused to return it to them after withdrawing their application.

In response to the requirement of the deposit cheque, the landlord defended the position by stating that the cheque was dated June 26, 2008 in order to protect the tenants.

Both parties referred to a part of the application form which I have reproduced here:

> "*I hereby apply for the rental premises as indicated on page one of this application form. I understand that by signing the application a binding offer to rent or lease said premises is created and in the event the landlord accepts my application and I withdraw or cancel I understand my deposit will be forfeited and I will be bound to the terms of this application making me liable for any loss of income incurred by the landlord as a result of my cancellation. If accepted, I agree to sign a lease and or written tenancy agreement*."

Analysis

The Act applies to tenancy agreements with respect to residential property. The Act defines tenancy agreement to mean an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit. As noted by the tenant, section 13 of the Act requires that tenancy agreements be in writing; however, by definition of "tenancy agreement" the Act also recognizes the rights and obligations of parties that have a tenancy created by oral agreement.

I agree with the tenant that the application form does not constitute a tenancy agreement as the application form is focused primarily on information about the tenant and does not provide for the critical requirements of a tenancy agreement such as the name of the landlord, the amount of rent payable, the terms of payment, the length of the tenancy and the start date. I also find the clause from the application form that was

quoted in the background section of this decision to be unenforceable against a "security deposit" as section 20 of the Act does not permit a landlord to charge a security deposit at anytime before a tenancy agreement is entered and the Act does not permit an automatic forfeiture of a tenants' security deposit. I also note that the application for does not refer to the deposit as a "security deposit" but merely a deposit. The Act and regulations do not permit a landlord to charge an application fee. Therefore, I do not find that the tenants paid a security deposit, as defined in the Act, and the landlord's request to retain the security deposit is impossible since the landlord does not possess a security deposit from the tenants.

I have also reviewed the numerous e-mails provided as evidence. Upon my review, I do not find that the e-mails, when combined, form a tenancy agreement. Therefore, I do not find sufficient evidence that a written tenancy agreement had been entered and I must determine whether there is sufficient evidence to find that a tenancy agreement was created orally, during a telephone conversation held on June 23, 2008.

Where verbal terms are clear and in situations where both the landlord and tenant agree, there is no reason why such terms can not be enforced. That being said, it is evident that, in relying on memory alone, the parties may end up interpreting verbal terms in drastically different ways. Where certain issues and expectations are verbally established between the parties, these terms are always at risk of being perceived in a subjective way by each individual. Obviously, by their nature, verbal terms are virtually impossible for a third party to interpret in order to resolve disputes as they arise. Therefore, my decision will be based on the requirements of the Act and regulations, by default.

Where a party violates the Act, regulations or tenancy agreement, the party who suffered damages or loss as a result may make a claim for compensation against the other party. The party making the claim for compensation has the burden to prove their

claim. Where the respondent party provides opposing verbal testimony in a manner that is just as reasonable and credible as the party making the claim, without evidence to the contrary, the party making the claim has not met their burden of proof, on the balance of probabilities, and the claim fails.

I find the disputed verbal testimony of the parties to be insufficient to establish the formation of a verbal tenancy agreement on June 23, 2008. Rather, based on the balance of probabilities, I find it more likely than not that the parties agreed that they would proceed in establishing a tenancy and that they would likely sign a tenancy agreement later in the week. An agreement to enter in to a tenancy agreement does not constitute a tenancy agreement. Nor, do I find the landlords actions of purchasing a lawn mower and a dehumidifier evidence of a tenancy agreement. I find the landlord acted in anticipation of a tenancy agreement being formed with the tenants. Therefore, I find the parties had an agreement to enter in to a tenancy agreement but did not enter in to an actual tenancy agreement.

Since I have found that a tenancy agreement had not formed between the parties there can be no violation of a tenancy agreement by the tenants. Nor can I find that the tenants otherwise violated the Act or regulations. Therefore, the landlords have not established a claim against the tenants under the *Residential Tenancy Act* and I dismiss the landlords' application without leave to reapply.

Conclusion

The landlords' application is dismissed without leave.

January 27, 2009
Date of Decision

Dispute Resolution Officer