Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNR, MNDC, MNSD, FF.

Introduction

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*.

The landlord applied for the following:

- A monetary order for rent owed and liquidated damages, pursuant to the tenancy agreement and application;
- An order to retain all or part of the security deposit for losses incurred ;
- A monetary order for the recovery of filing fee, pursuant to Section 72;

The tenant applied for the following:

- A monetary order for a reimbursement of rent paid;
- A monetary order for the return of the security deposit;
- A monetary order for the recovery of filing fee, pursuant to Section 72

Both parties attended the hearing and were given full opportunity to present evidence and make submissions. On the basis of the solemnly affirmed evidence presented at the hearing, a decision has been reached.

Issues to be decided: Landlord's Application

- Whether the landlord is entitled to monetary compensation under the tenancy agreement or section 67 of the *Act* for money owed, damages or loss. This determination is dependant upon:
    - Whether or not a tenancy agreement was created.

- If so –
    - whether or not the landlord has submitted proof that the specific damages were incurred by the tenant in violation of either the agreement or the *Act and;*
    - Is the Landlord entitled to retain the security deposit in partial satisfaction of the above claim?

Issues to be decided: Tenant's Application

- Has the tenant proven entitlement to be reimbursed for rent paid
- Has the tenant proven entitlement to the return of the security deposit

Background and Evidence

The landlord testified that the tenant made an application to rent the unit, and the parties agreed to a one-year fixed term tenancy beginning on January 1, 2009 and ending on December 31, 2009. The landlord testified that payment of the deposit was not required as part of the application process, however when the tenant signed the application on December 12, 2008, the tenant decided to pay the deposit of $590.00 and rent of $1,180.00 for the month of January 2009 at that time in order to secure the unit. The landlord's position was that by signing an application with the following provision: "I*, the applicant, understand and agree to a 12 month rental contract, which if broken, will carry charges for liquidated damages up to or equal to one month's rent*", the tenant had therefore made an enforceable commitment promising to sign a one-year lease and comply with all of its terms, including the requirement to pay a liquidation fee for prematurely ending the fixed-term agreement prior to the expiration of the term. The landlord testified that the application also included a term that stated, "*If the application is approved and the applicant fails to take possession for whatever reason, the applicant shall forfeit the full amount of the security deposit*." The evidence shows that the tenant's application was approved on December 18, 2008 and the landlord testified that the tenant also confirmed his intention to move into the unit and had even negotiated an earlier move-in date. The landlord testified that the tenant then failed to sign the tenancy agreement, did not move in as expected and subsequently notified the

landlord after January 1, 2009 that the tenant had decided not to take the unit. The landlord testified that the landlord then had to rush to re-rent the unit, which succeeded on January 9, 2009. The landlord refunded $1,040.00 from the tenant's account of $1,770.00 back to the tenant, deducting a pro-rated amount for the loss of rent for part of January and retaining the security deposit of $590.00 under the terms of the application and the tenancy agreement. The landlord's position was that because the tenant violated the tenancy agreement, the tenant was liable for liquidated damages plus the pro-rated rent for January and also that the tenant was required to "forfeit" the security deposit due to the automatic forfeiture term in the application for tenancy that the tenant signed.

The tenant testified that an agreement was reached by the parties to start the tenancy as of January 1, 2009. The tenant testified that he paid the security deposit of $590.00 plus the first month of rent for January 2009, on December 12, 2008. However, according to the tenant, the inclement weather forced the tenant to change his plans about moving in. Moreover, the tenant stated that he was not able to find anyone in the complex when he arrived. The tenant also testified that he had concerns about the elevator and about the fact that he was paying rent elsewhere too. The tenant's position was that, because he did not move in nor sign the tenancy agreement, then no tenancy was created and no liability was incurred. Therefore the tenant felt he would be entitled to a refund of the deposit and the full rent already paid for the month of January 2009, for a total refund of $1,770.00. Having received a partial refund of $1,040.00 the tenant believed that he was still owed $730.00.

Analysis

Section 16 of the Act states that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

The landlord's position is that by signing the application, the tenant had committed to all of the tenancy terms that would be contained in the tenancy agreement to be signed later on, despite the fact that the agreement itself had not yet been signed by the tenant.

However, the terms of a tenancy agreement cannot be enforced merely because a

tenant filled out and signed an application for tenancy. Even when both sign and the application contains a specific commitment where the tenant agreed to endorse and obey a pending tenancy agreement, terms contained in a rental application re not enforceable under the Act. An "agreement to agree" is not a binding contract under the law or under the Act. Moreover, there is no provision granting me the authority under the Act to make a determination based on terms contained in a rental application form.

Section 15 of the Act states that a landlord must not charge a person anything for (a) accepting an application for a tenancy, (b) processing the application, (c) investigating the applicant's suitability as a tenant, or (d) accepting the person as a tenant. The landlord has testified that no mandatory "up-front" payment was required from the tenant to have the tenant's rental application considered or processed The landlord's testimony was that the tenant was very eager to secure the unit and offered the payment of the first month rent and the deposit. The tenant disputed this.

I find that this rental application stated "*If the application is approved and the applicant fails to take possession for whatever reason, the applicant shall forfeit the full amount of the security deposit*". I find that section 20(e) of the Act specifically prohibits a landlord from including as a term of a tenancy agreement, that the landlord may automatically keep all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement. In fact, in order to retain a security deposit for any reason, the landlord would need to make an application for dispute resolution unless, at the end of the tenancy the tenant had provided written consent to allocate the deposit towards damages or money owed to the landlord. I find that including this term in the application is inaccurate and misleading and that such a term could never be enforced.

In any case, because the parties failed to sign the written tenancy agreement, none of the terms contained in the tenancy agreement are applicable. That being said, I find that while the unsigned written tenancy agreement may not apply, the provisions under the Act do. I find that, under the Act, the parties *did* enter into a tenancy as both agreed to the rental rate, the move in date and other standard terms of tenancy. I find that the provisions of the Residential Tenancy Act will apply in the absence of a written agreement. Therefore I find that the tenancy commenced on January 1, 2009 and that

is the date that the respondent became a tenant of the applicant landlord under the Act.

Section 45 (1) allows a tenant to end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that, (a) is not earlier than one month after the date the landlord receives the notice, and (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement. I find that the tenant's written notice to the landlord dated January 1, 2009 would therefore not be effective until February 28, 2009. I find that in this instance, regardless of the unsigned tenancy agreement, the tenant still failed to give the landlord adequate notice under the Act.

In regards to the tenant's application, I find that the tenant is not entitled to a full refund of the rent for January 2009 as the tenant is liable to pay damages to the landlord for any losses incurred due to the tenant's violation of the Act. The landlord has claimed damages and the question to be considered is how much of a loss was suffered by the landlord.

In regards to an Applicant's right to claim damages from the another party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed

loss or to rectify the damage.

4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof was on the claimant and I find that the landlord/applicant has met this burden. Based on the sworn testimony of both parties, I find that the landlord has established monetary entitlement to $439.00 comprised of $389.01 loss of rent for the month of January and the $50.00 cost of making this application. I order that the landlord is entitled to retain $439.00 from the security deposit and other funds paid by the tenant.

In regards to the tenant's application, I find that the tenant, having already received a partial refund of the $1,770.00 initially paid, through a refund of $1,040.74 from the landlord, is still entitled to an additional refund of $290.26. I find that the tenant is not entitled to be reimbursed for the cost of filing the application.

Conclusion

I grant the tenant an order under section 67 of the *Residential Tenancy Act* in the amount of $290.26. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated March 2009

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Dispute Resolution Officer