



Dispute Resolution Services

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

Decision

Dispute Codes: OPR MNR MNSD FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order to retain the security deposit in partial satisfaction of the claim.

An agent for the landlord and one of the respondent tenants participated in the teleconference hearing.

Issue(s) to be Decided

Is the landlord entitled to the monetary amount claimed?

Should the security deposit be returned to the tenants?

Background and Evidence

On February 13, 2009 the tenants filled out an application for tenancy and paid a \$2500 deposit toward the rental unit. The application for tenancy contains clauses as follows:

If this offer is accepted and the Applicant fails to sign the Landlord's Residential Tenancy agreement, or to take possession of the rental unit, the Applicant will be liable for the payment of the equivalent of one month's rent to the Landlord and any related expenses incurred by the Landlord.

The Applicant herewith makes an **Application Deposit** of \$ 2500.00 (**this is not a security deposit**) that will be applied to the first month's rent if this offer is accepted. If this offer is not accepted, the application deposit will be returned.

The tenants signed the application form on February 13, 2009. The landlord signed the form accepting the applicants as tenants on February 23, 2009. According to the tenancy agreement submitted by the landlord, the tenancy was to be for a fixed term

commencing March 15, 2009 and ending February 28, 2010, with a monthly rent of \$4995. A clause in the tenancy agreement states that a security deposit of \$2500 had been paid in advance on "Feb__, 2009." The tenants did not sign the tenancy agreement.

The evidence of the landlord was as follows. The tenants filled out the application and signed it and paid the "security deposit." The tenants and the landlord agreed that they could move in on February 23, 2009. On February 22, 2009 the landlord received a text message from the tenant, who stated that he and his wife were splitting up and that they could not move in the next day. The landlord called the tenant right away and the tenant said he cannot move into the house and he wants his security deposit back. The landlord began advertising to re-rent on March 1, 2009, but he was unable to rent it until April 15, 2009. The landlord has claimed \$7495 for lost revenue of one and a half months.

The tenant's response was as follows. All the tenants did was fill out a credit application and pay the landlord a security deposit in good faith. Within a week of filling out the credit application, the tenant told the landlord that they were not going ahead with the tenancy. The tenant never saw the tenancy agreement until it was submitted as evidence for this hearing.

Analysis

In considering the evidence, I find that the tenants withdrew their offer to rent on February 22, 2009, prior to the date that the landlord signed the application as accepted. Further, the landlord did not provide any evidence that he communicated their acceptance of the tenants' application before the tenants withdrew their offer. I therefore find that no binding tenancy agreement was created. Section 16 of the *Residential Tenancy Act* states that the rights and obligations of a landlord and tenant start from the date that the tenancy agreement is entered into. Therefore, the landlord cannot claim loss of rental income against the tenants.

I note that in regard to the "application deposit" that the landlord charged, Section 15 of

the *Act* prohibits a landlord from charging an application or processing fee, and section 20 of the *Act* prohibits a landlord from requiring a security deposit at any other time than when the landlord and tenant enter into the tenancy agreement. Therefore, the landlord acted improperly in taking the “application deposit” and cannot characterize the deposit as a security deposit, given that it was paid before the landlord and tenants entered into the tenancy agreement. The landlord must return to the tenants the \$2500 fee paid.

Conclusion

The application of the landlord is dismissed. The landlord is not entitled to recovery of the filing fee for the cost of their application.

I grant the tenants an order under section 67 for the balance due of \$2500. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Dated May 22, 2009.

Dispute Resolution Officer