



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution for a monetary order.

The hearing was conducted via teleconference and was attended by the landlord's agent and the tenant.

The landlord noted at the outset of the hearing that despite checking off the request for a monetary order for damage to the unit he wanted to amend the application to exclude this as the tenant never took possession of the rental unit and therefore caused no damage. I accept the landlord's amendment.

Issues(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for compensation for damage or loss under the *Residential Tenancy Act (Act)*, regulation or tenancy agreement for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to sections 26, 38, 45, 67 and 72 of the *Act*.

Background and Evidence

The landlord submitted the following documents into evidence:

- A copy of the tenant's Application for Tenancy signed and dated April 1, 2010 and states the tenant is seeking a tenancy to begin on April 30, 2010 and that monthly rent will be \$1,880.00. The landlord's agent provided an additional signature acknowledging receipt of a cheque for \$940.00. The application stipulates in a statement at the top of the page that should the applicant be accepted it becomes a binding agreement and will enter into a tenancy agreement. The statement goes on to say that if the offer is not accepted the deposit will be returned and that if accepted and the tenant fails to enter or proceed with the tenancy the tenant may be held liable for payment of the equivalent of one months' rent;

- A copy of billing receipt showing the landlord advertised the rental unit starting on May 2, 2010 and listings from Craigslist showing advertising as early as May 3, 2010;
- A copy of a tenancy agreement with another tenant to start a tenancy in this rental unit effective June 1, 2010 indicating the new tenants paid a security deposit on May 20, 2010; and
- A summary of the events from the landlord's agent's perspective dated May 4, 2010.

The landlord provided testimony that the unit was shown to the tenant on April 1, 2010 at which time a cheque was collected for the security deposit but that it was not cashed until April 9, 2010 after the tenant was informed that she was accepted and agreed to sign the tenancy agreement when she returned from out of the country in mid April, 2010.

The landlord contends that the relief manager for the complex tried calling the tenant on several occasions but was not able to contact the tenant until April 16, 2010 when she told the agent that she would sign the agreement upon her return on April 18, 2010. Further the landlord indicates the tenant finally answered a call on May 1, 2010 at which time she informed the landlord she would not be taking the unit.

The summary of events submitted by the landlord indicates the tenant was told that there would be a lease break fee of \$300.00 and that she is liable for May 2010 rent and possibly June 2010 rent if the unit was not rented prior to June 1, 2010.

The tenant contends that she made it clear to the landlord's agent when viewing the unit that she had just started looking and that she was not committing to taking this unit until she had seen some others. She states that left the security deposit cheque as the agent told her that she needed it to conduct the credit check.

The tenant states the cheque was posted dated but she did not indicate what date was on the cheque. She did not provide any documentary evidence in the form of a copy of the post dated cheque or confirmation that her bank reversed the payment if it had been cashed prior to the date on the cheque.

The tenant also contends that when she spoke with the relief manager on May 1, 2010 she was told the landlord would return the security deposit less an amount covered under a liquidated damages clause of \$300.00. The tenant states that she was also told that if she wrote a letter explaining her circumstances the landlord would consider refunding the full deposit.

The tenant testified she wrote the letter but never sent it because she was notified of this hearing. The tenant did not submit a copy of this letter into evidence. The tenant testified that she went by the rental unit on May 28, 2010 and it appeared that someone was living in the unit. The landlord testified the tenancy began on June 1, 2010 but the

tenants may have been provided an earlier access, he could not confirm this in the hearing.

Analysis

From the wording of the Application for Tenancy submitted by the landlord I find that the application clearly indicates that if the tenant named is accepted by the landlord then the parties will enter into a tenancy agreement.

The agreement also clearly outlines that if the “applicant fails to enter, or proceed with, the Residential Tenancy Agreement after the offer is accepted the applicant may be held liable for payment of the equivalent of one month’s rent”.

The *Act* defines a tenancy agreement as “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”.

While I accept both parties acknowledgement that a written tenancy agreement was not entered into, I find the Application for Tenancy contains terms of what the tenancy agreement would look like should the tenancy agreement be signed, such as the amount of rent, the day rent is due, the location, the parties.

As to the tenant’s claim that a post dated cheque was provided to the landlord so the landlord could conduct a credit cheque and in the absence of any evidence from the tenant regarding this cheque, I accept the landlord’s testimony that a cheque in any amount is not required to complete a credit cheque but rather in this case the cheque was accepted as the relief manager knew the tenant was leaving the country and wanted to ensure that is she was accepted as a tenant they would have the security deposit to hold the unit for the tenant.

Despite the tenant’s assertion that this the first time she has rented a place she was unfamiliar with the process and thought the deposit would and tenancy began when they signed a written agreement, the tenant has provided no evidence or testimony that she was incapacitated in any manner.

The three components of contracts are consensus, consideration and capacity. Based on my findings above, I find that there was consensus proven by the tenant’s signature on the application; there was consideration in the form of the security deposit; and finding no evidence of incapacitation I find the parties had full capacity to enter into an agreement. As a result, I find the parties had entered into a tenancy agreement no later than April 9, 2010, as defined under the *Act*.

Section 16 of the *Act* stipulates 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". As such, I find the tenant owe rent commencing on May 1, 2010.

Despite the landlord's testimony that the tenancy was to be for a 1 year fixed term the Application for Tenancy does not speak to this and I therefore cannot hold the tenant accountable to the legislation regarding fixed term tenancies.

Section 45 allows a tenant to end a periodic tenancy by giving the landlord a notice, in writing, with an effective date that is not earlier than one month after the date the landlord receives the notice and is the day before the day in the month, that rent is payable.

As such, the tenant was required to provide the landlord notice prior to May 1, 2010 to end the tenancy on May 31, 2010, the earliest possible date to end the tenancy as the agreement was entered into after April 1, 2010. The landlord asserts (undisputed by the tenant) that the tenant provided verbal notice on May 1, 2010 which, if accepted (verbal), the earliest effective date would be June 30, 2010. I therefore find the tenant is responsible for the payment of rent for the months of May and June 2010.

Section 7 states that a landlord who claims compensation for loss that results from the tenant's non-compliance with the *Act*, regulation or tenancy agreement must do whatever is reasonable to minimize the damage. I am satisfied the landlord took reasonable steps to mitigate losses and in so doing was able to rent the unit for June 1, 2010 thus reducing this tenant's liability.

Conclusion

I find that the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **\$1,930.00** comprised of \$1,880.00 rent owed and the \$50.00 fee paid by the landlord for this application.

I order the landlord may deduct the security deposit and interest held in the amount of \$940.00 in partial satisfaction of this claim. I grant a monetary order in the amount of **\$990.00**. This order must be served on the tenant and may be filed in the Provincial Court (Small Claims) 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 *Residential Tenancy Act*.

Dated: September 24, 2010.

Dispute Resolution Officer