

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing was convened by way of conference call to deal with the tenants' application for return of the security deposit and to recover the filing fee from the landlord for the cost of this application.

Issues(s) to be Decided

Are the tenants entitled to return of the security deposit?

Background and Evidence

The undisputed evidence of the parties is that a tenancy agreement was signed on June 16, 2010. The tenancy agreement, a copy of which was provided in advance of the hearing, provided for a fixed-term to commence on August 1, 2010 and an expiry date of July 31, 2011. Rent in the amount of \$1,100.00 per month was payable in advance on the first day of each month, and the tenancy agreement stated that the tenants were to pay a security deposit in the amount of \$550.00 and a pet damage deposit in the amount of \$550.00 by June 23, 2010. The tenants did not occupy the rental unit.

The tenants testified that that they gave the landlord 2 cheques to cover the deposits, but the parties agreed that the landlord would cash the cheques when the tenancy began; the landlord wanted the cheques in her hand so that she knew the rental unit was rented for August 1, 2010. The tenants then went on a camping trip for a month and advised the landlord that they would not be within cell phone range, but would contact the landlord.

The landlord left messages with friends and relatives of the tenants, and after the tenants received those messages, they contacted the landlord on July 6, 2010 who advised that the security deposit cheque had cleared the account but the pet damage deposit cheque was refused by the bank for non-sufficient funds. The tenants told the landlord that they would cover the cheque that had been returned and pay the rent for August on August 1, 2010. No pets were yet in the unit, so there could not be any pet damage. The landlord agreed.

The tenants had still not seen the inside of the rental unit. On or about June 28, 2010 they asked the landlord to view the unit, but the landlord stated she was too busy. They tried to view it again the next day, but the landlord told them that she had to evict the current tenant who would now not answer calls and the landlord could not get in to show the unit.

The tenants contacted the landlord again on July 13, 2010 to meet and see the unit. The landlord responded that the current tenant did a midnight move and told the tenants that she wanted the pet damage deposit and rent for August now and offered the tenants an immediate early tenancy, to which the tenants did not agree. They had already set up cable, hydro, phone and registered their child in school, and all arrangements had already been made for August 1, 2010. Further, the tenants were on a holiday and did not want to cut it short to move early.

The tenants further testified that on July 15, 2010 they contacted the landlord by phone but only reached her husband, who told them that the landlord would not talk to them, wanted nothing to do with them and stated they could not move in to the rental unit. He further asked them for their address to return the security deposit to. The tenants did not have an address, and gave him a friend's address. They stated that the landlord was clearly in the room at the time of the conversation; they could hear her in the background.

On July 18, 2010 the tenants found an advertisement for the unit on Craig's List. They called the landlord again on July 19, 2010, who advised she was keeping the security deposit.

The tenants are claiming \$550.00 for the security deposit, \$46.50 for the N.S.F. fees charged by their bank because the parties had agreed that the landlord would cash the cheques when the tenancy began but cashed them early, and the \$50.00 filing fee for the cost of this application.

The landlord testified that after the tenants called her they promised to cover the pet damage deposit by July 10, 2010 but did not do so. On July 13 or 14, 2010 she contacted the tenants and stated she would meet them at the rental unit, they could pay the pet damage deposit and move in early. She stated that the tenants did not want to pay a pet damage deposit or move in early. She advertised the unit on Craig's List on July 16, 2010 as "back-up" in case the tenants did not move in.

The landlord further testified that the tenants did not speak with her husband, and denied refusing to talk to the tenants on July 15, 2010.

Analysis

This is an application by the tenants for return of the security deposit and bank fees. I have no application before me by the landlord. The *Residential Tenancy Act* is clear as it relates to security deposits:

38 (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of

(a) the date the tenancy ends, and

(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

- (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

The *Act* also deals with effective dates of tenancies:

16 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.

In this case, I find that the tenancy agreement was effective on June 16, 2010 and the tenancy was to begin on August 1, 2010. I further find that the tenancy ended on July 16, 2010 when the landlord advertised the unit for rent.

The tenancy agreement also provided that the tenant would pay a security deposit and a pet damage deposit by June 23, 2010.

Therefore, both parties are in breach of the *Act* or the tenancy agreement. The tenants breached the term of the tenancy agreement that required the pet damage deposit to be paid by June 23, 2010. The landlord breached the *Act* by failing to deal with the security deposit.

Section 38 of the *Residential Tenancy Act* goes on to say as follows:

- 38** (6) If a landlord does not comply with subsection (1), the landlord
- (a) may not make a claim against the security deposit or any pet damage deposit, and
 - (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

The landlord did nothing about the security deposit held in trust for the tenants. The landlord had no explanation for keeping the security deposit after she had advertised the unit for rent on Craig's List on July 16, 2010. The landlord did not apply for dispute resolution and did not return any portion of it to the tenants, leaving the assumption that the landlord had no intention of dealing with it in accordance with the *Act*. The tenants did not supply a forwarding address in writing, as required by the *Act*, but served the landlord with the Tenant's Application for Dispute Resolution in July, 2010 which clearly

has an address in writing. I find that the landlord has failed to comply with Section 38 (1) of the *Act*, and therefore Section 38 (6) applies.

I further find that the tenants issued a cheque with a date of June 23, 2010 for which there were insufficient funds in the account to cover that cheque. I also find that there is conflicting evidence with respect to what the agreement was between the parties as to when the landlord would cash the cheques. The tenancy agreement speaks to the evidence, which states that both deposits were to be paid by June 23, 2010. For that reason, the landlord is not responsible for reimbursing the tenants for the service charge.

Conclusion

I order that the landlord pay to the tenants the sum of \$1,100.00, being double the base amount of the security deposit. The tenants are also entitled to recover the filing fee in the amount of \$50.00, and I grant the tenants a monetary order for the balance of \$1,150.00. This order may be filed in the Provincial Court of British Columbia, Small Claims division and enforced as an order of that Court.

The tenants' application for recovery of the banking fee is hereby dismissed without leave to reapply.

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: December 14, 2010.

Dispute Resolution Officer