



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenants for a Monetary Order for the return of their security deposit.

The parties appeared, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

Are the tenants entitled to a Monetary Order under sections 38 and 67 of the *Residential Tenancy Act* (the "Act")?

Background and Evidence

There is no written tenancy agreement or any agreed upon term of the alleged tenancy.

The tenant testified that the landlord charged a fee of \$650.00 at the time the tenants made an application for rental accommodation and before they would process the application. The tenant submitted that the landlord labelled this charge a damage deposit. The applications were signed on February 2, 2011.

The tenants submitted that they met the landlord on March 14, 2011, to sign a contract, but that they did not agree with the terms of the tenancy and that no agreement has been signed.

The tenants then requested their deposit returned, without success.

The landlord's agent, the regional manager for the landlord, agreed that the tenants paid \$650.00 and further stated that the landlord's representative explains to each applicant for a tenancy in one of their properties that the application requires a security deposit to be paid and to discuss the terms of the lease with the applicant.

The applicant is informed that should the application be approved, a tenancy is presumed to have been automatically created, which is explained to the applicant. The landlord's agent stated that an application will not be processed without the deposit being paid.

The landlord's agent pointed to the clause in the application for rental accommodation which stated that the deposit is not refundable upon approval of an application.

I note that there is no provision contained in the application for rental accommodation for a return of the deposit in the event an application is not approved.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

Only the evidence and testimony relevant to the issues and findings in this matter are described in this Decision.

When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations, the tenants in this case, have the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Under section 16 of the *Act*, 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.

However, I find in this case, the tenants are not tenants, but rather applicants. I cannot find any conclusive evidence or testimony that the parties ever agreed to any material terms of a tenancy agreement. Without this evidence, I find that there was no tenancy agreement.

Moreover, under section 15, it is a violation of the *Act* to require payment or rent or a security deposit from an applicant as a condition of making an application.

This section goes on to state that a landlord must not charge a person anything for accepting an application for a tenancy, processing of the application, investigating the applicant's suitability as a tenant or accepting the person as a tenant.

I therefore find on a balance of probabilities that the landlord charged an illegal application fee to determine the suitability of the tenants, which is prohibited by the Act. I find that the landlord's violation of the Act entitles the tenants to a return of the fee paid by them for the application, incorrectly labelled a deposit.

Even though not requested, I have allowed the tenants a recovery of their filing fee of \$50.00 as allowed under section 72 of the Act.

Conclusion

I therefore find the tenants have established a monetary claim of **\$700.00**, comprised of the fee paid by them of \$650.00 and the filing fee of \$50.00.

I am enclosing a monetary order for \$700.00 with the tenants' Decision. This order is a **legally binding, final order**, and may be filed in the Provincial Court (Small Claims) should the landlord fail to comply with this monetary order.

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: July 11, 2011.

Residential Tenancy Branch