



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Hollyburn Estates Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application for dispute resolution under the Residential Tenancy Act (the "Act") seeking a monetary order for money owed or compensation for damage or loss, for authority to retain the tenant's security deposit, and for recovery of the filing fee.

The landlord's agents appeared; the tenant did not appear.

The landlord testified that they served the tenant with the Application for Dispute Resolution and Notice of Hearing by registered mail on August 9, 2013. The landlord supplied the receipt showing the tracking number of the registered mail.

I find the tenant was served notice of this hearing in a manner complying with section 89 of the Residential Tenancy Act (the "Act") and the hearing proceeded in the tenant's absence.

The landlords were provided the opportunity to present their evidence orally and to refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me.

I have reviewed all oral and documentary evidence before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Issue(s) to be Decided

Is the landlord entitled to authority to retain the tenant's security deposit and to recover the filing fee?

Background and Evidence

The landlord submitted the following oral and documentary evidence in support of their application.

The tenant came to the office of the landlord in April 2013, viewed a rental unit of the landlord, and signed an application for that rental unit, said application being approved by the landlord on May 6, 2013 for a move in date of May or June.

On May 9, 2013, the tenant paid a security deposit of \$655, and on May 11, after deciding on another rental unit, the tenant changed his application for rent, with a move in date of July 1, 2013.

On June 1, 2013, the tenant signed a tenancy agreement for the rental unit in question, for a start date of the tenancy of July 1, 2013.

On June 19, 2013, the landlord's cleaners noticed that the rental unit had cockroaches and required an extermination, at which time the tenant was contacted and informed that the rental unit would not be ready until July 10. The tenant was offered another rental unit on a temporary, 10 day or permanent basis, with a prorated rent, or he could delay moving until July 10, if he could stay at his current residence, all with a free month rent at the end of the tenancy.

The tenant agreed to stay where he was until July 10, and then move in. Despite this agreement, the tenant sent an email on July 2, informing the landlord he had secured another location and would not be moving in.

Although the tenant requested his security deposit returned, the landlord replied to the tenant via email that his security deposit was forfeited due to the application for rent he signed, which stated "if approved and applicant does not take possession for whatever reason, the applicant forfeits the FULL amount of security deposit."

The landlord's relevant documentary evidence included email communication between the landlord's agents and the tenant, beginning June 17, 2013, a written tenancy agreement, and the application for rent signed by the parties.

Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act, which falls in sections 7 and 67, or tenancy agreement, the claiming party, the landlord in this case, has to prove, with a balance of probabilities, four different elements:

First, proof that the damage or loss exists, **second**, that the damage or loss occurred due to the actions or neglect of the respondent in violation of the Act or agreement, **third**, verification of the actual loss or damage claimed and **fourth**, proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

In the case before me, I find the landlord has not claimed for damage or a loss; rather the landlord claimed that they are entitled to retain the tenant's security deposit due to a clause in the application for rent allowing for an automatic forfeiture in the event the applicant fails to take possession of the rental unit.

Section 20(e) of the Residential Tenancy Act states that a landlord must not require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

I therefore find that the clause relied upon by the landlord to retain the tenant's security deposit is unenforceable under the Act and I therefore dismiss their application to retain the security deposit.

As I have dismissed the landlord's monetary claim, I decline to award them recovery of the filing fee.

Further as I have dismissed the the landlord's request to retain the security deposit, I order that they return the tenant's security deposit of \$655 to him immediately.

Conclusion

The landlord's application is dismissed.

I have ordered the landlord to return the tenant's security deposit and I therefore grant the tenant a final, legally binding monetary order pursuant to section 67 of the Act for the amount of \$655, which I have enclosed with the tenant's Decision.

Should the landlord fail to pay the tenant this amount without delay after being served the order, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court. The landlord is advised that costs of such enforcement are recoverable from the landlord.

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* and is being mailed to both the applicant and the respondent.

Dated: November 07, 2013

Residential Tenancy Branch

