Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Devon Properties Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNR, 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 unpaid rent, for authority to retain the tenants' security deposit and for recovery of the filing fee.

The landlord's agents and the tenants attended, the hearing process was explained and they were given an opportunity to ask questions about the hearing process.

The evidence was discussed and no party raised any issue regarding service of the evidence.

Thereafter all parties gave affirmed testimony, 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 retain a monetary deposit paid by the tenants, further monetary compensation, and to recover the filing fee?

Background and Evidence

The landlord's monetary claim is $1600, comprised of rent for October 2013, of $1100 and liquidated damages of $500.

In support of their application, the landlord's agent CA (hereafter "landlord") submitted the landlord is entitled to loss of rent revenue for October due to the documents signed by the parties. In support and explanation, the landlord submitted copies of an "Application for Acceptance as a Residential Tenant ("rental application")," having been signed separately by each tenant, and having been signed by the landlord on September 5, 2013. Also submitted by the landlord was a copy of a "Residential Tenancy Agreement," signed by the tenants on September 5, 2013, and by the landlord on September 6, 2013.

The rental applications also list the proposed monthly rent of $1100, the amount of the security deposit of $550, and parking fee of $35. These applications also state that the tenants were to pay $550 as a "holding deposit" to "secure the rental of the Rental Unit." The rental applications state if the applicants/tenants were accepted as tenants, the "holding deposit" would be applied toward the first month's rent, or would be returned to the applicants/tenants if they were not accepted. The rental applications also state that once the landlord accepted the proposed tenants and they failed to proceed with the tenancy agreement, the proposed tenants would be liable for the first month's rent, or any portion of the month's rent the rental unit remains unrented, and for the landlord's costs in re-renting the rental unit.

I must note that although the landlord referred to the $550 paid by the tenants as a "holding deposit," their application for dispute resolution and their tenancy agreement refers to this amount as a security deposit.

I must further note that although the 1 page rental applications appear to be in 8 point font, the contents of the document are highly condensed, not well spaced, and are difficult to read line by line without the benefit of a straight edge.

The landlord said that after a credit and background check, the tenants were notified on September 6, 2013, that they had been accepted and there was now a valid tenancy, beginning on October 1, 2013, as per the written tenancy agreement, which had now been signed by the landlord on that day.

The landlord submitted that they were notified on September 6, verbally, and on September 9, in writing, that the tenants were declining to move into the rental unit. The landlord contended that by signing the rental applications, as the landlord had accepted the applicants as tenants, the tenants were then bound by the terms of the tenancy agreement they signed on the same day as the rental applications were signed. In other works, the landlord argued that the tenants became responsible to begin paying rent on October 1, 2013, at a rate of $1100.

The landlord contended that they were unable to re-rent the rental unit for October, and therefore were entitled to loss of rent revenue for October, to retain the tenants' "holding deposit," and to liquidated damages as per the tenancy agreement, which was for a fixed term tenancy.

Tenants' response-

The tenants submitted that the building manager, ML, indicated that on the day they viewed the rental unit, there was another couple of potential tenants downstairs who were also signing a rental application, so that they should complete their applications as quickly as possible.

The tenants argued that he understood that landlords were allowed to collect only 1 security deposit per rental unit, and as another couple also paid a security deposit that day, a grey area was created for them, creating confusion as to whether the tenancy agreement was binding.

Landlords' response-

In response to my question, the landlord confirmed that they accepted multiple "holding deposits" on September 5 on the same rental unit, but that they accepted the tenants here as tenants as they checked out more beneficially for the landlord.

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 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 party took reasonable measures to mitigate their loss.

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 must consider whether or not the parties entered into a valid and therefore enforceable tenancy agreement.

G.H.L. Fridman wrote in *The Law of Contract in Canada*, Carswell, 1986 at p.56:

> An acceptance (or an offer) may contemplate something more by way of formalization before a binding contract is to come into existence ....
>
> An agreement to make an agreement is not enforceable. If parties have purported to contract that they will make a contract in the future, even if they have identified the terms upon which such later contract will be made, there will be nothing as yet that is legally enforceable.

I find this to be the case here as I find that the rental application was an agreement to make an agreement. In making this decision, I considered that the landlord had accepted two deposits on the same rental unit at the same time. In light of this, I find that there was not a meeting of the minds between the landlord and that the tenancy agreement was based upon a contingency, not a binding offer, which is required of a valid contract.

I further do not agree that a tenant can accept an offer of a rental unit prior to the landlord making such offer, as here the day following the landlord, the offeror, signing the tenancy agreement

I therefore find the tenancy agreement to be an invalid contract, and therefore not enforceable.

I therefore dismiss the landlord's application for loss of rent revenue for $1100, liquidated damages of $500, authority to retain the tenants' "holding deposit," and recovery of the filing fee, without leave to reapply.

As to the issue of the tenants' "holding deposit," under section 20(a) of the Act, a landlord must not collect a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement. In this case, I find the "holding deposit" collected by the landlord to be a security deposit, and that it was charged prior to entering into a tenancy agreement.

As I have dismissed the landlord's application claiming against the security deposit, I direct that they return the tenants' security deposit of $550 immediately.

As I have directed the landlord to return the tenants' security deposit of $550, I grant the tenants a final, legally binding monetary order pursuant to section 67 of the Act in the amount of $550, which I have enclosed with the tenants' Decision.

Should the landlord fail to pay the tenants this amount without delay, the tenants may serve the monetary order on the landlord and thereafter the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court if necessary. The landlord is advised that costs of such enforcement are recoverable from the landlord.

Conclusion

The landlord's application is dismissed without leave to reapply and they are directed to return the tenants' security deposit.

The tenants are granted a monetary order in the amount of $550.

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 respondents.

Dated: December 16, 2013

Residential Tenancy Branch