Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNR, FF

Introduction

This hearing was convened in response to applications by the landlord and the tenants.

The landlord's application is seeking orders as follows:

1. For a monetary order for unpaid rent;
2. To keep all or part of the security deposit; and
3. To recover the cost of filing the application.

The tenants' application is seeking orders as follows:

1. Return the holding deposit; and
2. To recover the cost of filing the application.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions at the hearing.

The parties confirmed receipt of all evidence submissions and there were no disputes in relation to review of the evidence submissions.

Issues to be Decided

Is the landlord entitled to a monetary order for unpaid rent?
Is the landlord entitled to keep all or part of the security deposit?
Are the tenants entitled to the return of the holding deposit?

Background and Evidence

The first issue to be determined at this hearing is whether or not the parties entered into a tenancy agreement.

The landlord's agent testified on June 13, 2014, the tenants completed an application for tenancy. The agent stated that the tenants paid a holding fee which was credited towards

the security deposit when the landlord completed the required reference checks on June 17, 2014.

The landlord's agent testified that she contacted the tenant to let her know that her references had passed and spoke about other matters and it was determined at that time that the rent would be increased from the original amount of $3,175.00 to $3,300.00 as the tenant would be having more people attend the home than was originally expected.

The landlord's agent testified the tenant agreed to the increased rent and agreed to pay the additional amount of $150.00 to top-up the security deposit. The agent stated that they further agreed to meet at the rental unit on July 1, 2014 at 11:00 am to receive the keys to the rental unit and enter into the written tenancy agreement.

Filed in evidence is a copy of the standard application for tenancy, clause B of the application reads in part,

> "this offer is subject to acceptance by the landlord and is open for acceptance for three (3) business days ending at 6 p.m., following the date herein, … this includes a deposit for which a receipt is attached.
>
> A holding deposit of $1500 holding/sec. dep shall be deducted if applicant(s) cancel the offer before the expiry time for acceptance. If this offer is not accepted, the deposit shall be refunded. If the offer is accepted, the deposit shall be credited towards the security deposit.
>
> If the applicant fails to enter, or proceed with, the tenancy agreement after the offer is accepted, the applicant may be held liable to payment of the equivalent of one month's rent to the landlord. This condition is for the benefit of the landlord and may be revoked by the landlord. If the landlord cannot provide the premises, the Landlord's responsibility is limited to return of the deposit only."
>
> [Reproduced as written.]

Clause G of the application reads in part,

> "Acceptance: The above applicant(s) are accepted for tenancy, proving all adult applicants sign the Tenancy Agreement."
>
> [Reproduced as written.]

The tenant testified that upon receiving the application for tenancy they were told that the landlord would not check references or rent to anyone that would not give a holding deposit. The tenant stated that they were told the fee was non-refundable if they decided not to rent the home.

The tenant testified that they were happy with the rental unit as the home was very nice, however, when the landlord's agent contacted them on June 24, 2014 not June 17, 2014 as

suggested. The landlord had decided to increase the rent based on their personal circumstances.

The tenant testified that the rent was increased to $3,500.00 per month from the listed rent of $3,175.00, which the agent was told they could not afford the increased amount. The tenant stated that the agent then offered the rent at $3,300.00 per month; however, she informed the agent that she would have to discuss the increase with her husband as he was not at home as she was unsure if they could afford this amount.

The tenant testified that when she called the agent later to inform her of their decision not to accept the higher rent, the agent did not answer her phone and was she was unable to leave a message for the agent as the agent's voicemail was full.

The tenant denied there was an agreement to meet at the rental unit on July 1, 2014 at 11:00 am.

The landlord's agent testified that on occasion her voicemail does get full, but does not believe it was full on this occasion.

Analysis

Based on the above, the testimony and 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 party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- Proof that the damage or loss exists;
- Proof that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement;
- Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- Proof that the Applicant 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 this case each party has the burden of proof to prove their respective claim.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Section 7(1) of the *Residential Tenancy Act (*the "Act") states that if a landlord or tenant does not comply with the Act, regulation or tenancy agreement, the non-comply landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Section 5 of the Act states, landlords and tenants may not avoid or contract out of this Act or the regulations any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 15 of the Act states, A landlord must not charge a person anything for accepting an application for a tenancy, processing the application, or investigating the applicant's suitability as a tenant.

Section 20(a) of the Act states, a landlord must not require a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement.

In this case, the landlord's application for tenancy charges a holding deposit. This holding deposit is accepted prior to any reference checks being completed and prior to entering in the tenancy agreement and is forfeited should the tenant cancel their application.

I find the landlord has breached section 15 and 20 the Act, by charging a holding deposit which is non-refundable fee should the tenant cancel their application and by accepting money prior to entering into a tenancy agreement.

Further, I find clause B of the application for tenancy is unconscionable as it is so one-sided and is grossly unfair to the tenant as the term states, the holding deposit shall be deducted if the applicant(s) cancel the offer before the expiry time for acceptance. This clause is solely for the benefit of the landlord.

I find the tenants had the right to reconsider their application for tenancy. A rental application is not a tenancy agreement and the tenants did not sign a tenancy agreement as required by clause G of the application.

Based on the above, I find the parties did not enter into a tenancy agreement.

As a result, I find the landlord has failed to prove a violation of the Act, by the tenants and the tenant were not required to pay rent. Therefore, I dismiss the landlord's application for a monetary order for unpaid rent and to retain the security deposit. As the landlord was not successful with their application they are not entitled to recover the filing fee.

As I have found the landlord has breached the Act, I find the tenants are entitled to recover their holding deposit in the amount of **$1,500.00.**

I find that the tenants have established a total monetary claim of **$1,550.00** comprised of the above described amount and the $50.00 fee paid for this application. This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The landlord's application is dismissed. The tenants are granted a monetary order as stated above.

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: January 12, 2015

Residential Tenancy Branch