Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LI-CAR MANAGEMENT GROUP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

I accept that the landlord has sufficiently pleaded that it seeks to retain the security deposit in satisfaction of a monetary order for compensation for lost rent.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord was represented by its agent. The agent is an employee of the corporate landlord. The landlord elected to call one witness. The witness is also an employee of the corporate landlord.

The agent testified that the landlord served the tenant with the dispute resolution package on 31 December 2014 by registered mail. The landlord provided me with a Canada Post tracking number that showed the same. The tenant appeared and confirmed that he had copies of the landlord's evidence. On the basis of this evidence, I am satisfied that the tenant was served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for loss arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

There is no written tenancy agreement between the parties.

On 19 December 2014 the tenant went to a viewing of the rental property. The tenant expressed interest in the property and arranged to submit his application for the rental unit.

Later on 19 December 2014, the tenant sent an email to the landlord expressing his continued interest in the rental unit:

> *Nice to meet you in your office today.*
>
> *I would like to give you some clarifying information about my application.*
> *...*
> *Tomorrow I will return to [previous residence] to collect my household goods there and prepare to move them to [city]. So, I strongly prefer if we can complete the lease signing and deposit payment today.*

The witness testified that the tenant was adamant that he wanted the property and pushed to have his application expedited. The landlord approved the tenant's application and communicated this acceptance to him on 19 December 2014.

Later on 19 December 2014, the tenant provided two cheques to the landlord. One cheque represented a deposit paid to the landlord ($750.00) and the other cheque was a prepayment of rent for January 2015 ($1,500.00). The tenant testified that he asked for a copy of the tenancy agreement to be sent to him by Monday morning. The tenant testified that he did not receive a copy of the tenancy agreement the morning of 22 December 2014.

The agent testified that there were three other parties that expressed interest in the rental unit. The witness confirmed that there were three other parties that expressed interest. The witness could not identify on which dates these parties viewed the property. The witness testified that none of the other parties' applications had been approved. The witness testified that the landlord did not commit to the other parties because the tenant was so adamant that his application be fast tracked.

The landlord's agent testified that on 19 December 2014, after the landlord approved the tenant's application, the landlord's employee contacted other interested parties and informed them that the rental unit was no longer available.

The tenant testified that he was told that the company did not normally arrange weekend viewings. The witness confirmed that there were no viewings on Saturday, 21 December or Sunday, 22 December 2014.

On 22 December 2014 at 1327, the tenant contacted the landlord by email:

> *Thanks so much for all your help on Friday. I really appreciate it and hope you had a great weekend. So sorry to make [employee] late for her nails appointment!*
>
> *After discussing with my ex, she is very worried about me having room-mates in this house because of my small children. So, I will not need such a large house in this case…*
>
> *Can you help introduce to me some other places which are near by to [neighbourhood] which are smaller and less expensive?*
>
> *Thanks so much for your kind cooperation.*

The landlord's employee informed the tenant that the landlord would refund the tenant's rent for January, but that the tenant's security deposit was forfeit.

The agent testified that the property management company called back the three other interested parties to see if they were still interested in the rental unit. All three expressed that they were no longer interested in the rental unit.

On 24 December 2014, the agent sent an email to the tenant:

> *Thank you for contacting our office regarding your security deposit. Once a deposit is made on a property, that property is removed from our in-house rental board. The website is updated periodically and may or may not reflect activities within the past 72 hours. The removal of the property from our in-house information means that the property has been secured by a tenant and the payment of the rent in advance is further confirmation that the tenant has full intentions of taking possession of the property. There were a number of individuals that had qualified for the same property but they were contacted and advised that the property was secured by a deposit. Therefore, your decision to not move forward with renting the property meant that we had to start over with new applicants. Given the time of the year, several of the prospects could not be reached. Our client cannot be penalized for your change of mind.*

On 24 December 2014, the tenant sent an email to the agent:

> *…Again, as there was no lease or other contract signed which outlined the rights and responsibilities of both sides, there was never any official agreement between either party.*

The agent testified that the majority of the management company's clients are referred to them company by the in-house rental board.

The agent testified that the landlord entered into a tenancy agreement with new tenants for the rental unit in mid-February.

The tenant submitted that he could not agree to the contract because the terms were uncertain. The tenant testified that he understood that the contract was a work in progress that needed to be worked out and that he would be in a position to accept the landlord's offer after he reviewed the lease agreement. The tenant testified that he expected that he would enter into the tenancy agreement when he had the written tenancy agreement in front of him to review and accept.

Analysis

Under the Act, there is no ability to claim a security deposit as “forfeit”; rather, a security deposit may be claimed by a landlord for a tenant’s failure to comply with the Act, regulations or tenancy agreement where such a failure has caused the landlord to experience a loss.

“Tenancy agreement” is defined in the Act to include both oral and written agreements:

> "tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

The sufficiency of an oral tenancy agreement was confirmed by the British Columbia Supreme Court in *Johnson v. Patry,* 2014 BCSC 540.

Pursuant to 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.

A contract or an agreement between two parties is formed when there is offer, acceptance and exchange of consideration. There are courses of conduct that can appear to constitute a contract but do not. For example, an agreement to agree is not an enforceable contract.

The tenant’s position is that no contract had formed between the parties. The tenant purports that the legal relationship between the parties was one of continued negotiations and that the formalization of the legal relationship would have occurred when the written tenancy agreement was signed. Such a relationship would be unenforceable as there can be no contract to negotiate or an “agreement to agree”. Another interpretation could be that the tenant was entitled to treat the tenancy agreement as at an end when the landlord failed to comply with the delivery schedule of the written tenancy agreement.

The landlord’s position is that the tenancy agreement had formed and all that remained was to sign the written tenancy agreement.

If I find that a tenancy agreement was constituted between the parties, then the tenant would have been required to have provided notice in accordance with section 45 of the Act. Pursuant to section 45 of the Act, the earliest effective date of the tenant's notice given 22 December 2014 would have been 31 January 2015. The landlord would be entitled to claim for a rental loss for January subject to the landlord's obligation to mitigate its losses.

Determining whether or not a tenancy agreement existed between the parties requires me to identify:

- what, if any, offer was made and by whom;
- what, if any, acceptance was made and by whom; and
- what, if any, consideration was exchanged between the parties.

The intent to create legal relationships is presumed in cases like these where the relationship between the parties is commercial in nature. Where circumstances indicate a normal commercial relationship with a contract with its attendant rights and duties, a binding contract may be the result even where the subject-matter of the alleged contract is speculative.

I find that the application made by the tenant was an offer. This offer was to rent the rental unit at a monthly rent of $1,500.00 and subject to the standard tenancy agreement terms imposed by operation of British Columbia law. An offer may contemplate the signing of a written contract; however, unless the words "subject to contract" or its equivalent has been used in the offer, the acceptance is binding. There was no "subject to contract" condition in this oral agreement.

I find that the acceptance by the landlord occurred when the landlord approved the application and communicated this acceptance to the tenant on 19 December 2014. When the landlord accepted the tenant's offer, the tenant could no longer withdraw the offer and was bound by the promises contained therein.

I find that the parties exchanged consideration: the landlord promised to provide the tenant with the rental unit as of 1 January 2015 and the promised to provide monthly rent and a security deposit. The tenant began performance under the tenancy agreement when he provided the first month of rent and the security deposit to the landlord.

There was no clause in the oral tenancy agreement that could be construed as a “time is of the essence” clause. Accordingly, the tenant was not entitled to treat the contract as at an end when the landlord failed to deliver the written tenancy agreement the morning of 22 December 2014.

As there was a tenancy agreement between the parties the tenant breached the Act by failing to provide notice in accordance with section 45. The tenant’s failure resulted in lost rent to the landlord for the month of January 2015.

Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant’s duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

I find that the landlord’s loss for the tenant’s breach was $1,500.00. The landlord has elected to limit the loss to $750.00. This is the landlord’s prerogative. I find that the landlord showed sufficient mitigation by calling all of the parties who had previously expressed interest in the rental unit and returning the rental unit to the rental market as soon as practicable given the holiday schedule.

The landlord’s application is allowed. The landlord is entitled to retain the tenant’s security deposit in the amount of $750.00.

As the landlord was successful in this application, I find that the landlord is entitled to recover the $50.00 filing fee paid for this application.

Conclusion

The landlord’s application is allowed.

I issue a monetary order in the landlord’s favour in the amount of $50.00.

The landlord is provided with this order in the above terms and the tenant must be served with this order as soon as possible. Should the tenant fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: April 13, 2015

Residential Tenancy Branch