



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, OLC, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by both tenants and the landlord.

Issue(s) to be Decided

The issues to be decided are whether the tenants are entitled to a monetary order for return of the security deposit and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The parties agreed the tenants moved in to the rental unit on July 3, 2013 for a monthly rent of \$1,000.00 due on the 1st of each month and that the tenants vacated the rental unit by May 1, 2015.

The tenants submit that the tenancy agreement was initially for a 1 year fixed term that converted to a month to month tenancy effective July 1, 2014 and that they paid a security deposit of \$500.00.

The landlord submits that there was no written tenancy agreement and in fact the tenants are not tenants but rather she had considered them lodgers. She also states that she did not collect a security deposit but she did collect a "holding fee".

The landlord testified that local bylaw officers informed her that she could not rent out the rental unit as a tenancy because she already had a secondary suite on the residential property. She states that she was told by the officers that she could rent it out to lodgers.

The landlord explained the portion of her house the tenants were renting was in the basement but that it did have a kitchen and bathroom and they never shared these facilities during the tenancy.

The landlord also submits that when she was approached by the tenants seeking to rent the unit they only wanted it for the beginning of July 2013 but that it was available for the month of June 2013. She stated that it was agreed that if the tenants, through their mother, paid a holding fee for the month of June she would allow them to start the tenancy in July 2013.

Analysis

Section 1 of the *Act* defines a tenancy as a tenant's right to possession of a rental unit under a tenancy agreement. The same section goes on to define a tenancy agreement as 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 the rental unit. And finally, rental unit is defined as living accommodation rented or intended to be rented to a tenant.

Section 4 of the *Act* states that the *Act* does not apply to:

- a) Living accommodation rented by a not for profit housing cooperative to a member of the cooperative;
- b) Living accommodation owned or operated by an educational institution and provided by that institution to its students or employees;
- c) Living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation;
- d) Living accommodation occupied included with premises that
 - i. Are primarily occupied for business purposes, and
 - ii. Are rented under a single agreement;
- e) Living accommodation occupied as vacation or travel accommodation;
- f) Living accommodation provided for emergency shelter or transitional housing;
- g) Living accommodation
 - i. In a community care facility under the *Community Care and Assisted Living Act*,
 - ii. In a continuing care facility under the *Continuing Care Act*,
 - iii. In a public or private hospital under the *Hospital Act*,
 - iv. If designated under the *Mental Health Act*, in a Provincial mental health facility, an observation unit or a psychiatric unit,
 - v. In a housing based health facility that provides hospitality support services and personal health care, or
 - vi. That is made available in the course of providing rehabilitative or therapeutic treatment or services;
- h) Living accommodation in a correctional institution;
- i) Living accommodation rented under a tenancy agreement that has a term longer than 20 years;

- j) Tenancy agreements to which the *Manufactured Home Park Tenancy Act* applies; or
- k) Prescribed tenancy agreements, rental units or residential property.

Based on the testimony of both parties and the above noted definitions and exemptions and despite the landlord's assertion that the tenants are lodgers and not tenants I find the agreement between these parties is a tenancy as defined under the Act and there is no allowable exemption from the Act.

As such, I accept jurisdiction in the matters between these parties.

Section 1 of the Act provides the following relevant definitions:

1. Security deposit – money paid, or value or a right given, by or on behalf of a tenant to a landlord that is to be held as security for any liability or obligation of the tenant respecting the residential property but does not include a postdated cheque for rent; a pet damage deposit; or a fee described under the Residential Tenancy Regulation; and
2. Rent – money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

As the tenants are claiming the return of the security deposit and the landlord disputes that a security deposit was collected the burden is on the tenants to provide additional evidence to confirm that they paid a security deposit. I find the tenants have failed to provide any such corroborating evidence.

However, I also note that as I have determined this was a tenancy subject to the Act, I also find the landlord was bound to collect only fees that were allowed under the Act and/or regulation.

Section 6 and 7 of the Residential Tenancy Regulation list the following as fees the landlord may charge a tenant:

- If a landlord provides a tenant with a key or other access device, the landlord may charge a fee that is refundable upon return of the key or access device, and no greater than the direct cost of replacing the key or access device. A landlord must not charge such a fee if the key or access device is the tenant's sole means of access to the residential property.

- The following non-refundable fees
 - direct cost of replacing keys or other access devices;
 - direct cost of additional keys or other access devices requested by the tenant;
 - a service fee charged by a financial institution to the landlord for the return of a tenant's cheque;
 - subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;
 - subject to subsection (2), a fee that does not exceed the greater of \$15 and 3% of the monthly rent for the tenant moving between rental units within the residential property, if the tenant requested the move;
 - a move-in or move-out fee charged by a strata corporation to the landlord; and/or
 - a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

As there is no provision in the Regulation for the landlord to charge a holding fee I find the landlord, in this case, has no authority under the law to collect such a fee and I order the landlord to return the \$500.00 fee to the tenants.

Conclusion

I find the tenants is entitled to monetary compensation pursuant to Section 67 and grant a monetary order in the amount of **\$550.00** comprised of \$500.00 holding fee and the \$50.00 fee paid by the tenants for this application.

This order must be served on the landlord. If the landlord fails to comply with this order the tenants may file the order in the Provincial Court (Small Claims) and be 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: November 26, 2015

Residential Tenancy Branch

