



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FF

Introduction

This hearing was convened by way of conference call concerning an application made by the tenants seeking a monetary order for return of the security deposit and to recover the filing fee from the landlord for the cost of the application.

The landlord and both tenants attended the hearing and each gave affirmed testimony. The parties were given the opportunity to question each other, and all testimony and evidence provided has been reviewed and is considered in this Decision.

No issues with respect to service or delivery of documents or evidence were raised.

Issue(s) to be Decided

Have the tenants established a monetary claim as against the landlord for return of all or part or double the amount of the security deposit?

Background and Evidence

The parties agree that a tenancy agreement was signed by each of the parties, a copy of which has been provided, for a tenancy to begin on October 1, 2016 and to expire on December 31, 2016. Rent in the amount of \$1,200.00 per month was payable on the 1st day of each month.

The first tenant (KJS) testified that he received a copy of the tenancy agreement to look over before signing it.

The tenants didn't move into the rental unit, but paid the landlord \$1,200.00 in September, 2016 to secure it. No other monies were paid to the landlord. The tenants contacted the landlord by telephone prior to the date the tenancy was to begin to advise that they would not be moving in.

When asked if the landlord advised that the \$1,200.00 was accepted as rent and that the security deposit would be paid when they moved in, the tenant replied in the affirmative.

The tenant further testified that the landlord was provided with a forwarding address of the tenants on the Tenant's Application for Dispute Resolution when served with the hearing package for this hearing.

The second tenant (HRG) testified that the landlord was informed by telephone on September 26, 2016 that the tenants weren't moving in. The landlord emailed the tenants later stating that the landlord had accepted other tenants who were moving in on October 1, 2016, so there was no loss of rental revenue. Copies of emails exchanged between the parties have been provided.

The landlord testified that a few days before they were scheduled to move in, the tenants informed the landlord that they were no longer going to move into the premises and the landlord set out to find new tenants. The landlord took great pains to go through the tenancy agreement with the tenants to be sure everything was understood, gave them a few days to look it over before finalizing it, and the landlord then had to go through the hassle of trying to get it re-rented.

The landlord further testified that the tenancy agreement is for a minimum of 3 months rental, and it contains a clause to protect the landlord: "10. If the Tenant gives notice of 30 days that they will be vacating the premises prior to December 31, 2016 the Tenant will pay the Landlord 1 months rental as compensation for failing to complete the term of the lease."

The landlord confirmed that the rental unit was re-rented for October 1, 2016, and in fairness offered by email to return half of the security deposit but that wasn't acceptable to the tenants.

Analysis

The *Residential Tenancy Act* does not permit clauses in a tenancy agreement that are contrary to the *Act* or that are unconscionable. I find that Clause 10 of the tenancy agreement in this case is both unconscionable and contrary to the *Act*. A landlord may include a clause in an agreement for liquidated damages, which are a genuine pre-estimate of the costs associated with re-renting if the tenants do not remain in the rental unit until the end of the fixed term, but liquidated damages cannot be a clause that penalizes a tenant. Further, if a tenancy agreement is not fixed to a certain end date, a tenant may give no less than 1 months notice in writing of intention to vacate but must

give that notice before the date rent is payable under the tenancy agreement. In any case, a landlord must do whatever is reasonable to mitigate any loss of rental revenue.

In this case, the landlord has not lost any rental revenue, and may not claim rent from 2 sources for the same period. Further, I find that Clause 10 does not qualify as liquidated damages.

The landlord questioned the first tenant about whether the \$1,200.00 was collected as a security deposit or for the first month's rent, but then testified himself that it was a security deposit, and I find that it was. The tenancy agreement is clear with respect to that.

The law does not permit a landlord to decide whether or not to keep a security deposit. A landlord must return a security deposit in full to a tenant within 15 days of the later of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing, or must make an application for dispute resolution claiming against it within that 15 day period. If the landlord does neither, the landlord must repay the tenants double the amount. The landlord has not made an application for dispute resolution claiming against it and therefore must return it to the tenants in full. Since the landlord only received the tenants' forwarding address in writing on the Tenant's Application for Dispute Resolution, I decline to order double. However, I find that the tenants have established a claim of \$1,200.00. Since the tenants have been successful with the application, the tenants are also entitled to recovery of the \$100.00 filing fee.

Conclusion

For the reasons set out above, I hereby grant a monetary order in favour of the tenants as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$1,300.00.

This order is final and binding and may be enforced. 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: December 28, 2016

Residential Tenancy Branch

