Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNR, FF

Introduction
This hearing dealt with cross-applications under the *Residential Tenancy Act* (the "Act"). The landlord applied on April 28, 2017 for authorization to retain the security deposit and for compensation for unpaid rent. The tenants applied on September 1, 2017 for recovery of the security deposit. Both parties applied to recover the application filing fee.

Both of the tenants and the individual landlord appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and had the opportunity to present their evidence orally and in written and documentary form, to make submissions to me and to respond to the submissions of the other party.

Service of the parties' respective applications, notices of hearing and evidence was not at issue.

Issue(s) to be Decided
Is the landlord authorized to retain the security deposit?

Is the landlord entitled to compensation for unpaid rent?

Are the tenants entitled to recover the security deposit?

Is either party entitled to the application filing fee?

Background and Evidence
Tenants' submissions

The tenants testified that they met with the landlord on January 29, 2017 to view a rental unit. They wanted to move in for March 1, 2017.

The tenants also testified that the landlord told them that he could not guarantee that they could have the suite because there were other applicants willing to start February 1. He also told them if they put down a deposit that they would have a better chance.

The tenants further testified that the landlord told them that it was not guaranteed that they would get the unit until their credit check had been done, and that it would take about three days for the credit check and the final decision. They asked him if they could keep looking for rentals and he told them that once the credit check was approved their security deposit would not be refundable.

It was agreed that the tenants filled out an application to rent and made a security deposit of $600.00. A copy of the receipt for the deposit was in evidence. The application was not in evidence. It was agreed that it did not reference the security deposit specifically.

The tenants further testified that they phoned the landlord the following day to tell him they did not want the rental. They asked him to please proceed with the other applicants. They called him again on January 31 to confirm that their deposit would be returned. The landlord told them he would return the deposit when he secured new tenants. Copies of one of the tenant's phone records were included in evidence. These show calls from that tenant to the landlord on January 29 and January 30.

Around this time they also attended at the rental building but the landlord would only speak to them over the entry system telephone. The tenants said that they tried to call the landlord again but he started refusing their calls. An email from one of the tenant's employers describes the above and says also that when she tried to call the landlord on behalf of her employee, the landlord hung up on her.

The tenants further said that on February 6 the landlord answered their call and said he would return the deposit but that he needed confirmation that they did not want the unit in writing. One of the tenants sent the landlord a text on that same day stating: "I want to let you know that my friend and I have decided to cancel the renting for the place for your advertising . . . Please proceed and look for new tenants. We will be expecting the deposit back as both parties agreed as soon as you get new tenants." A copy of this text was in evidence.

The tenants said that they called the landlord again on February 21 when they had not yet received the deposit as they needed the money for their new rental. On March 9 the tenants noticed that the landlord had removed the advertisement for the rental unit in

question from Craigslist and attempted to call him again. They called him again several times between March 9 and 10 and he did not answer their calls. The phone records in evidence support this.

Later in March, after being advised that they needed to provide the landlord with their forwarding address in writing for return of the security deposit, the tenants send the landlord a text asking for the landlord's mailing address. The tenants say that the landlord refused to provide his mailing address.

A series of text exchanges between the parties on March 31 were in evidence, in which the tenants ask for the landlord's mailing address or to meet in person, the landlord asks the tenants to text him their address so that he can begin dispute resolution, and the tenants refuse to provide their mailing address by text. One of the tenant's texts says: 'We cannot mail the letter of forwarding address without the full name and address of the owner or manager of the building." In response the landlord says: "If you want this issue been solved fairly, please text me your address. Then we start the legal process . . . ".

Landlord's submissions

The landlord testified that the tenants viewed the unit three times in January and paid the security deposit the last time. He told them that he had three other prospective tenants for February 1, but had not yet taken their security deposit or run a credit check.

The landlord further said that the tenants before me really wanted the unit and begged to be selected and that he responded by telling them that they could have it mid-February if they would deposit the security deposit and fill out the information required for a credit check. He said he was doing them a favour by agreeing to rent the unit for February 15 rather than February 1.

The application form was not in evidence. It was agreed that it required the tenants' names, references, and social insurance numbers. The tenants said that they asked if they could avoid providing their social insurance numbers as a matter of privacy and the landlord agreed. The landlord read aloud from the application form at the hearing. It appears to be characterized as an "offer" to lease by the tenants.

In response to my question, the landlord agreed that he and the tenants had entered into an oral agreement for a tenancy, subject to the outcome of the credit check.

The landlord further testified that he rejected the three other applicants who could have taken the unit immediately. He claims for rent for February for this reason. In response to my question the landlord stated that he did not contact the other applicants once he learned that the tenants before me did not wish to continue.

The landlord also testified that he called to tell the tenants that the credit check had gone through before they called him to cancel their application. The landlord did not say this in his initial submission. Instead, he added this in response to the tenants' reiteration that they cancelled their application orally on January 30.

Analysis

The landlord and the tenants agreed on many things. However, where there is conflict in the evidence, I prefer the tenants' evidence. This is because the landlord added information that he had not included in his initial submissions and at a point when that additional information would advantage him. Additionally, the landlord's additional testimony was not supported by the tenants' telephone records. Overall, also, the tenants' version of events was confirmed by the documentary evidence, while the landlords' was not.

Based on the landlord's own evidence, I find that there was no tenancy agreement. The landlord confirmed that any agreement was subject to the outcome of the credit check, and the application was characterized as an offer. Until an application has been accepted, there is no binding contract. The landlord would not have honoured an oral agreement if the tenants had not passed the credit check. Rather, the landlord would have said that there was no tenancy agreement.

Additionally, I accept the tenants' testimony that the landlord told them that the security deposit was not refundable after the credit check had been approved. By necessary implication, the deposit was refundable before that point, and I accept that the tenants advised the landlord over the phone on January 30 that they did not want the rental.

More importantly, the landlord has breached s. 20 of the Act, which states that a landlord must not require a security deposit at any time other than when the parties enter into the tenancy agreement. On the landlord's own evidence, the agreement would have been entered after the credit check and it would have been a written agreement. I also note that s. 15 prohibits a landlord from charging a fee for accepting or processing an application for tenancy or investigating the applicant's suitability for tenancy.

Based on the above, I find the tenants are entitled to recovery of their security deposit. As their application is successful, they are also entitled to recover the application filing fee. Accordingly, I make an award for **$700.00** in the tenants' favour.

As there was no tenancy agreement, the landlord has no claim for unpaid rent. The landlord has also failed to mitigate his alleged losses, as he did not contact the other tenants who were interested in the rental and were immediately available.

Conclusion

The landlords' application is dismissed.

The tenants' application is successful. The tenants are given a formal order in the above terms and the landlords must be served with a copy of this order as soon as possible. Should the landlords fail to comply with it, it may be filed in the Small Claims division of the Provincial Court and enforced as an order of that Court.

This decision is final and binding on the parties, except as otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act.

Dated: September 27, 2017

Residential Tenancy Branch