



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding 0899630 BC LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes**      FFT, MNSD (Tenant)  
                              FFL, MNRL-S (Landlord)

### **Introduction**

This hearing was convened by way of conference call in response to cross Applications for Dispute Resolution filed by the parties.

The Tenant filed the application February 08, 2019 (the "Tenant's Application"). The Tenant applied for return of the security deposit and reimbursement for the filing fee.

The Landlord filed the application May 14, 2019 (the "Landlord's Application"). The Landlord applied to recover unpaid rent, to keep the security deposit and for reimbursement for the filing fee.

The Tenant appeared at the hearing. The Agent for the Landlord appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence and no issues were raised in this regard.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered the documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

### Issues to be Decided

1. Is the Tenant entitled to return of the security deposit?
2. Is the Tenant entitled to reimbursement for the filing fee?
3. Is the Landlord entitled to recover unpaid rent?
4. Is the Landlord entitled to keep the security deposit?
5. Is the Landlord entitled to reimbursement for the filing fee?

### Background and Evidence

The Agent testified as follows.

The Landlord is not seeking to keep a security deposit but is seeking to keep \$950.00 the Tenant paid as half the monthly rent. The Landlord is seeking a further \$950.00 for the remainder of a full month's rent.

The Tenant agreed to rent the rental unit and entered into a tenancy agreement with the Landlord in relation to the rental unit. There was a binding agreement between the parties and the Tenant knew and understood this. There was a written tenancy agreement which is the Receipt for Partial Month's Rent (the "Receipt") submitted as evidence. The Tenant signed the Receipt in which she agreed she was entering into a tenancy agreement. The Tenant gave the Landlord \$950.00 as half the monthly rent. The Tenant agreed the \$950.00 was not refundable. As stated in the Receipt, the tenancy was to start March 01, 2019 and be a one-year lease.

The Agent gave the following timeline of events.

At the outset, the Landlord did a lot of pre-screening and qualified the Tenant over the phone. The Landlord agreed to rent to the Tenant. On January 17<sup>th</sup>, a showing for the rental unit was set up between the parties for January 20<sup>th</sup>. The showing occurred January 20<sup>th</sup>. The Tenant agreed to take the rental unit and it was agreed the Tenant would get the rental unit.

Subsequently, the Landlord requested further information from the Tenant to confirm information already provided. On January 21<sup>st</sup>, the Landlord emailed the Tenant requesting that she confirm the information and provide half the monthly rent. On January 22<sup>nd</sup>, the Tenant sent documentation and half the monthly rent. The Tenant

understood she was entering a contract. The Landlord sent the Tenant the Receipt on January 22<sup>nd</sup>. The deal was completed on this date.

On January 22<sup>nd</sup>, four or five hours later, the Tenant sent an email stating she was cancelling the contract. On January 25<sup>th</sup>, the Landlord told the Tenant she reserved the rental unit, paid the half month's rent and agreed there was a binding agreement and therefore the deal was closed. On January 27<sup>th</sup>, the Landlord received a written request from the Tenant to cancel the contract and return the \$950.00. The Landlord explained to the Tenant that they had a binding agreement, the Landlord would look for a new tenant and that the Tenant would be released from the agreement as soon as they found a new tenant.

The Agent submitted that the \$950.00 was not a deposit or application fee but was rent. The Agent submitted that the Landlord was going to give the Tenant possession of the rental unit March 01, 2019 as of the date the Receipt was signed. I asked the Agent why the Landlord sought further information if the Receipt was a tenancy agreement. He pointed to a clause in the Receipt that states the Landlord will give the money back if information provided is found to be inconsistent. He also said the Landlord needs to prepare the tenancy agreement so requires the further information to do this. The Agent agreed that the intention was to have the parties sign a Residential Tenancy Agreement on the RTB form after the Landlord received the further information from the Tenant.

The Agent testified that the Landlord obtains the application, as submitted in evidence, and half the monthly rent at the same time.

I asked the Agent about evidence showing the Landlord pre-screened the Tenant. He said the Landlord always asks questions at the outset and pointed again to the Receipt. He said this occurs prior to potential tenants viewing the rental unit and then the Landlord asks more questions after the potential tenant has viewed the rental unit. The Agent said the Landlord wasted time dealing with the Tenant.

The Agent testified that the Landlord had to re-rent the rental unit. He testified that, around January 27<sup>th</sup>, the Landlord started advertising the rental unit. The Agent said a new lease was signed February 12<sup>th</sup> with a start date of April 01, 2019. The Agent submitted that the Tenant owes for March rent according to the Receipt.

The Tenant testified as follows.

She went to see the rental unit January 20<sup>th</sup>. She did not make a decision about the rental unit that day. She subsequently asked the Landlord for an application form. She received an email from the Landlord on January 21<sup>st</sup> asking for \$950.00 as a deposit to take the application or they would not consider the application. She sent some documentation to the Landlord on January 21<sup>st</sup> and the \$950.00 on January 22<sup>nd</sup>. She never signed a tenancy agreement. She did sign the Receipt for the \$950.00. The Receipt is not a tenancy agreement. It does not include details of the tenancy. She emailed and called the Landlord January 22<sup>nd</sup> about not taking the rental unit. She requested return of the deposit. The Landlord said they would not return the deposit because she signed the Receipt.

It is not true that the Landlord pre-screened or qualified her January 20<sup>th</sup> as stated by the Agent. The person who showed her the rental unit told her she would have to make a payment for the application process or she would not qualify for the application process. The Landlord knew nothing, other than her name, when they sent the email asking for the \$950.00. The Landlord knew nothing about her until she sent the application January 22<sup>nd</sup>. When she paid the \$950.00 she received the Receipt and was asked to sign it. She was told the Landlord would return the \$950.00 if they did not rent to her. The \$950.00 is not rent. The Landlord is not allowed to ask for a deposit to take an application.

The Tenancy Application was submitted as evidence. It states that it is an offer to rent and "if accepted" the parties will "enter into the Residential Tenancy Agreement". It states that the offer is "subject to acceptance by the Landlord". It states that, "if the applicant fails to enter, or proceed with the Residential Tenancy Agreement after the offer is accepted, the applicant will be held liable for payment of the equivalent of the rent to the Landlord until the unit gets rented again". The Tenancy Application requests personal information, employment information, previous addresses, bank information and references. This was signed by the Tenant January 22, 2019.

The Receipt is for \$950.00. It states, "the tenant hereby agrees to rent from the landlord the [rental unit] starting on March 01, 2019". It also states in part as follows:

The lease will be at least one year long...

The tenant, by giving the half-month's rent understand that they have been qualified based on information provided to the landlord, and if needed, will provide

further information necessary to confirm the information provided. If the landlord encounters irregularities from the information provided in the qualification and the tenant cannot move in to the unit due to inconsistency in the information, the tenant will get the full half-month's rent back.

If the tenant decides in a future date NOT to move forward with renting for any reason, or refuses to move into the unit, the landlord will keep the first half-month's rent to be applied to the first month's rent. The tenant will be responsible to pay the balance of the first month's rent and keep paying the rent until the property is rented again if the tenant decides not to move in or cancel this agreement or for any other reason if there is a default of this contract. This document becomes a legal and binding tenancy agreement and the rental agreement between the parties is binding and effective as per the clauses above from this document.

The Tenant and an agent for the Landlord signed the Receipt.

The parties submitted emails between them. An agent for the Landlord sent the following email on January 21, 2019:

...attached please find an application form for you to fill out and return, along with the following:

- ½ months' rent
- Picture ID
- Proof of address
- Last 2 paystubs
- Last 2 bank statements

The documentation will assist us in evaluating your application, and the ½ months' rent will reserve the unit until we make a decision...

The emails show the Tenant paid the \$950.00 and then was sent the Receipt. The agent for the Landlord asked the Tenant to sign the Receipt and send it back.

### Analysis

Rent is defined in section 1 of the *Residential Tenancy Act* (the “*Act*”) as follows:

"rent" means 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, but does not include any of the following:

- (a) a security deposit;
- (b) a pet damage deposit;
- (c) a fee prescribed under section 97 (2) (k) [regulations in relation to fees];

[emphasis added]

Section 5(1) of the *Act* states that parties cannot avoid or contract out of the *Act*.

Section 5(2) of the *Act* states that an attempt to do so is of no effect.

Section 15 of the *Act* states:

- 15 A landlord must not charge a person anything for
- (a) accepting an application for a tenancy,
  - (b) processing the application,
  - (c) investigating the applicant's suitability as a tenant, or
  - (d) accepting the person as a tenant.

I find the \$950.00 is an application fee for the following reasons.

I do not accept that the Landlord pre-screened or pre-qualified the Tenant prior to the Landlord's agent sending the email on January 21, 2019. The Tenant denied that this occurred. The only evidence the Agent pointed to showing this occurred is a sentence

in the Receipt. The Agent did not produce any other evidence showing this occurred such as documentation relating to a pre-screening or pre-qualification or a witness statement from someone who did this.

The evidence shows the Tenant was only sent the Tenancy Application on January 21, 2019. The email of January 21, 2019 shows she was also asked for further information. The information sought in the Tenancy Application and email is the same type of information one would expect to have been obtained in a pre-screening or pre-qualification of the Tenant. It does not accord with common sense that the Landlord would seek this information twice.

Nor does it accord with common sense that the Landlord would take time to pre-screen or pre-qualify the Tenant when she had not yet viewed the rental unit and therefore may not be interested in renting it. In the absence of further evidence showing the Tenant was pre-screened or pre-qualified, I do not accept that she was.

I accept that the first time the Landlord sought information about the Tenant was in the January 21, 2019 email. I find this email was the start of the application process given the Landlord's agent attached the Tenancy Application and sought further information about the Tenant.

It is clear from the email that the Landlord did not view the parties as having entered into a tenancy agreement at that point as the email refers to the Landlord evaluating the application and making a decision about the application. Yet, in this same email, the Landlord is seeking \$950.00. This is so despite the Landlord not yet having made a decision about the application. This cannot be characterized as rent as it was not requested or given in return for the right to possess the rental unit. At the point the \$950.00 was sought and provided, there was no tenancy agreement between the parties and the Landlord was still in the process of evaluating the application.

Further, the Landlord's agent states in the January 21, 2019 email that the \$950.00 is to reserve the unit until they make a decision about the application. This again shows the \$950.00 is not rent.

I do not accept the Agent's submission that the Landlord was prepared to give the Tenant possession of the rental unit on March 01, 2019 as of January 22, 2019 when the Receipt was signed for the following reasons.

The Tenancy Application was signed the same date as the Receipt and contains statements characterizing it as an offer subject to acceptance by the Landlord. The Receipt purports to reserve the right for the Landlord to return the \$950.00 and not allow the Tenant to move into the rental unit if the Landlord finds inconsistencies in the information provided.

The statements in the Tenancy Application indicate there was no tenancy agreement between the parties at the time it was signed. The statements in the Tenancy Application and Receipt contradict the Agent's position that the Landlord was prepared to give the Tenant possession of the rental unit on March 01, 2019 as of January 22, 2019. Further, the statements indicate that the \$950.00 was not rent as it was not paid in return for the right to possess the rental unit.

I also note that there is no evidence showing the Landlord confirmed with the Tenant that her application had been evaluated or approved.

I do not accept that the Receipt is a tenancy agreement for the following reasons.

There would be no reason for the Landlord to collect further information from the Tenant if the parties had entered into a tenancy agreement on January 22, 2019. The Landlord would be bound by the tenancy agreement and could not simply end that agreement due to inconsistencies in information provided without complying with the *Act* in relation to ending a tenancy. Yet, in the Receipt the Landlord purports to reserve the right to decide there are inconsistencies in the information and decide the Tenant cannot move into the rental unit. This is not consistent with there being a tenancy agreement formed between the parties.

I do not accept the Agent's submission that the Landlord sought further information to prepare a tenancy agreement. The information sought in the Tenancy Application is not the type of information that is included in a tenancy agreement. It is the type of information landlords collect to determine whether someone is a suitable tenant.

The Agent acknowledged that the parties intended to sign a further Residential Tenancy Agreement after the Landlord received further information from the Tenant. There would be no reason for the parties to sign two separate written tenancy agreements. This tends to contradict the position that the Receipt is a tenancy agreement.



The Receipt does not include the information one would expect to be included in a written tenancy agreement. It does not clearly set out who the landlord and tenants are. It does not set out the term of the tenancy as it states it will be "at least one year long". It does not outline the security deposit. It does not include the standard terms required in a written tenancy agreement. It does not outline what is and is not included in rent. It does not set out the rent amount, although that can be deduced from the fact that the \$950.00 is "first half-month's rent". It does not state when rent will be due.

I find the Receipt is an attempt by the Landlord to contract outside of the *Act* by collecting application fees under the guise of it being rent. The Receipt is of no effect.

I find the Landlord has breached the *Act* by collecting an application fee. The Landlord is not entitled to retain the \$950.00 and must return it to the Tenant.

Given the Tenant was successful in this application, I find she is entitled to reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

The Landlord must return \$1,050.00 to the Tenant. I issue the Tenant a Monetary Order in this amount.

The Landlord is not entitled to recover unpaid rent as the parties did not enter into a tenancy agreement in relation to the rental unit and the Tenant was entitled to back out of the application process.

The Landlord is not entitled to reimbursement for the filing fee given they were not successful in this application.

During the hearing, the Agent for the Landlord indicated that his account of events as set out above is what the Landlord does. I caution the Landlord about this practice in the future as it may lead to administrative penalties being imposed against the Landlord under Part 5.1 of the *Act*.

### Conclusion

The \$950.00 is an application fee. The Landlord is not entitled to retain the \$950.00 and must return it to the Tenant. The Tenant is entitled to reimbursement for the \$100.00 filing fee. The Landlord must return \$1,050.00 to the Tenant. I issue the Tenant a Monetary Order in this amount. If the Landlord does not return \$1,050.00 to

the Tenant, this Order must be served on the Landlord. If the Landlord does not comply with the Order, it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

The Landlord is not entitled to recover unpaid rent. The Landlord is not entitled to reimbursement for the filing fee.

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

Dated: June 28, 2019

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Residential Tenancy Branch