Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This hearing was scheduled to deal with a tenant's application for a Monetary Order for damages or loss under the Act, regulations or tenancy agreement; and, return of the security deposit. Both parties appeared or were represented at the hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

At the outset of the hearing, I explored service of hearing documents upon each other. I heard the tenants served their hearing documents and evidence by sending it registered mail to the rental unit address and by leaving a copy of the documents at the door of the rental unit. The landlord stated she does not reside at the rental unit but she found the documents placed next to the door of the rental unit and she was prepared to respond to the tenants' claims. Since the landlord received the documents and had the opportunity to prepare a response, I deemed the landlord sufficiently served pursuant to the authority afforded me under section 71 of the Act.

The tenants had named three tenants in filing their application. I determined one of the named tenants was a minor child. My jurisdiction is limited to parties who have entered into a tenancy agreement with each other. While that minor child may have become an occupant of the rental unit I was not satisfied that she entered into a tenancy agreement with the landlord and I excluded the minor child as a named party to this dispute.

It should also be noted that the landlord appeared at the hearing with a translator and during the hearing I determined the landlord's translator was not an unbiased translator as evidenced by his tendency to add further comments and submissions to the documents he was instructed to translate. The translator acknowledged that he was a friend of the landlord and that the landlord had provided him information with respect to this dispute prior to the hearing. Since the tenants had provided copies of documents

written in a language other than English and they did not provide a written translation of their documents prior to the hearing, and the landlord's translator was not an unbiased translator, I asked both the translator and the tenants to read certain documents to me. One document, a text message dated April 5, 2019 resulted in two different translations. Accordingly, I have relied upon the conduct and actions of the parties with a view to determining what was communicated between the parties.

I also determined that the tenants have received a full refund of the security deposit they paid shortly after they filed this Application. Therefore, that matter has been resolved and I dismiss that component of their claim.

Issue(s) to be Decided

Have the tenants established an entitlement to the compensation they claim due to the landlord's breach of the Act, regulations or tenancy agreement?

Background and Evidence

The landlord advertised a townhouse unit for rent and the parties viewed the property together in consideration of a tenancy. After the parties met, the parties continued to communicate via text message and/or email.

The landlord sent the tenants a text message on April 5, 2019; however, the oral translation I was provided by the tenants and the landlord's translator was different. According to the tenants, the message translates to: "ok, I will rent to you, when would you like to move in?" According to the landlord's translator the message translates to read: "ok, I can/if I rent to you, when would you like to move in?" On April 5, 2019 the tenants sent a written tenancy agreement to the landlord via email and a security deposit of $1,175.00 was sent to the landlord vie e-transfer. The landlord accepted the security deposit and it was deposited into her bank account.

The tenants submitted that their agreement was for a tenancy set to start April 16, 2019 at the monthly rent of $2,350.00 although they would be permitted to take possession earlier, once the staging furniture was removed from the unit. However, on April 9, 2019 the landlord sent them another text message advising them that she received a conditional purchase offer for the property and that the offer was open until April 20, 2019. In response the tenants requested multiple times up to an including April 15, 2019 for the keys and to move into the rental unit but the landlord would not give them possession.

The tenants submitted that they had to move out of their existing rental unit as a result of the landlord's actions, during the period of April 9 – 15, 2019 the tenants were frantically reviewing their options including finding other rental accommodation and/or putting their furniture in storage while they stayed in a hotel. The tenants testified that they had to move out of their existing rental unit because their existing landlord had given them a Notice to End Tenancy for landlord's use of property. Ultimately, the tenants' existing landlord returned to town on April 15, 2019 and they were able to negotiate with their existing landlord to continue their tenancy. The tenants stated the terms of tenancy with existing landlord did not change and that they pay the same amount of rent on a month to month basis. The tenants proceeded to unpack their belongings and remain at their existing rental unit. On April 20, 2019 the landlord contacted the tenants to inform them the conditional purchase offer had collapsed and to ask if they still wanted to rent the unit. By that time the tenants had already made an agreement with their existing landlord to continue their tenancy so they declined the landlord's offer the following day.

The landlord was of the position that a tenancy did not form. The landlord submitted that she did not ask for the security deposit although she did accept the deposit for fear of losing the money. The landlord submitted that she had also asked for references from the tenants and the landlord claims that the tenants' reference was not favourable which is another reason she did not proceed with the tenancy. The landlord pointed out that when the conditional purchase offer collapsed she did contact the tenants to see if they still wanted the rental unit and when they declined she refunded the security deposit to them via e-transfer.

The tenants seek compensation of $28,200.00 which is the equivalent of one year's worth of rent payable under their tenancy agreement with the landlord. The tenants were of the position that is the appropriate amount of compensation payable in circumstances such as these under the "new rules". The tenants argue that they were under great stress trying to figure out what to do when the landlord notified them that she would not be providing them with possession of the rental unit and that she does not appreciate that she cannot just break a contract without any courtesy or regard for others.

The landlord remained of the position that she did nothing wrong and that they did not have a contract.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

With respect to the compensation requested by the tenants, there is no specific provision in the Act that provides for a set amount of compensation or calculation where the landlord fails to provide the tenants with possession of a rental unit as agreed upon. As such, I find the tenants' remedy is to seek damages or loss suffered as provided under sections 7 and 67 of the Act.

Under sections 7 and 67, a party may seek compensation and a Monetary Order where the other party has breached the Act, regulations or tenancy agreement. The party that makes an application for monetary compensation against another party has the burden to prove, based on the balance of probabilities, the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

The parties were in dispute as to whether a tenancy formed. Under section 1 of the Act, the definition of a tenancy agreement includes an agreement with respect to a tenant's right to possession of a rental unit that is entered into in writing, orally, and with express or implied terms. Accordingly, the absence of a written and signed tenancy agreement is not in itself determinative and I consider whether the parties entered into a tenancy agreement orally or by other means of communication.

I am satisfied the parties had oral discussion and communication in the form of text message and/or email with respect to a tenancy agreement in a language I do not speak or read. I was provided different translations as to what the text message of April 5, 2019 said and I have considered the parties actions with a view to determining whether a tenancy formed.

Also on April 5, 2019 the tenant sent a security deposit to the landlord and the landlord accepted the payment. Payment and acceptance of a security deposit is a critical piece

of evidence as to determining whether a tenancy agreement formed for the reasons set out below.

Section 17 of the Act provides:

> **17** A landlord may require, in accordance with this Act and the regulations, a tenant to pay a security deposit as a condition of entering into a tenancy agreement or as a term of a tenancy agreement.

Subsection 20(a) and (b) of the Act provide:

> **20** A landlord must not do any of the following:
>
> (a) require a security deposit at any time other than when the landlord and tenant enter into the tenancy agreement;
>
> (b) require or accept more than one security deposit in respect of a tenancy agreement;

[My emphasis underlined]

Given the restrictions as to when and under what circumstances a security deposit may be required or accepted as set out above, I view the payment and acceptance of a security deposit as evidence as to the formation of a tenancy agreement.

Although the landlord argued she did not request the security deposit I take note that she did not decline the payment and she did not immediately refund it. Rather, she held onto the security deposit for weeks. I am of the view that if a security deposit was accepted in error that a reasonable person would immediately refund it. Also, a security deposit may not be taken by a landlord in contemplation of a tenancy agreement and the time to check a prospective tenant's references is before taking the security deposit, not after. As such, I find the landlord's submissions concerning an unfavourable reference to be irrelevant. All these things considered, I find that the landlord's acceptance of the tenants' security deposit satisfies me that a tenancy formed between the parties, as submitted by the tenants.

As provided under 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." In keeping with section 16, I find the landlord was bound to give the tenants possession of the rental unit by the start date of the tenancy and she refused to do so. Therefore, I find the landlord breached the tenancy agreement and section 16 of the Act.

I am satisfied the tenants acted reasonably in trying to mitigate their losses. They tried communicating with the landlord and requesting the keys from the landlord. They also looked into their options given the landlord's refusal to give them possession by the date agreed upon including negotiating with the current landlord. I also accept that from April 9, 2019 through to April 15, 2019 the tenant's experienced frustration, anxiety, stress and loss of their free time as a result of the landlord's actions.

I find the tenants did not provide sufficient evidence that they suffered damages or loss equivalent to one year's worth of rent, especially when I consider that the period of great turmoil was one week. The tenants did not provide any timesheets or payroll statements to demonstrate the amount of time lost or lost wages or income. As such, I find the only basis for compensation that I can measure is the period of time of great stress created by the landlord and the value of the tenancy they lost. Therefore, I find an appropriate award to be equivalent to one week's worth of rent that would have been payable for the subject rental unit.

In keeping with the above, I provide the tenants with an award calculated as follows:

$2,350.00 x 7/30 days = $548.33

I further award the tenants recovery of the $100.00 filing fee they paid for this application.

The tenants are provided a Monetary Order in the total sum of $648.33 to serve and enforce upon the landlord.

Conclusion

The tenants are provided a Monetary Order in the sum of $648.33 to serve and enforce upon the landlord.

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: July 24, 2019

Residential Tenancy Branch