



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CASCADIA APARMENT RENTALS
LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC-S, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and provided affirmed testimony. Both parties confirmed the landlord served the tenant with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on August 1, 2019. The tenant confirmed that she did not submit any documentary evidence. I accept the undisputed affirmed testimony of both parties and find that both parties have been properly served as per sections 88 and 89 of the Act.

At the conclusion of the hearing, the tenant state that she no longer resides at the listed mailing address. The tenant provided a new mailing address in her affirmed testimony. The Residential Tenancy Branch File shall be updated to reflect the tenant's new mailing address.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for money owed or compensation and recovery of the filing fee?

Is the landlord entitled to retain all or part of the security deposit?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on August 17, 2019 on a fixed term tenancy ending on February 28, 2020 as per the submitted copy of the signed tenancy agreement dated July 4, 2019. The monthly rent was \$1,550.00 payable on the 1st day of each month. A security deposit of \$775.00 was paid on July 4, 2019.

The landlord seeks a monetary claim of \$775.00 as the tenant gave notice of cancellation in an email dated July 22, 2019. The landlord clarified that this was the tenant's notice to end the tenancy which was entered into on July 4, 2019 as per the submitted copy of the signed tenancy agreement. The landlord stated that the tenant agreed as per the submitted copy of the "Application for Tenancy" dated which states in part,

*This offer is subject to acceptance by the Landlord or is Nominee and is open for acceptance until 6:00pm on the fifth (5th) day following the date of this application. Should I/We cancel prior to the date of acceptance, then I/We agree that \$50 will be retained as the liquidated damages for processing this application. **Cancellation after the fifth (5th) day will result in forfeiture of the applicant's deposit.** Should my/our offer not be accepted by the Landlord my/our deposit shall be refunded in full without interest. I/We understand that I/We will be required to commence a Pre-Authorized Payment service or issue a series of post-dated cheques in six (6) month segments.*

[Reproduced as written]

The landlord claims that as the deposit is \$775.00 the landlord seeks authorization to retain it and relies upon the above high lighted portion of the "Acceptance of Terms and Conditions" section of the "Application for Tenancy".

The tenant disputes the landlord's claim stating that it is not fair of the landlord to keep her money as the landlord has claimed no losses. The tenant stated that although she did give notice to cancel her tenancy, she was "rushed" into signing the application without realizing what it meant. The tenant stated that she really wanted the house and because the landlord's agent was rushing her, she signed it as claimed.

The landlord also claims that upon being notified of the “cancellation”, the landlord immediately listed the unit for rent, but was not successful in re-renting the unit until September 5, 2019 when a new tenant took possession on the same date.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, both parties confirmed the tenant agreed and signed the “Application for Tenancy” dated July 4, 2019. As noted above, the agreement is that if the tenant cancels the tenancy after the 5th day after signing the application, the tenant forfeits the deposit. In this case, the entire \$775.00 security deposit as the “Application for Tenancy” does not provide for a set amount only the “security deposit”. I find that the entire terms and conditions that the landlord seeks to enforce is unconscionable and unenforceable as a review of the entire “Acceptance of Terms and Conditions” in the “Application for Tenancy” reveal:

This offer is subject to acceptance by the Landlord or its Nominee and is open for acceptance until 6:00pm on the fifth (5th) day following the date of this application.

Should I/We cancel prior to the date of acceptance, then I/We agree that \$50 will be retained as the liquidated damages for processing this application.

Cancellation after the fifth (5th) day will result in forfeiture of the applicant's deposit. Should my/our offer not be accepted by the Landlord my/our deposit shall be refunded in full without interest. I/We understand that I/We will be required to commence a Pre-Authorized Payment service or issue a series of post-dated cheques in six (6) month segments.

The landlord's terms and conditions seek \$50.00 as liquidated damages for processing the application which is contrary to the *Act* if the tenant cancels an application for tenancy. Section 15 of the *Act* states that a landlord must not charge a person anything for accepting an application for a tenancy, processing the application, investigating the applicant's suitability or accepting the person as a tenant.

Section 20 of the Act speaks to the security deposit in a signed tenancy agreement, where the landlord must not require, or include as a term of a tenancy agreement, that the landlord automatically keep all or part of a security deposit or the pet damage deposit at the end of a tenancy agreement. I interpret this section in that the landlord may not automatically keep the security deposit at the end of a tenancy agreement

Based upon the above, I find that the landlord has failed to establish a claim for the \$775.00 security deposit.

I order that the landlord return the \$775.00 security deposit to the tenant forthwith.

Conclusion

The landlord's application is dismissed.
The tenant is granted a monetary order for \$775.00.

This order must be served upon the landlord. Should the landlord fail to comply, the order may be filed in the Small Claims Division of the Provincial Court and 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 28, 2019

Residential Tenancy Branch