# Dispute Resolution Services



Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 0901016 BC LTD
and [tenant name suppressed to protect privacy]

## DECISION

Dispute Codes FFL, MNRL-S

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on May 29, 2018 (the "Application"). The Landlord sought to recover unpaid rent, hold the security deposit and reimbursement for the filing fee.

The Manager appeared for the Landlord at the hearing. F.R. appeared at the hearing and appeared for L.R. None of the other Tenants appeared at the hearing or were represented at the hearing.

At the outset, F.R. raised the issue of why she is named as a Tenant and Respondent in the Application. She said she is not a Tenant, did not sign anything and did not apply for the rental unit with the other Tenants.

The Manager made the following submissions. F.R.'s granddaughter, L.R. applied for the rental unit. The Tenants needed a co-signer. F.R. agreed to be the co-signer. F.R. provided her information to the Landlord. The Landlord approved the rental application. The Landlord told F.R. she had to sign the agreement but F.R. refused to do so. F.R. was not going to be a Tenant, she applied as a guarantor. F.R. did not sign any documents in relation to the rental application process.

Based on the submissions of both parties, I determined that F.R. should not have been named as a Tenant and Respondent in the Application. I have removed F.R. from the style of cause given this.

F.R. continued to be present at the hearing as she appeared for L.R.

I explained the hearing process to the parties who did not have questions when asked. Both parties provided affirmed testimony.

The Landlord had submitted evidence prior to the hearing. The Tenants had not submitted evidence. I addressed service of the hearing package and Landlord's evidence.

A.T. testified as follows in relation to service.

The hearing package and evidence were served on Tenant K.F. by registered mail June 8, 2018. The package was sent to the address provided by Tenant K.F. on the rental application. A.T. provided Tracking Number 1.

The hearing package and evidence were served on Tenant L.R. by registered mail June 8, 2018. The package was sent to the address provided by Tenant L.R. on the rental application. A.T. provided Tracking Number 2.

The hearing package and evidence were served on Tenant S.J. by registered mail June 8, 2018. The package was sent to the address provided by Tenant S.J. on the rental application. A.T. provided Tracking Number 3.

With permission, I looked the Tracking Numbers up on the Canada Post Website. Tracking Number 1 shows the package was signed for by Tenant K.F. June 11, 2018. Tracking Number 2 shows the package was signed for June 11, 2018. Tracking Number 3 shows the package was unclaimed.

Based on the undisputed testimony of A.T., and the Canada Post website information, I find Tenant K.F. and L.R. were served with the hearing package and evidence in accordance with sections 88(c) and 89(1)(c) of the *Residential Tenancy Act* (the "*Act*"). The finding that Tenant L.R. was served is based in part on the appearance of F.R. at the hearing for Tenant L.R. I am also satisfied Tenants K.F. and L.R. were served in sufficient time to allow them to prepare for, and appear at, the hearing.

I am not satisfied Tenant S.J. was served with the hearing package and evidence. A.T. testified during the hearing that the Tenants applied for the rental April 13, 2018. He said he sent the package to the address on the rental application for Tenant S.J. I am not satisfied without further evidence on this point that Tenant S.J. continued to reside at that address in June. I have removed Tenant S.J. from the style of cause in the circumstances.

As I was satisfied of service in relation to Tenant K.F. and L.R., I proceeded with the hearing. Both parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. I have considered all documentary evidence and all 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 Landlord entitled to recover unpaid rent?

2. Is the Landlord entitled to hold the security deposit?

3. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

A.T. advised that he was seeking $1,393.00 plus the $950.00 deposit paid by the Tenants for a total of $2,343.00.

Both parties agreed the Tenants never moved into the rental unit.

A.T. testified as follows. The Tenants applied for the rental unit April 13, 2018. The Landlord approved the Tenants April 24, 2018. The Tenants were supposed to sign the tenancy agreement April 24, 2018. F.R. was supposed to be the co-signer. The Landlord had approved F.R. as a co-signer. F.R. provided the necessary documents to the Landlord. F.R. then refused to have her signature notarized.

A.T. submitted that F.R. and the Tenants entered into an oral tenancy agreement by applying for the rental unit, and by F.R. applying to be the co-signer, and the Landlord accepting the applications. A.T. submitted that F.R. and the Tenants are therefore bound by the agreement.

A.T. said the Tenants signed the application for the rental unit. The Landlord had not submitted a copy of this to me. A.T. confirmed the Tenants never signed a tenancy agreement. A.T. submitted that this was not relevant because the *Act* allows for oral tenancy agreements. A.T. also noted section 16 of the *Act* which states, that 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".

I asked A.T. about the request to keep the security deposit. He said the Landlord never collected a security deposit and never applied to keep a security deposit.

I asked A.T. what the $950.00 deposit was. A.T. submitted that this was half of the monthly rent. A.T. said this was not an application fee. He said the Landlord would collect the other half of the rent if they proceeded with a tenancy agreement.

In reply to further questions about the $950.00 deposit, A.T. mentioned that the Landlord does not want to waste their time and that it is an expensive process to try to "pre-qualify" tenants. He said that if the Landlord decides tenants "pre-qualify" the Landlord asks for half of the monthly rent. He testified that, if in the process of "pre-qualifying" tenants prior to signing the tenancy agreement they find inconsistencies or incorrect information, they request more information or may request a co-signer. He described this as pre-approving tenants.

The Landlord had provided written submissions and evidence. The written submissions say that the Landlord asked the Tenants' permission to re-rent the unit but the Tenants did not want to

grant this permission and said they wanted to find another co-signer. On May 3, 2018, the Tenants told the Landlord to re-rent the unit. The Landlord could not re-rent the unit until June 1, 2018 and therefore lost rent. The submissions state that the Tenants had entered into a tenancy agreement and were responsible for paying the rent.

The Landlord submitted the receipt for the deposit. It indicates $950.00 was received from Tenant K.F. on April 13, 2018. It states, "The amount of the first half-month's rent was received in the form of cash". A.T. pointed to this as support for his position that the $950.00 is rent and not an application fee. It then states, "The tenant hereby requests to rent from the landlord the property above starting at April 15, 2018". It further states as follows:

> The lease will be at least one year long…
> The tenant will provide all the information necessary for the landlord to qualify and approve the application. If the landlord decides not to rent for any reason, the tenant will get the full half-month's rent back.
> If tenant decides NOT TO RENT for any reason after he/she is approved, the landlord will keep the first half-month's rent to compensate for the payment of the expenses the landlord incurs. The tenant may also be responsible to pay the first month's rent and keep paying it until the property is rented if the tenant was approved and decided not to move in. Once the tenant is approved it becomes a legal and binding tenancy and the rental agreement between the parties is binding and effective. (emphasis added)

The Receipt is signed on behalf of the Landlord and by Tenant K.F. as the "potential tenant".

The Landlord also submitted an email from someone on behalf of the Landlord to the Tenants advising that they were approved for the unit and have two options, to sign the lease and have the co-signer sign the lease or to tell the Landlord to market the property again and once they re-rent it the Tenants are "off the hook for the rent". The email states, "We approved you, and it is completely unreasonable for you now to turn around and to say that you will not be taking the unit and ask for the half-month's rent back and keep us in a loss, having already done all the work and incurred all the expenses to approve you" (emphasis added).

In reply, F.R. pointed out that the receipt says, "potential tenant signature". She said the agreement was always pending approval and that there were always conditions. She testified that the Tenants were never approved to move into the rental unit. She said the Tenants were never given keys and the Tenants never signed a tenancy agreement. She submitted that the application was just that, an application to see if the Tenants would qualify. She testified that the Tenants were never approved as Tenants because they could not meet the conditions.

Analysis

Section 15 of the *Act* states as follows in relation to prohibited fees:

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 do not accept the submission that the Tenants entered into an oral tenancy agreement with the Landlord by making an application for the rental unit and paying the $950.00 deposit. From the evidence before me, it is clear the parties were negotiating a written tenancy agreement. I do not accept that the parties intended to enter into an oral contract. If a written tenancy agreement had been entered into, the Landlord would have been obligated to allow the Tenants possession of the rental unit. This was not the case because no tenancy agreement had been entered into. The statements in the Receipt do not change my analysis. In my view, the Receipt is an attempt to contract outside of the *Act* and therefore is not enforceable.

I do not accept the submission that the $950.00 is rent. The Tenants had not entered into a tenancy agreement with the Landlord when the $950.00 was collected. The Landlord has no authority to collect rent in relation to a rental unit prior to a tenancy agreement being entered into.

Based on the submissions of A.T., and the underlined comments in the evidence submitted, I find the $950.00 is an application fee. In my view, the Landlord is collecting this to cover costs associated with processing applications and qualifying potential tenants. This is prohibited under section 15 of the *Act*. The fact that the Landlord refunds this if tenants are not approved or puts this towards the first rent payment if the process moves forward does not change my view. The situation that occurred here indicates this is an application fee. The Tenants did not enter into a tenancy agreement with the Landlord yet the Landlord collected $950.00 from them and is now seeking to keep it. The Landlord is not entitled to compensation for loss of rent as the Tenants never entered into a tenancy agreement with the Landlord and therefore are not responsible for any loss of rent.

In my view, the Landlord is not entitled to keep the $950.00 collected and should return it to the Tenants. Further, the Landlord is not entitled to compensation for loss of rent.

I would also caution the Landlord about this practice in the future as it may be that this practice leads to administrative penalties being imposed under Part 5.1 of the *Act*.

Conclusion

The Application is dismissed without leave to re-apply. The Landlord is not entitled to keep the $950.00 and should return it to the Tenants. The Landlord is not entitled to compensation for loss of rent.

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: September 4, 2018

Residential Tenancy Branch