



**Order under Subsection 135
Residential Tenancies Act, 2006**

Citation: DEMELO-MALLEY v BEDFORD LIVING, 2023 ONLTB 72095

Date: 2023-11-09

File Number: LTB-T-055567-22

In the matter of: 310, 323 NIAGARA BOULEVARD
FORT ERIE ONTARIO L2A3H1

Tenant

Between: ALEXANDER DEMELO-MALLEY

And

Bedford Living

Landlord

ALEXANDER DEMELO-MALLEY (the 'Tenant') applied for an order determining that Bedford Living, Bonnie Hoy, and Cheryl Carpenter (the 'Landlords') collected or retained money illegally.

This application was heard by videoconference on August 8, 2023.

The following attended the hearing:

- Tenant's Legal Representative Jennifer Priestley
- The Tenant
- Bonnie Hoy
- Cheryl Carpenter
- Russell Preddie, legal representative for Cheryl Carpenter

At 9:13 a.m. the attendees met privately to establish the roles of Ms. Carpenter and Ms. Hoy. As of approximately 9:30 a.m., Landlord Bedford Living was not present or represented although properly served with notice of this hearing by the LTB. There was no record of a request to adjourn the hearing. As a result, the hearing proceeded with only the Tenant's evidence. **Determinations:**

1. I have used the term "Tenant" throughout the order for ease of reference, although, as found below, there was never in fact a landlord-tenant relationship entered into by the parties.
2. At the outset of the hearing, it was determined that Bonnie Hoy is not a landlord party to the proceeding as she is the owner of a temporary staffing agency that supplied an employee to Bedford Living's property management company. Cheryl Carpenter is an employee of Bonnie Hoy's agency working as a temporary employee of the Landlord's property management company and is not a landlord. The application is amended to remove them as parties. Ms. Hoy, Ms. Carpenter, and Mr. Preddie were excused from the hearing.

3. As explained below, the Tenant proved the allegations contained in the application on a balance of probabilities. Therefore, the Landlord must pay to the Tenant \$1,483.72 which represents the \$1,400.00 deposit plus interest thereon plus the application filing fee of \$53.00.

Illegal charge collected

4. The Tenant submitted a completed rental application on June 5, 2022 to a representative of the leasing agent (Ms. Carpenter). He provided a \$1,400.00 bank draft made payable to Bedford Living on June 6, 2022 for the last month's rent deposit as requested.
5. The Tenant testified that by June 9, 2022 he had not received a response from the Landlord as to whether his application had been approved. He spoke with Ms. Carpenter by phone and stated that he was withdrawing his application and requested the return of the \$1,400.00. He stated that he was told that his deposit would not be returned, and it has not been returned as of the date of the hearing.
6. The Tenant submitted into evidence a text message conversation with Ms. Carpenter where she informs him that "for sure" the \$1,400.00 will not be returned and when asked why, states "Like anywhere you put money down that's a deposit and you don't get it back even if you were not approved that's the law [sic]."
7. The Tenant's Legal Representative stated that she contacted Ms. Carpenter by telephone, and after a "heated" discussion, Ms. Carpenter again refused to return the deposit and then did not return further calls. The Tenant's Legal Representative stated that she spoke with Ms. Hoy and the result was "not favourable." She stated that she was not told that there was someone else who she should contact about the matter.
8. The lease application submitted into evidence by the Tenant states:

I/We agree to provide the Landlord with a Last Month's Rent Deposit in certified funds that is equal to the total rent amount mentioned in the application.... I/We further agree and acknowledge that the Landlord's acceptance of the deposit does not constitute a tenancy agreement....

I/We further understand that upon the approval and acceptance of the Rental Application by the Landlord, I/we shall be deemed to have entered into a Tenancy Agreement with the Landlord.... [and] agree that upon acceptance of this Rental Application by the Landlord, the aforesaid contract shall be deemed a Rent Deposit and shall be applied towards the rent of the last month of the tenancy.... [emphasis added] Analysis

9. The relevant provisions of the Residential Tenancies Act, 2006 ("Act") are as follows:

13(1) The term or period of a tenancy begins on the day the tenant is entitled to occupy the rental unit under the tenancy agreement.

(2) A tenancy agreement takes effect when the tenant is entitled to occupy the rental unit, whether or not the tenant actually occupies it.

...

105(1) The only security deposit that a landlord may collect is a rent deposit collected in accordance with section 106.

(2) In this section and in section 106, 1. “security deposit” means money, property or a right paid or given by, or on behalf of, a tenant of a rental unit to a landlord or to anyone on the landlord’s behalf to be held by or for the account of the landlord as security for the performance of an obligation or the payment of a liability of the tenant or to be returned to the tenant upon the happening of a condition.

106(1) A landlord may require a tenant to pay a rent deposit with respect to a tenancy if the landlord does so on or before entering into the tenancy agreement.

...

107(1) A landlord shall repay the amount received as a rent deposit in respect of a rental unit if vacant possession of the rental unit is not given to the prospective tenant.

...

134(1) Unless otherwise prescribed, no landlord shall, directly or indirectly, with respect to any rental unit,

(a) collect or require or attempt to collect or require from a tenant or prospective tenant of the rental unit a fee, premium, commission, bonus, penalty, key deposit or other like amount of money whether or not the money is refundable

135(1) A tenant or former tenant of a rental unit may apply to the Board for an order that the landlord, superintendent or agent of the landlord pay to the tenant any money the person collected or retained in contravention of this Act or the Tenant Protection Act, 1997.

(2) A prospective tenant may apply to the Board for an order under subsection (1). Pursuant to subsection 107(1) of the *Residential Tenancies Act, 2006* (the “Act”), “A landlord shall repay the amount received as a rent deposit in respect of a rental unit if vacant possession of the rental unit is not given to the prospective tenant.”

10. In *Musilla v. Avcan Management* [2010] ONSC 5425, the Divisional Court found that a tenancy agreement had been entered into when the rental application was *accepted* by the Landlord.

11. I find that the Divisional Court decision of *Benedetto v. Cleland, Jamal and Krochak* (May 15, 2006) Toronto Docket No.325/05 (Div. Ct) re: TST-08299 is also on point. In that matter, the tenants applied for an order determining that the landlord had collected or retained money illegally. The tenants had given the landlord a rent deposit. When the tenants could not obtain a guarantor, as required by the landlord, they found another unit to rent. The tenants asked the landlord to return their rent deposit, but he refused. The (then) Tribunal found that the *Tenant Protection Act, 1997* (TPA), s. 188.1(1) (which is nearly identical to current subsection 107(1) of the Act) applied in these circumstances as the landlord did not give the tenants vacant possession of the rental unit.

12. The Tenant in this application submitted that as a tenancy agreement was never executed, there was never a landlord-tenant relationship, and the Landlord is therefore illegally retaining the Tenant's money.
13. I agree with the Tenant's position. While a submitted rental application that has been accepted by the Landlord may in certain situations constitute a binding tenancy agreement that is not the case here. The wording of the rental application, which was drafted entirely by the Landlord, clearly provides that the parties will enter into a written tenancy agreement should the application be accepted, and the acceptance of the deposit "does not constitute a tenancy agreement."
14. Based on the Tenant's uncontested evidence, his application was never approved (which is why he withdrew his application). As the Tenant never signed a written tenancy agreement, the Tenant was never given keys to the rental unit, and had no legal right to occupy the rental unit at any time. Therefore, the Tenant was never given possession of the rental unit, and the Landlord is required to return the monies in accordance with subsection 107(1) and 135(2) of the Act. The reason why the Tenant chose to abandon the application prior to signing the tenancy agreement is not relevant. This analysis is consistent with the decision in *Benedetto*.
15. I therefore find that the Landlord collected a charge which is not allowed by the *Residential Tenancies Act, 2006* (the 'Act').

It is ordered that:

1. The total amount the Landlord shall pay the Tenant is \$1,483.72. This amount represents:
 - o \$1,400.00 for the illegal charge collected.
 - o \$30.72 for interest owing for the period June 6, 2022 to August 8, 2023
 - o \$53.00 for the cost of filing the application.
2. The Landlord shall pay the Tenant the full amount owing by November 20, 2023.
3. If the Landlord does not pay the Tenant the full amount owing by November 20, 2023, the Landlord will owe interest. This will be simple interest calculated from November 21, 2023 at 7.00% annually on the balance outstanding.
4. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.

November 9, 2023

Date Issued

Margo den Haan

Member, Landlord and Tenant Board

15 Grosvenor Street, Ground Floor Toronto ON M7A 2G6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.