



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNR, O, FF

Introduction

This hearing was convened in response to an application filed by the landlord seeking a monetary order and recovery of the filing fee.

Both parties appeared at the hearing and gave evidence under oath.

Issue(s) to be Decided

Is the landlord entitled to the Orders requested?

Background and Evidence

The parties entered into a 1 year written fixed term Tenancy Agreement commencing September 1, 2010. The landlord signed the Agreement on July 30, 2010 and the tenant signed the agreement on August 3, 2010. Clause 10 of the agreement states that the tenant was required to pay a security deposit of \$875.00 on August 2, 2010.

The landlord testified that the tenant did not pay the deposit as agreed and on August 5, 2010 the landlord's property management agent emailed the tenant seeking the deposit. On August 9, 2010 another email was sent to the tenant requesting the deposit and advising that the sum was now overdue. On August 9, 2010 the tenant replied that she had a recent change in her position at work and she might be required to move in the new year and she asked if it would be possible to sign a 6 month lease with an option for extension in which case she would "...drop off the funds asap...". On August 9, 2010 the agent for the landlord responded that she would have to check with the owner advising that they normally only deal with 12 month leases on unfurnished properties. On August 10, 2010 agent for the landlord responded that the owner had declined to change the lease to a 6 month term and the 1 year lease was therefore still "...legally binding". On August 18, 2010 agent for the landlord sent a further email to the tenant advising that they had not received her funds and not heard from her in over a week. On August 18, 2010 the tenant responded "Thanks for the follow up, I will not be moving into the property".

The landlord's agent responded on August 18, 2010 advising that the agreement was legally binding and offering two options. The tenant could move into the rental unit and the landlord would endeavour to find a new tenant to take over the rental unit at the 6 month point. In the alternative the landlord offered that

...if you don't want to move in at all, we will still require the security deposit right away, and September's rent by September 1st, if we haven't found a tenant to take over the contract. In this case we will start remarketing the property right away, and looking to find someone ASAP to take over the contract.

and

If you do not pay the security deposit and first months rent by September 1st, 2010, the Owner will be forced to take you to arbitration with the RTO. As the contract is legally binding, you will be required to pay rent for the property until a new tenant is found.

(reproduced as written)

To which the tenant responded on August 19, 2010

I will not be paying the rent or deposit until you find a tenant. As per your email to me below you indicated without a signed contract and receipt of funds the contract was not complete, therefore I understood the contract to not be ratified without both of these components.

Also, the contract stated funds were due on August 2nd and you changed the terms of the contract in the email below, making it quite confusing as to which parts you would like to enforce and which parts you are willing to alter.

The tenant includes the body of the email referred to above which she says the states:

The contract states that the initial funds are due on 2nd of August however due to the time delay in having the contract signed by the Owner, I realize that this is not a feasible request. Please aim to have the funds to us by August 6th, 2010.

Please note that without the signed contract and receipt of funds, we cannot move you into the property so please ensure prompt action on these components of your lease.

(reproduced as written)

The landlord submitted that when he didn't receive the security deposit or rent for September 1, 2010 he served a Notice to End Tenancy. He waited for that Notice to take effect and then he took possession of the unit. The landlord submits that he relisted the property with his property management agent but they were unable to secure a new tenant until November 1, 2010. The landlord therefore seeks rent from the tenant for September and October 2010 each in the sum of \$1,750.00 and, pursuant to Clause 7 of the Tenancy Agreement the landlord also seeks liquidated damages in the sum of \$400.00.

The tenant argued that she did not pay the security deposit as agreed on August 2, 2010 and because this consideration had not been paid, the terms of the tenancy agreement were not yet binding. The tenant argued that when the security deposit came due on August 2, 2010 and it was not paid, the landlord had every right to rent the property to someone else. Because he chose not to do so the landlord cannot now hold the tenant responsible for 2 months of rent.

Analysis and Findings

The tenant argues that she did not have to fulfill the agreement she signed because she did not pay the consideration (security deposit) required to making the agreement binding.

It is trite law that the Court will not judge the value of consideration; in this case the parties had exchanged promises. The landlord had promised to provide a rental unit to the tenant for a fixed term of one year and the tenant promised pay monthly rent for that fixed term. This, I find, is their consideration. The terms of the contract are clear and unambiguous and I find that the contract was binding upon both parties. However, after signing the contract the tenant realized she may not be able or wish to remain in the rental unit for a full year and she attempted to renegotiate the fixed term. The landlord declined to renegotiate the fixed term. He already had a binding agreement for a fixed term of one year and was not obligated to renegotiate the term.

The tenant argued that the agreement was not enforceable because the tenant had not yet received the keys to the rental unit; however the landlord had no obligation to provide the keys until the commencement date of the tenancy on September 1, 2010.

I therefore find that the landlord is entitled to recovery of September 2010 rent in the sum of \$1,750.00. With respect to October rent I find that I am not satisfied that the landlord has demonstrated sufficient attempts to mitigate his rental loss for October 2010 and I therefore decline to award a sum for that month.

With respect to the landlord's claim for liquidated damages, Clause 7 of the Tenancy Agreement states in part:

LIQUIDATED DAMAGES: If the tenant ends the fixed term tenancy before the end of the original term as set out in clause 6 above, the tenant will pay the sum of \$400.00 to the landlord's agent as liquidated damages, and not as a penalty.

I find that the tenant ended the fixed term tenancy before the end of the original term and she is therefore responsible to pay the \$400.00 liquidated damages she agreed to pay when she signed the Tenancy Agreement.

Finally, as the landlord has been mostly successful with this application I will allow him to recover the filing fees he has paid in the sum of \$50.00.

Conclusion

The landlord is provided with a formal copy of an order for a total monetary award of \$2,200.00. Should the tenant fail to comply with this Order by paying this sum to the landlord, this Order may be filed and enforced as an Order of the Provincial Court of British Columbia.