



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT

Introduction

This hearing was convened by way of conference call in response to the tenants' application for an Order of Possession of the rental unit.

The tenants, the landlord and the landlord's agent attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The landlord and tenants provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Issues

The landlord's agent advised me of the spelling of her legal first name. The tenants had used the landlord's agent's abbreviated first name on their application. The parties did not raise any objections to landlord's agent's legal name being corrected on the style of course and this has now been amended.

The tenants requested that I consider their claim for a Monetary Order against the landlord. The tenants were advised by an Officer with the Residential Tenancy Branch to amend their application if a Monetary Order was being sought for compensation. The tenants failed to make this amendment for a Monetary Order for \$12,900.00. In the absence of a formal and proper application for that issue, I declined to hear or

determine that issue, as to do so, in my view, would not be in keeping with the principles of natural justice as to the requisite process and notice regarding claims in this process.

Issue(s) to be Decided

Are the tenants entitled to an Order of Possession of the rental unit?

Background and Evidence

The parties agreed that the tenancy never started at this rental unit. The tenant HR testified on behalf of both tenants throughout the proceeding. HR testified that by paying the security deposit in cash to EB this established a tenancy even if the tenants did not move into the unit. The tenants and landlord have created a tenancy and are bound by the *Residential Tenancy Act (Act)*. HR testified that they filled in an application form with EB and paid the security deposit in cash as requested for an amount of \$400.00. EB said she would meet the tenants the next week to give them the lease and the keys to the unit. The tenancy was due to start on December 01, 2015.

HR testified that they assumed therefore that they would be moving into the unit the following Tuesday. When the tenants went home they realized that the landlord had asked for \$400.00 for the security deposit yet the rent was only \$750.00 so HR called EB to see if a mistake had been made. EB informed the tenants that as there were two tenants the landlord increases the rent by \$50.00.

HR testified that they agreed to pay \$800.00 for this unit but wanted to paint the unit. EB did not want the tenants to paint due to poor paint jobs completed by previous tenants. The landlord then started to list all the other things the tenants had pointed out wrong in the unit. HR testified that EB became aggressive and defensive and said she wanted to give the tenants their security deposit back as they were not a good fit. HR testified that they said they would rather just move into the unit. HR testified that EB gave them no choice but to accept their security deposit back and so they asked for a further \$20.00

for the gas used to go and collect the security deposit as they wanted it returned in cash.

HR testified that the comments made in the letter from EB, describes HR as a tall coloured person and BF as a normal sized white person. HR finds these remarks to be racist.

HR testified that they still want to move into the rental unit and the landlord cannot prevent this as they did accept a security deposit from the tenants and therefore established a tenancy.

EB testified on behalf of the landlord. EB testified that the original unit the tenants wanted to view already had a prospective tenant so the tenants were informed the landlord had another unit they could view. The tenants made arrangements with EB to view this unit but they arrived late. They did view the unit on November 23, 2015 and filled in an application for tenancy. The tenants complained about the paint work and a bleach stain on the carpet but did pay a security deposit of \$400.00. The tenants were required to provide two references. The tenants gave one reference for the address they still lived in and informed the landlord that their previous landlord would not give them a good reference as they were suing that landlord. The tenants also said they had a moving truck booked for the following Monday.

EB testified that HR called EB later and complained again about the paint work, the carpets and the drapes. HR was very abrupt and said they probably wouldn't move in but would call EB the next day. EB called the tenants back the next day and informed the tenants that their application was not accepted and that the landlord would mail the tenants a cheque for their security deposit. HR did not want a cheque mailed as he had paid in cash so they agreed the tenants would come and pick up the security deposit plus an additional \$20.00 for their gas. At that meeting HR demanded the return of their tenants' application but was told it was not his property. At that point HR accused EB of being a slumlord and that he would sue her.

EB testified that on the application form that prospective tenants fill in there is a clause that clearly informs the tenants that both tenants and landlords have five days to establish the tenancy. The landlord requires this time to do reference checks on prospective tenants and tenants also have the right to change their minds. This application was signed on November 23, 2015 and therefore the landlord had five days to decide if their application was accepted. The reason the tenants were asked to pay the security deposit was because they were from out of town and it would avoid the tenants having to return to pay the security deposit if their application was accepted.

EB testified that the tenant HR was aggressive, loud and disrespectful to EB and so after discussions with the landlord it was deemed that the tenants would not be a good fit in the building with the other tenants. EB testified that she has not discriminated against the tenants and does not appreciate being called names or accused of being a racist.

HR cross examined the landlord and asked why the landlord did not state in the advert for the unit that they would charge an extra \$50.00 for the second tenant. The landlord responded and testified that 99.9 percent of their tenants are single people. If anyone brings a second occupant into the unit they are charged an additional \$100.00. As these tenants disputed this they were only going to be charged an additional \$50.00.

HR asked EB why she referred to him as a tall coloured person and BF as a normal white person. Using the term 'coloured' is an insult to HR. EB responded and testified that she did not intend to insult anyone it was just used to distinguish the tenants and not to discriminate against HR.

HR asked EB why, if there is a waiting time to check references, the landlord asks for the tenants to pay the security deposit in cash. EB responded and testified that they ask prospective tenants from out of town to pay a security deposit which is returned to them if they are not accepted. This is for their benefit so they do not have to return to pay a

security deposit if they are accepted. If references check out then EB calls the tenant to let them know. If references do not check out then prospective tenants are informed and the security deposit is returned quickly. It is company policy that they do not accept cheques for the security deposit.

HR asks EB if she knows that Residential Tenancy laws prevail over anything the landlord may have written in the application. EB testified that this term is in the application form so tenants know there is a waiting period.

EB cross examined the tenants and asked why they would want to move into the unit after they had been refused because of HR's attitude. HR responded and testified that it is not him that has the attitude. It was EB who became aggressive when they asked if they could paint the unit.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties. I have reviewed the tenants' application for tenancy signed on November 23, 2015. In this application there is a clause A and B which states that:

The tenants offer to rent the residential premises [address included here] at a monthly rent of \$800.00; occupancy to begin on December 01, 2015 and if accepted will enter the standard tenancy agreement shown to us which we have had an opportunity to examine. This offer is subject to acceptance by the landlord and is open for acceptance for five business days ending at 5.00 p.m. following the date herein. A security deposit of \$400.00 and a postdated first month's rent cheque is required. If the offer is not accepted, the above will be refunded.

I find the wording of the application the tenants filled in is contradictory to the Act concerning the payment and return of the security deposit. I refer the parties to s. 20(a) of the Act which states:

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;

By accepting the security deposit from the tenants the landlords have effectively entered into a verbal agreement to rent this unit to the tenants. I therefore refer the parties to s. 16 of the *Act* which states:

16 *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.*

Consequently, I find that the landlord breached the *Act* by refusing to allow the tenants to take possession of the rental unit on December 01, 2015. The tenants seek an Order to obtain possession of the rental unit; however, the landlord's agent testified that this rental unit has been rented to another tenant. This causes a complication as to what Order I am able to provide to the tenants with regard to possession of the rental unit. I am not able to evict another tenant who now has possession of the rental unit and to this end I will allow the tenants compensation instead for the landlord's breach of the *Act*.

I therefore award the tenants compensation equal to one month's rent of this rental unit to an amount of **\$800.00**.

I caution the landlord to ensure they comply with S. 20 of the *Act* for any future tenancies and ensure a security deposit is not collected from a tenant until a tenancy agreement has been put in place or the day the tenancy commences.

Conclusion

A copy of the tenants' decision will be accompanied by a Monetary Order for **\$800.00** pursuant to s. 67 of the *Act*. The Order must be served on the landlord. Should the landlord fail to comply with the Order the Order may be enforced through the Provincial (Small Claims) Court of British Columbia as an Order of that Court.

Due to the above, the tenants' application for an Order of Possession is dismissed.

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: January 11, 2016

Residential Tenancy Branch

