Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNR, OLC, FFT

Introduction

The applicants applied (1) to cancel a 10 Day Notice to End Tenancy for Unpaid Rent pursuant to section 46 of the *Residential Tenancy Act* ("Act"), (2) for an order that the respondent comply with the Act, regulations, or tenancy agreement, pursuant to section 62 of the Act, and (3) to recover the cost of the filing fee, under section 72 of the Act.

Both parties attended the hearing on February 1, 2021, which was held by teleconference. No issues of service were raised by the parties.

Preliminary Issue: Is there a tenancy agreement?

The applicants were hired by the respondent in 2019 to provide building caretaker services. A copy of the employment contract was submitted into evidence; clause (3.b) of the employment contract stipulated that "Should the employment of the Employee be terminated for any reason, the Employee will become a tenant and responsible for paying market rent for the unit based on what other units are currently paying."

On October 16, 2020, the applicants ended their employment. (The issues behind the ending of employment are complicated and involve COVID-19 and human rights.) On that same date, the respondent considered the applicants to be tenants and drafted a written Residential Tenancy Agreement, a copy of which was submitted into evidence.

It was the respondent's position that, pursuant to the applicants' employment contract, the applicants immediately became tenants and thus were parties to a tenancy agreement. The tenancy agreement set out that monthly rent was $2,219.00, that the security deposit was $1,109.50, and that the pet damage deposit was $1,109.50.0 The term of the tenancy was fixed, beginning on October 17, 2020 and ending on November 30, 2020.

The tenants argued that the imposition of the tenancy agreement, and the issuing of a 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") were arbitrary and retaliatory. The 10 Day Notice was submitted into evidence. The landlord's agent testified that it was served on November 5, 2020 for a total of $5,511.71, comprising rent of $2,219.00 that was due on November 1, 2020, and an additional $1,109.50 for the security deposit and $1,109.50 for the pet damage deposit.

The tenants further explained that there was no negotiation between the parties in respect of the unliterally imposed tenancy agreement. I note that the tenancy agreement was not signed by the tenants. Submitted by the tenants is a copy of a previous Residential Tenancy Branch decision in which the facts surrounding the tenants' employment and the imposition of a tenancy agreement mirror many of the facts in the dispute before me. I shall borrow some of the language from that previous decision, as I find that the application of the law is nearly the same.

As a starting point, it should be noted that the common law (including contract law) applies to the law between landlord and tenants in British Columbia (section 91 of the Act). In contract law, the following elements are necessary when a contract is created: (1) offer, (2) acceptance, (3) consideration, and (4) capacity.

Section 6 of the Act states that a term of a tenancy agreement is not enforceable if the term is inconsistent with the Act or the regulations, the term is unconscionable, or the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Based on the evidence before me, I find that the employment contract entitled the parties to enter into a tenancy agreement upon employment ending. The contract states that the employees (then becoming tenants) will be responsible for paying market rent. However, this is a vague term and is thus enforceable. Further, the employment contract does not express the terms and condition of the tenancy agreement in any manner that clearly communicates the rights and obligations under it. I find that the contract term of requiring the applicants to accept rent at "market" to be vague and unilaterally determined by the respondent, and that it is therefore unconscionable. Moreover, simply because the respondent believes there to be a tenancy agreement, or a tenancy, does not make it so. Indeed, the respondent drafted up a tenancy agreement on October 17, 2020, and there is no evidence before me to find that the applicants had any opportunity to review and accept the terms of that agreement. There is, I conclude, no acceptance by the applicants of the respondent's proposed tenancy agreement.

Further, while section 26 of the Act requires a tenant to pay rent due under a tenancy agreement, there is I must conclude no written or oral tenancy agreement. Therefore, the amount indicated due on the 10 Day Notice to be an amount not agreed to by the parties and this amount is therefore unenforceable. It follows, then, that the 10 Day Notice is of no legal force or effect and it is therefore cancelled.

Given that there is no tenancy and no tenancy agreement in this dispute, I am without jurisdiction to make any order against the respondent under section 62 of the Act.

If the applicants wish to enter into a tenancy agreement they may do so. Otherwise, the applicants do not have a legal right under the Act to continue to occupy the residential property.

Section 72(1) of the Act permits an arbitrator to order payment of a fee under section 59(2)(c) by one party in a dispute to another party. A successful party is generally entitled to recover the cost of the filing fee. As the applicants were successful in quashing the 10 Day Notice, I grant their claim for the $100.00 filing fee.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: February 1, 2021

Residential Tenancy Branch