



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the Act), I was designated to hear an application regarding a tenancy. In this application for dispute resolution, the Applicant was seeking an order of possession.

The Applicant was accompanied by their partner, WR, and the Respondent was accompanied by their counsel. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses; they were made aware of Residential Tenancy Branch Rule of Procedure 6.11 prohibiting recording dispute resolution hearings.

The Applicant testified they served their Notice of Dispute Resolution Proceeding and evidence on the Respondent's counsel on October 22, 2021 by registered mail, and on the same day left Notice and evidence packages on the door of the Respondent's home, and on the door of the rental property. Counsel for the Respondent confirmed receipt. I find the Applicant served the Respondent in accordance with section 89 of the Act.

Counsel testified they served the Respondent's evidence on the Applicant by email, as requested by the Applicant, on November 5, 2021. The Applicant confirmed receipt. I find the Respondent served the Applicant in accordance with section 89 of the Act.

Issue to be Decided

Is the Applicant entitled to an order of possession?

Background and Evidence

In this dispute, the Applicant claims a tenancy was established; the Respondent is of the position a tenancy was never established. The Applicant confirmed during the hearing that they wish to occupy the rental unit, and the Respondent confirmed the rental unit is not otherwise occupied.

The Applicant stated that the tenancy began on October 4, 2021, the date the Respondent accepted the Applicant's damage deposit, and the original move-in date the Applicant and Respondent discussed. However, the application indicates the tenancy began on October 13, 2021. When I inquired about the difference, the Applicant testified that the Respondent indicated that their child, who was living in the unit, was away for the long weekend, and the Applicant would be able to move in on the Wednesday after, which was October 13, 2021. The Applicant testified the Respondent then changed the move-in date to October 17, 2021.

The Applicant testified that after one of their many conversations about the Applicant renting the unit, the Respondent marked the Facebook ad as "sold," and offered to leave a couch and a patio set in the rental unit for the Applicant to use. The Applicant submitted an October 3, 2021 text message documenting the patio set agreement. The Applicant testified that rent was due on the last day of the month. The Applicant also submitted written evidence stating that the Respondent had indicated the Applicant would have to ensure the lawn of the rental was maintained while the Applicant was away during the summer. The Applicant also testified that they asked the Respondent which telecommunications company they would recommend for the Applicant's use in the rental unit, and that the Respondent made a recommendation.

The Applicant testified they asked the Respondent for their email address, so as to provide a security deposit, which the Respondent provided. The Applicant submitted as evidence as text message dated October 4, 2021, in which the Applicant wrote: "Email? I'll transfer 1100 now," to which the Respondent provided their email address. The Applicant testified they sent the security deposit of \$1,100.00 on October 4, 2021, and that it was accepted by the Respondent later the same day. Counsel for the Respondent submitted that the Respondent could not have stopped receipt of the security deposit as they had auto-deposit set up. Counsel confirmed they had not submitted any evidence to support that the security deposit had been automatically deposited.

The Applicant's partner, WR, testified that according to their cell phone records, they called the Respondent on October 11, 2021, telling the Respondent they were coordinating the move, and asking the Respondent if there was any problem with the rental. WR testified the Respondent indicated there was not a problem, just that their child, who was living in the unit, was away, and the Respondent needed to find out from their child when they could have their belongings out of the rental. WR testified that by this date the Respondent had accepted the Applicant's security deposit, and that the Respondent told WR that the Applicant would hear from them soon, and that the Respondent would put together a formal rental agreement in the next few days. WR testified that in this conversation, the Respondent told him that the latest the Applicant could move in was October 17, 2021, but it would likely be sooner.

WR testified that based on this information from the Respondent, they arranged for the movers to arrive at the rental with the Applicant's belongings on October 17, 2021, but the movers were denied access. WR testified that no reasonable person would send a moving truck [to a destination over 12 hours away] without a set move-in date.

A letter dated October 22, 2021, written by WR and submitted as evidence by the Applicant, contradicts some of WR's own oral testimony, in that it states the conversation with the Respondent was on October 15, 2021, not October 11, as testified to by WR, and the letter does not state that the Respondent named October 17, 2021 as the move-in date during their conversation. However, the letter agrees with WR's oral testimony in stating the Respondent advised WR that the rental was going ahead, and that there were no issues. The letter states that the Respondent and the Applicant had agreed on a move-in date of October 17.

Counsel for the Respondent noted that WR had stated in their letter that the conversation with the Respondent took place on October 15, 2021. Counsel submitted that as the Respondent said on October 14 they would return the Applicant's security deposit, it doesn't make sense that the Respondent would then arrange a move-in date. Counsel confirmed the Respondent returned the Applicant's security deposit on October 14, 2021.

Counsel submitted that when the Applicant accepted their returned security deposit, the Applicant acknowledged this was a severing of any ties between them and the Respondent, though no evidence was provided to substantiate this claim. The Applicant testified that they told the Respondent that their accepting of the returned security deposit did not indicate a mutual agreement. The Applicant submitted as evidence an October 17, 2021 text message indicating the same.

An undated Facebook conversation, submitted as evidence by the Applicant, appears to be the initial discussion between the Applicant and the Respondent. The Respondent writes of the unit: "I have it advised [sic] for Oct 30th but most likely ready for middle of oct [sic] if needed." In the same discussion, on September 29, 2021, the Respondent indicates that hydro is included, but not heat. In a subsequent Sept 30, 2021 Facebook conversation, submitted as evidence by the Applicant, the Respondent indicates "it should be empty mid Oct."

Counsel for the Respondent submitted that the Respondent tried to accommodate the Applicant, but the Respondent's child could not move out of the unit in time. Counsel further submitted that the parties could not agree on a move-in date, and that the Applicant picked a date, and did not confirm with the Respondent.

In a Facebook conversation dated October 13, 2021, submitted by the Applicant as evidence, the Applicant and Respondent are having a conversation about possible move-in dates. In that conversation, the Respondent wrote to the Applicant: "I can do the 17th."

The Applicant testified they later began a joint text conversation including WR and the Respondent. In an undated text message, submitted by the Applicant as evidence, in which the Respondent is in discussion with the Applicant and another party, the Respondent wrote: "I have been advised by Landlord BC [sic] the [sic] no signed contract has been provided, the move in is on the 17th and this is a month to month rental."

Counsel for the Respondent submitted that the Respondent was under the impression that the point of accepting the Applicant's security deposit was so the Respondent would remove the ad from Facebook and give the Respondent's application priority in negotiations. However, in a text submitted as evidence by the Applicant, the Respondent wrote: "The \$1100 deposit was to secure for the end of October which was stated in the rental ad."

Counsel for the Respondent submitted that the Applicant and Respondent were trying to set tenancy terms, but it "was too much too soon" for the Respondent, and no documents were signed. Counsel submitted that once the Applicant's demands became too unreasonable, the Respondent returned the security deposit.

Analysis

Section 54 of the Act allows a tenant who has entered into a tenancy agreement with a landlord to request an order of possession of the rental unit by making an application for dispute resolution.

Based on the testimony and documentary evidence from the parties, and on a balance of probabilities, I make the following findings.

I find it was reasonable for the Applicant to conclude that a tenancy had been created because the Respondent accepted the proffered security deposit, confirmed a move-in date of October 17, 2021, and removed the listing based on discussions with the Applicant.

While I acknowledge inconsistencies between WR's written submission and oral testimony, I accept their consistent statement that the Respondent advised WR the rental was going ahead, and that there was an agreed-on move-in date of October 17. I attribute the discrepancy as to whether the date of the conversation was October 11 or October 15, 2021 to an unintentional error, not an attempt to mislead.

I also accept the Applicant's evidence demonstrating that a tenancy agreement was being formed, including particulars of the tenancy, as well as the agreed-on loan of furniture, advice on telecommunications companies, expectations communicated about lawn care, and the Respondent providing their email address so as to receive the offered security deposit.

The Applicant provided documentary evidence that the Respondent wrote to the Applicant: "I can do the 17th." This is an agreement by the Respondent that the Applicant may occupy the rental unit beginning on October 17, 2021.

Pursuant to section 16 of the Act, the rights and obligations of the parties commence on November 22, 2021.

I find that the Applicant and Respondent entered into a month-to-month tenancy agreement, with possession to begin on October 17, 2021. I understand that based on the accepted security deposit of \$1,100.00, and the Applicant's testimony, rent is \$2,200.00, due on the last day of the month for the following month. Hydro is included, heat is not.

I order the Respondent, in accordance with section 13 of the Act, to put the tenancy agreement in writing.

I order the Applicant must pay the Respondent a security deposit (\$1,100.00) and rent for the month of December 2021 (\$2,200.00) before the Applicant occupies the rental unit, and, in any event, no later than November 30, 2021.

I order the parties to negotiate a mutually acceptable move-in date no later than December 1, 2021. If the Applicant occupies the rental unit on any day in November 2021, the Applicant must pay rent to the Respondent on a prorated basis for each day the Applicant or their belongings occupy the rental unit. For example, if the Applicant and/or their belongings are moved into the rental unit on November 28, 2021, the Applicant would pay \$220.00 for the period from November 28–30, 2021 ($(\$2,200/30 \text{ days}) \times 3 \text{ days}$). Rent for the month of December 2021 is due in full by November 30, 2021, regardless of when the Applicant occupies the rental unit.

I order the parties to conduct a move-in condition inspection and complete a condition inspection report in accordance with the regulation, pursuant to section 23 of the Act.

Any variation to the above terms must be in writing and signed by the parties.

Nothing in this decision is to be construed as limiting the Respondent's right to sell the rental property.

I find that as the Applicant has entered into a tenancy agreement with the Respondent, the Applicant is entitled to an order of possession, effective December 1, 2021. The parties may negotiate an alternate mutually agreeable date. I note that the rights and obligations of a tenancy includes payment of rent.

Conclusion

The Applicant's application is granted.

I order the parties to comply with the terms above.

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: November 22, 2021

Residential Tenancy Branch