Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OPT, FFT

Introduction:

A hearing was convened on December 13, 2021 in response to an Application for Dispute Resolution filed by the Tenant in which the Tenant applied for an Order of Possession and to recover the fee for filing this Application for Dispute Resolution.

As outlined in my interim decision of December 13, 2021, the hearing on December 13, 2021 was adjourned because the Agent for the Tenant stated that she wished to make additional submissions. The hearing was reconvened on April 04, 2022 as was concluded on that date.

The hearing on April 04, 2022 was scheduled to commence at 1:30 p.m. The Landlord attended the hearing at the scheduled start time. By the time the teleconference was terminated at 1:40 p.m., the Tenant had not appeared. As the Tenant did not attend the reconvened hearing, she forfeited the opportunity to make additional submissions. The Landlord did not present any evidence at the reconvened hearing that was relevant to the issues before me. This decision, therefore, was based on the evidence and testimony presented at the hearing on December 13, 2021.

At the hearing on December 13, 2021 the Agent for the Tenant stated that the Dispute Resolution Package was left in the Landlord's mailbox. The Legal Counsel for the Landlord acknowledged receipt of the Dispute Resolution Package.

At the hearing on December 13, 2021 the Agent for the Tenant stated that the evidence submitted to the Residential Tenancy Branch on November 18, 2021 was left in the Landlord's mailbox. The Legal Counsel for the Landlord acknowledged receipt of the

Tenant's evidence, with the exception of the written tenancy agreement. The evidence the Landlord acknowledged receiving was accepted as evidence for these proceedings.

The Legal Counsel for the Landlord stated that the Landlord has a copy of the tenancy agreement that was allegedly served to the Landlord by the Tenant on November 18, 2021 and she agrees it can be considered as evidence at these proceedings. As the Landlord has a copy of tenancy agreement and the Legal Counsel for the Landlord consented to having that document considered as evidence, the tenancy agreement is accepted as evidence for these proceedings.

On December 08, 2021 the Landlord submitted evidence to the Residential Tenancy Branch. The Legal Counsel for the Landlord stated that this evidence was served to the Tenant, via email, on December 08, 2021. The Agent for the Tenant stated that this evidence was received on December 10, 2021. As this evidence was received at least two days prior to the hearing, as required by Rule 10.5 of the Residential Tenancy Branch Rules of Procedure, this evidence was accepted as evidence for these proceedings.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided:

Is there a need to grant the Tenant an Order of Possession?

Evidence Presented at Hearing on December 13, 2021:

The Landlord and the Tenant agree that:

- On November 16, 2021 the parties each signed the tenancy agreement, which is in evidence;
- The tenancy agreement declares that rent of $4,000.00 is due by the 18th day of each month;
- The tenancy agreement declares that the tenancy will begin on November 18, 2021;
- The tenancy agreement declares that a security deposit of $4,000.00 is required;
- The Tenant paid a security deposit of $2,000.00 on November 16, 2021;
- A security deposit of $2,000.00 was paid on November 16, 2021;
- Rent of $8,000.00 was paid on November 16, 2021;
- The Landlord returned $3,000.00 to the Tenant, via auto-deposit, on November 18, 2021;

- The Landlord has attempted to return the remaining $7,000.00 the Tenant paid for the rental unit; and
- The Tenant has refused to accept the remaining $7,000.00 repayment.

Legal Counsel for the Landlord stated that the parties verbally agreed that the rent would be paid in advance once every two months, on the first day of the first month. The Agent for the Tenant stated that the parties agreed the rent would be due by the 18th of each month.

The Landlord submitted a translated email, dated November 15, 2021, in which the Agent for the Tenant declares she plans to send rent payments of $8,000.00 every second month. An agent for the Landlord responds to this email by asking for post dated cheques for January 18, March 18, May 18, July 18, and September 18.

The Landlord submits that the agreement that was signed on November 16, 2021 is invalid because it was contingent on information the Tenant promised to provide when the tenancy was discussed prior to signing the tenancy agreement.

In support of the submission that the agreement is invalid the Landlord relies on the following:

- A translated email, dated November 11, 2021, in which an agent for the Landlord asked the Tenant to complete a rental application form and to forward a " financial statement or Notice of Assessment";
- A translated email, dated November 12, 2021, in which the Agent for the Tenant asked if the Landlord really needed SIN information for a credit check and she declared she has not disclosed that information other than to report taxes to the CRA;
- A translated email, dated November 13, 2021, in which an agent for the Landlord declared that the SIN was not required but he asked for a "property tax statement for the Langley house, your ID and credit report";
- A translated email, dated November 13, 2021, in which the Agent for the Tenant declares, in part, that she would be willing to send that information to the Landlord but if it is being to a third party she would like to know the identity of the third party;
- A translated email, dated November 14, 2021, in which the Agent for the Tenant declares, in part, that she will provide "a copy of the property tax statement and ID after the contract is entered into"; that she is "nervous about providing you with bank information at the application stage"; that she "gave you that

information as I personally met you and felt that I could trust you"; and "if you don't agree to this, please let me know and we will look for other candidates;

- A translated email, dated November 14, 2021, in which an agent for the Landlord declares that he will prepare an agreement on that basis;
- A translated email, dated November 16, 2021, in which an agent for the Landlord asks the Agent for the Tenant to provide her ID and property tax notice for the Langley house;
- A translated email, dated November 17, 2021, in which an agent for the Landlord declares, in part, that "Our position is that we would have proceeded with the rent agreement after receiving your credit score and property tax information but you reassured us that you would provide this information after the contract was signed. We trusted you and proceeded to enter into the agreement. It's difficult to assess tenants based solely on a bank statement. We accommodated you as much as we can. It seems to have been a mutual misunderstanding rather than placing all blames on us. If you can't provide me with credit report etc. that you promised to send before, we cannot accept you as a tenant. If you wish to rescind this contract, please let me know your account information. We will return the $10,000 that we have received from you";
- A translated email, dated November 18, 2021, in which the Agent for the Tenant responds to a series of emails from the Landlord in which the Landlord advises they will not be proceeding with the tenancy, by informing the Landlord that her mother wishes to continue with the tenancy agreement; and
- A translated email, dated November 18, 2021, in which an agent for the Landlord declares, in part, that they "cannot proceed to rent the property to you without credit check, confirmation of assets, who lives there, and the tenant insurance" and that "It's not right to have the money transferred directly from a Korean account. We will not be proceeding with the tenancy so please keep your etransfer open or we will etransfer it to you and provide you with the password after"; and
- A translated email in which the Agent for the Tenant declared, in part, that the consent to "a credit history and criminal background check is retracted".

Legal Counsel for the Landlord stated that the rental unit was re-rented to a third party on December 01, 2021. The Landlord submitted a redacted copy of a tenancy agreement that corroborates this testimony.

The Agent for the Tenant stated that:

- she drove by the rental unit on the evening of December 10, 2021 and December 11, 2021 and on both occasions the home was dark;
- she knocked on the door of the rental unit at 10:30 a.m. on December 12, 2021 and nobody was home;
- she spoke with a neighbour on December 12, 2021 and was informed that the neighbour had only seen two males on the property, who she believes match the description of the Landlord and her son; and
- she does not believe the Landlord has re-rented the unit.

Evidence Presented at Hearing on April 04, 2022:

Legal Counsel for the Landlord stated that after the hearing on December 13, 2021 was adjourned the Tenant sent a locksmith to the rental unit for the purposes of changing the locks. She stated that the tenant currently living in the rental unit intervened and the locks were not changed.

Analysis:

On the basis of the tenancy agreement which was signed by both parties on November 16, 2021, I find that the Landlord and the Tenant entered into a written tenancy agreement for a tenancy that was to begin on November 16, 2021. By doing so, I find that they both were obligated to comply with the terms of that agreement.

While I accept that the Landlord signed the tenancy agreement on the understanding that the Tenant would provide documents such as personal identification, a property tax statement, and a credit report information I find that a failure to provide that information does not render the tenancy agreement invalid.

Presumably the tenancy would have proceeded if the Tenant had provided the information and the credit report was satisfactory. If the Tenant had provided that information and the credit report provided was unsatisfactory, however, the Landlord would not have had the right to end the tenancy agreement. There is nothing in the emails sent prior to the signing of the tenancy agreement and/or in the tenancy agreement itself that establishes the parties agreed the tenancy would not proceed if the Tenant's credit report is unsatisfactory.

While it is prudent and reasonable for a landlord to ensure a tenant has the means to pay the rent, that it something that should be determined prior to entering into a tenancy

agreement. Once the tenancy agreement is signed, the landlord must end the tenancy pursuant to section 46 of the *Act* if the tenant is unable to pay the rent. In these circumstances, there is nothing before me that suggests the Tenant would have been unable to pay the rent.

I accept, in some circumstances, that a contract could be voidable if a tenant provides false information about their identity. There is nothing before me that suggests the Tenant has provided false information about her identity.

The *Act* allows a landlord to end a tenancy, in various circumstances, if a tenant fails to meet specified terms of the tenancy agreement. For example, a landlord can end a tenancy pursuant to section 47(1)(a) of the *Act* if a tenant fails to pay a promised security deposit. A landlord may also end a tenancy, pursuant to section 44(1)(h) of the *Act* if a tenant breaches a material term of the tenancy agreement.

I find that the Landlord did not have the right to unilaterally withdraw from this tenancy agreement. In the event the Landlord believed the Tenant had breached a material term by failing to provide agreed upon documents, the Landlord should have attempted to end this tenancy pursuant to section 44(1)(h) of the *Act.*

On the basis of the testimony of the Agent for the Landlord and the tenancy agreement submitted in evidence, I find that the rental unit was re-rented to a third party for December 01, 2021.

In determining that the unit was re-rented to a third party for December 01, 2021, I have placed little weight on the Tenant's testimony that it appeared nobody was home when she was there on December 10, 2021, December 11, 2021, and December 12, 2021 and nobody was home. I find there may be a reasonable explanation for that, such as the third party has not yet moved into the unit, the third party was out of town, or the third party was simply asleep or away when the Tenant went to the unit.

In determining that the unit was re-rented to a third party for December 01, 2021, I have placed no weight on the Tenant's testimony that a neighbour told her that the neighbour had only seen two males on the property, who she believes match the description of the Landlord and her son. I find that this does not establish that the rental unit has not been re-rented, as it is entirely possible the third party had not yet moved their belongings into the unit. Given that the third party did not sign their tenancy agreement until November 27, 2021, I find it entirely possible that they did not move into the rental unit

on December 01, 2021.

Although I have concluded that the Landlord did not have the right to end this tenancy agreement unilaterally, I must dismiss the Tenant's application for an Order of Possession.

I must dismiss the application for an Order of Possession because the rental unit has been re-rented to a third party. It is therefore not possible for the Landlord to give possession of the unit to the Tenant, as the Landlord has no legal means of ending the tenancy with the third party.

The only remedy available to the Tenant in circumstances such as these, where an Order of Possession cannot be granted, is for the Tenant to apply for compensation for loss of quiet enjoyment of the rental unit. As the Tenant has not applied for financial compensation related to this matter, I cannot award such compensation at these proceedings. The Tenant retains the right to file another Application for Dispute Resolution for compensation related to these matters.

I favour the Tenant's submission that rent of $4,000.00 was due by the 18th of each month over the Landlord's submission that rent of $8,000.00 was to be paid in advance once every two months, on the first day of the first month. I favour the Tenant's submission in this regard as it is corroborated by the written tenancy agreement.

While I accept that the Agent for the Tenant informed the Landlord, via email, that she wanted to pay rent of $8,000.00 every second month, that did not require the Tenant to pay the rent every second month, in advance. The tenancy agreement required the Tenant to pay rent on, or before, the 18th day of each month.

Section 19(1) of the *Residential Tenancy Act (Act*) stipulates that a landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement. As the agreed upon monthly rent was $4,000.00, I find that the Tenant was only required to pay a security deposit of $2,000.00, pursuant to section 19(1) of the *Act*, regardless of the term in the tenancy agreement that declares a deposit of $4,000.00 is required.

On the basis of the undisputed evidence, I find that the Tenant paid a $2,000.00 security deposit and $8,000.00 in rent on November 16, 2021. As the Tenant did not proceed and the Landlord has no legal right to retain these payments, I find that the

Landlord must return these payments to the Tenant.

On the basis of the undisputed evidence, I find that the Landlord has repaid $3,000.00 to the Tenant. I therefore find that the Landlord still owes the Tenant $7,000.00 which must be repaid to the Tenant.

I find that it was reasonable for the Tenant to file an Application for Dispute Resolution in these circumstances and that the Tenant is, therefore, entitled to recover the fee paid to file this Application.

Conclusion:

The application for an Order of Possession is dismissed, without leave to reapply.

For clarity and for the benefit of any third party reading this decision, the Tenant named in this Application for Dispute Resolution has no legal right to enter the rental unit.

The Tenant retains the right to file another Application for Dispute Resolution, in which the Tenant applies for financial compensation related to these matters.

As the Landlord has no legal right to retain the $7,000.00 the Landlord is still holding, I Order the Landlord to return that amount to the Tenant, pursuant to section 62(3) of the *Act*. I also Order the Landlord to pay $100.00 to the Tenant in compensation for the cost of filing this Application for Dispute Resolution.

The Tenant is granted a monetary Order for $7,100.00. In the event the Landlord does not voluntarily comply with this Order, it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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: April 04, 2022

Residential Tenancy Branch