Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes O, FF

Introduction

The tenants apply for a monetary award of $1500.00 paid to landlord as an “application fee” pursuant to a tenancy they claim never commenced.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that the tenants are entitle to recover the money?

Background and Evidence

The rental unit is a two bedroom strata apartment.

The tenants saw the apartment for sale in an advertisement. They contacted the landlord regarding renting the apartment and discussion and negotiation ensued.

The first contact was March 5, 2015. The tenants were looking for a place to move to in mid-July. The landlord wanted to rent it commencing April 1. She was prepared to rent it furnished or unfurnished. She proposed a monthly rent of $3000.00.

On March 9, the tenant S.R. emailed the landlord asking to rent “unfurnished with roller blinds” for $3000.00 per month “preferable” with an option to purchase the rental unit “within 3-4 years.”

The landlord responded on the same day indicating that a long term lease “would be of interest” to her and the agreement could include an option to purchase. She requested a $1500.00 “holding deposit” to “hold the penthouse for you until your references have been checked.”

The landlord's email indicated that if the references were acceptable the holding deposit would become "your security deposit, which would be held and then returned at the end of the lease (upon move-out if you do not end up purchasing that is), provided there is no damage."

On the same day the tenant Ms. S.R. responded regarding references and asking what the latest start time could be, to permit her son to finish his school year where he was.

On the same day the landlord responded that she was "looking to rent the condo for April 1, but may be agreeable to a discounted rent until you are able to move in …" She goes on to discuss possible terms for an option to purchase or an agreement for sale.

The tenant Ms. S.R. responded the same day, posing the idea of a short term tenant for the time between April 1 and mid-July, when they could actually move-in.

The landlord responded the same day, showing interest in that alternative.

The tenant Ms. S.R. responded says "we will for sure find a solution …" and "We'll make it work."

On the same day the landlord inquired about what Mr. S.R. would be doing for income while living there.

Again on the same day the landlord wrote: "If you know at this point that you wish to secure the condo for rental at $3000.00, will you please forward the deposit of $1500.00? If we decide to do an agreement for sale, we can add to that later …"

On March 10 the tenant Ms. S.R. wrote to the landlord:

> We agree renting as of April 1 2015 since you have people, who will rent the apartment furnished till end of June or mid July. We understand the strata regulation (min 6 months rent) and therefore would be "sub renting." This is fine for us.
>
> We definitely can proceed with the rental agreement in that case. The option contract part can be set up separately. The agreement for sale covers mainly the sellers interest, which is not really appealing to us.
>
> We suggest to ad an "Option to purchase" agreement to the contract with a non refundable $5000 option consideration. We would take care of maintenance as it was ours, so you have no unexpected cost on your side. $2000 Dollar am [*sic*] month would go towards the purchase price the rest goes in your pocket."
>
> Can we go from there?

In reply, on March 10, the landlord wrote that such an agreement “could work” and suggested that the tenants’ real estate contacts draw up the contract.

In response the tenant Ms. S.R. wrote that the $5000.00 non-refundable option consideration would be payable right after signing the option to purchase contract.

Later that day the tenants transferred $1500.00 to the landlord and asked if the landlord could organize “a showing.”

At this point, the landlord had been under the impression that the tenants, or at least Ms. S.R. had attended a showing held earlier in the month. The tenants testified that to this point they had not physically seen the rental unit. The landlord replied saying she could arrange for Mr. E.R. to view the rental unit. It was agreed that he could see the unit on March 17th at 2:00 p.m..

The parties continued to correspond regarding the landlords’ credit check and tenant approval requirements.

On March 16, the tenant Ms. S.R. wrote enquiring about the showing for March 17th. The landlord replied saying there would be no more showings, nor would she send the rental contract until she had approved the tenants’ application. There was no viewing on March 17th.

The tenants wrote to the landlord on March 17 asking that the landlord “fully refund our reservation deposit of $1500.00 by latest TODAY, March 17th, 2015 by 4 pm(PST).

In reply the landlord wrote: “I have not refused your application nor your tenancy, thus the deposit is non-refundable.”

In a subsequent message, also on March 17th, the landlord indicated that the tenants’ application had been accepted that morning. She wrote,

> Your application is not conditional upon my setting up another viewing of the condo. I was willing to do this out of courtesy since you informed me that your husband will be in Vancouver at this time, but at this time I will not be making arrangements for any further viewings prior to your possession date of April 1.
>
> I will prepare the lease and send it to you by tomorrow for your review and signatures.

The parties continued to correspond in an effort to reach agreement. The landlord sent the tenants a rental agreement indicating “Please review the lease and, if acceptable, sign and scan back to me for final signature.” The actual agreement was not presented during this hearing but I understand that it provided for a three year fixed term at a monthly rent of $3000.00, commencing April 1, 2015

On March 19 the tenant Ms. S.R. wrote inquiring about the temporary renters she thought the landlord had arranged for them. She indicates she is not prepared to pay four months rent without living there but would agree on a lease starting June 1.

In reply the landlord wrote that she hadn't heard back from the prospective interim renters but would give the tenants their contact information. She confirmed her view that the tenancy started April 1.

In reply, on March 20, the tenant Ms. S.R. wrote that when the tenants paid the deposit they assumed the landlord had sub-renters for them and that they never agreed to pay the rent beginning in April and, as well, they hadn't seen the condo yet.

On March 20 the tenants forwarded the landlord a tenancy agreement and "lease option agreement" that they were prepared to agree to. It proposed a one year fixed term tenancy starting May 15th.

On March 23 the landlord replied that the tenants had made several changes that she would not agree to. She amended her version of the tenancy agreement to deal with blinds and sent it back to the tenants.

The tenants rejected the landlord's revised agreement, reiterating that they had not agreed to rent from April 1 unless there were subtenants in place to cover the period to mid-July.

There was further negotiation but no success. The tenants did not move in and the landlord declined to return the $1500.00 deposit money.

Analysis

The landlord relies on emails exchanged March 9, 2015 to establish that an April 1st start date had been agreed to. Those emails, read in their entirety, do not show an agreement. It was readily apparent from the correspondence that the tenants were NOT prepared to lease the premises from then but would be if an interim tenant could be secured.

The landlord's email of March 9th gives the tenants good hope that she would attend to the matter of sourcing out interim tenants. She didn't and she did not tell the tenants she hadn't before the tenants asked for their deposit money back.

There was no agreement on the term of the tenancy. It was the landlord's unilateral action to insert a fixed term tenancy term in the agreement. From the evidence presented, the tenants had merely proposed that an option to purchase would be "for three or four years."

There was no agreement on the option the tenants had requested and the landlord had agreed to in principle. In my view, the tenants were entitled to insist on such an arrangement as a condition of their tenancy until they signed a binding tenancy agreement or otherwise waived that requirement.

The landlord relies on the suggestion that the tenants did not object to some of her propositions regarding the terms of the tenancy as proof of the tenants' agreement.

It is the law that silence is not assent.

> The principle that silence does not denote consent or acceptance without something more was first raised in ***Felthouse v. Bindley*** (1863), 11 W.R. 429. This principle continues to be followed in contract law (***Schiller v. Fisher***, 1981 CanLII 49 (SCC), [1981] 1 S.C.R. 593 at para. 8) as well as insurance law. E. MacGillivray's *MacGillivray on insurance law relating to all risks other than marine* (London: Sweet & Maxwell, 2003) at 2-16 states that "[s]ilence does not denote consent and therefore no binding contract arises until the person to whom an offer is made says or does something to signify its acceptance."
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> - *Gellen v. Public Guardian and Trustee of British Columbia et al*, 2005 BCSC 1615

Generally, the fact of acceptance of an offer must be communicated to the offeror before acceptance is complete and a binding contract is created (*Schiller et al. v. Fisher et al*., [1981] 1 S.C.R. 593).

In result, the parties failed to reach agreement on the essential terms of this tenancy. The tenants were and remained only "proposed tenants."

At hearing the landlord agreed that the $1500.00 deposit money was a security deposit. After review of this evidence I find that from the outset and throughout, the landlord considered the deposit money to be a fee paid for her to consider the tenant's application, though she did not say this to the tenants. If the application was accepted the money would become a security deposit within the meaning of the *Residential Tenancy Act* (the "*Act*"). If the application was refused the deposit would be forfeited. The landlord's position on that matter was made very clear by her email to the tenants dated March 17, stating the deposit is "non-refundable."

The fact that the deposit might not be refundable was not something the landlord thought to mention to the tenants before the money was paid to her. In fairness, she cannot keep money given without knowledge of that essential condition.

The tenants are entitled to recover the $1500.00 deposit.

At hearing there was discussion, raised by me, regarding the effect of s.38 of the *Act*, should the deposit money be found to be a security deposit. Section 38 imposes a doubling penalty on a landlord should she fail to either repay a deposit or make an application against it within 15 days after the end of a tenancy and receipt of a tenant's forwarding address is writing.

On reflection I have determined that s.38 cannot apply to these circumstances because, as the tenancy never lawfully started, neither did it have an end.

The tenants' application discloses a claim for $43.80 for an Interac Transfer. This claim was not explained at hearing and so I dismiss it.

Conclusion

The tenants are entitled to a monetary award of $1500.00 plus recovery of the $50.00 filing fee. There will be a monetary order against the landlord in the amount of $1550.00.

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: September 13, 2015

Residential Tenancy Branch