



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

INTERIM DECISION

Dispute Codes:

OPT, OLC, MNDC, FF

Introduction

This hearing was convened in response to the Tenant's Application for Dispute Resolution.

On July 26, 2010 the Tenant filed an Application for Dispute Resolution, in which the Tenant applied for a monetary Order for money owed or compensation for damage or loss; an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act)*, *Regulation*, or tenancy agreement and to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution. The Residential Tenancy Branch subsequently scheduled a hearing for December 26, 2010.

On July 29, 2010 the Tenant amended his Application for Dispute Resolution to include an application for an Order of Possession. The Residential Tenancy Branch subsequently cancelled the hearing date on December 26, 2010 and scheduled the hearing for September 30, 2010.

The Landlord is seeking an adjournment of the matter on the basis that the female Landlord, who is the person who negotiated the tenancy agreement with the Tenant and is the only person who can give proper evidence in this matter, is working out of the country. Legal counsel for the Landlord stated that the female Landlord is managing an art promotion in Los Angeles and is unable to take a break from her meetings to participate in the teleconference. Legal Counsel for the Landlord stated that by the time the Landlord received notice of the new hearing date, which was sometime in the latter portion of August, the female Landlord's work schedule could not be changed.

The Tenant opposed the request for an adjournment on the basis of the fact that he and his family are currently living in a recreational vehicle; that he needs to find a place for his family to live if his application for an Order of Possession is unsuccessful; that rents are steadily rising in Big White due to the upcoming ski season, which will make it more difficult to find a home if the hearing is delayed; and that the male Landlord does have some knowledge of these matters as he met the male Landlord prior to meeting the female Landlord; and that much of the negotiations were done by email and are easily understood.

I declined the Landlord's request for an adjournment as it pertains to the Order of Possession. In reaching this conclusion I was heavily influenced by the fact that this hearing was conducted by teleconference and that she had adequate notice of the time and date of the hearing. I find it highly unlikely that the female Landlord could not have arranged her meeting schedule in a manner that would facilitate participation in this conference. I was equally influenced by the fact that this matter pertains to the Tenant's right to occupy the rental unit and that delaying the proceedings would be unduly prejudicial to the Tenant, given that the Tenant is living in a recreational vehicle and the winter months are approaching.

The parties were advised that the Landlord's request for an adjournment, as it relates to the application for a monetary Order, is granted, as a delay in determining whether the Tenant is entitled to financial compensation should not unduly prejudice either party.

The Landlord submitted a package of evidence to the Residential Tenancy Branch on September 24, 2010, a copy of which was served on the Tenant. The Tenant acknowledged receipt of this evidence.

The Tenant served a package of evidence to the Landlord and the Landlord acknowledged receipt of the evidence. The Tenant stated that his agent submitted copies of this evidence package to the Residential Tenancy Branch on July 29, 2010, however the evidence was not available to me at the time of the hearing. The Tenant elected to proceed with the hearing on September 30, 2010 with the understanding that I would not be able to view any documents he submitted in evidence.

At the conclusion of the hearing on September 30, 2010 I was unable to locate evidence submitted to the Residential Tenancy Branch by the Tenant. The Tenant is hereby directed to re-submit a copy of the evidence he served to the Landlord if the Tenant wishes to rely on those documents at the reconvened hearing.

The hearing proceeded on September 30, 2010, at which time both parties were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions to me.

Issue(s) to be Decided

The issue to be decided at this hearing is whether the Tenant is entitled to an Order of Possession, pursuant to section 54 of the *Residential Tenancy Act* (Act).

Background and Evidence

The Landlord and the Tenant agree that on April 25, 2010 the female Landlord and the Tenant signed a commercial lease which stipulates that the Tenant may use the premises for a deli, a store, a bed and breakfast, and residential living accommodations. The agreement stipulates that the Tenant will pay monthly rent of \$1,500.00 and that he will pay a deposit of \$750.00. The agreement is a two year fixed term agreement, which

was scheduled to begin on August 01, 2010, with a three year option. The parties agree the deposit of \$750.00 was paid on August 25, 2010.

The Landlord and the Tenant agree that they understood the property would have to be re-zoned for the purposes of operating a delicatessen; that the Landlord would make arrangements to have the premises re-zoned; that the Tenant would pay the Landlord \$1,600.00 for the cost of re-zoning; and that the re-zoning did not occur.

The Landlord and the Tenant agree that on April 25, 2010 the female Landlord and the Tenant also signed a residential tenancy agreement for a different area in the same building as the commercial premises. The agreement stipulates that the Tenant will pay monthly rent of \$700.00 and that he will pay a deposit of \$350.00. The agreement is a two year fixed term agreement, which was scheduled to begin on August 01, 2010. The parties agree the deposit of \$350.00 was paid on August 25, 2010.

There is nothing in the commercial lease that stipulates that the agreement is contingent on the residential tenancy agreement. There is nothing in the residential tenancy agreement that stipulates that the agreement is contingent on the commercial lease.

The Landlord and the Tenant agree that the commercial space is separate from the living accommodations in the building. The Landlord stated that the commercial space is now rented out as office space, for \$1,600.00 per month, and that he is occupying the residential space.

The Landlord submitted copies emails between the parties May 24, 2010 and July 22, 2010. There is nothing in these emails that indicate that the residential tenancy agreement was conditional on the commercial lease.

The Landlord stated that the two contracts are tied together as one transaction and that he never would have rented his home for \$700.00 if the Tenant was not also renting the residential property. The Landlord contends that the commercial lease was frustrated by the inability to obtain permission to rezone the property and that the residential lease was also frustrated because they were part and parcel of the same agreement.

The Tenant argued that it was the Landlord's decision to enter into two agreements, which clearly shows the Landlord's intent to treat them separately. He said the agreements are significantly different, as the commercial lease has a three year option and the residential tenancy agreement ends after the fixed term.

The Tenant and the Landlord agree that the Landlord sent the Tenant an email on July 14, 2010, in which they advised the Tenant they found him to be very pushy; they did not like his attitude; they did not need this kind of stress in their lives; they want to work with people they enjoy; and that requested a mailing address so they could return his money. The Tenant stated that he attempted to obtain a key to the rental unit after July 14, 2010 and was told the Landlords did not wish to abide by the terms of the tenancy agreement.

The Tenant and the Landlord agree that the Tenant sent the Landlord an email on July 21, 2010, in which the Tenant agreed to have his agent pick up the money that he had paid in relation to these agreements. The Landlord contends this represents a reciprocal agreement to end the tenancy.

Analysis

Section 4(d) of the *Act* stipulates that the *Act* does not apply to living accommodation included with premises that are primarily occupied for business purposes and are rented under a single agreement. I find that I have no jurisdiction over the commercial lease but I do have jurisdiction over the residential tenancy agreement.

I find that the commercial lease and the residential tenancy agreement are independent of each other. In the event that renting the commercial space was a material term of the residential tenancy agreement, I find that the Landlord had an obligation to ensure that the Tenant clearly understood the term. There is nothing in the commercial lease or the residential tenancy agreement that would cause me to conclude that the parties had agreed that the residential tenancy agreement was contingent on the commercial space being rented by the Tenant. There is nothing in the email communications between the parties that would cause me to conclude that the parties had agreed that the residential tenancy agreement was contingent on the commercial space being rented by the Tenant. As the parties do not now agree that the residential tenancy agreement was contingent on the commercial space being rented by the Tenant, I cannot conclude that the agreements are interdependent. The fact that the two contracts were entered into on the same day causes me to conclude that the agreements were independent or the entire premises would have rented under one single agreement.

I find that the Landlord and the Tenant entered into a residential tenancy agreement on April 25, 2010, which was to begin on August 01, 2010 and to continue until August 01, 2012, for which the Tenant was required to pay monthly rent of \$700.00. I find that the Landlord and the Tenant are compelled to abide by the terms of their residential tenancy agreement, and that the Tenant has the right to possess the rental unit for the duration of the tenancy. I find that the Tenant is entitled to retain possession of the rental unit until such time as it is ended in accordance with the *Act*.

Section 44(1)(a) of the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act*. The evidence shows that neither party has given proper notice to end this tenancy in accordance with these sections and I therefore find that the tenancy has not ended pursuant to section 44(1)(a) of the *Act*.

Section 44(1)(b) of the *Act* stipulates that a tenancy ends if the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy. As the fixed term of the tenancy has not yet expired, I find that the tenancy has not ended pursuant to section 44(1)(b) of the *Act*.

Section 44(1)(c) of the *Act* stipulates that a tenancy ends if the landlord and the tenant agree in writing to end the tenancy. As there is no evidence that the parties agreed in writing to end the tenancy, I find that the tenancy did not end pursuant to section 44(1)(c) of the *Act*. I do not find that the email from the Tenant, in which he agrees to pick up the money he paid to the Landlord, constitutes a written agreement to end a tenancy.

Section 44(1)(d) of the *Act* stipulates that a tenancy ends if the tenant vacates or abandons the rental unit. As the Tenant was never given access to the rental unit, I cannot conclude that the tenancy has ended pursuant to section 44(1)(d) of the *Act*.

Section 44(1)(e) of the *Act* stipulates that a tenancy ends if the tenancy agreement is frustrated. I find that the residential tenancy agreement can easily be fulfilled and that it has not been frustrated. In reaching this conclusion, I note that the Landlord has rented the commercial space for \$1,600.00 per month and that he can abide by the terms of the residential tenancy agreement without any significant economic hardship. I therefore find that the tenancy did not end pursuant to section 44(1)(e) of the *Act*.

Section 44(1)(f) of the *Act* stipulates that a tenancy ends if the director orders that it has ended. As there is no evidence that the director ordered an end to this tenancy, I find that the tenancy did not end pursuant to section 44(1)(f) of the *Act*.

As the Tenant has a contract that entitles him to occupy the rental unit and the tenancy has not ended in accordance with the *Act*, I find that the Tenant is entitled to an Order of Possession, pursuant to section 54 of the *Act*.

Conclusion

I hereby grant the Tenant an Order of Possession that is effective two days after it is served upon the Landlord. This Order may be served on the Tenant, filed with the Supreme Court of British Columbia, and enforced as an Order of that Court.

The Tenant's application for financial compensation for issues relating to the residential tenancy agreement will be considered at the reconvened hearing. The parties retain the right to come to settle any matters relating to the residential tenancy agreement or to mutual agree to end this tenancy, in writing, prior to the reconvened hearing.

This interim 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: October 04, 2010.

Dispute Resolution Officer