Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

OPT, FF

Introduction

This was a cross-Application hearing.

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for an order of possession and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The tenant has applied requesting an Order of possession for the rental unit and compensation for damage or loss under the Act in the sum of $4,089.00.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were affirmed and were provided with an opportunity to ask questions about the hearing process.

Preliminary Matters

The landlord was served with the tenant's November 4, 2010, amended Application and evidence which included the rental unit address as the service address for the tenant. The landlord was aware that the tenant had not lived at this address since October 18, 2010, as the locks to the rental unit had been changed by the landlord. The landlord served her evidence to the rental unit address as the tenant did not provide any other address for service. The tenant testified that she did not have a current address which she could use for service purposes, that the landlord had prohibited her from going to the rental unit and that she had not received the landlord's evidence submission.

Given the confusion in relation to the address used by the tenant I directed the landlord to read from her evidence. The landlord wished to reference a number of text messages sent between the parties; these messages formed the bulk of the landlord's evidence. The landlord was told she could reference any of her written evidence submission and that she could read those messages or any other portion of her

evidence in as testimony. Several times during the hearing I reminded the landlord that she had the right to reference any of the text messages and written submission that were relevant to the Application before me. The landlord chose to read from a number of the messages included in her evidence.

The parties each submitted copies of a tenancy agreement as evidence.

The landlord applied requesting an order of possession but a Notice ending tenancy has not been issued by the landlord. As the tenant is requesting an order of possession for the rental unit the landlord was informed that if the tenant were unsuccessful in her Application that the landlord would automatically retain possession, as the tenant is not currently residing in the unit. Therefore, the landlord's Application was unnecessary and I dismissed the Application.

Issue(s) to be Decided

Is the tenant entitled to an Order of possession for the rental unit?

Is the tenant entitled to compensation for damage or loss in the sum of $4,089.00?

Background and Evidence

The parties agreed on the following facts:

- That on October 11, 2010, a residential tenancy agreement was signed by 2 co-tenants and the landlord;
- That the tenancy was to commence on October 15, 2010;
- That the tenants filled in the agreement sections indicating rent and deposit amounts due, which were confirmed during the hearing as correct by the landlord;
- That rent was $1,100.00 due on the first day of each month;
- That rent would be pro-rated from October 15 to the end of that month;
- That the tenants were to pay a deposit in the sum of $550.00;
- That on October 14, 2010, the landlord gave the tenants a key to the rental unit by leaving it in the mail box;
- That the landlord understood the tenants would commence moving some belongings into the rental unit on October 14; and
- That on October 15, 2010; the tenants were told that they could not move in as the strata members had rejected the use of the unit as a rental.

The residential tenancy agreement included a clause, 2(a) which stated:

> *"The tenants are aware that this rental is upon approval of all strata members. If, after tenancy, the tenants behave in a way that is offensive to the strata members, this will be grounds for eviction."*

The tenant submitted that she understood this term to mean that once she had moved in the strata members could have an impact on her tenancy and recommend she be evicted if there were disturbances caused.

The landlord testified that clause 2(a) was included as a term of what she viewed as a conditional agreement, that was meant to be tentative and that the tenant understood the tenancy could not commence until approval of the strata members was obtained during a meeting to be held on October 15, 2010.

There was no agreement between the parties in relation to clause 2(a) of the tenancy agreement. The landlord stated that the tenant was ignoring conversations they had prior to signing the residential tenancy agreement and that the tenant was well aware that approval of the strata members was required before the tenancy could be assured.

The tenant denied knowledge of any such agreement and said she first became aware of a possible problem on the evening of October 14, 2010, when a neighbour approached the 2 co-tenants and told them they should not be moving into the unit as rentals were not allowed. The tenant then immediately contacted the landlord who told them to continue moving in.

The landlord thought the tenants were moving a few small items into the unit on October 14 and believed clause 2(a) of the tenancy agreement protected her, should the strata members reject the rental at a meeting to be held the next day. The landlord acknowledged that she made a mistake and should not have given the tenants the keys on October 14, 2010. Several text messages were immediately sent to the tenants, apologizing for the confusion, indicating that the landlord had made an error in allowing the tenants access without the prior approval of the strata members.

On October 15 the strata members informed the landlord that she could not use the unit as a rental. When I asked why she had advertised the unit and given the tenants access to the unit prior to obtaining approval, the landlord stated that when was inexperienced and had made an error in allowing the tenants to move items into the unit.

The co-tenant left the unit on October 14 and did not return, as she was upset by the events. The tenant/applicant remained in the rental unit as all of her belongings had been moved into the unit and she had nowhere else to live. On October 18 the landlord changed the locks and the tenant was denied further access to the unit. Some of the tenant's belongings remain on the residential property in a shed.

The tenant submitted copies of a number of void post-dated security deposit and rent cheques, to January, 2011, which were given to the landlord but not cashed.

The gas service was placed in the co-tenant's name and the hydro account was placed in the name of a male friend of the tenant's. The landlord has since had the accounts changed and stated that anyone can change account names without the authority of a landowner.

The tenant has claimed compensation for damage and loss as follows:

Moving and gas	533.00
Meals 3 X 31 days	1,240.00
Phone cards	100.00
Clothes/essentials	300.00
Total	4,622.00

The tenant did not submit any receipts or other verification of the amounts claimed; although she did testify that she had numerous receipts in her possession.

During the hearing the parties discussed the tenant's belongings that remain on the residential property. As this matter was not before me I suggested that the parties try to reach an agreement that will allow the tenant to retrieve the items from the property, should the tenant's Application be unsuccessful.

Analysis

There is a considerable amount of discord between the parties, not only related to the matters before me, but other aspects of the tenancy. I have considered the testimony and evidence in relation to the Application submitted by the tenant so that a determination may be made as to whether a residential tenancy agreement was established and, if so, whether the tenant is entitled to possession of the rental unit.

The landlord's Application was not required as she had not issued a Notice ending tenancy. If the tenant is unsuccessful in obtaining an Order of possession then the landlord will retain possession of the unit as it is vacant.

The landlord has relied upon clause 2(a) of the residential tenancy agreement signed between the parties on October 11, 2010, to assert that, in the absence of strata approval, a tenancy agreement would not be established. The landlord's interpretation of clause 2(a) rejects the interpretation of clause 2(a) submitted by the tenant; that a tenancy contract was reached between the parties. The landlord insisted that clause 2(a) provided the landlord with protection should the strata members reject her request to use the unit as a rental.

The landlord could not explain why the residential tenancy agreement signed on October 11, 2010, was completed prior to her having obtained the authority from the strata members to rent the unit. The landlord first advertised; located tenants; signed a

residential tenancy agreement and then gave the tenants possession of the unit on October 14, 2010. Once the landlord became aware of a possible problem as a result of contact by the tenants on October 14, 2010, informing her of the comments made by a strata member, she began to apologize and to assure the tenants the issue could be sorted out. Then, after the October 15, 2010, meeting with the strata, the landlord instructed the tenants to vacate the rental unit. This situation was further aggravated by the landlord changing the locks on October 18, 2010, and denying the tenant access to the rental unit.

Black's Law Dictionary, sixth edition, defines a contract, in part, as:

> *An agreement between two or more persons which creates an obligation to do or not to do a particular thing…a legal relationship consisting of the rights and duties of the contracting parties, a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also the right to seek a remedy for the breach of those duties…"*

The parties signed a document entitled "Residential Tenancy Agreement" which set out the terms of the tenancy, such as: the start date, expected behaviours, utility payments by the tenants, appliances, guests, rent increases, sub-let, smoking and rent payment by post-dated cheques. I find that this document formed a contract between the landlord and tenants, as the tenants signed agreeing to certain obligations and the landlord promised to supply the rental unit, given certain conditions.

The Residential Tenancy Act defines as a landlord as the owner of the property, or agent of the owner, who permits occupation of the rental agreement under a tenancy agreement. The Act further defines a tenancy as an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit. I find that the respondent met the definition of landlord as she allowed the tenant to take possession of the rental unit and that the written agreement fell within the definition of a tenancy provided by the Act.

The landlord argued that the residential tenancy agreement signed was conditional upon the strata members agreeing to allow the rental of the unit. The landlord submitted that a portion of clause 2(a) clearly informed the tenants that the agreement was conditional upon the required approval:

> *"The tenants are aware that this rental is upon approval of all strata members. If, after tenancy, the tenants behave in a way that is offensive to the strata members, this will be grounds for eviction."*

Section 6(3) of the Act provides:

> *(3) A term of a tenancy agreement is not enforceable if*
>
> *(a) the term is inconsistent with this Act or the regulations,*
> *(b) the term is unconscionable, or*

> *(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

Section 3 of the Residential Tenancy Act Regulation defines unconscionable as:

> *For the purposes of section 6 (3) (b) of the Act [unenforceable term], a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.*

I find that the landlord's interpretation of clause 2(a) gives that clause a meaning which is unconscionable and grossly unfair to the tenant. To expect the tenant to be at the ready to move into a unit on October 15, with the expectation that at the very last minute the tenancy could be cancelled, placed the burden on the tenant and weighed any benefit solely to the landlord. Therefore, I find clause 2(a) is unenforceable. Further, even if clause 2(a) was not unconscionable, I would find that it failed to clearly express the rights and obligations of the parties and thus, it would be unenforceable.

I find that the error in this case falls exclusively to the landlord who had a responsibility to undertake her obligations under the Act. The landlord acknowledged she made mistakes, but even if the tenants had not been given possession of the rental unit on October 14 and even if they had not moved items into the unit on October 14, I would find that a tenancy contract was created on October 11, 2010; when the parties signed the residential tenancy agreement.

Therefore, as I have determined that the parties did enter into a residential tenancy agreement and that this agreement was a contract for rental of the unit, I find that the tenant is entitled to possession of the rental unit. I have based this decision on the signed residential tenancy agreement and my assessment of clause 2(a) as unconscionable and unenforceable.

I have issued an Order of possession for the rental unit to the tenant no later than November 30, 2010, at 1 p.m. The tenant will be bound by the enforceable terms of the residential tenancy agreement signed on October 11, 2010.

If the tenant moves in mid-month, rent will be due at a rate of $36.16 per day and must be paid at the time she take takes possession, for each day, to the last day of the month. Thereafter, rent is due on the first day of each month in the sum of $1,100.00. If the tenant fails to comply with the Act the landlord is at liberty to take whatever action she sees fit as provided by the Act

When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of

the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

There was no dispute that the tenant was locked out of the rental unit on October 18, 2010. However, the tenant has claimed compensation for items or loss for which no verification was provided. In the absence of any evidence verifying the costs claimed by the tenant, I find that the monetary claim is dismissed.

Conclusion

The landlord's Application is dismissed.

The tenant has been issued an Order of possession for the rental unit. The landlord will provide the tenant with possession not later than November 30, 2010, at 1 p.m.

The tenant's monetary claim is dismissed.

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 18, 2010.

Dispute Resolution Officer