



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNQ FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to obtain an Order to cancel a 2 Month Notice to end tenancy issued because the Tenants no longer qualify for subsidized housing.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Should the 2 Month Notice to end tenancy issued October 26, 2012 be cancelled?

Background and Evidence

The parties agreed that the Tenants made application for tenancy on January 5, 2011 which required them to complete an *Application for Rent Subsidy Form* and provide additional financial information as required, to the previous Landlord. Even though the Tenants' income was too high to qualify for a rental subsidy they were still accepted as Tenants and were required to pay the full rent of \$526.00 per month. They entered into a written tenancy that began on February 1, 2011.

The Landlord confirmed that he began managing this property after the Tenants began their tenancy. He stated that when he conducted the annual income review for these

Tenants he determined that their 2011 income was over the threshold to allow them to continue to occupy the rental unit so he issued them a 2 Month Notice (the Notice) on October 26, 2012, to end their tenancy. He noted that the Notice was issued with an effective date of January 31, 2013, which is three months notice, and that the Notice indicates that they no longer qualify for the subsidized rental unit and does not say they are being evicted because they do not qualify for a subsidy.

The Landlord advised that the previous building manager was involved in approving these Tenants for occupancy and that their income information that was provided on the subsidy application was different than the income recorded on their 2011 tax assessment form. Specifically, the subsidy application indicates that the male Tenant would be receiving only one more month of medical E.I. and his 2011 tax assessment indicated he was paid over \$12,000 for E.I. benefits in the 2011 year.

The Landlord submitted that the previous manager would have told the Tenants that they need to pass the following two qualifications in order to occupy this building: (1) one of them had to be over the age of 55; and (2) their income could not be over the stipulated threshold amount. He argued that this was part of the process and is what he tells all prospective tenants. He acknowledged that nothing was provided to the Tenants in writing about the income threshold or their operating agreement and stated that a reasonable person would know that they could not continue to stay in a subsidized rental unit if they had a high income.

The Landlord advised that their tenancy agreement refers to "economic rent" which he argued is not the same as market rent. He noted that this is not market housing it is subsidized housing which is why the Landlord reserves the right to do financial assessments. He stated that economic rent was determined based on their costs to run the facility, as a non profit organization, and that their mandate is to set the rent low, for low income tenants who could not pay rent in the regular market. Then he pointed to the Application for Rent Subsidy" and noted that the document indicates "economic rent" as \$526.00 and that the Tenants were required to pay the economic rent in full as they did not qualify for a subsidy. He stated that the Tenants assume that the Landlord benefits from them paying full rent and he wanted to clarify that they get full rent either way as they receive the subsidized amounts from the third party whom they have their operating agreement with.

The Landlord pointed to #2 in the tenancy agreement (as listed below) and argued that this clause provides him the authority to evict a tenant if their income rises above the income threshold limit:

MATERIAL COVENANTS

The landlord has entered into an operating agreement with the British Columbia Housing Management Commission (the "Commission") restricting the Property for use as social housing. Therefore covenants in this Tenancy Agreement may be material and of great importance even though the same covenants might be of little or no consequence to a different landlord or to a different tenancy relationship.

The Landlord clarified that this rental complex has always been low income housing and not "geared to income housing" as their other units are where the tenants pay 30% of their income as rent.

The Tenants submitted that they were told their income was too high right from the beginning of their meetings with the previous manager. He told them that it was okay that their income was too high because they wanted a mix of people in the building, especially those who could afford to pay the full rent. At no time were they told there was a fixed income limit. They were told that they would be required to apply for subsidy each year and that they would have to pay the market rent or full rent if their income was too high.

The Tenants stated that they have never heard about threshold limits or seen the document outlining the limits prior to being evicted. Their Assistant at this hearing advised that he too was a tenant in this building and he had never seen the threshold documents prior to this proceeding.

The Tenants spoke about their application for rent process and how they had three separate processes or steps to go through with the previous Landlord before they were approved to move in. They were open and honest about reporting all of their income and submitted documents when requested. They confirmed that at the time they first completed the subsidy application that they noted that the male Tenant would be receiving one more medical E.I. payment. It was not until later in the year, after a court case against his former employer, that the male Tenant was approved for regular E.I. They never attempted to hide this information from their Landlord and willingly provided the financial information that was requested in this recent review by the new Landlord.

The Tenants confirmed that they were not given any documents other than copies of their tenancy agreement and application for subsidy. They noted that in all their communications with the previous Landlord they understood economic rent and market

rent to be the same thing. They point to their copy of the Application for Subsidy which lists the economic rent and market value rent as the same amount as that which is listed in their tenancy agreement as the rent, \$526.00.

The Tenants advised that they applied for copies of all the documents held in the Landlord's files through a Freedom of Information application and pointed to item # 4A in their evidence which was a copy of a note placed on their file by the previous Landlord. They noted that the last paragraph states:

Since they are not going to work here, and they have lots of \$ resource to pay rent, I am going to rent to them.

The Tenants argued that this was proof that the previous Landlord knew how much money they had and were earning and despite the process he decided to allow them to move in. They argued that this also supported their testimony that they were told by the previous Landlord that they wanted a mixture of tenants, some who could afford to pay and some who could not.

In closing, the Landlord stated that this rental unit is designated as lower income housing and only tenants whose income is below the threshold amount are allowed to reside in this unit. These Tenants have income above the threshold and need to be evicted. He believes the previous Landlord made a clerical error by allowing these Tenants to move in and that they should not be held accountable for that error. He said to put it simply: "there are those who qualify and those who do not".

The Tenants submitted 57 pages of documentary evidence which included, among other things, copies of: their written statement; financial documents; 2 Month Notice; correspondence between the Tenants and the Landlords; and a copy of some documents obtained from the Tenants' file held by the Landlord.

The Landlords submitted 70 pages of documentary evidence which included, among other things, copies of: their written statement; their constitution and by-laws; the Tenants' financial information; the tenancy agreement; the initial application for tenancy; and the initial Application for Subsidy.

Analysis

I have carefully considered the foregoing and on a balance of probabilities I find as follows:

When a tenant receives a 2 Month Notice to end tenancy they may accept the Notice and vacate the property or they may file an application to dispute the Notice. The Tenants made an application to dispute the Notice.

Upon review of the 1 Month Notice to End Tenancy, I find the Notice to be completed in accordance with the requirements of section 52 of the Act and I find that it was served upon the Tenants in a manner that complies with section 89 of the Act.

The Notice was issued pursuant to Section 49.1 of the Act for the following reasons:

- *The tenant no longer qualifies for the subsidized rental unit*

When a Notice is disputed the Landlord bears the burden to provide sufficient evidence to establish the reasons for issuing the Notice to End Tenancy.

The Landlord's argument is that the previous Landlord made a clerical error by allowing these Tenants to move in and because he has proven the Tenants income surpasses the allowable threshold they must vacate the subsidized unit in accordance with the 2 Month Notice. He argued that clause # 2 of their tenancy agreement provided him the authority to end this tenancy. He was also of the opinion that economic rent is different than market rent.

The Tenants argued that their tenancy was not dependent on an income threshold and submitted that they were granted access, without qualifying for subsidy, because they were willing to pay the full rent which they believed to be market rent. They are of the opinion that their tenancy should be grandfathered in because they were never advised of the income threshold.

I rely on the following definition of "rent" provided in section 1 of the Act:

"rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities,...

The Act, Regulations, Policy Guideline, do not define the terms "Economic Rent" or "Market Rent".

Black's Law Dictionary (1999) Seventh Edition defines "Economic Rent" as:

1. *The return gained from an economic resource above the minimum cost of keeping the resource in service*
2. *Rent that yields a fair return on capital and expenses.*

The *Act, Regulations, Policy Guideline, and Black's Law Dictionary* do not provide a definition for the term "Market Rent. Without a formal test for determining the definition I considered the definition under the reasonable person standard and determined the definition as follows:

Market rent is what a willing landlord might reasonably expect to receive, and a willing tenant might reasonably expect to pay for possession of a rental unit, for the use of common areas and for services or facilities, in relation with what the economic climate demands for rent of similar properties in similar areas that would provide an income for the landlord over the cost to provide the unit.

Both definitions refer to a resource, in this case rent, that would provide revenue of an amount that is above the minimum cost of keeping the property rented. I find that Economic rent could then be determined as the amount just above the cost to keep the unit running or a break even point while Market rent would be the rent demanded by the market to make a reasonable profit.

Upon review of the Application for Rent Subsidy the form indicates the economic rent in box 1 then provides calculations for the tenant rent contribution (TRC). The calculation of TRC is obtained by totalling 30% of a tenant's income, plus or minus other charges. If a market rent maximum applies it is to be listed and then the form notes: Tenant pays lesser of TRC or market rent if applicable. Then the final subsidy calculation uses the formula: Economic rent less (tenant rent contribution "or" Market rent whichever applies). Accordingly, I accept the Landlord's argument that in their normal calculations for rent subsidy Economic rent is different than Market rent.

After careful consideration of the original subsidy form, the manner in which it is completed, the previous Landlord's notation on the Tenants' file, and the foregoing testimony, I accept that the Tenants were approved and allowed to move into this building; and they were told that they would have to pay the full rent because they did not qualify for subsidy. I further accept that they were told they would have to go through the subsidy application process annually and at no time during their application process were they told that if their income surpassed a threshold amount they would have to move out.

Notwithstanding the Landlord's argument that the previous Landlord made a clerical error; I find the previous Landlord acted within his authority as Agent for the Landlord and entered into a legally binding tenancy agreement with the Tenants.

Section 6 (3) of the Act stipulates that 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.

Upon review of clause #2 of the tenancy agreement titled MATERIAL COVENANTS, I find this clause explains that the Landlord has an operating agreement with a third party that restricts this property for use as social housing and that the remaining terms of the agreement are a material term and of great importance. This clause does not give the Landlord the right to end the tenancy at will nor does this tenancy agreement stipulate that the Tenants' tenancy is dependent on their income being below a threshold amount. If this is the Landlord's intent then the clause does not meet the requirements of section 6(3) of the Act as listed above, and therefore cannot be enforceable in that manner.

The tenancy agreement provides at #5 under the heading PAYMENT OF RENT:

RENT IS \$526.00 per month For your rent contributions please refer to the green copy of Application for Rental Subsidy.

There is provision in the tenancy agreement for the Landlord to request income verification information on an annual basis if the Tenants are eligible for a rent subsidy. I do not find that this provision on its own relates the Tenants' rent to their income; rather it relates to the Tenants' entitlement to subsidy. Although the Landlord requested income information from the Tenants the purpose for doing so seems aligned with the monitoring process set for the subsidy arrangement that is between the Landlord and their operating contract with a third party.

Overall, I do not find sufficient evidence within the testimony or the documents entered into evidence that supports the Landlord's assertion that the Tenants ought to have known they would be evicted if their annual income rose above threshold amounts provided for in the Landlord's operating agreement with a third party. Rather, I find the evidence supports the Tenants' position that they were told they would have to pay the full rent if they did not qualify for a subsidy. Furthermore, based on the written tenancy agreement I find clause #5 PAYMENT OF RENT to be vague as it simply states:

RENT IS \$526.00 per month.

Therefore, it is my finding that the tenancy agreement lists the market rent for the unit as \$526.00 per month. Market rent falls within the jurisdiction of the *Act* which governs annual rent increases or applications for rent increases above the prescribed amounts.

As per the above, I find there to be insufficient evidence to uphold the 2 Month Notice to end tenancy issued October 26, 2012 and the Notice is hereby cancelled.

The Tenants have succeeded with their application; therefore I award recovery of their **\$50.00** filing fee.

Conclusion

The 2 Month Notice to end tenancy issued October 26, 2012, under section 49.1 of the *Act*, is HEREBY CANCELLED and is of no force or effect.

The Tenants may deduct \$50.00 from their next rent payment as full recovery of their filing fee.

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: December 17, 2012.

Residential Tenancy Branch