



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL, CNL, FF

Introduction

This hearing was convened in response to applications by the landlord and the tenant.

The landlord's application is seeking orders as follows:

1. For an order of possession based on a notice issued on May 16, 2013;
2. To recover the cost of filing the application.

The tenant's application is seeking orders as follows:

1. Cancel a notice to end tenancy; and
2. To recover the cost of filing the application.

Both parties appeared, gave testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions at the hearing.

Issue(s) to be Decided

Should the notice issued on May 16, 2013, be upheld or cancelled?

Are either party entitled to recover the cost of filing their application from the other party?

Background and Evidence

The parties entered into a fixed term tenancy which began on December 1, 2010 and was to expire on November 2011. The parties thereafter agreed to extend the fixed term agreement on a yearly basis. The current extension commenced on December 1, 2012 and expires on November 30, 2013. Current rent in the amount of \$1,250.00 was payable on the first of each month. A security deposit of \$727.50 was paid by the tenant.

The parties agreed that the tenant was served with a 2 Month Notice to End Tenancy for Landlord's Use of Property. The parties agreed that the reason stated in the notice is that,

- all of the conditions for sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this notice because the purchaser or a close family member intends in good faith to occupy the rental unit

The tenant stated that he does not dispute the reason stated in the notice, but disputes the effective date as they are under a fixed term agreement and the earliest date the tenancy can legally end is November 30, 2013.

The landlord's agent stated that condition #4 of the original tenancy agreement has a clause which allows the landlord to terminate the tenancy with notice as if the fixed term tenancy was a month-to-month agreement, if the landlord enters into an agreement to sell the property.

The landlord's agent stated that they believe their contract complies with section 44 (1) (c) and section 49.1 (c) of the Act, as they believe this is an agreement to end the tenancy earlier than specified in the fixed term agreement.

The tenant disputed the landlord position and claims that the term is unenforceable as the landlord cannot contract outside the Act.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

The evidence of both parties is that on October 24, 2012, they entered into an extension of a fixed term agreement that was to expire on November 30, 2013.

In this case, the landlord is relying on condition # 4 of the original tenancy agreement signed on November 12, 2010, which reads in part,

"The landlord does not accept a month-to-month tenancy even if it does not specifically enforce the end of the fixed term and the landlord may enforce the end of the fixed term tenancy at any time after the fixed term as if the fixed term tenancy ends at the end of the month that the landlord must enforce the fixed term tenancy."

"At any time during the term of the tenancy, the landlord may list the premises for sale in which case the tenant irrevocably agrees to cooperate with the landlord or its agent in the showing of such premises to prospective purchasers. If the

landlord enters into an agreement for the sale of the premises to a purchaser who wishes to personally reside in the premises, the landlord may terminate the tenancy with notice in accordance with the Act as if the fixed term tenancy was a month-to-month tenancy. The tenant irrevocably agrees that the landlord shall not be liable for any damages to the tenant for early termination by the landlord of this fixed term agreement.”

[Reproduced as written]

The evidence of the landlord's agent was the tenant agreed in writing to end the tenancy earlier by signing the tenancy agreement on November 2010. However, the evidence of the tenant was that this condition is not enforceable as they entered into an extension of the fixed term tenancy agreement and that the landlord cannot end that agreement prior to November 30, 2013, or contract outside the Act.

In this case, the first paragraph quoted above “The landlord does not accept a month-to-month tenancy” however in the second paragraph quoted above, “the landlord may terminate the tenancy with notice in accordance with the Act as if the fixed term tenancy was a month-to-month tenancy.”

The evidence of the landlord is that they believe this was an agreement to end the tenancy earlier and complies with section 44.1 of the Act. However, this is not a mutual agreement to end the tenancy on a date earlier than specified in the agreement. Rather this term is merely an attempt to contract outside the Act, and provide the landlord with a procedural advantage by changing the fixed term to a month-to-month only when it is beneficial to the landlord.

Further, Section 49.1(c) of the Act, that the landlord believed also applies in their case refers to a party who no longer qualify for rental unit, such as public or subsidized housing and does not apply in this case.

Under Section 5(1) of the Act neither the landlord nor tenant can contract out of this Act or the regulations.

Under the Residential Tenancy Branch Policy Guideline #8, unconscionable and material terms, determines if a term is so one-side as to oppress or unfairly surprise the other party then that term is not enforceable. As a result, I find condition #4 of the original tenancy agreement dated November 12, 2010, is contrary to the Act and is unenforceable.

On October 24, 2012, the parties entered into an extended fixed term agreement, which ends the tenancy on November 30, 2013. That agreement requires the tenant to move-out of the rental at the end of the tenancy as it does not revert to a month-to-month contract. I find the landlord has failed to prove that there was another agreed upon date to end the tenancy earlier than specified in the October 24, 2012, agreement.

Under Section 49 of the Act, if the tenancy agreement is a fixed term agreement, the landlord notice for landlord's use of property cannot be earlier than the date specified in the tenancy agreement as the end of the tenancy. In this case, the date specified as the end of the tenancy is November 30, 2013.

In this case, the landlord further argued that the tenant failed to dispute the notice within the required timeline under the Act, and therefore the tenancy should end on the date specified in the notice. This was disputed by the tenant. However, even if I accept the landlord version, under section 53(2) of the Act, if the effective date in the notice is earlier than the earliest date permitted under the Act, then the effective date is deemed to be the earliest date that complies with the section. Therefore, I find the earliest date that the notice complies with the Act, is November 30, 2013, as stated in the tenancy agreement. As a result, the date on the notice automatically corrects to November 30, 2013.

In this case, the tenant was not disputing the reason stated in the notice, rather was disputing the effective date. As a result, I find that the notice was issued for the reason stated. Therefore, I find the notice issued on May 16 2013, is valid notice under the Act, and the tenancy will end on the corrected effective vacancy date. I find the landlord is entitled to an order of possession effective at 1:00 pm on November 30, 2013.

As the application of the landlord and the application of the tenant both had merit, I decline to award the cost to recover their filing fee to either party.

Conclusion

The landlord is granted an order of possession effective November 30, 2013.

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: July 09, 2013

Residential Tenancy Branch