



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes O & FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was sufficiently served on the Landlord by mailing, by registered mail. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the landlord is entitled to an Order for Possession?
- b. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

The landlord seeks to end the tenancy on the basis the parties entered into a fixed term tenancy, the fixed term has expired and the tenancy agreement provides that the tenant must vacate the rental unit.

The parties entered into a written tenancy agreement dated January 31, 2013 that provided that the tenancy would start on February 1, 2013 and end on July 31, 2013. In bold letters the document further provides “**AT THE END OF THE FIXED LENGTH OF TIME THE TENANCY ENDS AND THE TENANT MUST MOVE OUT OF THE RESIDENTIAL SUITE.**”

Two copies of the tenancy agreement were submitted with major differences in how in their terms. The agreement relied on by the landlord sets the rent at \$510 per month and all of the spots for services in paragraph 6 ticked. The tenant denies the initial beside the fixed term provision on this document is hers. The initial appear to be in a printed form. The form of tenancy agreement given to the tenant has rent of \$320 plus \$5 for parking for a total of \$325 and the spots for services is not ticked on her document. It appears it is her initials on the copy that she has.

The parties agree the rent is subsidized and the tenant pays \$320 plus \$5 for parking for a total of \$325.

The tenant testified as follows:

- The she heard about the possibility of moving into the rental unit through a friend.
- She visited the rental unit and talked to the Building Manager. At that time she requested a copy of the tenancy agreement so that she could take it to Social Services to get her deposit. The Building Manager told her she would be given a copy of the tenancy agreement upon approval. At no time was she told the tenancy was for a fixed term or that the tenancy would end at the end of the fixed term.
- The tenant received her deposit in late January and she returned to talk to the Building Manager to fill out the remainder of the documents. At that time she advised the landlord that she did not have her glasses with her and that she could not read what she was signing because her eyesight was poor. She asked if there was anything in the agreement such an Addendum but was told that it

was a standard residential agreement. The Building Manager did not mention it was for a fixed term or that she would have to leave at the end of the fixed term.

- The tenant was assisting her daughter who was the victim of a vicious domestic assault. She moved in her belongings into the rental unit on February 6, 2013 but returned to her daughter's residence to take care of her grandchildren. She did not return to the rental unit until the middle of March.
- Upon returning to the rental unit in March she had an opportunity to read the tenancy agreement and became aware that it was a fixed term of 6 months only and that it provided she would have to vacate the rental unit at this time. She testified that she is on a disability pensions with limited income and had she known of this she would not have moved in.
- She talked to the building manager and was assured by the building manager that it was nothing to worry about and the tenancy would become month to month after the 6 month fixed term period. She requested the Building Manager put this in writing but she failed to do so.
- On June 4, 2013 the tenant wrote to the Administrator of the landlord raising her concerns about the matter referred to in the above and about the location of where she was parking her motor home. The letter also states that she is a person designated with disabilities and is in need of her own transportation. It states that she was told by the Building Manager that his problem relating to the parking of her motor home might jeopardize her tenancy.
- On June 11, 2013 the Administrator for the landlord responded to the tenant confirming that she would have to vacate by July 31, 2013, advising that parking areas are only for operative automobiles and disputing the allegation that the decision to end the fixed term and subsequent parking issues are not related.
- The parties were unable to meet to discuss this matter. The tenant was returning to Manitoba with her aunt's ashes and had to leave early because of flood worries in Manitoba.
- The tenant produced a number of letters from other residents in rental property supporting her and stating they have not had problems with the tenant. One of

the letters stated that when she rented in February 2013 she was told this was a 6 month probation period.

The Building Manager testified that she told the tenant that the tenancy was for 6 months and that after that the landlord had an option to allow it to become month to month or cancel the tenancy agreement. She could not remember the exact conversation.

The Administrator expressed his frustration trying to meet with the tenant in June as the tenant failed to advise him she was not able to make the meeting. The building manager did not provide any explanation as to why he was demanding that this tenant vacate the rental unit at the end of the fixed term. He also did not provide an explanation as to why other tenants are permitted to stay on a month to month basis.

Law:

The concept of negligent misrepresentation *Khan v. Vernon Jubilee Hospital* [2008] B.C.J. No. 2328, 2008 BCSC 1637, 90 B.C.L.R. (4th) 157

“Negligent Misrepresentation

8 The elements of the tort of negligent misrepresentation were first developed in the leading English authority, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.). These principles were adopted in the Supreme Court of Canada's decision in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 [“Cognos”]. In that case the plaintiff, an accountant living in Calgary, was recruited by the defendant company, located in Ottawa, to work on a specific, long-term project. The defendant, however, omitted to inform the plaintiff that the funding for the project had not been secured at the time of the interview. When the funding never materialized, and the project could not proceed, the plaintiff was terminated within a few months. He successfully sued the defendant on the basis of negligent misrepresentation.

9 The plaintiff must demonstrate the following five factors to establish a claim in negligent misrepresentation, as described at 110 in *Cognos*:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making said misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and,
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

13 Misrepresentations can consist either of positive statements or the omission of material information. As the Supreme Court of Canada observed in *Cognos* at 123:

- there are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made.

In that case, the defendant company's failure to disclose information that was highly relevant to the existence of the position being offered to the plaintiff was held to constitute a negligent misrepresentation.

14 As the Federal Court of Appeal explained in *Spinks v. Canada*, [1996] 2 F.C. 563, 134 D.L.R. (4th) 223, at 236 (C.A.) ["Spinks"]:

- A person may be "misled" by a failure to divulge as much as by advice that is inaccurate or untrue ... Consequently, the duty may be breached not only by positive misstatements but also by omissions, for they may be just as misleading.

Analysis

The landlord failed to provide an explanation as to why the landlord wishes to end this tenancy while other tenancies are permitted to continue on a month to month basis.

The landlord submits they have a legal right to end the tenancy based on the fixed term provisions.

I determined the landlord failed to tell this tenant that the tenancy agreement required her to leave at the end of the 6 month fixed term tenancy knowing that she did not have her glasses and was unable to read the agreement. Further, the landlord reassured that tenant that it was a standard form agreement and there was nothing unusual about it when in fact it contained the unusual term requiring the tenant to vacate after 6 months.

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There is uncertainty with regard to which form of the written tenancy agreement is to govern the parties' relationship. There are significant differences between the two including what services if any are to be provided and what rent.

I determined the principles of negligent misrepresentation as set out in *Queen v. Cognos* and *Khan v. Vernon Jubilee Hospital* should apply to the residential tenancy context for the following reasons.

Firstly, I determined that a special relationship existed between the landlord and the tenant in this situation. The building manager knew or should have been aware that the tenant was relying on information given. She was also aware the tenant was on limited income and a disability. The tenant told the landlord she did not have her glasses with her and could not read the document. She was assured by the landlord this was an standard residential tenancy agreement. In fact it contained the usual term of requiring the tenant to vacate after six months. Secondly, I determined the building manager made an untrue, inaccurate or misleading statement to the tenant. She assured the tenant this was a standard form residential tenancy agreement. Further, the failure to divulge highly relevant information (that she was required to leave after 6 months) is misleading. The letter from another tenant who started the tenancy in February was fully informed of the probationary nature of the proposed relationship. In the absence of evidence to the contrary I determine the landlord fixed term provision as a probationary period. In my view the landlord has a positive duty to disclose and fully explain this which the landlord failed to do. Thirdly, the representative of the landlord acted in a negligent way in making the misrepresentation. It was clear the tenant was relying on

the agent for point out any unusual terms. Fourthly, I determined the tenant relied on the negligent misrepresentation in a reasonable manner. I accept the tenant's testimony that she would not have moved in had she been told of the requirement that she would have to leave in 6 months. Finally, I determined the reliance was detrimental and to require the tenant to vacate would cause significant financial hardship to a tenant on limited income.

I determined the fixed term provision that requires the tenant to vacate after the 6 month period is of no force an effect. Section 13 of the Residential Tenancy Act and section 13 of the Residential Tenancy Act Regulations impose an obligation on the landlord to include standard terms. Paragraph 12 of the standard terms provides that f this is a fixed term tenancy and the agreement does not require the tenant to vacate at the end of the tenancy, the agreement is renewed as a monthly tenancy on the same terms until the tenant gives notice to end a tenancy as required under the *Residential Tenancy Act*. I have determined the provision of the tenancy agreement requiring the tenant to vacate is of no force and effect and thus the tenancy continues on a month to month basis.

This decision is based on negligent misrepresentation and the inconsistency in the two forms of the written contract.. However, the facts of this case raise another serious issue. The law permits the parties to enter into a fixed term tenancy agreement which requires a tenant to vacate at the end of the fixed term. This is particularly useful in a situation where a landlord is moving for a short period of time and intends to return to the rental unit. In this case however the landlord appears to using this provision as a probationary period giving the landlord complete discretion whether or not to renew the tenancy on a month to month basis. This exposes the landlord to criticism of bullying and unfair tactics as the decision is not transparent. It also raises the issue as to the legality of the conduct. Section 47 sets out the grounds the landlord can use to end the tenancy. It is arguable that the landlord is an attempting to avoid the provisions under section 47 of the Residential Tenancy Act and is therefore not enforceable as set out in section 5 and 6 which provides as follows:

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This Act cannot be avoided

- 5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
- (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Enforcing rights and obligations of landlords and tenants

- 6 (1) The rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement.
- (2) A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58 (1) *[determining disputes]*.
- (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.

I determined that as I did not receive submissions from the parties on this issue and it is not necessary for my decision that I would not rely on it in determining the outcome.

I determined the landlord has failed to establish it is entitled to an Order for Possession. As a result I dismissed the landlord's application. The tenancy shall continue on a month to month basis. The rights and obligations of the parties remain unchanged.

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: August 15, 2013

Residential Tenancy Branch