



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

MNDC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant seeking a monetary order for money owed or compensation for damage or loss under the Act.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

Issue(s) to be Decided

Is the tenant entitled to monetary compensation for damages and loss under section 67 of the *Act*?

Background and Evidence

This tenancy began as a fixed term tenancy on November 1, 2012. The parties both testified that they entered into negotiations to terminate the fixed term tenancy by a mutual agreement with several conditions, one of which was that they would then enter into a month-to-month tenancy.

A copy of the Mutual Agreement to end the fixed term tenancy was in evidence and contains the following terms:

"PREAMBLE

- 1. The tenant holds a fixed-term tenancy lease ("the lease") at a property owned by the landlord,which ends on October 31,*

2013, and at which point converts to a month-to-month tenancy lease;

- 2. The landlord wants to place the property up for sale immediately;*
- 3. To facilitate the sale of the property, the landlord requests that the tenant immediately convert the lease to a month-to-month lease ("the request");*
- 4. Landlord offers the tenant an incentive of \$2,500.00 in consideration of the request ("the incentive").*

TERMS

- 1. "Completion of the sale" is defined as the legal transfer of the property to a third party not named in this agreement.*
- 2. Within 72 hours of completion of the sale, the landlord will pay the incentive to the tenant in the form of a cheque if all of the following conditions are met:*
 - a. The tenant signs paperwork (to be provided by Pemberton Holmes) that legally converts the lease to a month-to-month lease by, midnight on April 20, 2013, and*
 - b. The tenant has paid rent to reside at the property for the month in which the completion takes place.*
- 3. This agreement does not affect or alter either party's rights and obligations under the Residential Tenancy Act of British Columbia ("the RTA").*
- 4. Where any part of this agreement is found to be in conflict with the RTA, that part will be considered null and void, without altering or affecting the remainder of the agreement."*

The landlord pointed out that the agreement was signed by the tenant on April 22, 2013, and the fixed term tenancy ended at the end of April 2013 as agreed. The parties testified that they then entered into a new month-to-month tenancy which was ended, in accordance with the Act, under section 49, once the property was sold.

The tenant testified that the landlord has refused to compensate the tenant the \$2,500.00 that was part of their mutual agreement to terminate the fixed term tenancy. The tenant testified because the parties agreed a month-to-month tenancy by consent, this enabled the landlord to benefit by being able to issue a section 49 Notice, once the property was sold, without having to wait until the fixed term of the original tenancy expired. The tenant feels entitled to receive the promised \$2,500.00 compensation.

The landlord argued that the tenant did not meet one term in the mutual agreement they signed, and this fact would disentitle the tenant from receiving the compensation under

the agreement. The landlord pointed out that term #2(a) in the contract, clearly states that the \$2,500.00 payment is conditional on the following:

“The tenant signs paperwork (to be provided by Pemberton Holmes) that legally converts the lease to a month-to-month lease by, midnight on April 20, 2013”

The landlord testified that the tenant did not sign the mutual agreement until April 22, 2013 which violated the above term in the agreement. The landlord's position is that the landlord is released from another term in the contract that requires the landlord to pay the tenant \$2,500.00 consideration.

In the alternative, the landlord also argued that the mutual agreement terminating the fixed term tenancy to enter into a month-to-month tenancy, would be considered as a separate contractual agreement made between the parties independent of their tenancy agreement. As such, according to the landlord, the contract is beyond the jurisdiction of the Residential Tenancy Act. The landlord is of the opinion that the arbitrator would have no authority to determine, nor to enforce, any of the terms of the contract, including the \$2,500.00 financial compensation being sought by the tenant.

The tenant's position is that they made an agreement to end the fixed term tenancy, in good faith, which the landlord willingly completed, with the exception of the payment..

The tenant pointed out that implementing the agreement allowed the landlord to sell the home in a vacant state, without transferring the fixed term tenancy to the new owner and this was done. The tenant pointed out that, in exchange for this benefit to the landlord, the tenant would be compensated \$2,500.00 for relinquishing the tenancy and entering into a month-to-month tenancy on the specified date. The tenant feels entitled to be paid the amount promised.

Analysis

I find that the landlord's argument that the tenant's breach of a term in the mutual agreement, to sign the "paperwork" by April 20, 2013, would automatically eliminate the tenant's right to compensation, has no basis under contract law.

I find that a breach of one contractual term by a party does not function to liberate the other party from having to comply with other terms in the contract.

I find as a fact that, despite the late signature, the landlord went ahead and completed this contract and benefitted from it. The fixed term tenancy ended as agreed and a month-to-month tenancy agreement replaced it, as agreed. I find that a party cannot consider selected portions of a contract to be invalid at the same time as completing the remainder of the contract.

In fact, without a valid and enforceable mutual agreement, the landlord would never have been permitted to terminate the fixed term tenancy under the Act.

Section 44 of the Act provides how a tenancy ends and states that a tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
 - (i) section 45 *[tenant's notice]*; (ii) section 46 *[landlord's notice: non-payment of rent]*; (iii) section 47 *[landlord's notice: cause]*; (iv) section 48 *[landlord's notice: end of employment]*; (v) section 49 *[landlord's notice: landlord's use of property]*; (vi) section 49.1 *[landlord's notice: tenant ceases to qualify]*; (vii) section 50 *[tenant may end tenancy early]*;
- (b) 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;
- (c) the landlord and tenant agree in writing to end the tenancy;**
- (d) the tenant vacates or abandons the rental unit;
- (e) the tenancy agreement is frustrated;
- (f) the director orders that the tenancy is ended.

In this case, the only way the fixed term tenancy could be ended before the expiry date, without contravening the Act, is through a valid and enforceable Mutual Agreement. .

I accept that the tenant committed a minor breach of the Mutual agreement. I find that I need not consider whether or not this breach resulted in any compensable loss to the landlord. The application before me is only to deal with the *tenant's* monetary claim, not the landlord's.

The sole issue to be determined in these proceedings, is the tenant's claim for compensation based on enforcement of the agreed-upon terms of the Mutual Agreement to End Tenancy.

I find that the tenant's claim is based on the landlord's failure to pay the tenant \$2,500.00 for mutually ending the fixed term agreement, which, I find, was a material term in the Mutual Agreement to End the Tenancy.

A material term is one that both parties agreed at the time it was signed, goes to the heart of the contract, such that a violation of the term would nullify the entire agreement.

Given that the tenant's delay in signing the contract did not impact the effective date set to end the tenancy, which transpired as scheduled on April 30, 2013, I find that the delay in signing would not qualify as a *material term* of this contract.

Therefore, the contract and remainder of the terms contained within the contract, including the compensation to be paid to the tenant, would, and did, survive and the obligation remains in full force.

As mentioned, the above finding is supported by the fact that the landlord went on to complete the other terms of the Mutual Agreement.

I find that the landlord and purchaser clearly relied on the validity of the Mutual Agreement in order to establish that the fixed term tenancy had ended for the purpose of purchasing and selling the property and the landlord must comply with the terms by compensating the tenant in the amount of \$2,500.00..

With respect to the landlord's alternate argument that the Mutual Agreement between the parties is a contractual matter falling outside the jurisdiction of the Residential Tenancy Act, I find that this position is also incorrect based on section 44(c) of the Act, excerpted above.

In any case, creating a separate contract for the purpose of circumventing the provisions of the Act is not permitted under section 5 of the Act. This section states that landlords or tenants may not avoid or contract out of the Act or Regulation and that any attempt to avoid or contract out of the Act or Regulations is "*of no force or effect.*"

Section 6 of the Act also states that a term of an agreement is not enforceable if a) the term is not consistent with the Act or 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 find as a fact, that the Mutual Agreement to End Tenancy contract between these two parties and the terms contained within the agreement are governed by Residential Tenancy legislation and as such this dispute is within my jurisdiction to determine.

In a claim for damage or loss under the act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement,
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage, and
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the tenant, to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the respondent.

On the question of whether or not the landlord violated the terms of the Mutual Agreement to End Tenancy, I find that the landlord clearly failed to comply with the term for compensation that the parties had mutually agreed upon in exchange for the tenant consenting to terminate the fixed term tenancy.

I find that, as a result of the landlord's failure to comply with the term in the agreement, the tenant suffered a monetary loss of \$2,500.00.

Accordingly, I find that the monetary claim by the tenant satisfies all elements of the test for damages and the tenant is therefore entitled to compensation under the Act in the amount of \$2,550.00, comprised of \$2,500.00 owed under the contract and the \$50.00 cost of the application.

I hereby grant the tenant a monetary order under section 67 of the Act for \$2,550.00. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

Conclusion

The tenant is successful in the application and is granted a monetary order against the landlord.

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: February 14, 2014

Residential Tenancy Branch

