Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, MNSD, FF, O, OLC, OPT,

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.

Both parties were given a full opportunity to present evidence and make submissions. All of the evidence was carefully considered including:

- The oral testimony of the parties and their witnesses.
- The affidavit evidence presented by the tenant
- The submissions of the parties
- The documents referred to in the testimony of the parties.

Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Tenant's Application for an Adjournment:

I determined the tenant personally served the Application for Dispute Resolution/Notice of Hearing on the landlord on November 28, 2014. The landlord testified he served the landlord's Application for Dispute Resolution/Notice of Hearing on the Tenant by mailing, by registered mail to where the tenant resides on December 3, 2014. The tenant testified he is out of town attending a family emergency and will not return until early January. He further testified that he did not receive a copy of the Canada Post Notification slip indicating a registered mail parcel was waiting for him prior to leaving. The Advocate for the tenant testified she provided the landlord with her evidence on December 12, 2014 and the landlord did not advise her of the landlord's application. Further, she was unaware of the landlord's application.

Service by registered mail creates a presumption of service within 5 days of mailing. . However, that presumption can be rebutted. While the British Columbia Supreme Court has held that a party cannot avoid service by refusing to pick up their registered mail there is no evidence that the tenant was aware of the Notification Slip or that he refused to pick up the registered mail. I determined the landlord has failed to prove sufficient service. As a result I granted an adjournment of both matters as they should be heard together. The landlord was asked to fax a copy of the Application for Dispute Resolution to the advocate for the tenant as soon as possible.

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to an order that the landlord comply with the Residential Tenancy Act, Regulations or tenancy agreement?
b. Whether the tenant is entitled to a tenant's Order for Possession?
c. Whether the landlord is entitled to an Order for Possession?
d. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
e. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

On June 19, 2014 the parties entered into a fixed term tenancy agreement for 5 months that provided that the tenancy would start on July 1, 2014, end on November 30, 2014 and "the tenant must move out of the residential unit." The tenancy agreement provided that the rent was $420 per month payable in advance. The tenancy agreement provided that the tenant would pay a security deposit of $187.50. The landlord seeks an Order for Possession based on the fixed term tenancy referred to above. The tenant seeks an order to the effect that the fixed term portion of the written agreement is vague, contradictory and confusing, is unconscionable and is an attempt by the landlord to avoid the act.

Briefly, the relevant evidence is as follows. The landlord is a non profit society. In the first half of 2014 it began the process of opening a 141 unit building that provided subsidized housing to vulnerable tenants, including at-risk and homeless youth, persons with psychiatric disabilities and other person who have been homeless or at risk of homeless. The tenant was chosen from a pool of over 1200 applicants.

The tenant moved to Vancouver in the summer of 2013. He was homeless for a period of time. Eventually he obtained medical support and was assessed by a psychiatrist at St. Paul's Hospital Outpatient Psychiatry with schizophrenia and bipolar disorder. He was referred to the Inner City Youth Mental Health Program (ICYMHP). They assisted him finding housing at the St. Helen's Hotel which is a converted Single Room Occupancy Hotel in Vancouver living on a floor with other at risk youths.

While living at St. Helens a social worker put in an application for the tenant to live at the landlord's rental property.

The affidavit of the tenant states as follows:

> "8. In my conversations with her and other staff at Coast (Coast Mental Health) and ICYMH, I came to understand that the new building was like BC Housing in that I would receive a bachelor apartment with its own bathroom and kitchen. It would be a regular bachelor apartment. I would live on one of two floors for at-risk youth like me, and there would be communal space. Many of my neighbors were applying, and I thought we could continue to live in community there. "

In the spring of 2014 the landlord had a face to fact interview with the tenant. The affidavit continues:

> "9. I was interviewed as part of the tenant selection process by DM (the building manager) and another person who name may have been John. I was told by several people that I came highly recommended. I was subsequently offered an

apartment in the new building. I gave notice at the St. Helen's and prepared to move into the new building.

10. At all times during this process, the new apartment was represented to me as a "regular" apartment – permanent housing, not transitional, and something I could see as my home."

On June 19, 2014 the tenant saw G (a representative of the landlord) to sign the tenancy agreement. At that time he expressed a number of objections including:

- The clause that stated the tenant would have to move out after 5 months.
- The clause limiting overnight guests to a total of 14 days.

The tenant testified that G told him not to worry about it. He said it was a trial run to see if the tenancy works out. If there were no problems the tenancy would continue. The tenant's affidavit states that it was his understanding that the word no problems meant "serious issues of conduct or wrongdoing." G told him that the he could apply to the Board about changing the 14 day guest rule.

The tenant testified he signed the tenancy agreement because he had already given Notice at his previous rental unit at St. Helens and he would become homeless if he did not. His affidavit states that had he known that the landlord intended to present an agreement with either of these terms he would not have agreed to leave his home at St. Helens and take a place with the landlord.

The tenant testified he moved into the rental unit and attempted to discuss the restricted guest policy with the landlord but was not successful. As a result he spends most nights at his girlfriend's place.

On August 24, 2014 the tenant's advocate wrote the landlord asking for a meeting to discuss the restrictive guest issue. On October 15, 2014 the advocate wrote a second

letter requesting a meeting and stating they intend to apply to the Residential Tenancy Branch for an arbitrator's order that the landlord comply with the Act. On October 20, 2014 the landlord responded in a letter that stated the tenant had a guest for longer than 14 days during his first month of residence. On October 22, 2014 the landlord wrote the tenant advising the tenant that his fixed term lease would expire on November 30, 2014 and he would have to vacate the rental unit at that time.

DM testified he met with the tenant and all aspects of the security protocol and the fixed term provided were discussed. On cross-examination DM testified he did not specifically say that the tenant would have to move out after the 5 month period. I find as a fact that the landlord failed to advise the tenant that the tenancy agreement the tenant would be required to sign included a clause that it was for a 5 month fix term and that the tenant would have to vacate the rental unit at that time.

The Advocate testified she had received a letter from the letter outlining their policy. She stated she had forwarded a copy of the letter to the Branch but I have not yet received a copy. She cross-examined DM and he acknowledged the landlord's policy includes the following:

- The tenancy agreement used by the landlord provides for a 5 month term after which the tenant must vacate. However, approximately 75% of the tenants are given a second 5 month fixed term agreement (which includes the term that they have to vacate after that) if the tenancy is acceptable to both parties. Finally, if the relationship is still working well the tenant is given a month to month tenancy.
- The policy of the landlord is to meet with the tenant to discuss whether the tenant should be given a second fixed term tenancy agreement.
- It is impossible to list the reasons why a landlord might not wish to continue with the tenancy. However, they commonly might be tenant's misconduct, breaking of the rules etc.
- The landlord does not have a written policy.

The landlord did not state why they did not wish to reinstate the tenancy. However, the landlord did state the following:

- The tenant is seldom in the rental unit as he spends most of his time his girlfriend and this is taking away a spot from another prospective homeless youth.
- The tenant has not engaged in many of the programs offered at the rental property.

One cannot help noticing that the letter to the tenant dated October 22, 2014 advising the tenant would have to vacate at the end of November came 7 days after the landlord received a letter from the Advocate for the tenant questioning the guest policy and stating they intend to file an Application for Dispute Resolution with the Residential Tenancy Branch disputing that policy.

Analysis:

I do not accept the submission of the Advocate for the landlord that the use of a 5 month fixed term tenancy agreement following which the tenant must vacate is illegal. The Residential Tenancy Act contemplates such a tenancy.

Secondly, I do not accept the submission of the Advocate for the Tenant that the term is void because it is vague, contradictory and confusing. The Advocate for the tenant submitted that the representations made during the first interview should be incorporated as part of the tenancy agreement. However, paragraph 1 of the tenancy agreement provides “Any change or addition to this tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. If a change is not agreed to in writing, is not initialed by both the landlord and the tenant or is unconscionable, it is not enforceable.”

Thirdly, I do not accept the submission of the Advocate for the Tenant that the provision of the agreement requiring that the tenant move out is unconscionable. In Braut v. Stec

2005 BCCA 521 (CanLII), where Hall, J.A., speaking for the court (at paragraph 16) approved this well-established statement of the law:

> ". . .where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable."

While I accept the submission of the Advocate for the Tenant that there is an inequality in bargaining power and that the tenant is in a vulnerable position, I do not accept the submission that a fixed term tenancy that provides that the tenant must move out at the end of the fixed term amounts to substantial unfairness in the bargain.

Fourthly, the agent for the landlord submits the term stipulating that the tenant must move is void as the landlord is attempting to avoid the Act. The Residential Tenancy Act permits such a provision. It is a common form of provision used. The parties are free to enter into such types of agreement.

However, in my view the landlord has breach the common duty of good faith performance of contract referred to recent Supreme Court of Canada case Bhasin v. Hrynew, 2014 SCC 71. The Supreme Court of Canada discussed the common law duty of good faith performance and concluded there was an evolving law which included as a contractual duty a minimum standard of honesty in contractual performance. It operates irrespective of the intentions of the parties. The headnote of that case includes the following:

> "Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear. Two incremental steps are in order to make the common law more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith,

> that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. Taking these two steps will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.
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> There is an organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. An organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations. It is a standard that helps to understand and develop the law in a coherent and principled way.

After carefully considering the evidence and submission of the parties I determined the landlord failed follow the common law duty of good faith in the performance of the contract and should not be able to rely on the provision that the tenant must vacate the rental unit at the end of November for the following reasons:

- The tenant is a person of vulnerability which the landlord was aware of.
- The landlord failed to take sufficient care in the opening interview to ensure that the standard form contract used by the landlord would give the landlord the discretion to end the tenancy at the end of the 5 month fixed term. This problem could have been easily overcome by having a tenancy agreement signed before the tenant gave notice to his previous accommodation or by having something in writing.
- In determining whether to renew the fixed term tenancy agreement for a further 5 months the landlord has acted in an arbitrary way and has dealt with the tenant in a manner inconsistent with other tenants. It does not appear that the landlord has a written policy. In any event, the landlord failed to follow the policies that were represented when the tenant signed the agreement. The tenant was told there would be a discussion as to whether a second fixed term tenancy would be entered into and was reassured that in all likelihood it would be renewed absence any major problems. In my view at the very least the duty to act fairly in the performance of the landlord's contractual duty includes a duty to be consistent

with the application of its policy especially given the fact that the landlord is dealing with vulnerable individuals.

As a result I determined that the landlord cannot rely on the fixed term provision that set the end of tenancy date for November 30, 2014 and requiring the tenant to vacate at that time. However, I do not accept the submission of the Advocate for the Tenant that this converts this tenancy into a month to month tenancy. The policy of the landlord would be for the parties to enter into a second 5 month fixed term tenancy and include a provision that the tenant must vacate at the end of the 5 month period.

Tenant's Application:

As a result I ordered that the tenancy shall continue for a 5 month fixed term ending on April 30, 2015 and that the tenant must vacate the rental unit at that time (December 1, 2014 to April 30, 2015) in accordance with the provisions of the previous tenancy agreement. I further ordered that the landlord comply with the common law duty of good faith performance of their tenancy agreement by meeting with the tenant and determining whether it is to be converted to a month to month tenancy in accordance with the policies applied by the landlord for such a determination.

Landlord's Application - Analysis - Order of Possession:

I dismissed the landlord's application for an Order for Possession, monetary order and to recover the cost of the 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: January 25, 2015.

Residential Tenancy Branch