Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, OPB, MNSD, MNDC, FF, O

Introduction

The landlord applies for an order of possession alleging cause and alleging an agreement with the tenant to end the tenancy. He also seeks damages for damage to the apartment "to be assessed," for legal fees and for moving costs and "damages for alternate housing" for the tenants Mr. S.K. and Ms. L.Y. who have a tenancy agreement with the landlord for a term that was to commence after the respondent tenant was to have left.

There is no actual Notice to End Tenancy for cause pursuant to s.47 of the *Residential Tenancy Act* (the "*Act*") before me at this hearing and so an order for possession "for cause" is not at issue.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show on a balance of probabilities that this tenancy has ended? Does it show that the landlord is entitled to recover damages?

Background and Evidence

The rental unit is a one bedroom "plus den" condominium apartment. The tenancy started in February 2014 for a one year fixed term to January 31, 2015 and then on a month to month basis. The monthly rent is $1800.00. The landlord holds a $900.00 security deposit.

There has been a previous arbitration involving this apartment (as per the file number noted on the first page of this decision). The new tenants, who had expected to take possession of the apartment on March 1 but who are still not in possession, brought an application against the landlord, heard March 20 2014, for an order of possession. The landlord attended and did not oppose the application. An order of possession was

issued against the landlord. The respondent tenant in this proceeding was not a party to that proceeding and so the order was not directed to her. The arbitrator in that hearing, appropriately, made no determination about the continuation or end of the tenancy in this proceeding.

The landlord testified that in early January he had become unhappy about the tenancy continuing. There was, apparently, a telephone discussion between the two, the points of which were itemized by the landlord in an email to the tenant, produced at hearing, dated January 7th, confirming the tenant was to move out by noon on January 31, 2015.

On January 10th the tenant emailed the landlord asking if she could stay another month as she hadn't had time to look for another rental unit. The landlord agreed by email reply the same day.

The tenant did not pay the February rent on time and on February 2nd the landlord emailed "you are to move out the end of this month. This is your termination notice."

On February 6th the tenant wrote back indicating that she had been out of town and thought the rent had been paid. She said "I will deposit the rent by this weekend and will move out by feb 31 [*sic*] as originally planned thanks."

During this time the landlord showed the apartment to Mr. S.K. and Ms. L.Y. In January then came across the landlord's ad on Craiglist and were interested in renting for February 1st. The landlord told them that the current tenant had changed her move out date to the end of February. That was even better timing for the two and on February 1st they attended to view the apartment at a time that had been prearranged by the landlord with the respondent tenant.

They each testified that though they thought the premises were empty because no one answered the door, the determined that a man "K" whom they thought to be the tenant's boyfriend was sleeping in the bedroom. They heard K confirm that he and the tenant would be moving out at the end of the month.

Mr. S.K. and Ms. L.Y. proceeded to sign a tenancy agreement effective March 1, 2015 with the landlord and paid a deposit.

As a result of the lack of payment of the February rent the landlord issued a ten day Notice to End Tenancy for unpaid rent. The Notice was finally served on the tenant on February 11th. She paid the rent the same day and thereby voided the Notice in accordance with s.46 of the *Act*.

In the evening of Saturday February 14th, the tenant emailed the landlord stating, "I have paid the rent and legally am allowed to stay until March 31. I will deposit the March rent to you on March 1."

The tenant has continued in occupation. The two prospective tenants have had to find other, interim accommodation and are apparently hoping to move in when the respondent tenant vacates. It is alleged they are suffering loss in the interim, though neither testified about any financial loss.

Counsel for the tenant related that an appropriate compensation for damages the landlord is exposed to by his inability to provide his new tenants with possession is $100.00 per day. His client also seeks recover of the new tenants' moving costs, $2500.00 in legal fees, process server costs and filing fees. He also anticipates that his client will be exposed to strata fines resulting from noise complaints during the respondent's occupancy.

The tenant did not attend the hearing or otherwise submit evidence.

Analysis

A tenancy may only be ended in accordance with the *Act*.

Section 44 provides:

> **44** (1) 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]*;
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> (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.
>
> (2) [Repealed 2003-81-37.]

> (3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

The landlord does not allege that the tenancy ended pursuant to any Notice to End Tenancy but relies on s. 44(1)(c), above, arguing that the parties have agreed in writing to end the tenancy as shown by their corresponding emails.

The tenant's representative argues that such an agreement must conform to the requirements of s.52 of the *Act*, which provides:

> **52** In order to be effective, a notice to end a tenancy must be in writing and must
> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,
> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and
> (e) when given by a landlord, be in the approved form.

He points out that the Residential Tenancy Branch publishes a specific form entitled "Mutual Agreement to End a Tenancy" for use by landlords and tenants and that form sets most of the requirements imposed by s.52.

The tenant's representative says that in this case, the cobbled together evidence of any agreement to end the tenancy does not comply with s.52 and so is of no effect in ending the tenancy.

I find that s. 52, above, does not apply to a mutual agreement to end a tenancy.

Section 44 deals with a mutual agreement to end a tenancy and a notice to end a tenancy as distinctly different processes and rightly so. The giving of notice to end tenancy is a unilateral action, independent of the wishes of its recipient.

The legislature has provided a separate subsection for each in s. 44. Subsection (1)(a) deals with a notice to end tenancy; ss.(1)(c) deals with mutual agreements.

Section 52 purports to deal only with a "notice to end a tenancy." It imposes specific, mandatory requirements on such a notice. Section 52(d), if it applied to mutual agreements to end a tenancy, would require the parties to set out "the grounds for

ending a tenancy." Obviously, landlords and tenants do not need grounds to mutually agree to end a tenancy.

The only requirement of a mutual agreement to end a tenancy is that found in s. 44, that the parties "must agree in writing" to end the tenancy. Such a phrase would be redundant if the drafters of the legislation intended s.52, which itself imposes an "in writing" requirement, to apply to mutual agreements to end a tenancy. Such an interpretation should be avoided (see, for example, *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 (H.L.), per Lord Simon at 546).

The Mutual Agreement to End a Tenancy form published by the Residential Tenancy Branch is an idealized form containing what the Branch considers a complete list of aspects the parties should included in their mutual agreement, but it has no legal effect and cannot go beyond or impose greater or different requirements than the statute itself or the regulation.

The email correspondence reveals, and I find, that the tenant agreed to vacate the premises by the end of January 2015. Whatever the instigation for the discussion might have been, the email trail beginning with the landlord's January 7 email, the tenant's request for an additional month, the landlord's agreement and the tenant's note of thanks together comprise the essentials of a mutual agreement to end the tenancy on February 28, 2015.

The written requirement for such and agreement is satisfied by the email correspondence considering that the *Electronic Transactions Act*, SBC 2001, c. 10,, s.5 provides:

5 A requirement under law that a record be in writing is satisfied if the record is
(a) in electronic form, and
(b) accessible in a manner usable for subsequent reference.

As a result of the mutual agreement to end this tenancy, the tenancy ended on February 28, 2015. The tenant remains in possession and so the landlord is entitled to an order of possession.

Regarding the landlord's claim for a monetary award for $100.00 a day for fraudulent misrepresentation as categorized by counsel for the landlord, I find that it has not been shown that there was a representation by the tenant that was "untrue or inaccurate," one of the essential ingredients of fraudulent misrepresentation cited by the landlord's

counsel. It appears that she is simply breaching the mutual agreement to end the tenancy by holding over.

In any event I consider this claim to be premature as it has not been shown that the landlord has suffered any loss to the incoming tenants as of this application date. The landlord is free to re-apply for damages resulting from the overholding.

The landlord claims damages for damage to the apartment “to be assessed”. No evidence was adduced regarding any damage. The claim is premature. The time for assessment is when the tenant moves out and turns over possession. I dismiss this item of the claim, with leave to re-apply.

The landlord claims $2500.00 in legal costs. No bill or account was referred to during the hearing. As pointed out at hearing, Residential Tenancy arbitrators have no jurisdiction to award costs and disbursements incurred in the process of dispute resolution. We are limited to our discretion to award recovery of any filing fee. It may be that legal costs incurred in dispute resolution with persons other than the tenant are a fair head of damages but, as with the $100.00 per day claim, in my view such a claim is premature. I dismiss this item of the claim with leave to re-apply.

For the reasons in the foregoing paragraph, I consider I have no jurisdiction to award process server costs for service of the originating documents and I dismiss that item of the claim, without leave to re-apply.

The landlord claims moving fees for the new tenants for their cost of moving to temporary accommodation awaiting vacant possession of this apartment. There is no evidence setting out those costs nor is there evidence that the landlord has paid then. In my view this claim is also premature. I dismiss it with leave to re-apply.

The landlord claims recovery of the filing fee awarded against him in the new tenants’ application for an order of possession heard March 20, 2015. It is not clear why the new tenants would apply for an order of possession against the landlord when it was apparent the landlord could not supply vacant possession. Nor is it clear why the landlord consented to that order of possession when he could not lawfully comply with it. In theses circumstances I decline to award recovery of the filing fee the landlord was ordered to pay.

The landlord is entitled to recover the $50.00 filing fee paid for this application and I authorize him to recover it from the security deposit he holds, in full satisfaction of the fee.

Conclusion

The landlord's claim for an order of possession is allowed. There will be an order of possession requiring the tenant to vacate the premises within 48 hours after personal service on her of the order or within 72 hours after a copy of the order of possession is attached to the door, whichever occurs first.

The remainder of the claim, but for the recovery of the filing fee, is dismissed on the terms above.

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: March 24, 2015

Residential Tenancy Branch