Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, FF, O, OPC, OPB

Introduction

This hearing dealt with applications from both the landlord and Tenant CTJ (the tenant) under the *Residential Tenancy Act* (the *Act*). In the landlord's application naming both the female tenant and the male tenant as Respondents, the landlord applied for an Order of Possession for cause and for the breach of a material term of the Residential Tenancy Agreement (the Agreement) pursuant to section 55. The female tenant applied for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- authorization to recover her filing fee for this application from the landlord pursuant to section 72; and
- other remedies, including a determination regarding whether the original Agreement remains in force and a determination regarding a hayshare agreement that was attached to the original Agreement .

Preliminary Issues

These applications were scheduled and heard by the original Arbitrator discharged with handling this matter on September 15, 2015. Although both parties attended that hearing, unforeseen circumstances prevented the original Arbitrator from rendering a decision regarding the matters before her. As there was no certainty as to when the original Arbitrator might be able to continue with her duties and issue a decision, the Residential Tenancy Branch (the RTB) had no option but to reschedule both applications for a new hearing.

Both parties were contacted and advised of the date and time for the proposed new hearing of their applications. Both parties understood that they would not be allowed to present any new written evidence and that this expedited new hearing was scheduled so as to ensure that they received a timely decision regarding their respective applications. They were assured that nothing said at the previous hearing would be taken into consideration in this new hearing, which is a *de novo* hearing. Both parties agreed to attend this new hearing, scheduled for November 5, 2015.

Both parties attended the new hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to call witnesses.

Issues(s) to be Decided

Do I have jurisdiction to consider either application? If so, should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Should any other orders be issued with respect to this tenancy?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters, documents and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of these applications and my findings around each are set out below.

On November 8, 2012, the female tenant and the landlord's son signed a one-year fixed term Agreement. This initial one-year term was to begin on March 1, 2013, and last until February 28, 2014. The landlord's son, DM, a co-owner of this property, signed this Agreement on his behalf and on behalf of his mother, who was also listed as one of the landlords on the Agreement.

This Agreement included references to three Schedules, Schedules A, B and C. Copies of Schedule A and C were attached to the Agreement; Schedule B was intended to be a joint move-in condition inspection report to be completed on March 1, 2013, the date when this tenancy was to begin. The parties entered into written evidence copies of the Agreement and the attached Schedules A and C, all of which were also signed by DM and the female tenant. As Respondent CS did not sign any of these Agreements or Schedules, he is not considered a tenant for the purposes of these applications.

According to the terms of the Agreement, monthly rent was set at $1,500.00, payable in advance on the first of each month, plus heat. The parties agreed that the tenant paid a $750.00 security deposit on or about March 5, 2013.

The tenant confirmed that on July 9, 2015, the landlord handed her the 1 Month Notice. This Notice identified the following two reasons for seeking an end to this tenancy by August 31, 2015:

> *Tenant is repeatedly late paying rent…*
>
> *Tenant has engaged in illegal activity that has, or is likely to:*
>
> - *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;…*

At the hearing, the landlord said that she was not personally involved in the negotiations with the tenant(s) at the beginning of this tenancy; her son DM looked after these negotiations. An August 28, 2012 copy of DM's email to the tenants entered into written evidence noted that in addition to the rental of this log home, the landlords had "extensive pasture and hay land." This email added that "The hay land is currently share cropped on a 25/75% arrangement with a

local beef producer..." In a follow-up email of September 1, 2012, DM outlined the following breakdown of asking rental rates for the home, the pasture, and the hay land, and combinations of these three portions of the property:

> *…As it currently stands, rent of the house and land would be $1,250.00 per month plus utilities with repairs and improvements to the house being our responsibility as dictated by the BC residential tenancy act whereas repairs and improvements to the land (fencing) for a specific use would the responsibility of the party requiring the repair or improvement. Use of our equipment to be negotiated separately if necessary. Use of the house alone remains the advertised $750.00 per month plus utilities, use of either the pasture or cultivated land is $500.00 if leased separately or $750.00 if leased together. Benefits from, our hay share crop agreement can be arranged simply for a collection service...and manure spreading. Under the terms of our agreement we receive approximately 300 small square bales but only require 30…*

The tenant confirmed that the original monthly asking rent for the rental house without any associated land or pasture was $750.00. She said that the parties settled on an overall monthly rental of $1,500.00, which was to include the rental house, the cultivated land and the pasture, less what the landlord was using herself for her greenhouse and cultivated land she uses to grow vegetables for her small seasonal retail produce business. The tenant said that in addition to the hay sharecropping operation the tenants run at this property, the tenants keep five cows, five goats, six pigs, a sheep and a bunch of chickens on the premises.

At the hearing, the parties confirmed that Schedule C outlined many provisions with respect to the tenant's responsibilities in maintaining and operating the cultivated land and pasture. Section 1 of this Schedule established that the tenant was not to "jeopardise the integrity of the certified organic status of either a part or the entirety of the property." The tenant did not dispute the landlord's sworn testimony and written assertion that the landlord has objected to the tenant's attendance to this portion of Schedule C. This Schedule also required the tenant to ensure adequate fencing was provided and maintained for the tenant's livestock. The landlord committed to provide the tenant with a tractor and implements required to maintain the pasture area in a reasonable state. The parties agreed that the tenant continues to have access to the landlord's tractor in accordance with the provisions of Schedule C. Section 7 of Schedule C provided a detailed outline of the circumstances surrounding the tenant's use of the hay fields, including the following provisions:

> *7 b) Should hay share crop agreement cease the tenant may assume haying responsibilities without increase in rent provided that the commitments of the hay share agreement are continues with the Landlord.*
> *c) The Tenant may have access to excess hay resulting from the current hay share agreement on an in the field arrangement; quantity of hay the tenant may have access to is not implied or guaranteed.*

d) The Landlord shall retain the right to manage the hay share agreement with the existing third party as they require, should the Tenant assume hay share responsibilities as new hay share agreement will be added to this document at the time of lease renewal…

The tenant testified that the original hayshare agreement with the local farmer who had been performing this task for the landlord was in place for the first year of her tenancy. Since then, the tenant said that she entered into a new hayshare agreement with someone else. Although the landlord had no recent data regarding the volume of hay yielded from these lands, she described this hay bale arrangement as significant. She noted that in 2012, there were 1,518 hay bales on the property, which each sell for between $4 and $7, depending on their quality and composition.

During the course of this hearing and in the written evidence, there was reference to the "Equity Agreement" between the parties. Although neither party considered the terms of this Equity Agreement important enough to include it in the volumes of written evidence they provided for this hearing, I emphasized that it was very important for me to have a copy of this Equity Agreement before I made a final determination as to whether I had jurisdiction to hear these applications. The landlord said that she had an unsigned version of that Equity Agreement, which she committed to fax to me by the end of the following day. The tenant said that there was a signed version of this Equity Agreement in existence, a copy of which she believed she had in her records. She also committed to fax a copy of this Equity Agreement to me by the end of the following day. Within a few hours of this hearing, the RTB received the landlord's fax of the Equity Agreement, which I have taken into account in making my decision.

At the hearing, the landlord read some of the provisions of the Equity Agreement into sworn testimony; the tenant did not dispute the terms of the Equity Agreement as read into sworn testimony by the landlord. Both parties agreed that DM and the tenant signed the Equity Agreement on November 8, 2012, at the same time as they signed the Residential Tenancy Agreement. They confirmed that the Equity Agreement was intended to cover the five year period commencing on May 1, 2013, and ending on April 30, 2017. Under the terms of the Equity Agreement, the tenant was to be credited with accrued equity towards the potential purchase of this entire property from the landlord at the end of the Equity Agreement when and if the property was listed for sale. The portion of the tenant's monthly rent that was directed towards the principal on the landlord's mortgage was to be applied as equity in the property. The landlord estimated the monthly principal to be in the neighbourhood of $500.00 of the tenant's monthly payments for this property. The parties agreed that in the event that the tenant decided not to purchase the property when it was listed, all of the payments made during the course of the tenancy directed towards principal on the mortgage would be returned to the tenant. Although the tenant said that she was not "locked in" to purchasing the property when the landlord listed it for sale, she agreed that the Equity Agreement was a form of a rent to own agreement. The landlord agreed with this description of the Equity Agreement, but noted that

the terms only remained in place if the tenant abided by the terms of the Equity Agreement, which she maintained was not the case.

The written copy of the Equity Agreement sent by the landlord by fax after this hearing, essentially confirmed the above account provided by the parties as sworn testimony at the hearing. Of particular note, was the following wording of the Equity Agreement:

> ***Rights and Obligations of the Lessor***
>
> *1) The Lessor shall return to the Lessee the principle portion of their lease payments on the sale of the property provided the payment of rent as described in the lease agreement has been paid in full and on time for the entire term of the agreement.*
>
> *2) The Lessor shall not to sell or list the property during the term of the agreement…*
>
> *5) The Lessor agrees to continue this agreement on a month by month basis after the completion of the term of the agreement and that:*
>
> *a) Equity will be calculated on a monthly basis for the period following the completion of this agreement until the sale of the property;*
>
> *b) The rental rate may be increased reflective of an increase of mortgage rates…*
>
> ***Rights and Obligations of the Lessee***
>
> *1) The Lessee shall renew the lease of the property on an annual basis…*
>
> *5) The Lessee retains the right of first offer on the property when it is listed…*
>
> (as in original)

Although the parties' written evidence and some of their sworn testimony reflected their disagreement on who was responsible for various incidents and events which occurred during the course of this tenancy, they both maintained that the Agreement and the Equity Agreement were two separate matters. They also asserted that the tenant's rental of the house fell within the *Act*, and referred frequently in their written submissions to the various infractions committed by the other party of the safeguards contained within the *Act*.

Analysis

Although the tenant and the landlord's son signed the Tenancy Agreement on behalf of her mother, their signature of the Agreement and inclusion of standard terms of a Residential Tenancy Agreement within that Agreement does not mean that this is a residential tenancy that falls within the confines of the *Act*.

Section 5 of the *Act* establishes that landlords and tenants may not avoid or contract out of the *Act,* and that any attempt to avoid or contract out of this *Act* is of no effect. Section 6 of the *Act* states that a term of a tenancy agreement is not enforceable if:

the term is inconsistent with the *Act*;

the term is unconscionable, or

> the term is not expressed in a manner that clearly communicates the rights and obligations under it,

In this case, the parties or their representatives signed two agreements on November 8, 2012. They entitled one of these as the "Tenancy Agreement;" they entitled the other as the "Equity Agreement."

After listening to the parties' description of the Equity Agreement and reading the contents of the Equity Agreement submitted by the landlord after this hearing, I find that the agreement between the parties was one whereby the tenant was obtaining equity in the property with each payment made to the landlord. At the hearing, the parties agreed that this was a type of "rent to own" agreement. Although the tenant was correct in noting that she was not "locked in" to a purchase of the property, equity in the property was being created with each monthly payment. The portion of the tenant's monthly payment that the landlord was directing towards the principal portion of the landlord's mortgage payments were being credited to the tenant in this unusual equity arrangement. Whether the tenant eventually purchased the property or not, the tenant would receive credit either through a reduction in the eventual sale price for the property or by way of a rebate to the tenant for this portion of the tenant's overall payments. The Equity Agreement also allowed for increases in monthly payments at the end of this Agreement, pegged to the landlord's mortgage rate increases.

Based on the written evidence and the sworn testimony of the parties, I conclude that the parties' description of this as an Equity Agreement was correctly named as such, and was intended to enable the tenant to acquire equity in the property with each payment made to the landlord. For these reasons, I find that these applications are for an arrangement that is not a residential tenancy under the *Act*. Despite the Tenancy Agreement also signed by the parties, I find that the monthly payments were not a traditional residential tenancy as each payment was intended to create increasing equity for the tenant in the ownership of this property. This is a variation on a "rent to own" agreement, and one which does not place this within the jurisdiction of the *Act*. I cannot make a decision on these applications because I have no jurisdiction under the *Act* to do so.

In addition, I should also note that, even if there were no Equity Agreement in place, section 4(d) of the *Act* would also bar my jurisdiction from considering these applications. Section 4(d) establishes that the *Act* does not apply "to living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement." RTB Policy Guideline #14 describes the factors to be considered in considering the predominant purpose of the tenancy.

The Tenancy Agreement included Schedule C, which contained provisions regarding the tenant's use of the land and pasture, which was a key element of the agreement between the parties. As outlined above, there are many features of Schedule C, which apply to the special arrangements made between the parties to include the tenant's use of the pasture and

cultivated land within this Agreement. The written evidence and the tenant's own testimony revealed that rental of the house alone would have been $750.00. Had either of the other components of this agreement been rented individually, monthly rental of the land would have been $500.00, and monthly rental of the pasture would have been $500.00. This evidence reveals that there was a significant business portion to the overall $1,500.00 paid by the tenant to the landlord each month. At page 2 of a June 1, 2015 document signed by both DM, the person who signed both agreements on behalf of the landlords, and the landlord, the landlords described the rental agreement between the parties under the following terms:

> …*We are under a commercial rental agreement, not a residential one…*

I also note that many of the issues in dispute raised in the written evidence of the parties pertain to these provisions of Schedule C. For example, the landlord has alleged that the tenant has not complied with the provisions regarding the organic farming of the property or the removal of a certain category of weeds from the farm. Disputes also arose as a result of a substantial sharecropping operation of hay on the land leased to the tenant with two sets of third party farmers. The hayshare portion of Schedule C also has the hallmarks of a dispute regarding the operation of this farming operation and not a residential tenancy.

For the reasons outlined above, I also find that even if the Equity Agreement did not exist, the premises rented were primarily for business purposes. In that event, section 4(f) of the *Act* would also have prevented me from considering these applications, which are beyond my jurisdiction.

Conclusion

I decline to hear this matter as I have no jurisdiction to consider these applications.

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: November 06, 2015

Residential Tenancy Branch