Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CANADA HONGYU INVESTMENT GROUP CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, O, FF

Introduction

The tenant applies for damages resulting from the landlord's alleged repudiation of the tenancy agreement.

Both parties attended the hearing, the landlord by its agents Ms. W. and Mr. W.. They were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that the landlord repudiated the tenancy agreement? If so, is the tenant entitled to damages and if so, in what amount?

Background and Evidence

The essential facts are not in dispute.

The rental unit is a one bedroom "plus den" condominium apartment.

After weeks of discussion the parties entered into a written tenancy agreement for the tenant to rent the apartment. The agreement is in the standard form provided by the Residential Tenancy Office. It was offered to the tenant by the landlord and signed by the tenant on June 27, 2015.

The landlord does not appear to have signed the tenancy agreement but it did not deny that it considered itself bound by it.

The tenancy was to start on July 1st, 2015, for a fixed term of four and one-half months, at a monthly rent of $1320.00, due on the first of each month, in advance. The agreement provided that the tenant must vacate the apartment at the end of the term unless another arrangement was agreed to.

On June 28th the tenant paid the required $660.00 security deposit to the landlord and gave it post dated cheques for the rents for July to October.

At 12:04 a.m. in the morning of June 29th, the landlord's agent Ms. W. emailed the tenant that she had been informed by the landlord that "they" were wanting to keep the apartment for a relative and so "we are unable to move forward with having you as a tenant at this point."

Later in that day, at 9:42 a.m., the tenant texted Ms. W. stating, "I will be filing for an order of possession for the apartment this morning."

At 12:39 p.m. the same day, as the result of a request from Ms. W. to talk, the tenant texted Ms. W. that he had spoken to his lawyer and, "If you are willing to negotiate something directly with me, please only do so by email or in writing moving forward and we can go from there."

In the same text the tenant pointed out,

> I have 24hrs to find a home now as I have already packed all my belongings, cancelled my services, rented a moving company, not to mention the people who have committed to helping me move. On top of that, it took me 3 months to find housing in this area, so a precedent has been set for how long it will take me to find … (*document incomplete*).

At 3:58 p.m. Ms. W. texted the tenant saying,

> We are aware of the regulations of the tenancy branch and how long you have been looking. They've decided to move ahead with the contract, as it was never anyone's intention to turn this into a messy situation. Please let me know what you think. Thanks.

The tenant replied by text that he had already made alternative arrangements, cancelled the movers and his mail redirection. He added that considered the tenancy agreement to be a contract "made in bad faith." At hearing the tenant expanded on his view that in light of what had transpired, he had no faith that the landlord would renew or extend the tenancy agreement after the expiry of its four and one-half month fixed term.

Analysis

By its agent's email in the early morning hours of June 29th, the landlord clearly demonstrated its intention to fundamentally breach the executed tenancy agreement by withholding the tenant's lawful possession of it. It was an "anticipatory breach," also known in law as a repudiation of the contract.

The *Residential Tenancy Act* (the "*RTA*") contains provisions dealing with a landlord or tenant ending a tenancy for a fundamental breach or "a breach of a material term" in the language of the statute. In my view those provisions can have no practical application to an anticipatory breach given prior to the start of a tenancy.

In the event of an anticipatory breach, the law requires the innocent party, the tenant in this case, to make an election or decision to either accept the repudiation or to stand by the agreement.

The legal textbook ***Chitty On Contracts*** (26th Ed., (1989) at p. 1075), states

> **Acceptance of repudiation.** Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must normally[65] make his decision known to the party in default ("accept the repudiation.")[66] Unless and until this is done the contract continued in existence, for "an unaccepted repudiation is a thing writ in water."[67] Acceptance of a repudiation must be clear and unequivocal. But, once made, it cannot be withdrawn.[68] If the parties thereafter resume performance of the contract, their rights are governed by a new contract, even if the terms remain the same.[69]

The law in British Columbia regarding repudiation was reviewed by Madam Justice Southin in the well known case *Norfolk* v. *Aikens*, 1989 CanLII 245 (BC CA). I apologize for including in this decision the extended extract below, from page 25, but clarity requires it.

> The doctrine of repudiation was elucidated in Heymans v. Darwins, Ltd., [1942] 1 All E.R. 337 (H.L.) and has been dealt with in this Court in Fletton Ltd. v. Peat Marwick Ltd. et al. (1988), 1988 CanLII 2860 (BC CA), 50 D.L.R. (4th) 729.
>
> The true proposition is this:
>
> > If one party repudiates the contract, the other has a choice:
> >
> > a) He may accept the repudiation and if he does both parties are relieved from the obligation of further performance. Thereupon the contract is the measure of the damages of the innocent party,
> > or
> > b) he may decline to accept the repudiation thereby keeping the contract alive in all respects for both parties.
>
> A repudiation may be a breach of an existing obligation or it may be an anticipatory breach. If it is a breach of an existing obligation, time for performance of which has arrived, the innocent party may reject the repudiation but nonetheless recover damages for the breach. This is not such a case.
>
> As Lord Simon put it in Heymans v. Darwins, Ltd. at p. 340-341:
>
> > The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so. As Scrutton, L.J. said in Golding v. London & Edinburgh Insurance Co., Ltd., at p. 488:
> >
> > > I have never been able to understand what effect repudiation by one party has unless the other accepts it.
> > >
> > > If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, **the co-contractor has the opportunity of withdrawing from his false position** and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance. (A classic example of this is to be found in Avery v. Bowden). Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) "accept the repudiation," by so acting as to make plain that, in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages.

(*emphasis added*)

In this case, the tenant did not convey his clear and unequivocal acceptance of the repudiation. By informing the landlord that he would be apply for an order of possession the tenant conveyed his decision to hold the landlord to its bargain.

Nothing in the intervening emails conveyed to the landlord any change in this decision. The landlord had an opportunity of withdrawing from its "false position" and it did so by Ms. W.'s text of 3:48 p.m. later that day.

Legally, the tenant was then obliged to perform his end of the tenancy agreement.

I appreciate that the tenant was doing his best to deal with a very difficult situation. I have no doubt that he was put to inconvenience and some cost in dealing with the matter as he did.

Nevertheless, his choice to tell the landlord that he was holding it to the tenancy agreement and the landlord's subsequent withdrawal from its position combined to return the parties to their previous legal arrangement. The tenant, having taken steps not to move in, thereafter declined to perform his part of the tenancy agreement. He must bear the cost resulting from that decision.

The tenant's argument that the landlord's bad faith had been revealed by its repudiation cannot help him. The written tenancy agreement does not provide that the tenancy continues after the end of its fixed term. The landlord would be under no legal obligation to extend it beyond then. The question of good or bad faith is not relevant.

Conclusion

The tenant's application must be dismissed.

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 27, 2015

Residential Tenancy Branch