



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, OLC, FF

Introduction

This was a hearing with respect to the tenant's application for a monetary award. The hearing was conducted by conference call. The tenant and the landlord called in and participated in the hearing. The parties exchanged documentary evidence before the hearing.

Issue(s) to be Decided

Is the tenant entitled to a monetary award and if so, in what amount?

Background and Evidence

The rental property is a house in Kerrisdale. The tenant testified that she was the victim of a house fire in July, 2012. The tenant's insurer assisted in finding accommodation for the tenant and her elderly mother. In September, 2012 the landlord advertised the rental unit for rent. Through her lawyer the tenant drew a tenancy agreement with the landlord. The agreement prepared on behalf of the tenant and dated September 11, 2012 provided that:

- 1) The term shall be set from an arrival date of September 15, 2012 at 1:00 PM, departing by December 15, 2012 at 1:00 PM (the "Term").
- 2) After the expiry of the term the tenancy shall continue on a month to month basis. After the expiry of the term this tenancy may be terminated upon thirty (30) days notice in writing delivered to the address noted above for each respective party.

The rental unit was rented as a fully furnished unit with furniture, a TV, audio and visual players, linens, appliances and cookware. The monthly rent was \$6,000.00. The tenants paid a \$3,000.00 deposit at the commencement of the tenancy.

On December 7, 2012 a second tenancy agreement was signed. The agreement was also drafted by the tenant's lawyer. The second agreement provided in part as follows:

- 1) The term shall be set from an arrival date of December 15, 2012 at 1:00 PM, departing by June 15, 2013 at 1:00 PM (the "Term").
- 2) After the expiry of the term this tenancy may be terminated upon thirty (30) days notice in writing delivered to the address noted above for each respective party.

The tenants did not move out on June 15, 2013, although the landlord requested that they do so. The tenants received a letter from the landlord dated September 1, 2013. In the letter the landlord stated as follows:

I am writing to follow up on our previous discussions regarding your moving out. As you know, our initial contract was temporary, and I intended to move back into my house when the lease ended on June 15, 2013. Since May 2013, I have repeatedly asked you about your plans to move out. You have consistently been evasive, saying that you want to move out but you have not given me a date. I understand finding a new home can be difficult, but I have patiently waited all summer and there has been no sign that you are making reasonable effort to move out.

I am asking you to vacate my house by **November 15, 2013**. I feel that is a reasonable request and that it should give you enough time to make alternative living arrangements.

I would like to formalize this by completing a mutual agreement to end the tenancy form before September 10th 2013. This form is a mutual agreement between landlord and tenant to end a tenancy (see attached copy). As stated, I would like the date to be **November 15, 2013**.

I need to move back to my house. To stay in my basement longer is not an option.

The tenants did not sign the mutual agreement and they refused to move out of the rental unit. The landlord served the tenants with a two month Notice to End Tenancy for landlord's use. The notice was dated September 14, 2013 and it required the tenants to move out of the rental unit by November 15, 2013. The Notice to End Tenancy did not state a ground for ending the tenancy. The tenants moved out of the rental unit on October 15, 2013.

The tenant did not commence this application until October 15, 2015, one day shy of the two year limitation for bringing this claim. She has claimed payment of the sum of \$18,200.00. In her application the tenant said:

Landlord gave us (my mother was also tenant, has since passed away) 60-day notice because she claimed she wanted to move back into the space. We did not receive the one-month rent owing for the 60-day notice. In addition, I discovered that the landlord had listed her property for rent only a few months later when she is required to live there for 6 months following the date the notice takes effect (thereby additionally owing an amount equal to 2 months rent). As well, the landlord cut off our phone service (included in the rent) 1 day early. As my mother was not in good health and hearing impaired (unable to use cellphone), this meant that she would not be able to access 911 services over the phone if needed and so I had to sit with her all night in case of a problem - Telus said it would be easy to reconnect the service with landlord's permission, but later that day the landlord posted a note on our window saying she was sorry about the phone service but there was nothing she could do about it. When I spoke to the RTB, they said we could request compensation for this but we would have to choose the amount - so I am asking for \$200 (equal to 1 day's rent).

The tenant said that the landlord advertised the property for rent after the tenant moved out. She referred to a copy of an advertisement placed upon the "Make Yourself At Home" website, advertising Vancouver short term accommodations for February, 2014.

The tenant's claim for a monetary award seeks payment of the sum of \$6,000.00, said to be due as compensation equivalent to one month's rent pursuant to section 51(1) of the *Residential Tenancy Act* due because the landlord issued a two month Notice to End Tenancy pursuant to section 49 of the *Act*.

The tenant claimed a further \$12,000.00. She submitted that the landlord did not use the rental unit for the purpose stated in the Notice to End Tenancy (although no purpose was stated in the Notice to End Tenancy) because it was advertised for rent by the

landlord after the tenancy ended. The tenant claimed payment of the equivalent of two months' rent pursuant to section 51(2) of the *Residential Tenancy Act* based on advertisements to rent the property placed after the tenant moved out. The tenant claimed a further \$200.00 said to be for compensation because the landlord cancelled the phone for the rental unit before the tenancy ended and the phone did not work on the last day of the tenancy.

The landlord testified that she is the owner of the rental property. She has operated a bed and breakfast facility in the rental property since 1998. Two levels of the house, the main and upstairs were used for operation of the bed and breakfast. The landlord submitted documents, including a copy of her business licence to substantiate that she had been running a bed and breakfast business for many years. The landlord testified that in September, 2012 she decided, in order to make some money during the off-season, to rent out the premises on a fixed-term basis for a maximum of three months. She moved into the basement suite, formerly occupied by her adult son, who was away at school. The landlord advertised the rental property through a short-term rental agency as fully furnished accommodations. The tenant and her mother who had suffered a house fire in their own home, arranged to rent the property while their house was being repaired. The landlord said she made the tenants aware that she was seeking only a short-term rental with a fixed end of tenancy date because she was running a B&B out of the premises and that she was moving temporarily into the basement. The tenant submitted that the *Residential Tenancy Act* should not apply to this tenancy because the tenant rented the property as emergency shelter or transitional housing.

The landlord testified that the tenant insisted that her lawyer draft the tenancy agreement which was to be for a fixed term of three months. She said that she has never entered into a lease before. The agreement was drafted by the tenant's lawyer and the landlord was not advised to obtain independent legal advice. The landlord referred to e-mails she exchanged with the tenant's lawyer, in particular e-mails exchanged with lawyer for the landlord on September 11, 2012 after he sent a draft copy of the tenancy agreement to her. In an e-mail to the lawyer responding to the attached residential tenancy agreement the landlord said: "Thank you. I changed the departing date to December 15, 2012. The lawyer replied to the landlord saying: "thank you and we agree with the departure date of December 15, 2012, that was a slip." The tenant said she did not understand the lawyer's reference in the agreement to a month to month tenancy. This provision was not explained to her and contradicted the specific agreement for a December 15th departure date.

The tenant testified that in November, 2012 the tenant and her mother asked to extend their tenancy on a month to month basis. She did not agree to the proposal, but said she would consider extending the lease. The tenants suggested a lease from December 15, 2102 to June 15, 2013. Although the landlord had B &B bookings for dates after December, 2102 and no longer wished to live in the basement she reluctantly agreed to a lease until June 15, 2013, in part out of sympathy for the frail health of the tenant's mother, but she adamantly stated to the tenants and to their lawyer that the tenancy must end and the tenants must move out on June 15, 2013. The landlord agreed to sign a new lease. It was again prepared by the tenant's lawyer and the month to month provision was removed. It also contained a provision that the tenancy could be ended on 30 days' notice by either party, but the landlord was not told that such a provision was not contemplated by the *Residential Tenancy Act*. The landlord was not advised to obtain independent legal advice with respect to this second agreement. The landlord began to accept bookings from B & B guests for the summer season, based on the June 15th end of tenancy date.

When the tenants evinced no sign that they were preparing to move on June 15th the landlord spoke to the tenants; they refused to move out and refused to provide a date when they intended to move. This resulted in the landlord having to cancel multiple B & B reservations to the detriment of her business. The tenants claimed that they were not required to move out and they refused to move throughout the months of July and August. The landlord wrote to the tenants on September 1, 2013 as reproduced above. The tenants did not respond to the letter and refused to provide a move-out date. The landlord finally sought advice from the Residential Tenancy Branch. She was told the 30 day provision inserted by the tenant's lawyer was unenforceable and she received advice that she should give the tenants a two month Notice to End Tenancy. She did so by handing the Notice to the tenants on September 14, 2015. The Notice to End Tenancy did not state a reason for ending the tenancy.

The tenants moved out on October 15, 2013. The landlord moved back into the main portion of the rental property immediately after the tenants moved out and afterward rented the basement suite to a tenant. The basement suite was never part of the rental unit rented to the tenants. The landlord did not rent the rental unit to other tenants for more than 8 months after the tenants moved out. She then resumed operating her B & B as a commercial business, distinct from a residential tenancy. The landlord lived in the main part of the premises until June 1, 2014 when she moved into a smaller apartment.

Analysis

The landlord submitted that the *Residential Tenancy Act* does not apply to this dispute because she is the owner of the rental property and lived in the house with the tenants at the relevant times. The *Residential Tenancy Act* provides that the Act does not apply to living accommodation where the tenant shares bathroom or kitchen facilities with the owner of that accommodation. In this case the landlord occupied a separate suite in the rental property and did not share bathroom or kitchen facilities with the tenants so this exemption is not applicable.

The landlord also submitted that the tenants occupied the rental unit as living accommodation provided for emergency shelter or transitional housing because the rental unit was provided to them as shelter after the tenant's house was damaged by fire. I do not accept this submission. Emergency shelter is considered to be housing provided to the homeless and hard to house as a refuge from the weather, or housing for persons escaping from abusive relationships and transitional housing has been noted to be the provision of housing together with ongoing therapy or treatment for health problems including physical, mental and addiction issues. I find that this exemption is not applicable to this tenancy and the *Residential Tenancy Act* does apply.

I found the landlord to be credible and forthright in her testimony. She provided documents that showed that she has been in the business of operating a licenced commercial bed and breakfast rental business out of her home for many years. I accept her testimony that she advertised the rental property on a short term rental site during the off-season of her B & B business. It is not disputed that the tenants were seeking a short term rental while their fire damaged home was being repaired. The first tenancy agreement was prepared, at the insistence of the tenant by her lawyer. The agreement was for a three month term ending December 15, 2012, but it contained a term stating that the tenancy would continue on a month to month basis. This term was inserted by the tenant's lawyer. The landlord did not notice the provision or recognize its import when she signed the agreement.

When the tenants sought to continue the tenancy beyond December 15, 2012, the landlord agreed to a new term, but, did not agree to continue the tenancy on a month to month basis. The landlord signed a new fixed term tenancy agreement, but she specified that the month to month provision be removed. The new agreement stated that the term of the tenancy: "shall be set from an arrival date of December 15, 2012 at 1:00 PM, departing by June 15, 2015 at 1:00 PM (the "Term"). This provision appears to contemplate and require the tenants to move out or depart at the end of the term, but

an element of ambiguity is created by the following clause which provided that after the expiry of the term the tenancy may be terminated upon 30 days' notice in writing.

The *contra proferentem* rule is an aid to contractual interpretation. The rule is generally stated as follows:

Where there is any ambiguity in the contractual provision it will be interpreted in the manner least favourable to the maker of the contract. It is also often said that the contractual provision will be "strictly construed against the maker".

The rule is applied when there is an inequality of bargaining power between the parties to the contract. I find that the rule should be applied in the circumstances of this case because here the tenant's lawyer drafted the contract pursuant to the instructions of his client and he controlled the wording of the contract. The tenant was not invited to obtain independent legal advice and despite her clear and unequivocal communications both to the tenant and to her counsel that the tenancy was not to continue beyond June 15, 2013. The lawyer proceeded to insert this ambiguous and prejudicial term without making any comment or suggestion that it would be prudent for the landlord to have the contract reviewed before signing it.

I find that there is ambiguity in the contract between the provision specifying that the tenants will depart on June 15 and the provision that after the term, the tenancy may be ended on 30 days' notice by either party. I find that the contract should be interpreted in accordance with the landlord's clearly expressed expectations that required the tenants to depart or vacate on June 15, 2013. I find that a further reason for arriving at this conclusion is that the following term inserted by the tenant's lawyer purporting to give either party leave to end the tenancy on 30 days' notice is in fact contrary to the provisions of the *Residential Tenancy Act* because the *Act* does not afford a landlord the right to end a tenancy on 30 days' notice without cause. I find that the ambiguity should be resolved in favour of the landlord and the illegal term inserted by the drafter should be severed or ignored.

It follows that by failing or refusing to vacate the rental unit by June 15, 2013 the tenants were over-holding without consent after the tenancy ended. The steps taken by the landlord to secure the tenants' departure, first by letter and then by giving a Notice to End Tenancy when none was needed because the tenancy had ended, does not create a right to compensation. The Notice to End Tenancy was given because it was a course of action suggested to the landlord by an information officer at the Residential Tenancy Branch. The suggestion was not well founded; the Notice itself was not properly completed and I have determined that it was an unnecessary step because the

tenancy had already ended. I find that in these circumstances the Notice to End Tenancy cannot be invoked by the tenant to support a claim for compensation from the landlord.

I find that the tenant's claim for compensation is without merit and it is dismissed without leave to reapply.

Conclusion

The tenant's application is dismissed. I make no award with respect to the filing fee for this application.

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: June 20, 2016

Residential Tenancy Branch