



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OLC FF

Introduction:

Both parties attended and agreed that the tenant's Application for Dispute Resolution was served personally to the management office. I find the Application was legally served pursuant to section 89 of the Act. The tenant requests pursuant to the *Residential Tenancy Act* (the Act) for an order that the landlord obey the terms of their tenancy agreement and the Act and to recover their filing fee.

Issue(s) to be Decided:

What are the terms of the tenancy agreement entered into by the parties? Are some terms unconscionable, contradictory or ambiguous?

Background and Evidence:

Both parties attended and were given opportunity to be heard, to present evidence and to make submissions. The undisputed evidence is that the parties entered into a Residential Tenancy Agreement on June 27, 2015. The agreement is a fixed term for two years from July 15, 2015 to July 31, 2017. Rent is \$3500 a month and a security deposit of \$1750 was paid on June 27, 2015.

The tenant states that this lease was not intended to be a two year fixed term. He said in initial discussions, they had offered a two year term but the landlord said it would be a one year term and then they would discuss it. He points to clause 8 in the lease as evidence of this intention, some emails between the parties in 2016 and the landlord/owner's actions in inspecting the home with very little notice and entering into lease negotiations on April 22, 2016. Apparently the inspection embarrassed the female tenant who had personal items visible in the master bathroom. The tenant said the owner wanted to finish negotiations quickly as he was going out of the country soon and the tenant was going on vacation. The tenants followed up with emails to the management company offering a rent of \$2800 or \$2600 a month for the next year.

The landlord/management company by email agreed the owner was in violation of the Act by entering with insufficient Notice contrary to section 29 of the Act. However, they pointed out that there is a fixed term lease for two years and there is no point to enter negotiations to change the rent for the second year. They also pointed out that the owner has the right to increase the rent in accordance with the Act every 12 months even in a fixed term lease. She explained one of her emails dated April 23, 2016 by saying she was not in the office and commented thinking that most leases are one year; however when she returned to the office and checked the lease, she emailed the tenant the comments regarding the two year term and there being no point in trying to negotiate the rent for the second year as it is plainly stated in the lease.

The tenant requests comment and interpretation of clauses 2, 8 and 14 of the lease. He states they are contradictory and clause 14 is unconscionable in its penalties for terminating the lease. He submits that clause 8 supports his assertion that the lease was intended as a one year fixed term lease and the actions of the owner corroborate this.

In evidence is a copy of the lease and emails between the parties. On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis

Section 44(b) of the Act provides that a fixed term tenancy ends if the agreement provides the tenant will vacate on the date specified as the end of the tenancy and section 44(3) states that if the tenant is not required to vacate on the date specified and 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.

I find as fact that the parties entered into a fixed term tenancy agreement for a little over two years expiring on July 31, 2017 and clause 2 of the Agreement, which the tenant requested I interpret, reiterates section 44 of the Act as quoted above. Clause 2 also notes that the tenant is to contact the landlord **in writing** prior to June 1, 2017 to renegotiate a new fixed term tenancy or to provide a full two months Notice of their intention to vacate the property upon the expiration of the current lease. Clause 2 notes specifically that section 44(3) is not intended to apply to allow the tenancy to lapse into a month to month tenancy.

The tenant contended that many discussions prior to them entering into the lease centered around it being a one term fixed term and the landlord's actions on his brief

visit confirmed this understanding. However, I find they signed the two year fixed term lease after such discussions and I find the written lease which they signed, dated and initialled on each page is the best evidence of the intention of both parties. Although the owner made a brief visit and according to the tenant opened negotiations, I find insufficient evidence that the owner was rescinding the lease or entering into a new lease arrangement. I note the clause 2 of the lease is specific in stating that contact to renegotiate a new fixed term must be in writing. This indicates to me that the owner and landlord expected items to be in writing to be legal.

The tenant contends that clause 8 of the agreement contradicts the two year term and confirms intention for a one year term. Clause 8 of the tenancy agreement states in part:

Rent Increase

- a) If at the end of the one year fixed term, the tenancy agreement does not require the tenant to vacate the rental unit on that date, and 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, therefore the landlord may increase the rent only in the amount set out by the regulation.

I find clause 8 does not contradict clause 2 of the agreement. Clause 8 is a standard clause as the management explained. I find it reiterates section 44(3) of the Act and is intended to apply to the matter of rent increases. In a new contract, I find the landlord can normally set the rent at market rates but this term in clause 8 restricts the landlord to the legislated amount if the fixed term ends and the tenancy continues on a month to month basis. I find the argument of the tenant on this point is without merit.

The tenant again contends that clause 14 of the lease is unconscionable. It provides that if the tenant breaches the lease before the end of the fixed term, the landlord may treat the tenancy as at an end and in that case, the tenant shall pay to the landlord two months rent as liquidated damages plus the additional leasing fee of \$1250. I find the tenant in this fixed term lease is obligated in contract to pay rent of \$3500 a month to the end of the fixed term. If the tenant decides to leave before the expiry of the lease, the landlord is obligated to mitigate his damages by diligently trying to re-rent as soon as possible. In that case, the landlord would be entitled to actual loss of rent plus the leasing fee and any provable damages. I refer both parties to section 7 of the Act regarding damages and obligation to mitigate. I note in a letter dated April 24, 2016, the management said there might be an option to terminate the contract if the owner moved back by February 1, 2017. I caution the parties if this event occurs to make any agreement in writing concerning all costs.

The tenant contended the lease was unconscionable in its terms and should be construed against the landlord as the more powerful party. I find Residential Policy Guideline 8 defines unconscionable terms as terms that are oppressive or grossly unfair to one party. A test is whether the term is so one sided as to oppress or unfairly surprise the other party, for example if one party exploited infirmity, mental weakness, age, ignorance or need of another party. In this case, I find insufficient evidence that the lease terms are unconscionable. I found the tenants articulate and knowledgeable of legal matters and their rights in the hearing. I find they freely signed the two year fixed term lease and then after the first year hoped to renegotiate a lower rent which the landlord refuses to do. I find the lease enforceable.

Regarding the landlord's unlawful entry into their unit without sufficient notice. I find the landlord violated section 29 of the Act and caused embarrassment to the female tenant. Although I recognize it was the owner and not the management company that did this, I find the owner of a rental property is obligated to know the law and not infringe on the privacy of his tenants. I find the tenants entitled to a rent rebate of \$100 to compensate them for this violation.

Conclusion:

I find the tenant entitled to \$100 rent rebate and to recover one half of their filing fees paid for this application (\$50) as their application had some merit in respect to the unlawful entry. I dismiss the balance of their Application in its entirety.

I HEREBY ORDER THAT the tenant may deduct \$150 from their rent for July 2016 to compensate them for the unlawful entry and 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: June 09, 2016

Residential Tenancy Branch