



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT AAT RPP FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* ("the *Act*") for an order of possession; an order requiring the landlords to return the tenants' personal property pursuant to section 65; an order to allow access to or from the rental unit or site for the tenants or the tenants' guests pursuant to section 70; and authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The tenants confirmed receipt of the landlords' evidentiary materials submitted for this hearing. However Landlord LC argued, referring to Residential Tenancy Branch Rule ("RTB Rule") No. 4.7 that she objected to the tenant's evidentiary submission and amendment made on August 26, 2016 being considered in this hearing. Landlord LC submitted that the evidence and amendment were not filed and served in a sufficient amount of time for the landlords to adequately respond or submit evidence in response.

RTB Rule No. 3 addresses the filing and service of evidence and Rule No. 4 addresses amending a claim. Rule 3.11 provides that evidence must be served and submitted as soon as reasonably possible. Rule 3.14 provides that evidence must be received by a respondent not less than 14 days before the hearing. Rule 3.17 provides that an arbitrator has discretion to determine whether to accept evidence that has not been served as required. The RTB Rules also provide that it is necessary to ensure that neither party is unreasonably prejudiced by the inclusion of late evidence. RTB Rule No. 4.3 provides that "[amended] applications and supporting evidence should be submitted ... as soon as possible ..."

The evidentiary materials and amendment application submitted by the tenants include a monetary order worksheet and supporting documents including bills, receipts and copies of text messages as well as photocopies of photographs with dates ranging from August 9-30, 2016. Given that this hearing was scheduled for September 6, 2016 and given that the tenants made their original application on August 22, 2016 after vacating the residence on July 31, 2016, I find that the amendment and the newly submitted evidence (August 26, 2016) have been submitted with delay.

The landlords argued that this material should not be considered and that their receipt of the materials on August 31, 2016 in the late evening (effectively 5 days prior to the hearing) did not allow them an opportunity to properly and fully respond to the amendment and the other materials/evidence. It is imperative that the principles of natural justice are considered when the inclusion of evidence is at issue. A parties' ability to know and respond to the case against them is a primary consideration in determining whether to accept evidence.

The amendment included the addition of a \$7514.17 monetary claim where there was previously no monetary award sought within the tenants' original application. Therefore, the distinction in the case the landlords were required to meet changed significantly with the amendment. I accept Landlord LC's testimony that she received the materials/amendment on August 31, 2016 and had not been able to create a full response.

Amendments are to be submitted as soon as possible and additional evidence not less than 14 days before the hearing. I accept the submissions of the Landlord LC that there was insufficient time to respond to the materials submitted by the tenant and insufficient time to file and serve any response. Given my finding that the landlords received these materials 5 business days before hearing and the landlords' evidence describing the limits of their ability to respond in a reasonable time prior to the hearing, I find that the tenant's amendment application and evidence have not been provided in sufficient time to be considered within this application. **I dismiss the tenants' application to amend to include a monetary order with leave to reapply.**

Issue(s) to be Decided

Are the tenants entitled to an Order of Possession?

Are the tenants entitled to an order that the landlords return the tenants' property?

Are the tenants entitled to an order to allow the tenants' access to the rental unit?

Are the tenants entitled to recover the filing fee for this application?

Background and Evidence

The parties agreed that a 12 month fixed term tenancy began on August 1, 2015 with a rental amount of \$2000.00. The landlords continue to hold a \$1000.00 security deposit and a \$1000.00 pet damage deposit paid by the tenants at the outset of the tenancy. The tenants applied for an Order of Possession for the rental unit as well as authorization to access the rental unit.

The tenants claim that the landlord entered a further agreement beyond their 12 month lease. The landlords testified that the rental unit is their residential premises and that the tenants were aware the living arrangement (12 month lease) was scheduled to end. The landlords testified that they did not make an agreement to enter into a further lease with the tenants.

Both parties submitted documentary evidence from this hearing including;

- Copies of the tenancy agreement,
- Email correspondence between the two parties,
- Photographic evidence of the rental unit.

The correspondence provided evidence of the timeline for events. The tenants received notice from the landlord on April 18, 2016 that the landlords intended to “use the rental unit” from August 5 to August 26, 2016. The tenants testified that they believed they would be returning to the unit after the landlords had completed their stay for a further period of time.

While the landlords resided temporarily in the rental unit, negotiations and discussions of a lease renewal continued between the two parties. The landlords testified that, after they saw the condition of the rental unit, they were reluctant to continue renting to the tenants. The tenants acknowledged that, due to personal circumstance, the rental unit was not cleaned before the landlords came to stay. In correspondence between the two parties, there was discussion of both the condition of the unit and of a further lease period however there is no clear indication in writing that an agreement was reached between the parties.

The tenants testified that several of their personal belongings are still on the property and they seek their return. In providing further detail, the tenants referred to approximately 6 unique mugs, a tablet computer and some other small items. The tenants testified that they were unable to provide a clear and thorough list of their

belongings or where they might be found because they had not packed their belongings but anticipated returning to continue residing in the unit.

The landlord agreed that items were left behind by the tenants and mostly placed in the garage. The landlord agreed that they would return any items they were able to locate however the items were left all throughout the residence and difficult to identify as the tenants without a list.

The landlord submits that a new lease agreement was never entered into and that therefore the tenancy ended on July 31, 2016, the final day of the fixed term tenancy. The tenants submit that the landlords, by way of the original tenancy agreement, agreed to enter a further fixed term lease at the end of the tenancy.

Analysis

There is evidence (the residential tenancy agreement and testimony of both parties) that proves that this tenancy began as a 12 month fixed term tenancy to end on July 31, 2016. Residential Tenancy Policy Guideline No. 30 provides direction on the definition and terms of a fixed term tenancy:

A fixed term tenancy is a tenancy where the landlord and tenant have agreed that the tenancy agreement will begin on a specified date and continue until a predetermined expiry date...

Section 44 of the *Act* addresses how a tenancy ends, including a fixed term tenancy:

44 (1) A tenancy ends only if one or more of the following applies:
...(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

Policy Guideline No. 30 also indicates that, a landlord and tenant may agree to renew a fixed term tenancy agreement with or without changes, for another fixed term. In accordance with the *Act* and the Policy Guidelines, the tenancy agreement signed by both parties in this matter states that

... Tenant may renew this lease for a further term ...Tenant's failure to obtain written agreement of renewal or extension of this Lease from the Landlord shall confirm end of tenancy at the expiry of the Lease.

(emphasis added)

In this form of tenancy, a term is fixed for the assurance of both parties. With few exceptions, this tenancy will continue to the end of its term, allowing the tenant and landlord the security that comes with this fixed period of time. This form of tenancy also has a scheduled end (or expiration) date with the option to renew if both parties agree to set a new term for the tenancy. In this case, the residential tenancy agreement indicates that the tenancy will end and the tenant will vacate the rental unit on July 31, 2016.

In this particular tenancy situation, at the end of the fixed length of 12 months ending July 31, 2016, “the tenancy ends and the tenant must move out of the residential unit.” However, the landlords continued to accept rent from the tenants for the month of August while they “used the rental unit” for a period of time. The landlords did not provide notice to the tenants that, at the end of the one month extension, the tenants would be required to vacate the rental unit.

Section 44(3) (and reiterated at Policy Guideline No. 30) provides guidance if an agreement does not indicate that the tenant will vacate,

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.

(emphasis added)

In considering the legislation and Policy Guidelines regarding fixed term tenancies, I rely on section 44(3) where the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms. While I do not find sufficient evidence that the tenants and landlords agreed to a further fixed term, I find that the circumstances of the continuing tenancy in August 2016, the landlords effectively agreed to continue the tenancy on a month to month basis.

I find that the tenants’ failure to obtain the consent of the landlord for a new fixed term and the landlord’s failure to create a fixed term tenancy with an indisputable end date results in a need to apply the legislation as it currently reads to ensure the proper interpretation of this agreement.

I find that the tenancy will continue on a month to month basis in default in accordance with the legislation (section 44(3) of the Act). The tenancy shall continue and will default to month to month tenancy as of July 31, 2016. Further, I order that the landlords allow the tenants’ access to their rental unit.

With respect to the tenants' application for the return of their property, I find that the tenants have not provided sufficient information to issue an order that the tenants' property be returned to them. However, as the tenancy continues as of the date of this decision, I find that the tenants' belongings should be left within the rental unit or, if another arrangement is made between the parties, the tenants' belongings should be stored and returned in accordance with the requirements of the *Act*.

As the tenants have been partially successful in this application, I find the tenants are entitled to recover the \$100.00 filing fee from the landlords.

Conclusion

The tenancy shall continue on a month to month basis. I order that the landlords allow the tenants' access to their rental unit.

I issue a monetary order in the amount of \$100.00 to the tenants.

The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I dismiss with leave to amend the tenants' application to include a monetary order with leave to reapply.

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: September 27, 2016

Residential Tenancy Branch