Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding GREATER VANCOUVER REGIONAL DISTRICT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPB, MNDC, FF

Introduction

The landlord applies for an order of possession pursuant to the terms of the tenancy agreement and for a monetary award under an overholding clause in the tenancy agreement.

Both parties attended the hearing, the landlord by its legal counsel and representatives, and 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

Has this tenancy ended, entitling the landlord to an order of possession? Is the landlord entitled to a monetary award under the overholding clause?

Background and Evidence

The rental unit is a cabin or cottage in a park under the authority of the applicant, a local government.

The tenant was employed by the landlord as a caretaker, either as a contractor or employee (that question appears to be in dispute in another forum) for a two year term ending December 31, 2016.

By a separate agreement called a “Caretaker Tenancy Agreement” the tenant rented the cottage for a fixed term of two years ending December 31, 2016 at a rent of $1200.00 per month. The agreement provides that the tenant must vacate the rental unit at the end of the term.

In September 2016 the landlord sent the tenant a letter under the hand of Mr. T. McC., dated September 22, informing him that his tenancy would be terminated as per the tenancy agreement on December 31, 2016. The letter proposed a walk through inspection for the afternoon of December 31.

The tenant did not vacate on December 31. He says that in October he had asked for an extension of his tenancy past December but received no confirmation. He wrote to the landlord again and was directed back to Mr. McC.

He says that when Mr. McC. came to conduct the move-out inspection they agreed he would stay on as a tenant, at a rent of $1200.00. He produces a document written and signed by him and initialled by Mr. McC. which he says corroborates the agreement. The document reads:

I M.C. [*tenant’s name redacted*] agree to maintain [*the cottage*] and grounds in [*the park*] in the current state. I have offered to pay rent of $1200.00 + $100 as a security deposit to [*Mr. McC.*].

It is the tenant’s view that he now has a continuing tenancy as the result of this note.

Mr. McC. testifies that when he attended at the premises with the tenant on December 31 the tenant indicated he would not be moving out. The tenant offered him a cheque for January rent but it was refused. He says that the tenant’s October request for an extension had also been refused in a responding letter. He says that the tenant’s handwritten document of December 31 was the tenant’s offer to stay and that he had made it clear he did not accept the tenant’s offer.

Regarding the landlord’s monetary claim, its counsel points to clause 17(b) of the tenancy agreement, which provides:

If the tenant remains in possession of the Rental Unit after the end of the tenancy, then the tenant agrees to pay the Landlord an amount equal to 3 times the rent for any period of time in which the Tenant remains in possession of the Rental Unit as an overholding tenant.

The landlord claims $3600.00 pursuant to this clause, for the tenant overholding the premises in January 2017.

The tenant says it is a punitive amount.

Analysis

Has This Tenancy Ended?

Section 48(1) of the *Residential Tenancy Act* (the "*Act*") deals with the ending of a caretaker's tenancy. It states:

48 (1) A landlord may end the tenancy of a person employed as a caretaker, manager or superintendent of the residential property of which the rental unit is a part by giving notice to end the tenancy if

(a) the rental unit was rented or provided to the tenant for the term of his or her employment,
(b) the tenant's employment as a caretaker, manager or superintendent is ended, and
(c) the landlord intends in good faith to rent or provide the rental unit to a new caretaker, manager or superintendent.

The *Act* also deals with ending a fixed term tenancy. Section 44(1)(b) provides:

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;

Where, as here, the tenant is both a) a caretaker who has been provided with a rental unit for term of his employment, and b) a tenant under a fixed term tenancy that requires him to vacate at the end of the tenancy, the *Act* gives no priority to which method a landlord must or might rely on.

In my view the landlord in this case is free to rely on either of ss. 48(1)(b) or 44(1) to assert that a tenancy has ended. Its choice of s. 44(1) is a valid and lawful one.

After a consideration of all the evidence I am unable to agree with the tenant that the parties agreed to extend the tenancy past its December end.

The tenant's request for an extension in October, was, obliquely, declined by the landlord's response email of October 25.

Mr. McC. was at the premises on December 31 to conduct the move out inspection, without the forethought of negotiating an extension. I consider it unlikely that he would,

then and there, commit to a continuation of the tenancy given the formalism of local government.

The handwritten December 31 document itself is in the form of an “offer” not an agreement. I accept Mr. McC.’s evidence that he initialed the document at the tenant’s request as an acknowledgement that the offer had been made and not to acknowledge an acceptance of the offer by the landlord and that he told the tenant so at that time.

In result, the tenant has not established that a tenancy continued past the effective end dated of the fixed term tenancy. This tenancy ended December 31, 2016 and the tenant was obliged to vacate. As he has not, the landlord is entitled to an order of possession.

The Overholding Charge

An overholding tenant is one who is in breach of his obligation to offer up the premises to his landlord at the end of the term. A landlord is entitled to claim damages resulting from that breach. Quite often damages are seen as “occupation rent” or “loss of rental income.” In commercial tenancies, by statute, a tenant must pay double rent for overholding.

The landlord here relies on a clause in the tenancy agreement that stipulates the tenant must pay triple rent for overholding. In my view the clause is a liquidated damages clause and is invalid because it is a penalty, as the tenant claims.

Residential Tenancy Policy Guideline 4, “Liquidated Damages” provides a useful background. It indicates, among other things:

> A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

It is not reasonable that triple the amount of rent could be seen as a "genuine pre-estimate of the loss" for the tenant's overholding. It is an extravagant amount and a penalty. Clause 17(b) of the tenancy is unenforceable.

The landlord has not offered proof of actual damages resulting from the tenant's overholding, however, in this case the damages are obvious and I award the landlord the amount of $1200.00 for occupation rent for the month the January 2017.

Conclusion

The landlord's application for an order of possession is allowed.

The landlord is entitled to a monetary award of $1200.00, plus recovery of the $100.00 filing fee. It holds no deposit money to apply in reduction of the award and so the landlord will have a monetary order against the tenant in the amount of $1300.00.

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: February 20, 2017

Residential Tenancy Branch