Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, O, FF

Introduction

The tenant applies to recover a $2400.00 security deposit and a $300.00 pet damage deposit, claiming that his fixed term tenancy ended in November 2016.

The landlord takes the position that the tenancy did not end until the end of the fixed term August 8, 2017, that the landlord has made his own application to keep the deposit money, and so the tenant is not entitled to its return at this time.

Both parties attended the hearing 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

When did this tenancy end? Is the landlord obliged to account for the deposit money?

Background and Evidence

The rental unit is a three bedroom home. The tenancy started August 8, 2016. There is a written tenancy agreement indicating that the tenancy is for a fixed term ending August 8, 2017. At hearing the tenant implied that the fixed term was a term imposed on him by the landlord, however he acknowledged that his tenancy was for the fixed term.

The monthly rent was $2400.00, due on the 8th of each month, in advance. The landlord holds a $2400.00 security deposit and a $300.00 pet damage deposit.

Shortly into the tenancy the tenant and his wife found a house they wished to purchase. In early October they gave the landlord an email notice that they would like to move out November 22, offering to pay a half month's rent (November 8 to December 8 being the full month).

The landlord responded that he would advertise for new tenants and that the tenant "would be responsible for costs associated with the break of the lease."

On October 13 the tenants wrote (emailed) again about the half month's rent proposal and about an error in the landlord's add. The landlord responded but did not comment on the half month's rent proposal, saying "lets [*sic*] see what happens."

In late October the tenant introduced a prospective purchaser to the landlord. It would appear that discussions between them advanced to the stage of an agreement for purchase and sale of the rental unit, subject to the purchaser obtaining mortgage approval. The purchaser was not able to obtain the necessary approval and the purchase and sale did not complete.

On November 1, the landlord emailed the tenant that "no suitable renter has shown up" but that he was optimistic.

On November 10 the landlord emailed the tenant an update informing him that he did not yet "have a tenant to sublease the house from you" but that he would continue to advertise.

On November 15 the landlord emailed the tenant, acknowledging payment for rent up to November 22 and stating: "We still have no tenant to sublet from you."

The tenant moved out November 16. A move-out inspection was conducted by the parties. The tenant provided the landlord with a forwarding address in writing at that time.

On December 13 the tenant emailed the landlord requesting return of his deposit money. The landlord responded pointing out that it was a one year lease, the tenant was responsible "to pay the lease" and if "we sublease it I will credit what we get paid against your lease.'

In response the tenant pointed out that someone else was living in the home. The landlord replied that he had rented out the home on a month to month basis on December 1 for a rent of $1800.00, causing a monthly rent shortfall of $600.00

The tenant responded to this information saying he had checked the law and his obligation to the landlord had ceased.

The tenant brought this application on December 19, 2016. A hearing was held on June 15, 2017. The landlord did not attend that hearing and, by a decision dated June 18, the arbitrator awarded the tenant return of the deposit money, doubled pursuant to s. 38 of the *Residential Tenancy Act* (the "*Act*").

The landlord successfully applied for review of that decision and the matter was reset, resulting in this hearing.

On August 9, 2017, a day after the end of the fixed term in the tenancy agreement, the landlord made an application to recover unpaid rent and to keep the deposit money to offset against any award. That hearing is scheduled for February 6, 2018.

At the start of this hearing counsel for the landlord requested an adjournment of this matter to February 6, 2018 and that it be heard together with the landlord's application on that date. The request was denied. It was determined that if the tenant proves he was entitled to his deposit money back in November 2016, he should not have to wait until February 2018 to recover it.

Analysis

The act of a tenant purporting to end a fixed term tenancy before the end of that term is a fundamental breach of the tenancy agreement. Under the law relating to property it is referred to as a "surrender" of the lease. Under the law relating to contracts it is called a "repudiation" or, sometimes, a "rescission" of the agreement. Repudiation has become the common term.

The *Act* does not give direction in these circumstances. Section 91 of the *Act* indicates that the common law therefore governs the situation.

The common law regarding the repudiation of a lease was expanded an restated by the Supreme Court of Canada in the 1971 decision in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] SCR 562, 1971 CanLII 123 (SCC). The Court set out a landlord's four remedies in the event of a repudiation by a tenant. Laskin, J. (as he then was) stated:

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis. Counsel for the appellant, in effect, suggests a fourth alternative, namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term.

The Court accepted the suggested fourth remedy as an addition to the prior three.

In brief, at common law a landlord facing repudiation of the lease may either accept the repudiation or not accept it.

If he accepts the repudiation, the lease is terminated and he may either sue the tenant for rent and damages due to the date of termination or, with notice to the tenant, he may claim damages for the loss of rent over the term of the lease.

If the landlord does not accept the termination, he may do nothing and simply sue the tenant for the rent as it comes due over the term of the lease, or, he may, with notice to the tenant, re-let the premises on the tenant's behalf. If the landlord makes this election, that is; not to accept the termination, then the tenancy ends at its contractual end date.

Nowadays the landlord's remedies to sublet for the tenant and claim any deficiency over the term of the lease or to accept the end of the tenancy with notice that the tenant will be responsible for any shortfall in rent over the term, are virtually the same remedy.

However, the landlord's election is of relevance to this application because the tenant is seeking recovery of his deposit money and, under the *Act*, the landlord is not obliged to account to the tenant for that money until the end of the tenancy (s. 38(1) of the *Act*). If the landlord is found to have accepted the tenant's repudiation, then the tenancy ended in November 2016. If the landlord did not accept the repudiation but maintained the lease, then the tenancy would not have ended until August 8, 2017.

In the first case the landlord's obligation to account to the tenant for the deposit arises in November 2016. In the second, his obligation only arises after August 8, 2017 and he has made an application for dispute resolution in accordance with s. 38, thus suspending his obligation to account for the deposit money.

Though the *Act* does not set out the law to be applied in the event of repudiation, Residential Tenancy Policy Guideline 3, "Claims for Rent and Damages for Loss of Rent" speaks to the question. The relevant portion of the Guideline states:

> Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:
>
> 1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
> 2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

> These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the *Act* or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.

The wording of this Guideline is not as exact as it could be. It begins by stating that the landlord facing a fundamental breach (a repudiation by the tenant) has two options, both or which involve the landlord accepting the repudiation. However, it is clear that the common law gives a landlord two other options resulting from his non-acceptance of the repudiation. The Guideline appears to correct itself by stating that "these principles apply to … cases where the landlord has elected to end the tenancy …."

In result .the Guideline offers only a partial outline of the remedies available to a landlord at common law.

In this case, the correspondence between the parties makes it clear that the landlord was not accepting the tenant's repudiation. While the landlord's email of October 10 is perhaps ambiguous, stating "you will be responsible for the costs associated with the break of the lease" the emails of November 10 and 15 are clear; the landlord is proposing to lease the premises on the tenant's behalf. The landlord's election to maintain the lease and notice of his intention to sublet on the tenant's behalf was made known to the tenant before the tenant left.

The tenant's argument that he could not sublet without the permission of the landlord is without merit. It was the landlord himself who determined the subtenant.

I find that the tenancy did not end with the tenant's departure from the home in November 2016.

It can happen that after an unaccepted repudiation and after the tenant leaves, the landlord does an act that is inconsistent with the continuing tenancy and by that act is taken to have accepted the tenant's repudiation.

After the tenant in this case gave his notice but before this application was brought, the landlord negotiated for the sale of the home. Had he conveyed the property to the prospective purchaser, in my view, and having regard to s. 93 of the *Act,* the new owner would have stepped into the landlord's shoes in the lease and it would have continued. The sale efforts were not an acceptance of the tenant's repudiation. Of course, had that new owner wanted to move in himself and arranged that the landlord to issue a two month Notice to End Tenancy under s. 49(5) of the *Act*, I consider such an act would have been an acceptance of the tenant's repudiation.

Had the landlord passed to a new tenant an interest greater than or inconsistent with the applicant tenant's interest, for example, had he granted a fixed term tenancy past August 8,

2017, then this tenancy would have ended because the landlord had granted a right greater than the tenant's, thus eliminating the tenant's interest. However, the landlord appears to have rented out the home on a month to month basis in December 2016.

The tenant indicated that after he vacated, the landlord had entered the home to conduct repairs, or perhaps renovations. It was not clear when this work was done. The extent of the work was not described in any detail sufficient to permit a conclusion that the landlord's entry and use of the property was inconsistent with the tenant's continued tenancy. I find that this work did not indicated the landlord's acceptance of the tenant's repudiation.

The tenant's application for return of his deposit money was made December 19, 2016. His application is predicated on the proposition that as of that date he was entitled to the return of his deposit money, in other words: that the tenancy had ended by then.. It is my finding that the tenancy had not ended by that date. It has not been shown in this proceeding that the landlord had by word or by act inconsistent with the tenancy accepted the tenant's repudiation as of December 19, 2016.

The tenant's application must therefore be dismissed.

In my view, if after December 19, 2016, the landlord has by some word or act inconsistent with the continuation of this tenancy, accepted the tenant's repudiation then tenant is free to raise that argument and lead evidence to that effect either in another application or at the hearing of the landlord's application in February 2016.

The cases have noted many ways by which a landlord has been held to have accepted a tenant's repudiation, for example: conversion of the premises to another use, trespass by the landlord, extensive renovation, renting out beyond the tenant's term (*see* generally: *Goldhar v. Universal Sections and Mouldings Ltd*., 1962 CanLII 116 (ON CA), (overruled on other grounds by *Highway Properties (above*)) and cases cited therein),

The arbitrator assigned to February 2018 hearing will also be charged with the return or crediting of the tenant's deposit money against any award the landlord may achieve.. On the evidence she may determine if the tenant's repudiation was accepted by the landlord's word or act after the December 19, 2016 application but earlier than August 8, 2017. If the facts warrant it, that arbitrator may also determine and apply the doubling penalty provided for in s. 38 of the *Act* (see Residential Tenancy Policy Guideline 17, "Security Deposit and Set off [*sic*]).

It should be noted that I agree with the tenant that he has been misguided by reference to the Residential Tenancy Branch website. In determining his options about repudiating the fixed term tenancy agreement, the tenant referred to the website area "Ending a Tenancy" and its sub-categories; "Tenants Leaving Without Proper Notice" and "Leaving Before the End of a Fixed Term Tenancy." Neither category deals with the outcome of a landlord not accepting the

tenant's repudiation, nor does there appear to be any reference to Residential Tenancy Policy Guideline 3 (*above*).

The words found in the Residential Tenancy Branch website are not the law and are not binding on an arbitrator. They cannot serve the tenant as a defence against the effect of the *Act* or the common law.

Conclusion

The application is 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: October 23, 2017

Residential Tenancy Branch