



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding COAST MENTAL HEALTH
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC OPT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- an Order of Possession of the rental unit pursuant to section 54.

AW appeared on behalf of the landlord in this hearing, and had full authority to do so. Both parties were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord confirmed receipt of the tenant's application for dispute resolution ('applications'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenant's application. As both parties confirmed receipt of each other's evidentiary materials, I find that these documents were duly served in accordance with section 88 of the *Act*.

Issue(s) to be Decided

Does the tenant's application fall within the provisions of the *Act*?

Is the tenant entitled to an Order of Possession?

Is the tenant entitled to an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

This tenancy began on March 15, 2018. The monthly rent is \$425.00 payable on the first of the month. Both parties confirmed that the tenant pays an additional \$35.00 a month for a meal plan.

The tenant has received letters from the landlord ending the tenancy after the landlord determined the tenant has failed to abide by the expectations of this tenancy. No Notices to End Tenancy have been issued to the tenant as the landlord's agent testified that this accommodation falls under the definition of transitional housing, and therefore does not fall within the jurisdiction of the *Act*.

A copy of the Program Agreement was submitted in evidence which reads "*The Residential Tenancy Act (or successor legislation) does not apply to this Agreement. If any provision in the Agreement is found by court to be invalid or unenforceable, that provision will be severed from this Agreement and the remainder remains in full force and effect*".

The landlord testified that the tenant is provided meals and medication as part of the agreement. The tenant has the option to participate in voluntary group and community based programs. The tenant testified that he has never been offered any programming.

The tenant is requesting an Order of Possession as he fears that the landlord will end the tenancy and change the locks without issuing the tenant any formal notices to end tenancy. The tenant is requesting that the landlord comply with the *Act* as he feels that this tenancy falls under the jurisdiction of the *Act*.

The landlord's agent testified in the hearing that they do not plan on changing the locks as every occupant is given assistance in finding new housing. The landlord's agent provided assurance that the tenant would not be homeless, although the new housing may not be to the tenant's liking.

Issue: Does this Application Fall Within the Jurisdiction of the Act?

Section 4(f) of the *Act* provides that the *Act* does not apply to living accommodations provided for transitional housing. The *Residential Tenancy Regulation* defines transitional housing in section 1(2) as accommodations that are provided:

- (a) on a temporary basis,

- (b) by a person or organization that receives funding from a local government or the government of British Columbia or of Canada for the purpose of providing that accommodation, and
- (c) together with programs intended to assist tenants to become better able to live independently.

Based on the above definition, I am not at all satisfied with the landlord's explanation as to how the current tenancy could be described as transitional. Despite the fact that programming is available to the tenant, the tenant gave undisputed sworn testimony that he has not received any programming. It was also undisputed that these programs are voluntary, and the decision to participate or not have no implications for the tenant's residency there.

The Agreement simply states that the program ends when the landlord decides to end the agreement, or with 30 days' notice from the tenant. There does not appear to be any plan in place whereby the tenant is to transition to a more independent form of living.

The agreement signed by both parties includes a clause that the *Residential Tenancy Act* does not apply to this agreement.

The *Residential Tenancy Act* provides by section 5 that:

This Act cannot be avoided

- 5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
- (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 (3) provides:

- (3) A term of a tenancy agreement is not enforceable if
 - (a) the term is inconsistent with this Act or the regulations,
 - (b) the term is unconscionable, or
 - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 3 of the Residential Tenancy Regulation gives the following definition of "unconscionable":

3 For the purposes of section 6 (3) (b) of the Act [*unenforceable term*], a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

Although the tenant signed the Agreement, I find that he did so without a clear understanding that by signing, he was surrendering the rights afforded to him under the Act.

In *Murray v. Affordable Homes Inc.*, 2007 BCSC 1428, the Honourable Madam Justice Brown set out the necessary elements to prove that a bargain is unconscionable. She said at p. 15:

Unconscionability

[28] An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. (***Fountain v. Katona***, 2007 BCSC 441, at para. 9). To prove that the bargain was unconscionable, the complaining party must show:

- (a) an inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which leaves that party in the power of the stronger; and
- (b) proof of substantial unfairness of the bargain obtained by the stronger.

Morrison v. Coast Finance Ltd. (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 (B.C.C.A.).

[29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (***Warman v. Adams***, 2004 BCSC 1305, [2004] 17 C.C.L.I. (4th) 123 at para. 7).

[30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the

presumption by providing evidence that the bargain was fair, just and reasonable. (**Morrison**, at 713).

[31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain (**Warman** at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in **Morrison** has also been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (**Harry v. Kreutziger** (1978), 95 D.L.R. (3d) 231 at 241, 9 B.C.L.R. 166.)

I find that the requirement of the tenant to forfeit his rights under the *Act* as part of the Agreement is unconscionable within the meaning of the Regulation. I find that there is an inequality of bargaining power between the tenant and the landlord in circumstances where the tenant, who is either homeless or facing potential homelessness, had little alternative but to accept the agreement in exchange for housing.

Based on the evidence provided to me by the parties, I find that this tenancy remains within the *Act* and does not constitute transitional housing. I find that the term of the Agreement that denies the tenant's rights under the *Act* is unconscionable. In this case, I am not satisfied that the landlord has provided sufficient evidence to demonstrate that the features of this tenancy are "transitional housing" and thus outside my jurisdiction as per section 4(f) of the *Act*.

Analysis: Application for an Order of Possession and Order for Landlord to Comply with the Act

The tenant requested an Order of Possession for the rental unit as he has been sent letters by the landlord indicating that the tenancy has ended. It was undisputed by both parties that the landlord has not been served with any Notices to End Tenancy which comply with section 52 of the *Act*, which states that the Notice must: be in writing and must: (a) be signed and dated by the landlord or tenant giving the notice, (b) give the address of the rental unit, (c) state the effective date of the notice, (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy, and (e) when given by a landlord, be in the approved form.

As the tenancy has not ended in accordance with the *Act*, as the landlord has not changed the locks, and as the tenant is still in possession of his rental unit, I dismiss the tenant's application for an Order of Possession with leave to reapply.

I do not find that the landlord had failed to comply with the *Act*, and therefore I also dismiss the tenant's application for the landlord to comply with the *Act*. As stated above, I find that this tenancy does fall within the jurisdiction of the *Act*, and therefore both parties are bound by the terms and obligations as stated in the *Act*. This tenancy will continue until ended in accordance with the *Act*.

Conclusion

I find that this tenancy is covered under the *Act*.

The tenant's application for an Order of Possession and an Order for the Landlord to Comply with the *Act* are dismissed 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 13, 2018

Residential Tenancy Branch