Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

matter regarding DESTERRE SENIORS CITIZENS SOCIETY and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNQ

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on January 28, 2019, wherein the Tenant sought to cancel a 2 Month Notice to End Tenancy Because the Tenant Does Not Qualify for Subsidized Housing, issued on January 7, 2019.

The hearing was scheduled for teleconference at 9:30 a.m. on March 14, 2019. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. Both parties were represented by legal counsel at the hearing.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The parties confirmed their email addresses during the hearing. The parties further confirmed their understanding that this Decision would be emailed to both parties and that any applicable Orders would be emailed to the appropriate party.

Issue to be Decided

1. Should the Notice be cancelled?

Background and Evidence

Residential Tenancy Branch Rules of Procedure—Rule 6.6 provides that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenant applied for dispute resolution and is the Applicant, the Landlord presented their evidence first.

The Landlord seeks to end the tenancy on the basis that the Tenant does not qualify for housing due to her age.

Introduced in evidence was a copy of the residential tenancy agreement signed February 27, 2012. Monthly rent at the time the tenancy began was $310.00.

The Landlord's Administrator, A.J. testified on behalf of the Landlord as follows. She confirmed that the Tenant's rent has not increased during her tenancy and that her current rent is $310.00 per month.

A.J. stated that the housing complex (comprised of 46 units in two separate buildings) is for seniors, and the Tenant does not meet the age requirement. She stated that when the Tenant moved into the rental unit she was only 39 years old. She further stated that there is one other tenant who does not meet the age requirements in the complex.

A.J. testified that a "new board took over in February of 2018" and had to "fix many issues".

A.J. stated that the property was originally designated for persons who were 65 years and older, and that at some point, in the 1990's, they brought the age requirement down to 55 years old if those persons also had disabilities.

A.J. testified that the Landlord is unable to operate the business with rental income alone and are seeking funding through B.C. Housing. A.J. stated that Landlord previously received funding from B.C. Housing until approximately two years ago, just before the current Landlord/Society took over. She further confirmed that currently the property is not funded by B.C. Housing, and the hope is that it will be funded as of April 1, 2019.

A.J. testified that the Society's constitution and bylaws limits the age of the tenants in this housing complex. Introduced in evidence by the Landlord was the first page of the Constitution, which A.J. stated was the Constitution as of November 2018. A complete copy of the Constitution was not before me.

A.J. claimed that there are six pages to the "Original Constitution" and five pages of Bylaws. The Original Constitution was also not in evidence, nor were the bylaws. A.J. confirmed that she did not have the Original Constitution in front of her and had to pull it off a computer (which she did during the hearing) and stated that the Original Constitution is dated in 1970.

A.J. could not give any evidence with respect to the circumstances of this tenancy agreement as she was not involved at the time. She further confirmed that the board which is presently sitting was also not involved.

The Landlord also provided in evidence a copy of the "BC Housing Link" dated 2001 as well as one from 2019. This document lists the property in which the rental unit is located as for persons over the age of 65 years old or 55 years old if they are also disabled.

A.J. claimed that "just because their agreement ran out, doesn't change what they can do with the housing, or who they can house".

In response to the Landlord's submission the Tenant testified as follows. She confirmed that she has lived in this property since February 2012. She further confirmed that she moved into the property when she was 39 years old. The Tenant testified that she did not tell the Landlord that she was a senior, and while they may claim they did not know her exact age, they would have known that there was no possible way she could be 55 years old.

The Tenant confirmed that at the time the tenancy began she had a conversation with the Landlord's representative, M.W., who was the building manager. She testified that she was not informed that she had to be a senior, or an "adult" as defined by the tenancy agreement, as the Landlord was prepared to let that requirement go. The Tenant further testified that M.W. told her that if she got into this building, she no longer had to worry about housing.

The Tenant stated that at no time prior to February 2018 did anyone tell her that she was too young to live in the building. She also stated that the first time she heard there was an issue about her age was in June of 2018.

The Tenant stated that to her knowledge, her application for tenancy was based on her disability and income. She stated that she has Cerebral Palsy and she receives Canada Pension Disability Benefits. The Tenant further confirmed that the Landlord has not asked for proof of her income during this tenancy.

Counsel for the Tenant submitted that it is the Tenant's position that the Landlord was not able to issue a 2 Month Notice to End Tenancy pursuant to section 49.1, as the Landlord is not a "public housing body" as defined by the *Act* or prescribed in the *Regulations,* nor is the rental unit a "subsidized rental unit" as defined in section 49.1. He further stated that the main crux of the Tenant's argument is that the tenancy is not covered by section 49.1 and if it is, the Landlord is estopped from relying on the strict terms of the tenancy agreement.

Counsel further submitted that there is no evidence that the rental unit meets the definition of "subsidized rental unit" as set out in section 49.1(1)(b) as the Tenant did not have to provide proof of eligibility at the time she moved into the rental unit. As the rental unit does not qualify as a "subsidized rental unit" the Landlord may not give notice to end the tenancy pursuant to section 49.1(2).

Counsel also submitted that there is nothing in the tenancy agreement which provides that the Landlord may end the tenancy if the Tenant ceases to qualify, except the income requirements in clause 8 of the tenancy agreement. As such, there is a clause which exists, but it not with respect to age.

Counsel also submitted that the Landlord hasn't complied with 49.1, or rather is unable to comply as the housing does meet the definition of public housing body, or subsidized housing and there is no section in the tenancy agreement which deals with age.

Finally, Counsel submitted that if the Tenant is wrong, and the Landlord has properly relied on section 49.1, they should be estopped form relying on the clause which restricts age.
In reply to the Tenant's testimony and counsel's submissions, A.J. stated that the Tenant did in fact have to provide her income regularly to show she qualified for housing.

A.J. also stated that the Landlord does meet the definition of “public housing body”, although she did not expand on how was the case.

Analysis

After consideration of the testimony and evidence before me, the submissions of the parties and on a balance of probabilities I find as follows.

As noted previously, the Landlord bears the burden of proving the reasons for ending the tenancy.

Counsel for the Tenant aptly submitted that to issue a notice pursuant to section 49.1 of the *Residential Tenancy Act*, the rental unit must be a “subsidized rental unit” as defined.

To meet the definition, a *subsidized rental unit* must be operated by a “public housing body”, which is also defined in section 49.1. For clarity, I reproduce the entirety of section 49.1 of the *Act* as follows:

> **Landlord's notice: tenant ceases to qualify for rental unit**
>
> **49.1** (1) In this section:
>
> **"public housing body"** means a prescribed person or organization;
>
> **"subsidized rental unit"** means a rental unit that is
>
> (a) operated by a public housing body, or on behalf of a public housing body, and
>
> (b) occupied by a tenant who was required to demonstrate that the tenant, or another proposed occupant, met eligibility criteria related to income, number of occupants, health or other similar criteria before entering into the tenancy agreement in relation to the rental unit.
>
> (2) Subject to section 50 *[tenant may end tenancy early]* and if provided for in the tenancy agreement, a landlord may end the tenancy of a subsidized rental unit by giving notice to end the tenancy if the tenant or other occupant, as applicable, ceases to qualify for the rental unit.
>
> (3) Unless the tenant agrees in writing to an earlier date, a notice under this section must end the tenancy on a date that is
>
> (a) not earlier than 2 months after the date the notice is received,

(b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, and

(c) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.

(4) A notice under this section must comply with section 52.

(5) A tenant may dispute a notice under this section by making an application for dispute resolution within 15 days after the date the tenant receives the notice.

(6) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (5), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit by that date.

The reference to “prescribed” in the definition of “public housing body” above refers to section 3.1 of the *Regulations* which must also be read in conjunction with section 2 of the *Regulations* and which both read as follows:

Public housing bodies

3.1 The persons and organizations set out in section 2 (a) to (g) of this regulation are prescribed as public housing bodies for the purposes of section 49.1 of the Act.

Exemptions from the Act

2 Rental units operated by the following are exempt from the requirements of sections 34 (2), 41, 42 and 43 of the Act *[assignment and subletting, rent increases]* if the rent of the units is related to the tenant's income:

(a) the British Columbia Housing Management Commission;

(b) the Canada Mortgage and Housing Corporation;

(c) the City of Vancouver;

(d) the City of Vancouver Public Housing Corporation;

(e) Metro Vancouver Housing Corporation;

(f) the Capital Region Housing Corporation;

> (g) any housing society or non-profit municipal housing corporation that has an agreement regarding the operation of residential property with the following:
>
> (i) the government of British Columbia;
>
> (ii) the British Columbia Housing Management Commission;
>
> (iii) the Canada Mortgage and Housing Corporation;
>
> (iv) a municipality;
>
> (v) a regional district;
>
> (h) any housing society or non-profit municipal housing corporation that previously had an agreement regarding the operation of residential property with a person or body listed in paragraph (g), if the agreement expired and was not renewed.
>
> [am. B.C. Regs. 249/2008; 278/2016, Sch. s. 2.]

As clearly noted in section 3.1, subsection 2(h) is specifically excluded such that housing societies, or non-profit municipal housing corporations, with *expired* agreements are not *prescribed* for the purposes of section 3.1 of the *Regulations* and in turn, 49.1 of the *Act*.

The Landlord's representative testified that the Society's agreement with B.C. Housing expired two years ago. While efforts are being made to enter into a further agreement, currently the Society's agreement has expired and is not renewed. As such, I find the Landlord is not currently a "public housing body" as defined in the *Act* and prescribed in the *Regulations.*

Although I have reproduced all of section 49.1 above, I reiterate that section 49.1(2) only applies to "subsidized rental units" as clearly provided for in that section:

> (2) Subject to section 50 *[tenant may end tenancy early]* and if provided for in the tenancy agreement, a landlord may end the tenancy of a ***subsidized rental unit*** by giving notice to end the tenancy if the tenant or other occupant, as applicable, ceases to qualify for the rental unit.
>
> [emphasis added in ***bold italics***]

Whether the rental unit meets the definition of "subsidized rental unit" as set out in section 49.1(1)(b) is contingent on a finding that the Landlord is a public housing body; as I have found the Landlord does not meet this definition I also find the rental unit is not a "subsidized rental unit" as defined in section 49.1 of the *Act.*

Section 49.1 *only* applies to subsidized rental units. As the rental unit does not meet the definition of a "subsidized rental unit" the Landlord may not give notice to end the tenancy pursuant to section 49.1(2). **Based on these findings alone I find the Notice to be invalid.**

However, even in the event I had found the Landlord met the definition of *public housing body*, and the rental unit met the definition of *subsidized rental unit,* I find the Notice is invalid pursuant to section 49.1(2) as the tenancy agreement does not authorize the Landlord to end the tenancy if the tenant ceases to meet the age requirement. Again, I reproduce section 49.1(2) which provides that such an event must be specifically provided for in the tenancy agreement:

> (2) Subject to section 50 *[tenant may end tenancy early]* ***and if provided for in the tenancy agreement***, a landlord may end the tenancy of a subsidized rental unit by giving notice to end the tenancy if the tenant or other occupant, as applicable, ceases to qualify for the rental unit.
>
> [emphasis added in ***bold italics***]

I accept the Tenant's evidence that she may have provided proof of her income when she applied for tenancy, but that she has not been asked for proof of her income since. In any case, this is not the reason the Landlord seeks to end her tenancy. Rather, the Landlord claims the Tenant does not qualify due to her *age*.

There is nothing in the tenancy agreement which provides that the Landlord may end the tenancy if the Tenant "ceases to qualify", except the income requirements in clause 8 of the tenancy agreement which reads:

> ***8. Declaration of Income:***
>
> *The tenant agrees from time to time as required by the landlord, on a form provided by the landlord to declare the number of tenants and occupants in the premises and their gross income and assets. Failure by the tenant to make a declaration as required by the landlord or to provide or cause to be provided such information or documentation as is requested by the landlord shall be cause for termination of this tenancy agreement.*

As such, while such a clause exists it does not apply to age.

The Application provided by the Tenant when she applied for tenancy required that she indicate her date of birth. That Application was provided in evidence before me and clearly notes her year of birth as 1972. As such, the Landlord was aware of her age at the time she applied.

Which brings me to the third reason the Notice is invalid pursuant to section 49.1(2); again I reproduce section 49.1(2):

> (2) Subject to section 50 *[tenant may end tenancy early]* and if provided for in the tenancy agreement, a landlord may end the tenancy of a subsidized rental unit by giving notice to end the tenancy if the tenant or other occupant, as applicable, ***ceases to qualify*** for the rental unit.
>
> [emphasis added in ***bold italics***]

Although entire industries exist to prevent and reverse the signs of aging, it is inevitable that people get older, not younger. In this case, it is simply impossible that the Tenant "ceased" to meet the age requirement set forth in the tenancy agreement, as she did not meet the age requirement when she first applied for housing seven years ago.

While the Landlord's intention to provide subsidized housing for those in need is commendable, and I have heard their concerns regarding their Application process if they allow this tenancy to continue, the *Act* requires that I determine whether *this tenancy* should end for the *reasons* indicated in the *Notice*.

For the reasons detailed above, I find the Landlord has failed to prove the tenancy should end pursuant to section 49.1 of the *Residential Tenancy Act.* The Tenant's Application to cancel the Notice is hereby granted. The tenancy shall continue until ended in accordance with the *Act.*

Although I have cancelled the Notice for the reasons cited above, I will briefly deal with the issue of *estoppel* as it relates to this case.

The evidence confirms that the Tenant informed the Landlord of her age at the time she entered into the tenancy agreement. I accept her testimony that she was honest with the Landlord at the time that she was only 39 years old and therefore did not meet the definition of "Adult" as provided for in the tenancy agreement.

I also accept the Tenant's evidence that the prior Landlord informed her that they did not expect strict compliance with the clauses relating to age in the residential tenancy agreement, and that this was not raised as an issue until 2018, sometime after the current management took over. Materials submitted by the Landlord confirm they were aware of prior management's relaxed approach to the age requirement as they write:

> *"In the past we have had high vacancy rates and the management or board at the time, has housed persons what do not meet the minimum qualifications. This should never have happened and the units should have remained empty, or the tenants that were*

> *allowed to live in the units, should have been informed that their tenancy could be needed at any time if someone who meets the minimum requirements is in need of housing."*

In this same letter, the Landlord writes that comparable housing in a "disabled unit" operated by another Society might be available to the Tenant at a cost of $700.00 per month. While this is presumably considerably lower that market rent, it is more than double the $310.00 the Tenant currently pays.

In the 2005 Supreme Court of Canada decision, *Ryan v. Moore,* 2005 2 S.C.R. 53, the court explained the issue of estoppel by convention as follows:

> 59 …. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:
>
> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

Applying the foregoing, I find as follows:

(1) The Landlord, having permitted the Tenant to reside in the rental unit since 2012, despite not meeting the age requirements, created a mutual assumption upon which the Tenant relied.

(2) The Tenant relied on this shared assumption, remained in the rental unit, and did not seek alternate housing (such as subsidized or low income housing for persons with disabilities).

(3) It would be unjust and unfair to allow the Landlord to resile or depart from the common assumption that the Tenant's age would not disqualify her for housing, and rely on the strict terms of the tenancy agreement. Housing costs have increased dramatically since the tenancy began in 2012 and to end this tenancy would create a considerable hardship for this Tenant.

As such, even in the event I had found the Notice complied with section 49.1 of the *Act* I would have cancelled the Notice as I find the Landlord is estopped from relying on the strict wording of the tenancy agreement as it relates to age.

Conclusion

The Notice is cancelled. The tenancy shall continue until ended in accordance with the *Residential Tenancy Act.*

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: March 20, 2019

Residential Tenancy Branch