



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ABC Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL, OLC, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution, made on January 12, 2020 (the "Application"). The Tenant applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- an order to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") dated January 11, 2020;
- an order that the Landlord comply with the *Act*, tenancy agreement or regulation; and
- an order granting the return of the filing fee.

The Tenant, the Landlord K.D, the Landlord's Representative S.D., and the Landlord's Agent E.P. attended the hearing at the appointed date and time.

At the beginning of the hearing, the parties acknowledged service and receipt of their application package and documentary evidence packages. No issues were raised with respect to service or receipt of these documents during the hearing. Pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

I note that Section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

The parties were given an opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Is the Tenant entitled to an order to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") dated January 11, 2020, pursuant to Section 49 of the *Act*?
2. Is the Tenant entitled to an order that the Landlord comply with the *Act*, tenancy agreement or regulation, pursuant to Section 62 of the *Act*?
3. Is the Tenant entitled to the return of the filing fee, pursuant to Section 72 of the *Act*?
4. If the Tenant is not successful in cancelling the Two Month Notice, is the Landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Background and Evidence

The parties testified and agreed to the following; the tenancy began on August 15, 2018. Currently, the Tenant pays rent in the amount of \$3,700.00 which is due to the Landlord on the first day of each month. The Tenant paid a security deposit in the amount of \$1,800.00 and a pet damage deposit in the amount of \$1,800.00, both of which the Landlord continues to hold. The tenancy is still ongoing.

The Landlord's Agent testified that she served the Tenant in person with the Two Month Notice on January 11, 2020. The Tenant confirmed having received the Two Month on the same date. The Two Month Notice has an effective date of March 31, 2020. The Landlord's reason for ending the tenancy on the Two Month Notice is;

"The rental unit will be occupied by the Landlord or the Landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse)."

The Landlord stated that she currently owns the rental property and resides elsewhere, however, due to health reasons, the Landlord is seeking to move into the rental property as it is in close proximity to her son who would be able to assist her in need be. The

Landlord stated that she intends to occupy the rental unit with her partner S.D. once she gains vacant possession.

In response, the Tenant stated that he and the Landlord entered into a fixed term agreement which commenced on August 15, 2018 and is meant to continue until July 31, 2022. The Tenant stated that the tenancy agreement was completed with the Landlord's Agent on July 24, 2018. The Tenant stated that the Landlord is not permitted to end the tenancy early as indicated on the Two Month Notice.

The Landlord's Agent stated that the term of the tenancy agreement which speaks to the fixed term tenancy is unconscionable. Both parties provided a copy of the tenancy agreement which read in part;

"This is a FIXED TERM tenancy that shall begin on 15 August 2018 and shall end on 31 July 2022, and the tenant(s) shall give vacant possession to the landlord. If the tenant wants to move before the end of a fixed term tenancy, the tenant will have to continue to pay rent until the end of the term unless the landlord agrees in writing that the tenant can end the tenancy early or can assign or sublet the unit. If the tenant has a job change requiring the tenant to leave the city of Richmond, this lease agreement will be ended with 2 calendar months notice from the tenant."

The Landlord's Agent stated that the term is unconscionable as it provides the Tenant with an exit clause, whereas the Landlord does not have the same opportunity, making the term unconscionable. As such, the Landlord feels as though the term should not be enforceable.

The Tenant stated that the parties agreed to this term being placed in the tenancy agreement as the Tenant was relocating for work purposes and was reluctant to enter into a lengthy fixed term tenancy. The Tenant stated that the Landlord's willingness to include the term in the tenancy agreement encouraged him to agree to the fixed term tenancy agreement. The Tenant also stated that he is not the one relying on the term, but that it is the Landlord's who are seeking to end the tenancy, which contradicts the fixed term portion of the term. As such, the Tenant feels as the Two Month Notice should be set aside.

If successful, the Tenant is also seeking the return of the filing fee paid to make the Application.

Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

Subsection 49(3) of the Act sets out that a landlord may end a tenancy in respect of a rental unit where the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

The Landlord served the Tenant in person with the Two Month Notice on January 11, 2020, with an effective vacancy date of March 31, 2020. The Tenant confirmed having received the notice on January 11, 2020. I find the Two Month Notice was sufficiently served pursuant to Section 88 of the Act.

The Residential Tenancy Policy Guideline #30 states that during the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties.

The Tenant has applied to cancel the Two Month Notice based on the fact that the parties entered into a fixed term tenancy until July 31, 2022. As such, The Tenant stated that the Landlord is unable to end the tenancy early.

The Landlord's Agent stated that the fixed term tenancy term in the tenancy agreement is unconscionable and therefore not enforceable.

The Residential Tenancy Branch Policy Guideline 8 (the "Policy Guideline") describes unconscionable terms as;

Under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

Terms that are unconscionable are not enforceable. Whether a term is unconscionable depends upon a variety of factors.

A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party. The burden of proving a term is unconscionable is upon the party alleging unconscionability.

In this case, I accept that the parties came together and agreed to the terms set out in the tenancy agreement. I find that Landlord provided insufficient evidence to demonstrate that they were at a disadvantage when they agreed to the terms in the tenancy agreement. I find that the fixed term tenancy term found in the tenancy agreement is not unconscionable, therefore enforceable.

In light of the above, I find that the tenancy is a fixed term tenancy until July 31, 2022 and that the Landlord is not permitted to end the tenancy early with a Two Month Notice for Landlord's Use of the Property. As such, I cancel the Two Month Notice, dated January 11, 2020. I order the tenancy to continue until ended in accordance with the Act.

As the Tenant has been successful, I find he is entitled to recover the \$100.00 filing fee paid to make the Application. I order that this amount may be deducted from the next month's rent.

Conclusion

The Tenant's application is successful. The Two Month Notice issued by the Landlord dated January 11, 2020 is cancelled. The tenancy will continue until ended in accordance with the Act.

The Tenant is entitled to deduct \$100.00 from the next month's rent for recovery of the filing fee.

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 13, 2020

Residential Tenancy Branch