Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Sincere Real Estate Services Ltd
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes AS FFT OLC

Introduction

This hearing dealt with the tenants' 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;
- an order allowing the tenants to assign or sublet because the landlord's permission has been unreasonably withheld pursuant to section 65; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

SW ("landlord") 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 tenants' application for dispute resolution ('applications'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenants' 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

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

Are the tenants entitled to an order allowing them to assign or sublet?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant and landlord's applications and my findings around each are set out below.

This fixed-term tenancy began on December 1, 2019, and is to end on November 30, 2020. The monthly rent is set at $3,200.00, payable on the first of every month. The landlords collected a security deposit and pet damage deposit in the amount of $1,600.00 each deposit.

The tenants are requesting several orders be made regarding the tenancy agreement. The tenants are requesting that the fixed-term tenancy be converted to a month-to-month tenancy in order for them to have the flexibility to move out if they find new housing. The tenants feel that the landlord failed to disclose several important details that were material to their decision to rent the home.

The tenants reside in the main portion of the home, which is approximately 2,400 square feet. Another self-contained rental unit in the home is rented out to a couple, which is approximately 700 to 800 square feet. The tenants currently are responsible for 100 percent of the utilities, which are in their name, despite the fact that the other tenants also use this electricity.

The tenants testified that the landlords failed to disclose that the hot water tank was electric, and not gas. The tenants testified that they requested to ability to view the mechanical room before signing the tenancy agreement, but were never given access. The tenants testified that the landlords also failed to disclose that there were two occupants in the other rental unit, and not one as they were informed. As the tenants are responsible for 100 percent of the utility costs, the tenants feel that they have been impacted greatly by the landlord's failure to disclose this information to them.

The tenants also feel that it is unfair that they are responsible for paying the set municipal fees as set by the city.

Lastly, the tenants are requesting an order to sublet a room to a student or worker.

The landlord's agent responded that they have never intentionally mispresented any information to the tenants. The landlords testified that they were unaware that the other tenant was residing there with his partner at the time the tenancy agreement was signed. The landlord's agent testified that the tenant failed to inquire about the water tanks until after they had already moved in, as indicated by the text messages submitted in their evidence package. The landlord's agent testified that the landlord had offered to compensate the tenants $50.00 per month towards their electric bill, but dispute the fact that they had mislead the tenants into signing the tenancy agreement. The landlord testified that the monthly rent already reflects the fact that the tenants were responsible for the entire portion of utilities for the entire home.

The landlords are also opposed to the rental of the home to additional occupants or sublease agreements as stated in the tenancy agreement.

Analysis

The tenants applied for the ability to sublet a room in the rental unit. Although the term "sublet" is used by the tenants in this dispute, I must note that RTB Policy Guideline #19 clearly provides the definition of a "sublet" versus a "roommate" or "occupant" situation, which states:

> *"Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate…"*

By the above definition the tenant is applying for the ability to allow an additional occupant or roommate, as the tenants will still reside there. I find that the tenancy agreement clearly states that only one family, with a maximum of 4 occupants can occupy the rental unit. I find that the tenants' application to sublet the rental unit does not fall under the definition of sublet as defined by RTB Policy Guideline #19, and as the tenancy agreement clearly limits the number of occupants to one family, with a maximum number of 4 occupants, I dismiss the tenants' application to allow additional occupants without leave to reapply.

It was undisputed by both parties that the tenants are responsible for 100 percent of the utilities for the entire home, despite the fact that the home contains two separate suites.

Section 1 of the **Residential Policy Guidelines** states the following about shared utilities:

SHARED UTILITY SERVICE
1. A term in a tenancy agreement which requires a tenant to put the electricity, gas or other utility billing in his or her name for premises that the tenant does not occupy, is likely to be found unconscionable[5] as defined in the Regulations.

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.

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***, at713).
>
> [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 tenants to pay 100% of the utilities for the entire home despite the fact that there are two suites to be unconscionable within the meaning of the Regulation. Although I recognize the landlord's testimony that the amount of the monthly rent already takes in consideration the fact that the tenants pay all the utilities, I find the requirement to have the utilities in their name to be grossly unfair considering that there is another couple also sharing the electric usage. In consideration of the landlord's proposal to supplement the utility bill with $50.00 per month, I find the tenants made a valid argument that the landlord mistakenly informed the tenants that there was only one occupant when there were two. I find the additional occupant does impact the utility costs, which have affected the tenants. I find that the tenants signed the agreement taking in consideration the estimated total monthly cost of renting the home, which has now changed as there are in fact two occupants in the other suite, and not one as disclosed.

Based on these facts, I find that it is grossly unfair for the tenants to pay 100 percent of the electricity bill when two other tenants also occupy the home. Although the unit is much smaller, the other rental unit also impacts the monthly utility costs that the tenants must pay. Although the landlords testified that the monthly rent already reflects the additional rental unit, this testimony is disputed by the tenants. I find that the reduction

in monthly rent as testified to by the landlords was not sufficiently supported, and I find that it is unreasonable that the tenants are responsible for 100 percent of the electricity considering that there are two other tenants.

I order that the landlord place the utilities in relation to the electricity for both rentals in the landlord's name, and that the landlord be responsible for collecting a pro-rated portion of the utilities from the tenants. I order that the electricity bill be transferred to the landlord's name by June 1, 2020, and that the landlords collect a portion of the bill from the tenants. As it is difficult to proportion the amount of increased usage another occupant would contribute to the electricity bill, I amend the tenancy agreement requiring the tenants to pay 100 percent of the electricity, and order that the tenants be responsible for 75% which is based on the calculation of approximate square footage of both rental units (2400 square feet of 3200). Failure to comply with this Order could result in liability under the *Act.*

The tenants also requested an amendment to the amount of fees that the tenants pay to the city. I find that the tenants failed to provide sufficient evidence to support that the portion they pay to be grossly unfair. For this reason, I dismiss this portion of their claim without leave to reapply.

I have considered the tenants' request to amend the tenancy agreement from a fixed-term to a month-to-month. Although I am sympathetic to the tenants that their expectations were not met after they had moved in, I am not satisfied that the landlords had intentionally mispresented the home to the tenants prior to signing. As acknowledged above, I find that the landlords failed to properly disclose the number of tenants in the other rental unit, rendering the term requiring the tenants to pay 100 percent of the utilities to be unconscionable. This is reflected in the amendment to the requirement of the tenants to pay 100 percent of the utilities. However, I am not satisfied that the failure to inform the tenants that the water tanks were electric to be an intentional act by the landlord in order to mislead or coerce the tenants into entering the tenancy agreement. Although the tenants' testimony is that they requested access to view the mechanical room, I find that they decided to proceed with signing the tenancy agreement without inquiring about the hot water tanks. I find that the landlords' evidence shows that the tenants made this inquiry only after they had already moved in. I do not find that the landlord had withheld this information to gain an unfair advantage over the tenants. For these reasons, I dismiss the tenants' application to amend the term of the tenancy agreement without leave to reapply.

As the tenants were partially successful in their application, I allow the tenants to recover half the filing fee for this application.

Conclusion

I amend the tenancy agreement requiring the tenants to pay 100 percent of the electricity, and order that the tenants be responsible for 75% of the utility charges in relation to the electricity usage. I order that the landlord place the utilities in relation to the electricity for both rental units in the landlord's name, and that the landlord be responsible for collecting a pro-rated portion of the utilities from the tenants. I order that the electricity bill be transferred to the landlord's name by June 1, 2020, and that the landlords collect the 75% owed by the tenants.

I allow the tenants to implement a monetary award of $50.00 for recovery of the filing fee by reducing a future monthly rent payment by that amount.

The remainder of the tenants' application is dismissed without 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: April 22, 2020

Residential Tenancy Branch