



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding KAHN INVESTMENTS LTD. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

The landlord applies for a monetary award pursuant to an agreement that this fixed term tenancy would end early at the tenant's request and the tenant would pay it a total of \$2500.00.

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. The landlord's representative LK objected to the late receipt of tenant evidence. It was agreed that some of the documentation was already included in the landlord's evidence and that the tenant could refer to that. Any other document was to be considered on an individual basis as it was referred to. Neither side objected to any document referred to by the other. Indeed, much was traded texts between the tenant and LK, which both parties had and so neither were taken by surprise.

At the start of the hearing it was noted that the purported end of tenancy agreement in question, ending the tenancy August 31, 2020, and which was disputed by the tenant as having been made under duress, contains a provision that if the tenant failed to pay the landlord \$2500.00 by August 15, 2020 the agreement was cancelled and that the *Residential Tenancy Act* (the "RTA") would apply.

The tenant did not pay the money and so the agreement, disputed by the tenant and relied on by the landlord, was no longer effective. The parties acknowledged this circumstance and agreed the landlord's claim was, in reality, a claim for the \$2000.00 loss of September 2020 rental income plus the \$500.00 due under a "liquidated damages" clause in the tenancy agreement. The parties agreed they were ready and willing to proceed with this hearing on that basis.

Issue(s) to be Decided

Did the tenant breach the fixed term tenancy agreement and, if so, what loss has the landlord suffered as a result? Has the landlord failed to mitigate its loss?

Background and Evidence

The rental unit is a two bedroom upper portion of a duplex structure. There is a written tenancy agreement. The tenancy predates the current agreement, which is for a two year fixed term ending in 2021. The monthly rent was \$2000.00, due on the first of each month. The landlord holds a \$1000.00 security deposit.

The tenant says that in June 2020 LK informed her the landlord intended to sell the house. A realtor became involved and began the process of examining the rental unit and making arrangements for showing it to prospective purchasers.

The tenant testifies that she was concerned about this development. It was during the Covid-19 pandemic and she was worried about her young daughter being at home with her sister and her mother, who came by to care for the child while the tenant was away at work.

Additionally, the tenant claims that she was under the impression that if the house was sold she would have to vacate.

The tenant wanted to leave. The parties negotiated a written agreement on July 28 whereunder the tenancy would end on August 31, 2020 and the tenant would pay the landlord one month's rent of \$2000.00 plus liquidated damages of \$500.00. It was a term of the agreement that the tenant would pay the total of \$2500.00 *via* e-transfer on August 15, 2020.

Within a day after signing the agreement the tenant contacted the landlord to indicate she would not and could not abide by it. She had felt pressured because she had only had four hours to consider the agreement, and, after considering her financial circumstances, could not afford it.

The landlord declined to alter the agreement.

The tenant did not pay the \$2500.00 on August 15 and she vacated the rental unit on or before August 31.

It is apparent the landlord had advertised for new tenants, effective September 1, 2020, by an ad placed July 29. LK had contacted the tenant about three showings for new tenants in August, but all three showings were cancelled. The tenant does not believe the landlord was acting in good faith and speculates the showings were fake.

LK testifies that the landlord did not find a new tenant for September. Indeed, the landlord sold the property on September 2, he says. The completion date of the sale was not stated. The tenant agrees a "sold" sign went up on the property on September 1, or 2.

Analysis

Fundamental Breach

The tenant implies that because of the showings and the inconvenience and risk to her family and herself resulting from strangers walking through her home during the current Covid-19 pandemic, she had to move and was justified in ending the fixed term tenancy..

I find that I cannot agree. What she alleges is that by having a realtor conduct showing over the months of July and August, (and perhaps some in June, the tenant was not sure) the landlord has fundamentally breached the tenancy agreement or, as it is also referred to; has breached a material term of the tenancy agreement.

As indicated in Residential Tenancy Policy Guideline 8, "Unconscionable and Material Terms"

Material Terms

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is

possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement², and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

The term in question would be the tenant's entitlement to exclusive possession of the rental unit and to quiet enjoyment of it, versus the landlord's entitled to enter the rental unit, on notice, for a reasonable purpose.

Showing prospective purchasers, or tenants, is a an appropriate reason for a landlord to give notice and enter a rental unit, provided that it is not excessive. If showings are excessive or not being carried out properly a tenant is free to apply for damages or a rent reduction or a restriction on the landlord's right of entry. Indeed, the tenant's first response to the idea of showings was to ask the landlord for a rent reduction. I find that to be a strong indicator that the alleged breach was not a breach of a material term.

The tenant is still entitled to seek monetary compensation for any excessive, unreasonable or improper entry by the landlord or its agents.

There is no evidence that the manner in which the showings were being conducted were in violation of any rule or recommendation issued by the authorities to prevent the spread of SARS-CoV-2 virus.

I find that it has not been proved that there was conduct by the landlord or its agents that could be consider a breach of a material term. The tenant did not have a lawful ground for ending the tenancy on August 31.

It should be noted that the tenant appeared to have been under the mistaken impression that should the property be sold during her fixed term tenancy she would have to move. As stated at hearing, neither a landlord nor a purchaser may unilaterally end a fixed term tenancy. Any purchaser would have been required to buy the property subject to the tenancy agreement and to honour its terms.

The Landlord's Claim

Neither a landlord nor a tenant is entitled to unilaterally end a fixed term tenancy before the expire of the term. The tenant was not entitled to end this tenancy on August 31. On September 1, 2020 the September rent of \$2000.00 was due and payable to the landlord

In addition, the tenancy agreement provides that in the event the tenant leaves before the end of the term she must pay liquidated damages in the amount of \$500.00 to cover the costs associated with re-renting the rental unit. I find the tenant owes the landlord \$500.00 liquidated damages accordingly.

Mitigation

Any person suffering damage or loss resulting from the breach of an agreement is required to take reasonable steps to minimize the loss suffered (see Policy Guideline 5, "Duty to Minimize Loss"). In the case of a residential landlord, that usually means the landlord is obliged to take the steps necessary to rent out the rental unit to a new tenant as soon as practicable.

Here the landlord placed an ad for new tenants on July 29, the day after the mutual end of tenancy agreement was struck. The tenant notes there were over one hundred "views" of the digital ad. The landlord arranged at least three showings in August. Though the tenant suggests a deceptive motive on LK's part, there is no evidence to take that suggestion out of the realm of idle speculation.

I find that it has not been shown that the landlord failed to take reasonable steps to mitigate the loss resulting from the tenant's early termination of the fixed term tenancy agreement.

Conclusion

The landlord is entitled to recover \$2000.00 for rental income loss from September 2020.

The landlord is entitled to recover \$500.00 pursuant to the liquidated damages clause in the tenancy agreement.

The landlord is entitled to recover the \$100.00 filing fee for this application.

I authorize the landlord to retain the \$1000.00 security deposit in reduction of the amount awarded. It will have a monetary order against the tenant for the remainder of \$1600.00.

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: November 17, 2020

Residential Tenancy Branch