Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL OLC FFT

Introduction

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

- cancellation of the landlords' 2 Month Notice to End Tenancy for Landlord's Use of Property (" 2 Month Notice"), pursuant to section 49;
- an order requiring the landlords to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and 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. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The landlords confirmed receipt of the tenants' application for dispute resolution ('application'), evidence, and amendment. In accordance with sections 88 and 89 of the *Act*, I find that the landlords duly served with the tenants' application, evidence, and amendment. The landlords did not submit any written evidence for the hearing.

Both parties confirmed in the hearing that the tenants have been served with a second 2 Month Notice to End Tenancy for Landlord's Use that has not been disputed at the time of the hearing. This application was filed to cancel a 2 Month Notice dated February 22, 2021, which the landlords withdrew. Accordingly, the tenant's application to cancel the 2 Month Notice dated February 22, 2021, and this 2 Month Notice is of no force or effect. The tenancy will continue until ended in accordance with the *Act*.

Issues(s) to be Decided

Are the tenants entitled to an order for the landlord to comply with the *Act?*

Are the tenants entitled to recover the filing fee?

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 this application and my findings around it are set out below.

This fixed-term tenancy began on July 15, 2020, and is to end on August 14, 2021. Monthly rent is set at $2,900.00, payable on the first of the month. The landlords collected a security deposit in the amount of $1,480.00, which they still hold.

The tenants filed an amendment for the landlords to comply with the *Act, s*pecifically an order to address a Mutual Agreement to End Tenancy that was signed on June 30, 2020 for the tenancy to end on August 14, 2021, at the end of the fixed-term tenancy.

The tenants testified that the landlords had required that the tenants agree to sign the Mutual Agreement before the landlords would agree to rent to them. The tenants testified that they were not aware of the change in the legislation in 2017 about fixed term tenancies, and agreed to sign the Mutual Agreement. The tenants testified that they are concerned that the landlords used this requirement in an effort to circumvent the *Act,* such as avoiding the requirement to provide the tenants with the required compensation under section 51 of the *Act.*

The landlords confirmed in the hearing that they do not wish to withdraw the Mutual Agreement as they feel the Mutual Agreement is valid. The landlords testified that they had obtained advice by contacting the tenancy branch prior to drafting the agreements.

Analysis

It is undisputed that the both parties had signed a Mutual Agreement to End Tenancy effective August 14, 2021, the end of the fixed term for this tenancy. It is also undisputed that the tenants have been served with two, 2 Month Notices to End Tenancy for Landlord's Use.

The tenants believe that the landlords have tried to avoid the *Act* by requiring the tenants to sign a Mutual Agreement as a condition of the tenancy agreement.

Residential Tenancy Policy Guideline #30 states the following about the requirement of a tenant to vacate a rental unit:

Requirement to Vacate

A vacate clause is a clause that a landlord can include in a fixed term tenancy agreement requiring a tenant to vacate the rental unit at the end of the fixed term in the following circumstances:

• the landlord is an individual, and that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.
• the tenancy agreement is a sublease agreement

For example, an owner can rent out their vacation property under a fixed term tenancy with a vacate clause if they or their close family member intend in good faith to occupy the property at the end of the fixed term. There is no minimum amount of time that a landlord or close family member must occupy the rental unit. Occupancy can be part time, e.g., weekends only.

The reason for including a vacate clause must be indicated on the tenancy agreement and both parties must have their initials next to this term for it to be enforceable. The tenant must move out on the date the tenancy ends. The landlord does not need to give a notice to end tenancy or pay compensation as required when ending a tenancy under section 49. See Policy Guideline 50: Compensation for Ending a Tenancy for more information

If the tenancy agreement does not require the tenant to vacate the rental unit at the end of the term, and if the parties do not enter into a new tenancy agreement, the tenancy continues as a month-to-month tenancy.

In this case, the landlords did not fill out section E of the tenancy agreement. This is a requirement if the landlords wish to end the tenancy at the end of the fixed term under

the allowable circumstances under section 13.1 of the Residential Tenancy Regulation which states:

Fixed term tenancy — circumstances when tenant must vacate at end of term

13.1 (1)In this section, "close family member" has the same meaning as in section 49 (1) of the Act.

(2)For the purposes of section 97 (2) (a.1) of the Act *[prescribing circumstances when landlord may include term requiring tenant to vacate]*, the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that

(a)the landlord is an individual, and
(b)that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

Instead, the landlords required that the tenants sign a Mutual Agreement on June 30, 2020. The landlords testified that they obtained advice before making this request. The landlords later served the tenants with a 2 Month Notice on February 22, 2021, which was withdrawn because the effective date of that Notice did not comply with the *Act.* The landlords served the tenants with a new 2 Month Notice, which has not been disputed by the tenants.

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 *Act* does allow two parties to end a fixed-term tenancy by mutual consent, the tenants have filed an application challenging the validity of the Mutual Agreement as they were required to sign the Mutual Agreement as a condition of the tenancy agreement, and they feel that the landlords are attempting to avoid the issuance of a 2 Month Notice and the required compensation under the *Act.*

Although the landlords' testimony is that they have obtained advice prior to drafting the agreements, taking this step does not relieve the landlords of their obligations under the *Act.* Furthermore, despite this sworn testimony, I am not satisfied that the landlords had provided sufficient evidence to support this claim.

The undisputed fact is that the landlords had the option to end the fixed term tenancy by either filling out the sections of the tenancy agreement, or by issuing a 2 Month Notice to End Tenancy as allowed under the *Act.* In this case the landlords first attempted to end the tenancy pursuant to the Mutual Agreement, and later served the tenants with the two 2 Month Notices.

I am satisfied that the evidence supports the tenants' testimony that they were required to sign the Mutual Agreement before the beginning of the fixed-term tenancy. I find that this requirement was for the benefit of the landlords. The landlords would have to compensate the tenants a month's rent, which in this case is $2,900.00, if they were to serve the tenants with a 2 Month Notice to End Tenancy. The question therefore is whether requiring the tenants to sign the Mutual Agreement is an attempt to contract out of the Act and legislation, and whether this requirement is oppressive or grossly unfair to the tenants.

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**
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> [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).
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> [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).
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> [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.)

As noted above the *Residential Tenancy Act* provides that parties may not avoid or contract out of the provisions of the *Act* or Regulation. It is my view that the landlords' use of the Mutual Agreement as it was done here as a required condition of the tenancy agreement does amount to an attempt to contract out of the *Act* and legislation. I make this finding, not based on the singular employment of a mutual agreement, but based on the fact that under the *Act,* the fixed-term tenancy would automatically convert to a month-to-month agreement unless the relevant, required sections were completed, which in this case they were not. In the case that the tenancy would continue as a month-to-month, the *Residential Tenancy Act* does not prohibit the use of a mutual agreement, but to condone the use of a mutual agreement instead of requiring the landlords to fill out the relevant and required sections of the tenancy agreement to end the fixed-term tenancy only under specific circumstances would amount to the nullification of important provisions of the legislation intended to protect tenants. I further find that the use of a mutual agreement in this manner is unconscionable within the meaning of the Regulation. I find that there is an inequality of bargaining power between the tenants and the landlords in circumstances where the tenants had no alternative but to accept the proffered agreement if they wanted to rent the home, even if the requirements heavily favoured the landlords, and were not compliant with the *Act* and Regulation.

In the particular circumstance of a fixed term tenancy where the relevant and required sections were not completed, which would normally mean that the tenancy would continue on a month-to-month basis unless ended in accordance with the *Act*, I find the requirement of the tenants to sign the Mutual Agreement to be unconscionable; it does amount to an attempt to contract out of the *Act* and Regulation and it is therefore of no force or effect. The tenancy is to continue until ended in accordance with the *Act.*

The tenants referenced hypothetical issues such as compensation under the *Act.* As the tenants have not filed an application to cancel the new 2 Month Notice, or for monetary compensation, I cannot consider these claims. The role of an Arbitrator is to decide the merits of a party's claim for damages, loss, or other specific relief under the *Act*, not making findings on future events that had not yet occurred. On this basis, I decline to make any further orders.

I find that the tenants are entitled to recover the $100.00 filing fee for their application. The tenants may choose to give effect to this monetary award by reducing a future monthly rent payment by $100.00.

Conclusion

As the landlords withdrew the 2 Month Notice dated February 22, 2021, this 2 Month Notice is cancelled and is of no force or effect.

The Mutual Agreement dated June 30, 2020 is of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I issue a $100.00 Monetary Order in favour of the tenants for recovery of the filing fee. I allow the tenants to implement the above monetary award by a reducing future monthly rent payment until the amount is recovered in full. In the event that this is not a feasible way to implement this award, the tenants are provided with a Monetary Order in the amount of $100.00, and the landlord(s) must be served with **this Order** as soon as possible. Should the landlords fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: June 16, 2021

Residential Tenancy Branch