Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Parties	File No.	Codes:
(T) J.C.	310050295	OLC, FFT
(L) B.T.	310050800	OPM

Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* ("Act") by the Parties.

The Tenant filed a claim for:

- The Landlord to comply with the Act, regulation, and tenancy agreement; and
- recovery of the $100.00 application filing fee;

The Landlord filed a claim for:

- an Order of Possession for a mutual agreement to end tenancy.

The Landlord, B.T., the Tenant, J.C., and counsel for the Tenant, L.H. ("Counsel"), appeared at the teleconference hearing and gave affirmed testimony. A witness for the tenant, Z.M-H., ("Witness"), also appeared and provided affirmed testimony. I note that the Witness is also a tenant of the Landlord's residential property; however, he has a different tenancy agreement from the Tenant before me; therefore, I find he is not a Party to this arbitration. As such, his testimony is Witness evidence.

I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process. During the hearing the Tenant and the Landlord were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules");

however, only the evidence relevant to the issues and findings in this matter are described in this decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Issue(s) to be Decided

- Should the Landlord be ordered to comply with the Act, regulation and/or tenancy agreement, and if so, how?
- Is the Landlord entitled to an order of possession?

Background and Evidence

The Parties agreed that there was no written tenancy agreement between them; however, they confirmed that the tenancy began in November 2009, with a current monthly rent of $560.00, due on the first day of each month. The Parties agreed that the Tenant paid the Landlord a security deposit of $200.00, and no pet damage deposit.

The issue before me involves a document the Parties signed that purports to end the tenancy agreement between the Parties on September 30, 2021. This agreement states the following:

Mutual Agreement To End A Tenancy
Between Landlord And Tenant

Landlord Information:
[Name
Address
Telephone number]

Tenant Information:
[Name
Address
Telephone number]

Signature:

> The Tenant agrees to vacate the above name premises/site at: [residential property address]
>
> Time: 11:59 PM Date: September 30, 2021
>
> By signing this form, both parties understand and agree the tenancy will end with no further obligation between Landlord and Tenant.
>
> Signature of Landlord: [signature] 21/08/2021
> Signature of Tenant: [signature]
>
> ("Mutual Agreement")

The Landlord argues that he is eligible for an order of possession, because the Parties signed a binding, mutual agreement to end the tenancy. He asserts that the Tenant is overholding in the rental unit by not having vacated on September 30, 2021, pursuant to the Mutual Agreement.

The Tenant's position is that the Mutual Agreement is unenforceable for two reason: (i) it lacks consideration; and (ii) it is unconscionable; the Tenant requests that the Landlord comply with the law in this matter.

Lack of Consideration

Counsel argues that the Mutual Agreement is a contract that has offer, acceptance, but no consideration, which he says is one of the three fundamental parts of any contract. Counsel referenced Bruce McDonald's book on contract law (no citation or title) in the chapter, "Consideration and Sealed Promises". A portion of this chapter states:

1. Definition

   The question of consideration arises in the context of deciding whether any given promise in a contract is enforceable. Consideration is assessed on a promise-by-promise basis. Consideration is not rightly assessed, therefore, on a whole contract basis, except perhaps in the case of a unilateral contract where there is only one promise. Consideration can be seen as the 'price" of the promise….

I find that this is a useful starting point for understanding consideration and the Tenant's arguments in this regard. However, I am more swayed by Counsel's reference to case

law, as there is no evidence before me as to the name, date, or edition/version of this uncited book reference.

In the hearing, Counsel said:

> Currently before us, the Landlord did not give the Tenant anything in return for the promise to end the tenancy. The Tenant gets to get out of the tenancy and that is consideration, but they already have the possibility under s. 45 (1) – tenant may end tenancy . . ..
>
> The Mutual Agreement was signed on August 21st, with the tenancy to end on September 30th. The Tenant could have given notice before the 30th, therefore, he gained nothing from the Landlord for signing this agreement, since they could have ended the tenancy without the Landlord's input.

Counsel went on: "There is strong case law saying that lack of consideration in a contract [is fatal to it]." He cited *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25 at paragraph 21, which paragraph I found to be uninformative on its own. Rather, the case summary sets of the situation:

> *. . . The parties had signed a second agreement making the [fixed-term] contract a month to month contract. The judge found new consideration was not given to the employee in exchange for agreeing to the second contract, and hence the fixed-term contract applied. The employer appealed. Held: Appeal allowed on the issue of aggravated damages only. <u>The language of the second contract contemplated fresh consideration but none was given</u>. The judge's conclusions that the fixed-term contract applied were correct. The award for aggravated damages is set aside. The record did not support a conclusion that the employee suffered more than normal distress, stress and anxiety as a result of the dismissal. Comments on the law of mitigation of damages in an employment setting are provided.* .
>
> [emphasis added]

Turning to paragraph 21, at Counsel's reference:

> [21] The Second Contract was premised upon the cancellation of the Fixed-Term Contract for consideration, but no consideration was provided. In these circumstances, I cannot say the judge erred in his conclusion in respect to the consideration issue.

Counsel gave limited submissions on how this case applies to the matter before me; however, I infer it is cited for the conclusion that consideration is needed if the relevant parties amend a contract, such as they have by agreeing to end the tenancy agreement.

Unconscionable Agreement

Counsel argued that the Landlord should have used form #RTB-8, "Mutual Agreement to End a Tenancy", because this form contains the following warnings, which were not included in the Mutual Agreement signed by the Parties:

> NOTE: This form is NOT a Notice to End Tenancy. Neither a Landlord nor a Tenant is under any obligation to sign this form. By signing this form, both parties understand and agree the tenancy will end with no further obligation between landlord(s) or tenant(s). If you are the tenant, this may include foregoing any compensation you may be due if you were served a Notice to End Tenancy. If you have questions about tenant or landlord rights and responsibilities under the Residential Tenancy Act or the Manufactured Home Part Tenancy Act, contact the Residential Tenancy Branch using the information provided at the bottom of this form before you sign.

Counsel stated:

> The meaning of unconscionability is outlined in [RTB] Policy Guideline #8 [("PG #8")], and also at page 20 of Tenant's evidence. That states in short that unconscionability is a variety of factors – so one-sided, and one party takes advantage of the weakness of the weaker party.

PG #8 states:

> **Unconscionable Terms**
>
> 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 [s.6 (3)]. 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.

Counsel continued:

> Landlords are found to be the stronger party and the RTB offers relief in light of the power imbalance. Page 12 – 19 are examples of the notices required by parties .. . . All of these contain lengthy explanations of their rights and obligations. Many tenants are ignorant of their rights under the Act. The mutual agreement form on page 12 states specifically, that tenant is under no obligation to sign the form and by signing such a form, the tenant may be giving up compensation.
>
> When you contrast the form given by the Landlord to the form #RTB-8, those warnings have been removed. He used the exact same wording, but removed the warning. He is taking advantage of the ignorance of the tenants, which is obvious from the excluded warnings. The Landlord's deliberate exclusion of this warning shows he wanted to exploit their lack of knowledge under the Act. It's so one-sided, these two things fulfill PG 8's criteria for unconscionability.

Counsel referred me to what he called "…not binding, but the newest and most in-depth decision on unconscionability in contract law." He referred me to the case of *Downer* v. *Pitcher,* 2017 NLCA 13. This Newfoundland and Labrador Court of Appeal case states at paragraph 53 that in terms of conscionability in contract law:

> [53] Although generally the courts should try to develop and apply the common law and equity in a uniform manner throughout the country (except where local conditions may dictate otherwise), in this case there is little consistency on this subject throughout the country and no definitive guidance from the Supreme Court of Canada. Further, there is no definitive statement on the subject from previous decisions of this Court, except 2017 NLCA 13 (CanLII) possibly *Mushrow* which contained three separate opinions which were not all expressed in the same way.

The Court goes on to state in paragraph 54: "…I believe the applicable principles could be stated as follows". The Court lists six principles in this area that are applicable to the circumstances of that case, which involved a traffic accident. In this case, one party signed a release for another party, which was raised as an issue in the months to follow. The party who signed the waiver experienced soft tissue injuries following the accident. The appeal before the Court involved the following:

> [1] This appeal addresses whether a trial judge erred in setting aside a release, made as part of settling a motor vehicle damage claim, on the grounds of unconscionability. The specific issues to be addressed on appeal are:
>
> > (1) Whether the trial judge erred in her formulation of the test for applying the doctrine of unconscionability;
> >
> > (2) Whether the trial judge erred in applying the proper legal test to the evidence and in concluding that (a) there was an inequality of bargaining power between the parties; (b) the inequality was improperly exploited by the appellant; and (c) the settlement was unfair in the sense of being unconscionable.

The Court concluded that the trial judge had erred in concluding that the release was unenforceable on the grounds of unconscionability.

Counsel stated the following in applying the principles in *Downer:*

> All the requirements are fulfilled – the Landlord abused his power . . . an imbalance of power is naturally inherent to Landlord and Tenant relationships. Tenants are lacking in critical knowledge of their rights. The Landlord may have read the Guidelines, but he chose to exclude the warnings on the Mutual Agreement. He showed up at their door, did not give them any chance to seek legal counsel, and removed the agreement after they signed it.
>
> No reasonable person in this position would have entered into this transaction. The Witness only moved in one month before – he would not have freely agreed to move out, if it was not required. They would not freely agree to no compensation or consideration for this contract, so it was obvious that the Tenants lacked knowledge and understanding of their situation. The Landlord was aware of the Tenants' vulnerability. The Tenants had no chance to seek legal advice. He gave them nothing in return, so it's obviously an unfair

> agreement.
>
> As to the improvidence with the agreement – the more improper the action, the more we can draw inference of the inequality – of course, no agreement can be more unfair than when someone gets something for nothing.

The Landlord replied, as follows:

> I am going to say that what I served is not unconscionable. I ask that the law to be obeyed and I'm waiting for an order of possession.
>
> May I let you know of incidents happened in the waiting time – many incidents happened that we think you should know, too.

However, the incidents to which the Landlord referred were unrelated to the matters before me; therefore, I declined to consider the Landlord's testimony in that regard

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Lack of Consideration

Counsel introduced case law into this analysis with *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25, I also note paragraph 11 of this case:

> Consideration for the Second Contract
>
> [11] It is a basic principle of contract law that consideration between parties is required to create a binding contract. There has been shifting of this principle in cases of variation of terms of the contract, discussed in *Rosas v. Toca*, 2018 BCCA 191. *Rosas* considered a series of informal arrangements to extend the time for payment of a debt, to the point that the limitation period on the original debt expired before an action was commenced seeking to recover it. Chief Justice Bauman, writing for the court, addressed the law of fresh consideration as it should apply to variations of existing contracts and concluded at para. 183:
>
> > [183] … When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress,

> unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative. .
>
> [emphasis added]

Further, on first look, the Mutual Agreement does not comply with section 52 of the Act, as to form and content; however, section 52 does not apply to this situation, because the Mutual Agreement is not a **notice** to end the tenancy, but an **agreement** to end the tenancy.

Section 52 states:

> **52** In order to be effective, a notice to end a tenancy must be in writing and must…

Further, section 44 (1) (c) states:

> 44 (1) A tenancy ends only if one or more of the following applies:
>
> **. . .**
>
> (c) the landlord and tenant agree in writing to end the tenancy.

In addition, form #RTB-8 Mutual Agreement to End a Tenancy states that it is NOT a notice to end tenancy. Accordingly, section 52 does not apply as to form and content, because section 52 states: “In order to be effective, a notice to end a tenancy must be in writing and must . . .”; [emphasis added] however, as section 44 of the Act sets out, an agreement to end a tenancy is not a notice to end the tenancy.

Based on the evidence and authorities before me, I find that a lack of fresh consideration in this situation is not fatal to the Mutual Agreement. As such, I dismiss the Tenant’s argument in this regard, without leave to reapply.

Unconscionable Agreement

I am torn by the Tenant’s submissions, in that essentially, he is asking me to determine that the Landlord took advantage of his lack of knowledge of RTB forms and wording. However, Counsel did not indicate in what way the Tenant was vulnerable. PG #8 sets out a test for determining if a term is unconscionable in a contract:

> 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.

PG #8 also states: "The burden of proving a term is unconscionable is upon the party alleging unconscionability."

I find the case law to which Counsel referred me indicates that the law of unconscionability is not well settled. The *Downer* case to which he referred me indicates that not even the Supreme Court of Canada has set down binding law in this area. As a result, I find that the burden on the Tenant is even greater to prove that this set of circumstances resulted in an unfair, unconscionable agreement between the Parties.

The Landlord arrived at the rental unit with the Mutual Agreement for the Parties to sign. However, if the Tenant did not want to end the tenancy agreement, it raises the question in my mind as to why he agreed to do so? Counsel did not indicate if it is the Tenant's age, infirmity or mental weakness that rendered him weaker than the Landlord in bargaining power.

The Tenant is an adult – responsible for signing agreements. He had the ability to say "No, I'd like to contact the RTB about my rights first." I find it reasonable to conclude that without any indication of a weakness on the Tenant's part, that he should know by now that he is responsible for agreements he signs.

Based on the evidence before me overall, I find that the Tenant has not proven on a balance of probabilities that the Landlord exploited him with the Mutual Agreement, as I find the Tenant did not present evidence of his infirmity or weakness in bargaining power. As a result, I dismiss the Tenant's Application wholly without leave to reapply.

I find that the Landlord is eligible in this set or circumstances to an order of possession for the rental unit. There was some discussion in the hearing about the effective vacancy date of the order of possession, as on one hand, the effective vacancy date of the Mutual Agreement has passed, but on the other hand, the Landlord expressed a willingness for this date to be at the end of November. Accordingly, I grant the Landlord an order of possession of the rental unit effective November 30, 2021 at 1:00 p.m. pursuant to section 55 of the Act.

Conclusion

The Tenant is unsuccessful in his Application, as he failed to provide sufficient evidence to meet his burden of proof on a balance of probabilities. As a result, I find that the Landlord is successful in his Application for an Order of Possession for a mutual agreement to end tenancy, as I found that the Mutual Agreement between the Parties to end the tenancy is valid and enforceable.

Pursuant to section 55 of the Act, I grant the Landlord an Order of Possession of the rental unit, effective November 30, 2021 at 1:00 p.m. This Order must be served on the Tenant. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible.

Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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 18, 2021

Residential Tenancy Branch