



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, FFL

Introduction

The Landlord seeks an order of possession pursuant to s. 55 of the *Residential Tenancy Act* (the “Act”) following the end of a fixed term tenancy. The Landlord also seeks return of its filing fee pursuant to s. 72.

F.A. appeared as counsel for the Landlord. A.L. appeared as agent for the Landlord. D.D. appeared as the Tenant and was represented by counsel, T.F..

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

Preliminary Issue – Service and the Tenant’s Application

Issues of service were canvassed at the outset of the hearing. During this discussion, I was advised that the Tenant had filed an application which is scheduled to be heard on July 28, 2022. Upon review of the file provided by the Tenant, the application relates to an order pursuant to s. 62 that the Landlord comply with the *Act*, tenancy agreement, or regulations.

The parties both made mention that evidence was served by the Landlord in relation to its application and that the Tenant served its evidence in relation to his application. I was further advised that Tenant’s counsel had only recently been retained.

I informed the parties of my view that of the two applications, the Landlord’s dealt with the primary issue of whether the tenancy will end or continue. Given that it was

scheduled first, I suggested it proceed provided the parties consented and everyone was served. I further advised that I did not have the Tenant's evidence, which was provided as part of his application, and that I would review that evidence after the hearing. The parties agreed to proceed with the Landlord's application under the circumstances.

The Tenant acknowledged receipt of the Landlord's application and evidence without objection. The Landlord acknowledges receipt of the Tenants evidence from the other file, again without objection. Based on the mutual acknowledgements, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Issues to be Decided

- 1) Is the Landlord entitled to an order of possession?
- 2) Is the Landlord entitled to return of its filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant was to take occupancy of the rental unit on June 1, 2020, but took occupancy some days before that date.
- Rent of \$2,200.00 is due on the first day of each month.
- The Landlord holds a security deposit of \$1,100.00 in trust for the Tenant.

The Landlord in question is a corporate entity. The Landlord's evidence includes a corporate search, which lists the director and voting shareholder. Landlord's counsel advised that the company is solely owned by one individual. Tenant's counsel argued that the structure of the Landlord was unclear based on the search, which indicates a maximum number of 7 directors. Landlord's counsel emphasized that it was wholly owned by one individual.

A copy of the tenancy agreement was put into evidence. It lists that the tenancy is for a fixed term ending on May 31, 2022. Under clause 2 of the tenancy agreement, the

tenant was to vacate due to “family use planned for summer 2022”. The tenancy agreement was executed by the Landlord on May 12, 2020 and by the Tenant on May 11, 2020.

I was advised by Landlord’s counsel that the intention was for the sole shareholder’s daughter and children to occupy the rental unit during the summer months. It was argued that they had a good faith intention to occupy the rental unit. Tenant’s counsel argues that the Landlord’s shareholder nor the daughter were present to provide evidence on their intentions such that the submissions that were made are hearsay.

Landlord’s counsel further directed my attention to a mutual agreement to end tenancy, which was signed by the parties on May 8, 2020 and indicates the tenancy is to end on May 31, 2022. It was argued that the mutual agreement was a preferred course as per Policy Guideline #30 but that it was not required.

Tenant’s counsel argues that the Landlord is acting in bad faith. I was directed by the parties to a series of emails between them from January 2022 to April 2022 which detailed their attempts to negotiate a new fixed term tenancy. Landlord’s counsel says that there were negotiations but that there was no agreement and that given that there was no agreement, the fixed term of the tenancy agreement ought to be enforced.

Tenant’s counsel argues that negotiations broke down due to a dispute over increased rent requested by the Landlord. Emails dated April 5, 2022 and April 6, 2022 outline a request from the Landlord’s agent for rent of \$3,500.00, the Tenant arguing that that was above what is permitted under the *Act*, and the Landlord’s agent withdrawing the offer to renew the lease. It was argued that this is proof that there is no good faith intention to occupy the rental unit and that the Landlord is using the fixed term tenancy to extract a rent increase in contravention of the *Act*. Landlord’s counsel directed me to s. 43(1)(c) of the *Act* in which rent increases can be agreed to in another amount provided the parties do so in writing.

Tenant’s counsel further argued that the mutual agreement to end tenancy is void ab initio as it was signed prior to tenancy agreement being signed. I asked the parties why the documents were signed at separate times. The Tenant advised that the Landlord’s agent asked that he sign the mutual agreement to end tenancy and an addendum prior to signing the tenancy agreement. The addendum to the tenancy agreement was signed on May 8, 2022.

The parties confirm the Tenant has not vacated the rental unit after May 31, 2022.

Analysis

The Landlord seeks an order of possession due to a purported fixed term tenancy.

Section 44(b) of the *Act* requires a tenant to vacate the rental unit at the end of a fixed term in circumstances that are prescribed under s. 97(2)(a.1). The sole permitted use of a fixed term under the Regulations is set out as follows under s. 13.1:

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.

There is no dispute here that the Landlord is a corporate entity. I asked Landlord's counsel whether he had any submissions with respect to the requirement under s. 13.1(2)(a) of the Regulations that the landlord be an individual. Landlord's counsel emphasize that Landlord is solely owned by one individual and that the distinction is not relevant.

I do not agree with Landlord's counsel on this point. Section 49 of the *Act* is instructive on the question of whether a solely owned corporate entity could be classified as an individual under s. 13.1 of the Regulations. As some context, s. 49 of the *Act* deals with notices to end a tenancy for the landlord's use of the property. Section 49(1) provides a definition for a "close family member", which is specifically referenced under s. 13.1 of the Regulations. Section 49(1) also includes a definition for a "family corporation", which is a corporation in which all the voting shares are owned by either one individual or one

individual plus one or more of that individual's brother, sister or close family members. The Landlord would likely be defined as a "family corporation" under s. 49 of the *Act*.

Section 13.1 of the Regulations makes no reference to family corporations, this despite clearly referencing the definition for close family member under s. 49 of the *Act*. This leads me to conclude that there was no intention for s. 13.1 to be used by corporate entities. Both on the plain reading of s. 13.1(2) of the Regulations and the context of the Regulation as informed by s. 49 of the *Act*, I find that the Landlord, as a corporate entity, is not an individual. Given this, the use of the fixed term tenancy by the corporate Landlord is not permitted under the *Act*. I find that the fixed term portion of the tenancy agreement is unenforceable.

Dealing with the final aspect of this matter, being the mutual agreement to end tenancy, I agree with Tenant's counsel that it cannot be enforced. Leaving aside the issues of timing with respect to the signing of the tenancy agreement and the mutual agreement to end tenancy, it would be inappropriate, in my view, to permit a landlord who, as here, extract a mutual agreement to end tenancy from a tenant at the beginning at the term when they are not permitted to make use of a fixed term tenancy under s. 13.1 of the Regulations. To give force to the mutual agreement to end tenancy would be to permit the Landlord to circumvent the general restrictions under the *Act* for fixed term tenancies.

There can be little doubt that the *Act* imposes significant restrictions on the use of fixed term tenancies. This is done for a reason: it is intended to protect tenants who face imbalanced bargaining power relative to landlords. For example, it is conceivable that a landlord may use a fixed term tenancy to extract a rent increase from a tenant above the amount permitted under *Act*. I provide this as an example alone and make no comment on whether that is what occurred here as was argued by the Tenant.

Looking at the issue of timing, it would appear to me to be illogical that parties can agree to end a tenancy before the tenancy comes into existence. When the mutual agreement to end tenancy was signed, there was no tenancy. The parties' rights and obligations under the tenancy agreement only crystalized when the tenancy agreement was entered into, a point that is made clear by s. 16 of the *Act*. Given that there was no tenancy when the mutual agreement to end tenancy was signed, I find that it is void.

I find that the mutual agreement to end tenancy is invalid. To enforce it would permit the Landlord to avoid the general restrictions of fixed term tenancies under the *Act*. Further,

the mutual agreement was signed prior to the existence of the tenancy itself, which would render it void.

I find that the Landlord is not entitled to an order of possession. The tenancy shall continue until it is ended in accordance with the *Act*.

Conclusion

I dismiss the Landlord's application for an order of possession under s. 55 of the *Act* without leave to reapply. The tenancy shall continue until it is ended in accordance with the *Act*.

As the Landlord was unsuccessful, I find that it is not entitled to the return of its filing fee. The Landlord's claim under s. 72 of the *Act* 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: July 24, 2022

Residential Tenancy Branch