

## **DECISION**

### **Introduction**

This hearing dealt with the Landlord's Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession based on a mutual agreement to end the tenancy under sections 44 and 55 of the Act
- authorization to recover the filing fee for this application from the Tenant under section 72 of the Act

The hearing also dealt with the Tenants' Application for Dispute Resolution under the Act for:

- a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement under section 67 of the Act
- an order under section 62 of the Act that the Landlord comply with the Act, regulation or tenancy agreement
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

Landlord JZ attended the hearing.

Tenant CG also attended the hearing.

### **Service of Notice of Dispute Resolution Proceeding (Proceeding Package)**

Both parties acknowledged service of the Notices of Dispute Resolution.

### **Issues to be Decided**

Is the Landlord entitled to an Order of Possession based on a Mutual Agreement to end tenancy?

Is the Tenant entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?

Is the Tenant entitled to an order that the Landlord comply with the Act, regulation or tenancy agreement?

Is the either party entitled to recover the filing fee for this application from the other?

## **Background and Evidence**

I have reviewed all evidence, including the testimony of the parties, but will refer only to what I find relevant for my decision.

Evidence was provided showing that this tenancy began on November 1, 2020, with a monthly rent of \$2,899.00, due on first day of the month, with a security deposit in the amount of \$1,400.00.

JZ testified that she intends to move in to the rental unit due to a difficult break up with her partner. JZ testified that there had been previous discussions about an eventual end to the tenancy between the Tenants and herself. The Tenants had indicated that they might end the tenancy on a few occasions, and JZ's mother had met the Tenant JG in the summer of 2023 and indicated that they intended to move into the rental unit.

JZ provided text messages between herself and JG on September 14<sup>th</sup> and 16<sup>th</sup>, 2023, showing JZ proposed ending the Tenancy on January 1<sup>st</sup>, 2024, but indicated that any date between December 1<sup>st</sup> and January 15<sup>th</sup> would be acceptable. JG initially agreed to January 1<sup>st</sup>, but later requested January 5<sup>th</sup>. On September 16<sup>th</sup>, JZ met with JG at the rental unit, having prepared a Mutual Agreement to End Tenancy with an effective date of January 5<sup>th</sup>. JZ signed the Mutual Agreement.

CG testified that at the time the Mutual Agreement was signed, he was on a lengthy business trip, and JG was home taking care of their two children. He testified that JG had been suffering from post-partum depression, and that, as a result, she was non-confrontational and agreeable to others. He testified that taking care of the children under these circumstances was as much as she was able to handle at the time. He further testified that JG was on medication to treat the depression. CG testified that JG trusted that JZ had brought the correct document to end the tenancy.

CG testified that he discovered the Mutual Agreement when he arrived home from his business trip. He testified that JG did not understand that the Mutual Agreement waived their right to receive a Notice to End Tenancy or the compensation associated with such a Notice.

## **Analysis**

### **Is the Landlord entitled to an Order of Possession based on a Mutual Agreement to end tenancy?**

Under section 55(2)(d) of the Act a landlord may apply for an Order of Possession when there is a written agreement between the landlord and the tenant that the tenancy has come to an end.

Here, the Landlord relies on a Mutual Agreement to End Tenancy signed by the Landlord JZ and the Tenant JG. The Tenants claim that JG lacked the capacity to make such an agreement, and that it would be unfair to enforce the Mutual Agreement.

The test for mental capacity to enter a contract is discussed at length in the recent decision of *iFinance Canada Inc. v. B.M.*, 2021 BCCRT 164 from the BC Civil Resolution Tribunal:

25. Courts have recognized there is a hierarchy of capacity levels. There are varying levels of capacity required for different decisions, and varying degrees of incapacity to make decisions: *Wolfman-Stotland v. Stotland*, 2011 BCCA 175 at paragraphs 26 to 27. Whether an individual has the required capacity for the decision being made is a question of fact to be determined in all of the circumstances. The assessment is a highly individualized and fact-specific inquiry: *Laszlo v. Lawton*, 2013 BCSC 305 at paragraph 197.

26. As cited in *RMK v. NK*, 2020 ABQB 328, the decision in *Bank of Nova Scotia v. Kelly* (1973), 1973 CanLII 1289 (PE SCTD), sets out a test for determining capacity to contract. *Kelly* has been followed by other Canadian courts, although I was not able to identify a BC decision that cited it. However, as discussed further below, I find the law applied both in BC and in Alberta is consistent with the *Kelly* test, which I find useful.

27. Under the *Kelly* test, for the contract to be valid, both parties must have: (a) the ability to understand the nature of the contract, and (b) the ability to understand the contract's specific effect in the circumstances.

28. So, in law a person is mentally incapable when they are unable to understand the nature and terms of the contract and are unable to form a rational judgment of its effect on their interests: see *RMK* citing *Fowler Estate v. Barnes et al*, 1996 CanLII 11726 (NLSC) at paragraphs 25 and 26.

The cause of incapacity to contract need not be fixed or of long duration. Here, the contracting party, JG, suffered from post-partum depression (PPD), her husband was away on a lengthy business trip, and she was caring for her two children by herself. That JG might well have been capable of understanding the Mutual Agreement if she were relieved of those particular stresses is besides the point. At the time she signed the mutual agreement, JG was dealing with PPD alone and caring for her two children. It is at that moment in time that her capacity must be evaluated.

I take note that, with post-partum depression, one's circle of concern narrows to the most immediate and urgent concerns. Often that is the mother's care for her own children; even that can be overwhelming.

It is the Tenants' burden to show that JG lacked contractual capacity. The evidence relied upon by the Tenants was limited to CG's testimony and, to a small extent, the communication records between JG and JZ.

In the text messages between JZ and JG, JZ does not state that she is discussing a Mutual Agreement to End Tenancy. She gives JG the choice of an end date for the tenancy in the limited window between December 1<sup>st</sup> to January 15<sup>th</sup>. I find that, under these circumstances, a reasonable tenant would conclude that the Landlord was discussing the details of an end to tenancy for the use of the property by the landlord, a prerogative allowed to landlords under section 49 of the Act. However, when JZ met with JG, she did not provide a Two Month Notice under section 49 of the Act, but rather secured JG's signature on a Mutual Agreement to End Tenancy.

CG testified that JG did not, in fact, understand the basic implications of the Mutual Agreement, when he returned and discussed it with her, namely that the Mutual Agreement waived the Tenant's rights to a notice to end tenancy. He testified that she suffered from significant post-partum depression, that she was on medication to deal with it, that she was agreeable and non-confrontational during this period, and that she was caring for her two children, currently aged two and seven, alone while CG was on a business trip.

I also note that JG appears to have recognized her need to consult her husband but did not do so. While not determinative by itself, I find this gives some support to the argument for incapacity.

On the balance of probabilities, and considering the foregoing in its totality, I find that JG lacked the requisite capacity to enter into a contract at the time she signed the Mutual Agreement. As a result, the Mutual Agreement is void.

If I am incorrect in this conclusion, I find that the Mutual Agreement is unconscionable. As discussed by the Supreme Court of Canada in *Uber Technologies v. Heller*, 2020 SCC 16, unconscionability requires both an inequality of bargaining power and a resulting improvident bargain.

Here, the bargain struck with respect to the mutual agreement I find to have been improvident. Although there was evidence that the Tenants had discussed moving from the rental unit in the past, there was no evidence that they planned on doing so when the mutual agreement was presented to JG. The Landlord had her own motives for securing an end to the tenancy; there was no evidence of any substantive rationale for JG to agree to the end to the tenancy. In substance, JZ sought to end the tenancy so she can move into the rental unit herself, a circumstance that the Act allows for through the issuance of a Two Month Notice to End Tenancy for Landlord's Use. Such a Notice requires the Landlord to pay one month's rent and includes a requirement that the Landlord occupy the rental unit within a reasonable time and for a period of at least six months, or the Landlord will ordinarily be required to pay 12 months' rent in compensation to the Tenants. Tenants may also dispute whether such a notice is issued in good faith. In signing the Mutual Agreement, JG gave up these substantial rights and received, at best, a delay of a month and five days from when the tenancy could have been ended via a Two Month Notice.

The evidence considered above, in the context of capacity, establishes that JG was, at the time of the signing of the Mutual Agreement, a party with a substantially lower bargaining power.

Based on the foregoing, the Landlord's application for an Order of Possession is dismissed.

**Are the Tenants entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?**

**Are the Tenants entitled to an order that the Landlord comply with the Act, regulation or tenancy agreement?**

The Tenants apply, in essence, to convert the Mutual Agreement into a Two Month Notice to End Tenancy for Landlord's Use. As I have found the Mutual Agreement is unenforceable, I find these applications to be moot, and they are therefore dismissed.

**Is the either party entitled to recover the filing fee for this application from the other?**

As the Tenants were largely successful in their application, I find that they are entitled to recover the \$100.00 filing fee paid for this application under section 72 of the Act.

## **Conclusion**

The Landlord's application for an Order of Possession based on a Mutual Agreement to End Tenancy is dismissed, without leave to reapply.

The Tenants' application for a Monetary Order for damage or loss under the Act, regulation or tenancy agreement is dismissed, without leave to reapply.

The Tenants' application for an order that the Landlord comply with the Act, regulation or tenancy agreement is dismissed, without leave to reapply.

I grant the Tenants a Monetary Order in the amount of **\$100.00** as authorization to recover the filing fee for this application from the Tenant under section 72 of the Act.

The Tenants are provided with this Order and the Landlord(s) must be served with **this Order** as soon as possible. Should the Landlord(s) 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. The Tenants are authorized to withhold this amount from a future payment of rent.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: April 17, 2024

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Residential Tenancy Branch