



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BRAEMAR GARDENS APARTMENTS LIMITED
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPN, FFL

Introduction

This hearing dealt with a landlord's application for an Order of Possession based on a tenant's notice to end tenancy. Both parties appeared or were represented at the hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure. The tenant was also assisted by two persons at the hearing who presented themselves as being the tenant's boss and co-worker.

I confirmed that both parties exchanged their respective hearing documents and evidence upon each other. I explained the hearing process to the parties and permitted the parties to ask questions.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession based on a tenant's notice to end tenancy?

Background and Evidence

The tenancy started on January 1, 2017 and is for a fixed term set to expire on December 31, 2018. The tenant paid a security deposit of \$460.00 and the tenancy agreement requires the tenant to pay rent of \$920.00 on the first day of every month.

On August 11, 2018 the tenant signed a written notice to end tenancy on a form generated by the landlord. The effective date reads September 30, 2018.

Although the stated effective date pre-dates the end of the fixed term the landlord accepted the early end of the tenancy and began making preparations for the end of the

tenancy set for September 30, 2018. Then on September 28, 2018 the landlord was informed by the tenant and/or a person assisting her that the tenant would not be vacating the rental unit. The landlord proceeded to file this Application.

The landlord seeks to uphold the tenant's notice to end tenancy. The landlord has accepted "rent" for use and occupancy only for the months of October 2018 and November 2018. During the hearing, the landlord's agent stated that the landlord was agreeable to an Order of Possession effective December 31, 2018 to give the tenant more time to find alternative housing.

The persons assisting the tenant at the hearing submitted that the tenant's notice to end tenancy should be found to be unenforceable because the notice to end tenancy was signed under duress and because the tenant lacks mental capacity to give a notice to end tenancy.

As for the allegation of duress, the tenant submitted, through the people assisting her, that she was told by the landlord's agent that she had to sign the notice to end tenancy which was presented to her by the landlord.

As for lack of mental capacity, the persons assisting the tenant stated the tenant suffers from mental illness, and has learning disabilities that have resulted in a capacity equivalent to a grade 4 education. To illustrate, the persons assisting the tenant stated that the tenant described to them that she was given an eviction notice but when they asked to see the notice they could see that it was a tenant's notice to end tenancy.

The persons assisting the tenant described her as being 70 years old, destitute, vulnerable and unable to understand written agreements. The persons assisting the tenant are trying to assist the tenant in finding supportive or assisted living accommodation through BC Housing but explained this takes some time and if the tenancy ends in the near future the tenant will be homeless.

When I pointed out that the tenant signed the tenancy agreement the tenant's support persons responded by stating the tenant is incapable of understanding the terms of tenancy but understood she would get a rental unit if she signed it.

When I questioned whether the tenant may require more supports than that provided by the landlord and the current arrangement, I heard that the tenant has support of her adult son who lives with her.

The landlord denied that the notice to end tenancy was entered into under duress. Rather, the landlord described how the parties met on August 11, 2018 and there was a discussion surrounding the bed bug infestation and lack of preparation for bed bug treatments; the fire in the rental unit of August 2, 2018 where the tenant and her son did not react to the smoke filling the unit and smoke detector sounding; and, the tenant's lack of insurance. The landlord's agent stated that she told the tenant on August 11, 2018 that the landlord would likely proceed with an eviction but the tenant agreed to move out at the end of September 2018 and signed the notice to end tenancy. The landlord's agent stated that the tenant's son was present during the meeting of August 11, 2018 and the tenant was informed of nature of the document she was signing.

The tenant stated she could not recall whether her son was present during the August 11, 2018 meeting. The tenant's son was not called to testify by the tenant or persons assisting her.

I noted that included in the evidence before me was a 10 Day Notice to End Tenancy for Unpaid Rent dated August 3, 2018. The landlord stated the tenant presented the outstanding rent to the landlord on August 7, 2018. The persons assisting the tenant stated the tenant had written post-dated cheques for the months prior to August 2018 and the tenant was unaware that the post-dated cheques had run out until she received the 10 Day Notice. In any event, I was satisfied that the 10 Day Notice was nullified by way of payment of the outstanding rent within five days of receiving the 10 Day Notice, as provided under section 46 of the Act, and I did not consider the 10 Day Notice any further.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

The landlord requests an Order of Possession based on the tenant's notice to end tenancy. Section 55(2)(a) of the Act provides for such a request. Below, I have reproduced section 55(2)(a)

(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

(a) a notice to end the tenancy has been given by the tenant

Section 45 of the Act provides for a tenant's right to end a tenancy. Section 45(2) applies where a tenant has a fixed term tenancy, such as in this case. Section 45(2) provides:

- (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
 - (a) is not earlier than one month after the date the landlord receives the notice,
 - (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
 - (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In keeping with section 45(2) of the Act, the tenant was entitled to give the landlord a notice to end tenancy that had an effective date of December 31, 2018 since this is the expiry date of the fixed term. The notice to end tenancy before me has a stated effective date of September 30, 2018 which is earlier than the date permitted under section 45(2). However, an incorrect effective date does not invalidate a notice to end tenancy. Rather, section 53 of the Act deals with circumstances where a notice to end tenancy has an incorrect effective date. Section 53(2) provides that "If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section." Accordingly, the stated effective date is deemed to read December 31, 2018.

In this case, the landlord's agent stated that when the tenant's notice to end tenancy was given the landlord was agreeable to ending the tenancy earlier than the fixed term expiry date; however, during the hearing the landlord was agreeable to ending the tenancy on December 31, 2018. Accordingly, if the notice to end tenancy is upheld the effective date shall be December 31, 2018.

The issues raised by the tenant and/or her support person that are before me to decide are: whether the notice to end tenancy was given under duress; or, whether the tenant lacks sufficient capacity to give the landlord a notice to end tenancy. The burden to prove these positions rests with the tenant and/or her representatives.

As for the allegation of duress, I find the statement that the tenant was told she “had to” sign the notice to end tenancy does not rise to the level of duress. There were no suggestions that there were threats, violence or constraint that resulted in the tenant signing the notice to end tenancy. Therefore, I do not consider that position any further.

As for the assertion the tenant lacks capacity to give a notice to end tenancy, I find that position not sufficiently supported by the evidence before me. It is not uncommon for parties that appear in a dispute resolution proceeding to suffer from mental illness, learning disabilities, illiteracy and/or lack of education; however, I would expect that where there is an argument concerning lack of capacity I would be provided sufficient evidence to corroborate a position that carries such significance. When I look at the evidence provided to me by the tenant, or persons assisting her, I see photographs of the rental unit and documentation that was appears to have been given to the tenant at the start of the tenancy or during the tenancy by the landlord. I do not see documentation that would demonstrate a lack of capacity from a medical professional or some other professional that carries the credentials to make such a determination.

Also of consideration is that the tenant entered into a tenancy agreement and has benefited from entering into that contract without any argument that she lacked capacity in entering that contract. I also note that the tenant had sufficient capacity to give the landlord post-dated cheques for rent and I heard that the tenant has the support of her adult son who resides with her.

During the hearing, I found the landlord’s agent to be very credible. She displayed a an excellent recollection of dates and events and I accept the events were as she described. The landlord testified that the tenant and the tenant’s adult son were present at the meeting of August 11, 2018. From what I gather, the landlord’s agent informed the tenant that the landlord would commence eviction proceedings unless the tenant ended the tenancy. I consider such conduct to be more in the nature of informative with options presented rather than duress and I find insufficient evidence that the tenant lacked capacity to understand her choices in deciding to give the landlord a notice to end tenancy.

In light of all of the above, I uphold the tenant’s notice to end tenancy. I find the tenancy shall come to an end on December 31, 2018 and I provide the landlord with an Order of Possession for that date. The tenant remains obligated to pay rent for December 2018.

While the landlord was successful in this application, given the undisputed financial constraints of the tenant, I exercise my discretion with respect to awards for recovery of the filing fee under section n72 of the Act and I make no such award to the landlord.

Conclusion

The tenancy shall end on December 31, 2018 and the landlord is provided an Order of Possession with this decision for that date to serve and enforce upon the tenant.

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 09, 2018

Residential Tenancy Branch