



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BTC STUDENT HOUSING KELOWNA
LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL, FFL

Introduction

This hearing convened as a result of a Landlord's Application for Dispute Resolution, filed on December 2, 2020, in which the Landlord requested monetary compensation from the Tenant for unpaid rent and to recover the filing fee.

The hearing was conducted by teleconference on March 23, 2021, August 24, 2021, and January 20, 2022. Both parties called into the hearings and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. Both parties were also assisted by legal advocates; the Landlord was assisted by a paralegal, C.W. and the Tenant was assisted by his lawyer, D.S.

The parties agreed that all evidence that each party provided had been exchanged. A review of Branch records indicates that initially the Landlord filed evidence only seven days prior to the hearing and therefore beyond the dates permitted by the *Residential Tenancy Branch Rules of Procedure* (the "Rules"). During the hearing on March 23, 2021, the Tenant's counsel confirmed they did not oppose the acceptance and consideration of the Landlord's late evidence. No other issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Rules*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to monetary compensation from the Tenant?
2. Should the Landlord recover the filing fee.

Background and Evidence

In support of the Landlord's claim, the Landlord's Onsite Property Manager, J.B., testified as follows. She stated that she has been the property manager since October of 2016.

The rental unit is a one bedroom unit in a 120 unit building. J.B. confirmed that the Landlord is not affiliated with the University, despite the fact the name of the company includes "Student Housing". Each rental unit has its own kitchen and bathroom.

A copy of the residential tenancy agreement was provided in evidence before me. The Tenant digitally signed the lease on July 9, 2018. Pursuant to this document, the term of the lease was as follows:

TERM AND USE:



Jul 30, 2018, 2:20pm 162.213.137.28

You the Tenant, agree to lease the Room and Rented Premises only for residential use and for a term as follows:

Term of this lease will begin the 1st day of September, 2018 at 2:00 p.m. ("Beginning Date") and end the 27th day of August, 2021 at 2:00 p.m. ("Expiry Date") but the Tenant may shorten the Term only as follows:

The tenant may, up until January 15, 2019, give written notice to terminate the tenancy as of Aug 27th, 2019.
The tenant may, up until January 15, 2020, give written notice to terminate the tenancy as of Aug 27th, 2020.
The tenant may, up until January 15, 2021, give written notice to terminate the tenancy as of Aug 27th, 2021.

[exact copy from tenancy agreement]

J.B. stated that typically students reside in residence for their first year and then complete their studies while residing in this property. She stated that while this Tenant's term was for three years, it is, at minimum, a 12 month lease.

J.B. stated that the Tenant moved in September 1, 2018.

J.B. testified that on January 2, 2020, they sent a reminder to Tenant about his option to end his tenancy early. J.B. stated that the Tenant did not exercise his option to end his tenancy as of August 27, 2020.

J.B. stated that the Tenant enquired in May of 2020 about his options to end his tenancy. A copy of this email was provided in evidence. J.B. confirmed that he wrote "can I cancel my renewal?" such that he acknowledged he renewed his lease.

The Tenant then sublet his suite from May to August 2020. The Tenant then contacted the Landlord for advice and help. J.B. stated that they informed the Tenant that he could do a "lease takeover" provided that he pay a \$225.00 fee and complete the required form.

J.B. stated that the Tenant vacated the rental unit at some point, although she did not know when, as when she came to the rental unit there were items still in the unit. She confirmed that she conducted a move out inspection on February 22, 2021.

J.B. testified that the Tenant continued to pay rent until August of 2020. Although he initially paid for September and October 2020 the Tenant later reversed those payments on November 26, 2020. She stated that they tried to resolve the issue of non-payment however they did not issue a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities for any of the missed payments.

The Landlord filed this application seeking monetary compensation from the Tenant on December 2, 2020.

J.B. testified that they were not sure if the Tenant was living in the rental unit in September-January 2021 although she contacted the Tenant on February 22, 2021 for a move out inspection. J.B. confirmed that the Tenant did not give formal notice to end his tenancy.

J.B. stated that they started advertising the rental unit as of January 4, 2021. She confirmed they rent to non-students as well.

The Landlord filed a Monetary Orders Worksheet in which the Landlord claimed compensation for unpaid rent for September 2020 to February 2021 for a total of \$5,370.00.

In response to the Landlord's claim, the Tenant affirmed the contents of his affidavit sworn March 12, 2021. The Tenant confirmed that the affidavit was true and that he did not need to add, alter or remove any portions of the affidavit, save and except for the statement that his contract was signed with the Landlord's employee J. as on reflection

he determined that it was K. During the hearing before me the Landlord's representative did not take issue with the introduction of the Tenant's affidavit for the truth of its contents. The affidavit included the following:

- This tenancy was the first time the Tenant lived alone.
- The Tenant met with J.B. in early July 2018.
- The Tenant was hesitant to live alone as he is a social person and insisted that his lease be only a year as he wasn't sure this was going to be a good fit for him.
- The Tenant also intended to graduate in the next year and a half as such was not looking for a long term lease.
- The Tenant was aware he may need to find a subletter for the summer months as his term was only 8 months.
- The Tenant reviewed only some portions of the lease on a computer screen. The Tenant deposes that nothing in the sections that were shown to him signaled to him that he was committing to anything more than 1 year.
- The Tenant signed the lease on an electronic pad; the screen only showed the signature line and nothing more.
- The Tenant understood that he was signing a one-year lease, with an option to extend the lease for up to three years, not a three year lease with an option to shorten the lease. (emphasis in original)
- The Tenant believes his signature was put on a three year lease, or the Landlord misrepresented the nature of the lease in order to get students to sign up on the assumption that the term was for one year.
- The Tenant notes that the Landlord's website includes the following:

“All [V.] leases are 12-month minimum fixed-term leases with the option to renew or terminate each year for up to 3 consecutive years. All V. leases end August 27th at 2pm. Renewal or termination notice must be received by January 15^h of the year the tenant wishes to terminate.

- The Tenant received an email containing a link to the lease agreement as well as other forms. When the Tenant attempted to access the lease agreement the link was no longer active.
- On January 28, 2019 the Tenant received an email from J.B. informing him that his lease had auto-renewed for the 2019-2020 period.
- In January of 2020 the Tenant received a similar email from J.B. informing him that his lease had auto-renewed. The Tenant did not understand that this meant that he had obligations under the lease to August 27, 2021 (a year and 9 months thereafter).
- In March of 2020 the Tenant was informed that his classes would be online due to the Covid-19 pandemic. At that time the Tenant also lost his job.
- On May 3, 2020 the Tenant emailed the Landlord to inform them that he had found a subletter until the end of August 2020. He also informed them that he wished to end his tenancy after the end of that sublease. He further informed the Landlord that he needed to move back home (out of province) as he intended to continue his studies from there.
- J.B. responded by email and informed the Tenant that he would have to do a “lease takeover” and that a \$225 fee would apply.

- The Tenant understood her response to mean that he had to find someone for the remaining term to August 27, 2020, not 2021.
- The Tenant was suspicious of the sublet fee as he understood such fees were not chargeable.
- The Tenant posted an ad online and received multiple responses but chose someone who was willing to stay until August 27, 2020.
- The Tenant deposes that there is low housing supply in the city in which the rental unit is located and as such there is a high demand for rentals and vacancy rates are among the lowest in the province.
- The Landlord posted his rental unit as available starting in May and would have been able to find a suitable tenant earlier due to the demand for rentals.
- The Landlord increased the rent by \$195.00 per month as of March 2020.
- The Landlord withdrew rent payments from the Tenant's account for September and October 2020 and attempted to do so for November 2020 however his account was without sufficient funds to cover the final rental payment.
- The Tenant contacted his bank and had the September and October payments reversed; he understood that the Landlord/payor had agreed to this.
- The Tenant believes that the Landlord did not intend to pursue compensation until they saw unfavourable comments about the Landlord posted online by the Tenant.
- In December of 2020 the Tenant received a "cease and desist" letter from C.W. in which she wrote on behalf of the Landlord that if the Tenant did not withdraw his Google Review the Landlord would file a dispute notice with the Residential Tenancy Board.
- In March of 2021 the Tenant decided to test his understanding of the demand for student housing in the city in which the rental unit is located and in less than two weeks received 6 emails or texts from interested tenants.

In cross examination The Tenant confirmed he lived in the unit just under two years, from 2018 to 2020. The Tenant further confirmed that he had conversations with J.B. about a sublet or someone to take over his lease. He stated that at one point he had found someone to take over his lease and guessed that it was two months before the end of his lease at the end of August 2020.

Also in cross examination, the Tenant stated that in June of 2020, he sent an email to J.B. confirming that he was not going to stay. He further stated that he contacted J.B. in August when he found out his subtenant was not paying rent, and at this time he again informed her that he would not be coming back to the apartment. He also spoke to her in November of 2020 when he realized they were still taking his rent from his account.

The Tenant confirmed that the first time he spoke to J.B. was June of 2020 and that at that time J.B. gave him options: to either sublet it himself, to pay her to find someone else, or to try to get some money from the government to pay the rent. The Tenant confirmed that he knew that the sublet agreement was between him and the sublet, not the Landlord. However, as the Landlord was proposing the subtenant be there beyond his term, he believed the tenancy would then be between the subtenant and the

Landlord. The Tenant stated that he had the understanding that he simply needed to sublet his unit until the end of August 2020 after which the subtenant would then deal with the Landlord directly. The Tenant also confirmed that he was surprised that the Landlord was taking rent from his account after August 2020, as he did not expect the Landlord to continue to take rent from his account after the end of his tenancy.

The Tenant acknowledged that he was sent an email in 2019 at which time he confirmed he would renew. He further acknowledged that in 2020, he was again asked if he wanted to renew, and he said he did, but didn't believe this to be a contract which bound him until after the end of his term in August 2020.

Although aptly cross examined on the point, the Tenant denied that he agreed to a term longer than 1 year. The Tenant reiterated that he signed a digital pad and not the actual paper document, and although he did receive the lease at a later date by email, he received other documents at that time, had other tasks to do, including getting a guarantor and bank information, all within a 5 day period, at the same time as school was starting. He also confirmed that when he received the documents, he did not initially review them and when he went to do so the link did not work.

The Tenant stated that it was in September of 2020 that he discovered the document provided that he was to be there for three years. He then reached out to other people at the residence and was able to find other people who had the same problem.

The Tenant confirmed that before he signed the contract, he looked at the website to see what the rooms looked like and how it might feel to be there. He denied looking at the FAQ or tenant portals on the website. He stated that he understood that the minimum stay was 1 year and maximum was 3 years based on the information provided on the website (and which was reproduced previously in this decision when summarizing his affidavit).

In redirect, the Tenant confirmed he sent an email to the Landlord in May of 2020, such that he made them aware he did not wish to continue with his tenancy in May of 2020, not June as he testified. He also noted that it took him some time to find that email during his testimony.

The Tenant also submitted a witness statement from F.A who confirmed she was present on July 8, 2018 when the Tenant paid the deposit for the rental unit. She further confirmed that the lease agreed upon was for a maximum of one year effective August 27, 2018.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at:

www.gov.bc.ca/landlordtenant.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Landlord has the burden of proof to prove their claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;
- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the *Act* or agreement;
- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- proof that the applicant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

In this case the Landlord sought monetary compensation for unpaid rent pursuant to a fixed term tenancy. The parties disagree as to the duration of the fixed term. The Landlord argues that the tenancy was for a fixed three year term. The Tenant argues the agreement was for a one year fixed term with an option to extend to three years.

The evidence before me indicates that the Tenant met with the Landlord's representative on July 9, 2018, to discuss the tenancy and to pay a deposit. The Tenant was accompanied by a friend, who provided a written statement in evidence before me. The Landlord's representative did not testify before me.

The Tenant provided a detailed affidavit which was entered into evidence for the truth of its contents. The Tenant was rigorously cross examined on his affidavit and his testimony. The Tenant was consistent in his testimony that at the time he entered into the tenancy agreement he insisted the tenancy term be for one year only. He had never lived alone prior to this and was concerned about committing to a longer term. He was also scheduled to complete his studies in a year and a half such that it was not practical for him to enter into a longer term tenancy. The Tenant's witness confirmed his testimony that he discussed the fixed term with the Landlord's representative and insisted on a one year term. The Landlord did not call that representative to testify before me.

On balance, I accept the Tenant's testimony and that of his witness that when he entered into the agreement, he discussed the term with the Landlord's representative and insisted the term be for one year.

I also accept the Tenant's evidence that he did not review a paper copy of the tenancy agreement and received a copy of it some time after it was digitally signed. I also accept his testimony that he received several other documents at the time, did not review the agreement as he was pressed for time to get the signature of a guarantor, as well as his banking information back to the Landlord, while at the same time in the first few busy weeks of returning to university. I also accept his testimony that he was unable to open the link to the tenancy agreement when he attempted to do so. Finally, I accept his testimony that it was only after he believed his tenancy had come to an end and the Landlord continued to remove funds from his account for rent that he realized the written agreement provided for a three year fixed term.

In her brief closing submissions, the Landlord's Advocate submitted that the lease is signed, it's a three year term, and the Tenant should be obligated to make the rent payments as agreed. While it is generally true that a tenant is potentially liable for all

the rent owing during a fixed term, the duration of this fixed term is at issue. Further, a landlord seeking compensation for unpaid rent during a fixed term continues to have a duty to mitigate their losses.

When interpreting contracts such as residential tenancy agreements, guidance can be found in G.H.L. Fridman, "The Law of Contract in Canada" (Carswell, Thomson Canada Limited, 1994), which provides the following at pages 466-472:

- Where there is no ambiguity in a written contract it must be given its literal meaning .
- In accordance with what is sometimes referred to as the "golden rule", words must be given their plain, ordinary meaning, at least unless to do so would result in an absurdity.
- If there are two possible interpretations, one of which is absurd or unjust, the other of which rational, the latter must be taken as the correct one, on this basis of giving effect to the general contractual intentions of the parties.
- The contract should be construed as a whole, giving effect to everything in it if at all possible.
- No word should be superfluous.
- If a single transaction is carried into effect by several documents, the whole is treated as one document and they must all be read together for the purpose of ascertaining the intention of the parties.
- Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails. In other words, where there is ambiguity in a contract the contract should be interpreted in favour of the party who did not draft the contract.

In the case of residential tenancies, the contract is the residential tenancy agreement, and as it is the landlord who drafts the residential tenancy agreement, any ambiguity in the agreement must be interpreted in favour of the tenant.

The parol evidence rule provides that evidence outside the words of a written contract should not be considered if that evidence adds to, subtracts from, varies, or contradicts the written contract. However, there are exceptions to this rule, and in particular if the evidence goes to the validity of the contract itself.

Further, the *Act* specifically provides that a tenancy agreement includes an oral agreement. In this case I accept that the parties did not review the written tenancy

agreement in detail prior to it being signed such that I give less weight to the strict words of the written contract.

In this case, I find that consideration must be made for the discussions which occurred during the meeting with the Tenant and the Landlord's representatives on July 9, 2018. I accept the Tenant's testimony and the evidence of his witness that he was insistent the tenancy term be for one year. I also accept his evidence that they did not review the tenancy agreement in detail on that date.

I also note that the Landlord's website includes the following:

"All [V.] leases are 12-month minimum fixed-term leases with the option to renew or terminate each year for up to 3 consecutive years. All V. leases end August 27th at 2pm. Renewal or termination notice must be received by January 15th of the year the tenant wishes to terminate.

I find the above to be confusing at best and misleading at worse. On balance, I find it likely that the term of the tenancy was communicated to the Tenant by the Landlord's representative in such a way as to mirror this confusion. This, combined with the fact the parties did not review a paper copy of the tenancy agreement, supports a finding that the Tenant was not aware the strict wording of the tenancy agreement provided for a fixed *three* year term with an option to cancel under specific conditions.

I therefore find that the discussions between the parties on July 9, 2018 (the date the deposit was paid), and the Landlord's own website created ambiguity in terms of the duration of the fixed term. This ambiguity must be interpreted in favour of the tenant to the extent that I find the Tenant should not be bound by the three year fixed term.

Even in the event I am incorrect, I find the Landlord's claim for compensation should fail as I find the Landlord failed to mitigate their losses.

The evidence before me indicates the Tenant informed the Landlord as early as May 2020 that he wished to end his tenancy. I accept his testimony that he decided to return home when he lost his job and all university classes went online due to the Covid-19 pandemic. When he informed the Landlord that he did not wish to continue with his tenancy, he was provided with only three options: to sublet the unit himself, to pay a fee and have the Landlord sublet the unit, or to apply for financial assistance from the government.

Notably the Landlord did not issue a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities pursuant to section 46 of the *Act*. Rather, the Landlord commenced this action in December of 2020, some seven months after the Tenant informed the Landlord he wished to end his tenancy. I find it unreasonable the Landlord did not make any effort to determine whether the unit was occupied in September, October, November and December 2020.

I find it likely the Landlord retaliated against the Tenant based on his comments posted online; this is supported by the email sent by C.W. to the Tenant in December 2020, as she clearly informs the Tenant they will file an application before the Residential Tenancy Branch if he did not remove his online review; the Landlord acted on this letter as this Application was then filed in December of 2020.

The Landlord failed to provide evidence of their attempts to re-rent the unit, and it appears as though the Landlord made no effort to advertise the unit until January of 2021, for a start date of May of 2021, a *year after* being informed the Tenant wished to end his tenancy. I find this to be wholly unreasonable considering the communication from the Tenant to the Landlord's representatives.

While it is the case the tenancy ended during the early part of the Covid-19 pandemic, I am not persuaded this precluded the Landlord from re-renting the unit sooner. I accept the Tenant's evidence that he posted an advertisement online and received a number of responses from prospective tenants. I find this supports a finding that if the Landlord wished to re-rent the unit sooner, they would have been able to do so.

I therefore find the Landlord failed to mitigate their losses by failing to advertise the unit sooner and failing to take reasonable steps to determine whether the unit was occupied after August 2020.

For these reasons I dismiss the Landlord's claim for monetary compensation from the Tenant in its entirety, including their request to recover the filing fee.

Conclusion

The Landlord's claim 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: February 1, 2022

Residential Tenancy Branch