Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding VERNON & DISTRICT COMMUNITY LAND TRUST SOCIETY and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62.

Both parties attended and were provided with a full opportunity to be heard, to present their sworn testimony, to make submissions, and cross-examine one another.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties were also clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's application and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the landlord duly served with the tenant's application and evidence.

The tenant testified that they have been unable to retrieve and review the landlord's evidentiary materials as they have been away. The landlord testified that they had served the tenant with their evidentiary materials in accordance with section 88 of the Act by posting the package on the tenant's door on February 27, 2023. The landlord testified that the tenant did not provide a forwarding address for service of documents. After discussing the issue, the landlord confirmed that they were okay with proceeding with the scheduled hearing. Given that the tenant did not receive or review the landlord's evidentiary materials, the landlord's evidence was excluded for the purposes

of this hearing. I note that the hearing proceeded on request of both parties, and that the exclusion of the landlord's evidentiary materials was not due to the landlord's failure to serve the tenant in accordance with the *Act.*

Issues to be Decided

Is the tenant entitled to an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began on July 1, 2020. The tenant resides in subsidized housing where the tenant currently pays $605.00 in monthly rent. The landlord holds a security deposit of $353 for this tenancy.

The tenant filed this application as they requested permission for an extended leave from their rental unit, and was denied by the landlord. The tenant wants permission to be absent for longer than the three months permitted by the landlord. The tenant testified that they wanted to go away to a warm destination for longer than three months, and should not be punished for being able to do so. The tenant feels that the landlord has not provided a valid reason for the denial as they are low income, and qualified for the subsidized housing on that basis. The tenant submitted copies of correspondence, as well as a copy of the tenancy agreement which states:

*"20. **Extended Absence from Rental Unit**: As the rent for the rental unit is geared to income, if the tenant is absent from the rental unit for three consecutive months or longer without the prior written consent of the landlord, the landlord may end the tenancy, even if the rent is paid for that period. "*

The landlord testified that the tenant was denied permission for the extended absence due to the housing crisis in the area. The landlord testified that as the housing is subsidized housing, the housing is intended for those in need. The landlord argued that this was clearly communicated to the tenant in the tenancy agreement, and that they had responded to the tenant in writing about the denial.

The landlord testified that as housing demand is at critical levels, they deemed the tenant's ability to travel for extended periods and reside elsewhere as an indication that the tenant is not in need of subsidized housing, and should move into regular housing.

Both parties confirmed that at the time of the hearing, the tenant had not been served with any Notices to End Tenancy, and that the tenancy was still ongoing.

Analysis

The tenant filed this application as the landlord had denied them permission for an extended absence from their rental unit. Both parties confirmed that the tenancy agreement contained a clause that as the rent unit is geared towards income, the tenant may not be away for longer than three consecutive months without prior written consent of the landlord.

The *Residential Tenancy Act* provides by section 5 that:

This Act cannot be avoided

> **5** (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
>
> (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 (3) provides:

> (3) A term of a tenancy agreement is not enforceable if
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> (a) the term is inconsistent with this Act or the regulations,
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> (b) the term is unconscionable, or
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> (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Section 3 of the Residential Tenancy Regulation gives the following definition of "unconscionable":

> **3** For the purposes of section 6 (3) (b) of the Act *[unenforceable term]*, a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.

The landlord states that they may end the tenancy if the tenant fails to obtain prior written permission for extended absences exceeding three months. The question therefore is whether the inclusion of this term is an attempt to contract out of the legislation, or whether it is oppressive or grossly unfair to the tenant.

In *Murray v. Affordable Homes Inc.*, 2007 BCSC 1428, the Honourable Madam Justice Brown set out the necessary elements to prove that a bargain is unconscionable. She said at p. 15:

> **Unconscionability**
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> [28] An unconscionable bargain is one where a stronger party takes an unfair advantage of a weaker party and enters into a contract that is unfair to the weaker party. In such a situation, the stronger party has used their power over the weaker party in an unconscionable manner. (***Fountain v. Katona***, 2007 BCSC 441, at para. 9). To prove that the bargain was unconscionable, the complaining party must show:
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> (a) an inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which leaves that party in the power of the stronger; and (b) proof of substantial unfairness of the bargain obtained by the stronger. ***Morrison v. Coast Finance Ltd***. (1965), 55 D.L.R. (2d) 710 at 713, 54 W.W.R. 257 (B.C.C.A.).
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> [29] The first part of the test requires the plaintiff to show that there was inequality in bargaining power. If this inequality exists, the court must determine whether the power of the stronger party was used in an unconscionable manner. The most important factor in answering the second inquiry is whether the bargain reached between the parties was fair (***Warman v. Adams***, 2004 BCSC 1305, [2004] 17 C.C.L.I. (4th) 123 at para. 7).
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> [30] If both parts of the test are met, a presumption of fraud is created and the onus shifts to the party seeking to uphold the transaction to rebut the presumption by providing evidence that the bargain was fair, just and reasonable. (***Morrison***, at713).
>
> [31] The court will look to a number of factors in determining whether there was inequality of bargaining power: the relative intelligence and sophistication of the

> plaintiff; whether the defendant was aggressive in the negotiation; whether the plaintiff sought or was advised to seek legal advice; and whether the plaintiff was in necessitous circumstances which compelled the plaintiff to enter the bargain (***Warman*** at para. 8). The determination of whether the agreement is in fact fair, just and reasonable depends partly on what was known, or ought to have been known at the time the agreement was entered. The test in ***Morrison*** has also been stated as a single question: was the transaction as a whole, sufficiently divergent from community standards of commercial morality? (***Harry v. Kreutziger*** (1978), 95 D.L.R. (3d) 231 at 241, 9 B.C.L.R. 166.)

The *Residential Tenancy Act* provides that parties may not avoid or contract out of the provisions of the *Act* or Regulation. It is my view that the landlord's inclusion of the above referenced term does not amount to an attempt to contract out of the legislation. I make this finding based on the fact that the term simply states that the landlord may end the tenancy for the reason stated. The term does not stipulate that the tenancy is automatically ended. Rather, the term is a warning to the tenant that the actions of the tenant may result in the end of this tenancy as the tenant may no longer qualify for the subsidized housing.

Subsection 49.1(2) of the *Act* sets out that a landlord may end a tenancy in respect of a rental unit if:

> *Subject to section 50 [tenant may end tenancy early] and if provided for in the tenancy agreement, a landlord may end the tenancy of a subsidized rental unit by giving notice to end the tenancy if the tenant or other occupant, as applicable, ceases to qualify for the rental unit.*

The *Residential Tenancy Act* allows landlord to serve a tenant with a Notice to End Tenancy if they cease to qualify for the rental unit. I find the terms of the tenancy agreement are aligned with the legislation, which allows the landlord the ability to serve the tenant with a Notice to End Tenancy for this reason. I do not find that the inclusion of the term to be unconscionable, nor does the inclusion of the term amount to an attempt to contract out of the *Act* and *Regulation*.

I note that in this case, at the time of the hearing, the tenant had not been served with any Notices to End Tenancy for ceasing to qualify for the subsidized unit. Section 62(4)(a) of the *Act* states that an application should be dismissed if the application or part of an application does not disclose a dispute that may be determined under the *Act.*

I exercise my authority under section 62(4)(b) of the *Act* to dismiss the tenant's application as I find the issue moot as there is currently no dispute before me over the validity of a Notice to End Tenancy for ceasing to qualify for the subsidized unit.

I further note that although the tenant takes issue with the criteria they must meet to qualify for the subsidized housing, I do not have authority to change the eligibility criteria for subsidized housing. I therefore dismiss the tenant's entire application without leave to reapply.

Conclusion

The tenant's entire application 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: April 11, 2023

Residential Tenancy Branch