



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNC, MNDC, OLC, FF

Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution, seeking to cancel a one month Notice to End Tenancy, for monetary orders for compensation under the Act or tenancy agreement, for an order for the Landlord to comply with the Act and to recover the filing fee for the Application.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

Both parties submitted a portion of their evidence late and I have not considered this evidence. I have reviewed all oral and other written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Initial Issues(s) to be Decided

Does the Act apply to this tenancy?

Background and Evidence

The Landlord submitted a request in advance of the hearing asking that a decision be made to cancel the hearing based on a lack of jurisdiction in this matter. At the outset of the hearing the Landlord again argued the Act has no jurisdiction in this matter.

The Landlord submits that under section 4(c), the Act does not apply to living accommodations in which, "the Tenant shares bathroom or kitchen facilities with the owner of that accommodation". The Landlord testified that her Daughter is an owner of the accommodation and since her Daughter lives with the Tenant, the Act should not apply.

In evidence the Landlord submitted a self drafted document entitled "Property Agreement" dated January 15, 2008, which sets out that the Landlord and her spouse consider their Daughter to be a one third owner of the property, based on certain conditions including, she makes payments of \$1,000.00 a month for a period of 60 months, and other terms which when completed are to be considered, "... a down payment on the property."

The Landlord argued that this agreement made the Daughter an owner of the property under "contract law". The Landlord did not provide evidence on whether or not the Daughter had fulfilled all the "certain conditions", although this may be premature as 60 months have not passed since January 15, 2008. The Landlord also provided written submissions stating the document had been drafted on advice from her accountant, so that the Daughter may have an interest in the property which could not be attacked by a prospective common law spouse.

The Act does not define an "owner" as used in section 4(c). The definition of "landlord", in section 1 of the Act, includes the meaning "the owner of the rental unit", but is not limited to the "owner". Nevertheless, section 4(c) specifically refers only to the "owner" of the accommodation, not the "landlord". Accommodation is a term used in section 1 of the Act under the definition of "rental unit", i.e., "living accommodation rented or intended to be rented".

In British Columbia the ownership of property is established under the Land Title Act. In section 1 of the Land Title Act an "owner" is defined as, "a person registered in the records as owner of land or of a charge on land, whether entitled to it in the person's own right or in a representative capacity or otherwise, and includes a registered owner".

The Tenant supplied a Land Title Office computer search, dating from April 9, 2010, indicating the Landlord and her spouse are the registered owners in fee simple of the subject property. There is no indication on the print out that the Daughter is registered in the records of the Land Title Office as an owner, or that she has a charge on the land.

The Tenant and the Landlord entered into a self drafted tenancy agreement, entitled "Rental Agreement". It includes a few of the terms required by the Act. The agreement identifies the Landlord, her spouse and their Daughter as landlords. The Tenant paid a security deposit of \$300.00, and the monthly rent was agreed to be \$600.00. It also has terms on ending the tenancy, when rent is due and other matters.

Therefore, based on the above, I find that the Landlord's Daughter is not an owner of the property and that section 4(c) of the Act does not exclude this matter from the

jurisdiction of the Act. While the “contract” *may* be valid between the Landlord and her Daughter in relation to a potential interest in the property, it does not supersede the Land Title Act or the Residential Tenancy Act and make the Daughter an owner. I find I have jurisdiction to make a determination in this matter.

Issues(s) to be Decided

Is the Notice to End Tenancy valid or should it be cancelled?

Is the Tenant entitled to the other relief sought?

Background and Evidence

In regard to the subject matter of the Application, the Tenant has applied to cancel a one month Notice to End Tenancy issued to her by the Landlord for alleged cause, issued on April 14, 2010, with an effective vacancy date of May 31, 2010 (the “Notice”).

The Landlord has alleged in the Notice that the Tenant significantly interfered with or unreasonably disturbed another occupant or the Landlord, seriously jeopardized the health, safety or lawful right of another occupant or the Landlord, and has put the Landlord’s property at significant risk.

The Landlord testified that her Daughter, who lives with the Tenant, had informed her some time ago that she wished she could live by herself due to the Tenant’s boyfriend. She testified that when the tenancy had started out it was going to be just single girls living together. There was a third party renter who was in the unit for a short period, who was also female.

The Landlord testified that problems began to occur in the tenancy relationship when the Tenant started going out with the new boyfriend. She explained her Daughter would testify about the Tenant and her boyfriend having loud sex in the rental unit.

The Landlord testified her Daughter was reluctant to go to the Tenant to complain about the noise being made during the sexual relations. The Landlord testified she told the Daughter to inform the Tenant that she, the Landlord, would take the blame. She informed her Daughter to tell the Tenant that the Landlord wanted the Tenant and the Daughter to vacate the rental unit so it could be rented to a family. When the Tenant was informed of this, she explained to the Daughter and the Landlord that they could not end a tenancy in this manner and that the Tenant knew her rights under the Act.

Following this the Landlord and her Daughter served the Tenant with the Notice alleging the cause.

The Daughter testified that the Tenant and the boyfriend have noisy sexual relations. The Daughter alleged that one day when she returned to the rental unit she saw through a window that the Tenant's boyfriend was naked in the kitchen. She testified she did not enter the rental unit and went back to her car. The Daughter further alleged that the Tenant and the boyfriend had sex in the kitchen, and on another occasion they had sex on the living room couch. The Daughter testified that she was home on both these occasions and was disturbed by their noise and behaviour. She testified it was unsanitary and unhealthy to have sex in the kitchen and on the couch in the living room.

The Daughter further testified that on Halloween night in 2009, the Tenant and the boyfriend were having sex in the Tenant's room and were making the related noises, with the door open. She testified she knocked on the door. She testified that her and her friends were made uncomfortable by the Tenant and her boyfriend having sex.

The Daughter also alleged that the Tenant's boyfriend had left the door to the rental unit unlocked when he left at night, on one or more occasions. Towards the end of the hearing the Daughter referred to the Tenant's boyfriend as being "obnoxious".

In reply the Tenant testified that her boyfriend may have left the door unlocked once or twice, although the Daughter had left a window open to the rental unit on several occasions, which would also allow access to the rental unit. She also alleges that the Daughter had boyfriends over to the rental unit, had illegal drugs at the rental unit during parties, and had parties with people drinking to intoxication.

The Tenant testified she was shocked when the Landlord told the Tenant and the Daughter they both had to move out so the Landlord could rent to a family. The Landlord had not provided any prior notice to the Tenant in this regard. The Tenant testified she felt bullied to leave the rental unit on short, verbal notice.

She testified that she informed the Landlord she knew her rights and the Landlord would have to give her two months notice and a free month of rent, in accordance with the Act. Following this the Landlord's Daughter served the Tenant with the Notice alleging cause.

The Tenant also replied that she had not had sex with her boyfriend in the kitchen or on the couch, although she admitted they had "made out" in those places. The Tenant testified that her boyfriend had not been fully naked in the kitchen, he just had his shirt

off. The Tenant thought she was being discreet and she had not been told or warned that she was disturbing the Daughter or her friends. She testified that on Halloween night the Daughter was having a party, and she and her boyfriend went to her room. She testified she had closed the door, however, there were people who knocked on the door and looked into the room during the party.

The Tenant further testified that she and the Daughter were two grown adults and the Daughter should have said something to her. She testified she thought she was being discreet and did not realise the noise from her sex with the boyfriend was upsetting the Daughter. She testified that on a few occasions the Daughter had boyfriends over as well, and that the Tenant and the Daughter often would laugh about such things as making noise during sex.

The Tenant submitted that there was no open or honest communication with her from the Landlord or the Daughter. She explained her boyfriend was visiting the rental unit occasionally and only stayed there on weekends one or two nights.

In final submissions, the Daughter testified she had vacated the rental unit. The Landlord testified she had moved into the bedroom that her Daughter had vacated in the rental unit because she wanted to protect her property from the Tenant. The Landlord alleged that she had trouble finding other renters due to the noisy sex of the Tenant and her boyfriend.

Analysis

Based on the foregoing, the testimony and evidence, and on a balance of probabilities, I find that the Notice must be cancelled.

Therefore, I order that the Notice to End Tenancy is cancelled and is of no force or effect. The tenancy will continue until ended in accordance with the Act.

While the Daughter might have been embarrassed or made uncomfortable by noise from the Tenant and her boyfriend, there was insufficient evidence or testimony that the alleged noise unreasonably disturbed her or kept her awake at night or significantly interfered with her sleep or other activities.

I further find that the Landlord has insufficient evidence to show the Tenant had put the property at significant risk. While it might be that the Daughter was reluctant to discuss the sex noise with the Tenant, if the Daughter had truly feared for her safety or the safety of the property due to the Tenant's boyfriend leaving without locking the door, it is

likely the Daughter would have communicated this at the time the incident occurred. Simply put, a reasonable person who is genuinely concerned for their safety voices concern about these types of incidents at the time they occur, in order to prevent future occurrences.

I find that the Landlord, by her own testimony, intentionally misrepresented to the Tenant the reasons why she wanted the tenancy to end. The Landlord testified she told her daughter to verbally inform the Tenant she wanted to move a family into the rental unit, when in fact the Landlord had been told by her Daughter that she did not want to live there anymore.

I do not accept the argument of the Daughter or the Landlord that there was sufficient cause to try and end the tenancy with Notice. It appears more likely, based on the evidence before me, that once the Tenant asserted her right to adequate notice and compensation under the Act for this form of ending the tenancy, the Landlord and her Daughter came up with the alleged causes to issue her the Notice.

Therefore, I find the Landlord had insufficient evidence to show the Tenant has significantly interfered with or unreasonably disturbed another occupant or the Landlord, seriously jeopardized the health, safety or lawful right of another occupant or the Landlord, or has put the Landlord's property at significant risk.

I also note that the Daughter has vacated the rental unit and the Landlord has testified she moved into her Daughter's old room. The Landlord testified she did this to protect her property. I found during the course of the hearing that there was insufficient evidence to suggest the Tenant has done, or has threatened, any harm to the Landlord's property.

More importantly, I find the Landlord, who is an owner under the Act, has breached the Act and a material term of the tenancy agreement by taking possession of the rental unit without proper notice or compensation to the Tenant. The tenancy agreement and arrangements entered into by the parties at the outset of the tenancy did not contemplate the Tenant living with an owner.

In fact, during the hearing the Landlord submitted that when her Daughter vacated the rental unit this should have ended the tenancy with the Tenant. Based on his type of submission and the actions of the Landlord, it appears the Landlord has little understanding of the rights and obligations provided to both parties under the Act.

Given the disregard the Landlord has demonstrated for the tenancy agreement and the provisions of the Act, I find it would be a breach of the Act, contract law and natural justice, for the Landlord/owner to breach the tenancy agreement and then attempt to avail herself of the provisions of section 4(c), to end the tenancy.

The Landlord is strongly cautioned that should she attempt to use her own breach of the tenancy agreement and the Act, to attempt to avoid the Act and end the tenancy by the provision of section 4(c), the Tenant might apply for monetary compensation against the Landlord under the Act and tenancy agreement, which may include aggravated damages and other damages. I strongly caution the Landlord that she must act in good faith towards the Tenant and must adhere to the Act, regulation and tenancy agreement. I have also enclosed a guidebook for the Landlord to refer to for information on the rights and obligations under the Act.

I also note that following the conclusion of the hearing the Landlord wrote a letter addressed to this Officer, instructing how I might write this Decision and requesting that certain matters, which were not at issue during the hearing of the Tenant's Application, be included in this Decision. I find that the behaviour of the Landlord, in writing before and after the formal hearing process, and in particular to request specific inclusions in this Decision, is completely inappropriate. The Landlord is advised to adhere to the rules of procedure in any future hearings.

As the Tenant has been successful in her Application, I order that she may recover the filing fee for the Application from the Landlord by deducting **\$50.00** from one month of rent. As the tenancy is continuing and the Notice has been cancelled, the Tenant agreed that the monetary claim in this Application was no longer necessary.

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: June 09, 2010.

Dispute Resolution Officer