DECISION

Dispute Codes MNDC, FF, O

Introduction

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

- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The female landlord (the landlord) testified that she placed a February 1, 2010 2 Month Notice to End Tenancy for Landlord Use of Property in the tenants' mail slot on February 1, 2010. The male tenant (the tenant) confirmed receiving this notice on February 1, 2010 and discussing the notice with her. The tenant testified that he sent the landlord a copy of the tenants' application for dispute resolution hearing package on June 2, 2010 by registered mail. He provided the Canada Post Tracking Numbers. The landlord confirmed that she received the tenants' application for dispute resolution. The parties also agreed that they had received one another's evidence packages. I am satisfied that all of the above documents were served in accordance with the *Act*.

Issues(s) to be Decided

Are the tenants entitled to a monetary order for double the monthly rent because the landlord did not use the rental premises for the purpose stated in the landlord's notice to end tenancy? Are the tenants entitled to recover their filing fee for this application from the landlords?

Background and Evidence

The landlord testified that this fixed-term tenancy commenced on February 15, 2005. At the end of the two-year fixed term on March 1, 2007, this converted to a month-to-

month tenancy. At the time that the landlord issued the notice to end tenancy, the tenants were paying $1,900.00 in rent on the first of each month. The parties agreed that the landlord has returned the tenants' $950.00 security deposit with interest.

The tenant testified that he based his decision to vacate the rental premises on March 26, 2010 on the landlord's February 1, 2010 2 Month Notice to End Tenancy for Landlord Use (the notice). This notice required the tenants to vacate the rental premises by April 1, 2010. The tenant was aware that the landlord advertised the property for sale about a week after he received the notice to end tenancy. He said that he did not receive any formal notification from the landlord that the notice was rescinded or withdrawn. He said that he rented alternate accommodations before his scheduled February 11, 2010 surgery for occupancy by April 1, 2010.

There is undisputed evidence that the landlord did not occupy the rental premises, but instead, a few days after issuing the notice to end tenancy, listed the property for sale. The parties agreed that the landlord sold the property on February 25, 2010 to an investor who was willing to let the tenants remain in the property.

The tenant testified that he believed that the landlord intended to sell the property from the outset and issued the notice without intending to occupy the rental premises. He asked for a monetary award of two month's rent in accordance with section 51(2)(b) of the *Act* as the rental unit was not used for the stated purpose in the notice to end tenancy for at least six months.

The landlord entered undisputed testimony that the tenants did not pay any rent for March 2010. The landlord testified that she issued the notice because she and her husband had recently separated and she was intending to move to the rental premises with her two children rather than remain in the family home. She said that she had every intention of occupying the rental premises herself with her two children until the male tenant and later the basement tenants voiced their strenuous objections to having to leave the property. She testified that she asked the male tenant for a few days to

think over her options. The parties agree that the male tenant, the female landlord and a realtor met on February 5, 2010 to discuss the landlord's plans to sell the property. She said that she was hopeful that the realtor would be able to interest an investor in purchasing the property and letting the tenants remain on the premises.

The parties submitted copies of electronic mails (emails) exchanged between them.

The tenant entered into evidence his February 5, 2010 email sent after he met with the landlord and the landlord's realtor. In the following portion of this email, the tenant drew the landlord's attention to sections 44 and 51 of the *Act* and noted that there was a contradiction between the landlord's revised plans to sell the property and the stated reason for issuing the notice to end tenancy.

> *...While in the notice I received, it was clearly stated that the decision was based on 44(1)(v) (landlord use of property) the realtor's visit today, the Remax sign in front of the house, and quite a few other elements, contradict what was written in the document signed by you!!*
> *I feel it is my civic duty to follow up, now or in the future, on this item, in accordance with the Act...*

The tenant testified that he received no substantive response to this part of his email in the landlord's February 6, 2010 email.

The landlord testified that the following portion of her February 6, 2010 email advised the tenants she had changed her mind and that they would not have to vacate the premises by April 1, 2010.

> *...I reviewed it firstly when we gave you notice to vacate as we were planning to use the property. Then again, when three days later I explained to you that we no longer wanted to use the property and we would try to sell it. It was both of our hopes at that time, that if we sold the house you're living in, you would have a better chance of staying, which you were keen on, and then I would stay in the*

house in which I was living...I know you don't feel hopeful, but it is possible that an investor will buy the house and you can continue to live there if you choose too.

(as in original)

The tenant also entered into evidence an August 24, 2010 letter from the realtor who met with the landlord and tenant on February 4, 2010. In his letter, the realtor stated that "during this hour-long visit I told him (the tenant) that the eviction notice given by the landlord should be considered rescinded."

The landlord testified that the placement of a "For Sale" sign on the lawn, the calls regarding property viewings, and their ongoing dialogue alerted the tenants that they would only need to leave the premises if the purchaser needed it himself or herself. In that case, she said that the tenants would be given a new notice to end tenancy by the new owners of the property, with additional time to find alternate accommodations. She said that she was unaware that the tenants still planned to vacate the premises by the April 1, 2010 deadline provided in her February 1, 2010 notice to end tenancy.

Analysis

The tenant has asked for a monetary order under section 51(2) on the basis of the landlord's failure to comply with the provisions of section 44(1) and 49 of the *Act*. Section 44(1)(a)(v) reads in part as follows:

(1) A tenancy ends only if..

(a) the tenant or landlord gives notice to end tenancy in accordance with one of the following:...

(v) section [landlord's notice: landlord's use of property]...

Section 51(2) reads as follows:

(2) In addition to the amount payable under subsection (1), if

(a) Steps have not been taken to accomplish the stated purposed for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or

> *(b) The rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,*
>
> *the landlord or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement...*

Section 49(3) of the *Act* allows a landlord to end a tenancy when "the landlord or a close family member of the landlord intends in good faith to occupy the rental unit." Residential Tenancy Policy Guideline #2 outlines a two part test for interpreting this "good faith" requirement. First, the landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy. Second, the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises. If the "good faith" intent of the landlord is called into question, the burden is on the landlord to establish that she truly intended to do what she indicated on the Notice to End Tenancy, and that she was not acting dishonestly or with an ulterior motive as her primary motive

There is insufficient evidence to conclude that the landlord was not acting in good faith when she gave the two month Notice to End Tenancy. The landlord maintained that she genuinely intended to move to the rental premises, but recognized the disruption this would cause to long-term tenants, reviewed her options, and decided to sell the property instead. She said that she changed her mind during a period that was difficult for her as her marriage was ending. I accept that the female landlord genuinely intended to occupy the rental unit with her children when she issued this notice.

By the end of the tenant's meeting with the landlord and realtor on February 4, 2010, the tenants knew that the property was being listed on the real estate market. In August 2010, the realtor maintained that he clearly advised the tenant on February 4, 2010 that the notice to end tenancy had been rescinded. I see no such clear written evidence

provided by the landlord to inform the tenants that the February 1, 2010 notice to end tenancy had been rescinded.

The tenant's February 5, 2010 email raised essentially the same concerns that form the basis for the tenant's present application for dispute resolution. I do not find that the landlord's email responses addressed these concerns. I accept the tenant's undisputed testimony that the landlord's February 6, 2010 email response was directed at concerns that the tenant raised about the method by which inspections and showings of the rental premises would occur as the property was listed for sale. Rather, the landlord's February 6, 2010 email response expressed her hope that the property would be sold to an investor who might not require the tenants to move. I find that the tenants received nothing in writing from the landlord to assure them to the extent necessary that the landlords no longer required possession of the rental premises by April 1, 2010.

Residential Tenancy Policy Guideline No. 11 provides the following guidance with respect to the amendment and withdrawal of a notice to end tenancy:

> *A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.*

The legislation does not address the withdrawal of a Notice to End Tenancy, in particular a notice given for landlord use. In general, a party may not unilaterally withdraw a Notice to End Tenancy. However, this policy would seem to have greater application to notices for cause, for non-payment of rent and to tenants' 30 day notices. A party who has been given a notice may have accepted it and made arrangements to move as a result of receiving the notice. A party giving a notice should not be able to withdraw or cancel it if that will prejudice the other party who has accepted it and acted upon it. For that reason, a notice may not be unilaterally withdrawn.

In this case, I accept that the tenant tried to clarify the seeming contradiction between the written notice received on February 1, 2010 and the information provided to him by the landlord and the landlord's realtor on February 4, 2010. Based on the evidence presented, it seems that the landlord did not adequately address the tenant's concerns about the conflicting messages he received on those dates. Had the landlord truly wanted to retain the tenants as she claimed, she could have done a more effective job in responding to the first email that the tenant sent the landlord after their meeting.

The landlord also provided evidence that she contacted the realtor to enquire about selling the property on the same day that she issued the notice to end tenancy for landlord use of the property. This evidence can either support the tenant's assertion that she had ulterior motives in issuing the notice to end tenancy or the landlord's claim that she did so out of compassion for the tenants' circumstances.

Dissatisfied with the lack of clarity provided in the landlord's responses, the tenant testified that he made alternate arrangements for accommodations on or about February 10, 2010 in accordance with the landlord's formal notice to end tenancy. Based on the tenant's emails to the landlord, I do not accept that the tenant provided express or implied consent to the withdrawal or abandonment of the landlord's notice to end this tenancy. For that reason, I do not accept that there was mutual consent to withdraw or abandon the notice to end this tenancy or establish a new tenancy agreement before the tenants acted in reliance upon the landlord's notice.

I allow the tenant's application for a monetary award of double the monthly rent in accordance with section 51(2) of the *Act*. I grant a monetary award in the tenants' favour in the amount of $3,940.00. To this amount, I add the tenants' $50.00 filing fee for a total monetary Order of $3,990.00.

Conclusion

I allow the tenants' application for a monetary Order. Since the tenants were successful in this application, they are entitled to recover their costs for filing this application from the landlord.

The tenants are provided with these Orders in the above terms and the landlord(s) must be served with a copy of these Orders as soon as possible. Should the landlord(s) fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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*.