



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNL, OPL

Introduction

This hearing dealt with cross applications filed by both parties seeking remedy under the *Residential Tenancy Act*.

The Landlord is seeking an order of possession pursuant to a 2 Month Notice to End Tenancy for Landlord's Use of Property (the "Notice").

The Tenant is seeking to cancel the 2 Month Notice to End Tenancy for Landlord's Use of Property.

Both the Agent for the Landlord and Tenant appeared, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross examine each other.

Preliminary Matter:

I have considered whether the Notice was issued properly to the Tenant in the manner according to the Act for documents served, whether the Tenant filed for Dispute Resolution within 15 days of when the Notice was presumed to have been received and whether the evidence packages were delivered to the RTB and the other party within the time frame according to the Act.

I find that the Tenant has been out of the country for an extended period of time, but that the Landlord served the Notice and Notice of Hearing documents in the time and manner prescribed by the Act and have been properly served.

Likewise, due to the confusion as to when the Tenant received her complete hearing package, I accept that the Landlord was properly served with the Tenant's Application and Notice of Hearing.

There was a question as to whether or not the Landlord's and Tenant's evidence packages were served within the five business days prior to the hearing, but both parties acknowledge receipt prior to the hearing and that the evidence has been reviewed. Therefore due to the Tenant's continued absence from the country, and the parties' acknowledgement, I have accepted all evidence.

I note the hearing was quite lengthy and the written submissions quite long and detailed, with several duplicates by both parties. I have given careful consideration of all oral and written evidence before me; however, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

Is the Landlord entitled to an Order of Possession under section 54 or 55 of the *Residential Tenancy Act*?

Is the Tenant entitled to an order cancelling the 2 Month Notice to End Tenancy for Landlord's Use?

Background and Evidence

I heard undisputed testimony that the rental unit was listed as a resort accommodation at the time the Tenant began occupancy, but thereafter, due to the Tenant and owner agreeing to a longer tenancy, the rental unit was taken out of the rental pool and the Tenant was given a month to month tenancy agreement.

The tenancy agreement indicates that the tenancy began on February 14, 2010 and rent was \$1,500.00 per month, payable on the first day of the month.

The Landlord issued the Tenant a 2 Month Notice to End Tenancy for Landlord's Use on September 22, 2010, by posting on the door, with an effective move out date of November 30, 2010. The Landlord's use as indicated on the Notice was that the Landlord has all the necessary permits and approvals required by law to convert the rental unit to a non-residential use.

Pursuant to the Rules of Procedure, the Agent for the Landlord proceeded first in the hearing to explain why the Notice had been issued.

The Agent for the Landlord's relevant evidence included a Chronology and summary outlining the Landlord's position of the facts in dispute, the Tenancy Agreement, an email train between the Agent for the Landlord and owner concerning a purported agreement with the Tenant for a long term lease with a temporary vacate date for the upcoming holiday period, emails between the Agent for the Landlord and the Tenant, 3 unsigned Addendums to the tenancy agreement, a handwritten note to the Landlord by the Tenant, a typed letter dated September 22, 2010, from the Landlord to the Tenant, a copy of the Notice and a lengthy email from the Tenant to the Agent for the Landlord, purportedly sent on October 1, 2010, outlining the Tenant's position relative to a long term tenancy.

The Agent for the Landlord gave affirmed testimony on relevant point, in short summary form, that the Tenant and the owner at some point in early 2010, agreed that the Tenant

would occupy a residence, which had previously been in a resort rental pool, for a longer period of time through the end of the ski season. The owner then enlisted the services of the Landlord to enter into a month to month tenancy agreement, which was signed by the parties on February 14, 2010.

The Agent for the Landlord testified that the owner in May contacted the resort accommodation service to put the rental unit back into the resort rental pool to allow for holiday bookings. The Agent for the Landlord stated that the owner and the Tenant had come to an agreement for a long term tenancy agreement with the understanding that the Tenant would temporarily vacate the premises for the holiday booking. Thereafter there were repeated unsuccessful attempts to contact the Tenant to sign addendums, which were changed three times at Tenant's request, to include an exclusionary period for the holiday booking and to extend the length of the tenancy, according to the Agent for the Landlord.

The Agent for the Landlord stated that he repeatedly informed the Tenant that the Landlord would have to end the tenancy agreement for Landlord's reversion to commercial use of the premises if the parties could not agree to the addendums to account for the holiday bookings.

The Agent for the Landlord stated that as he was unsuccessful in getting the agreement to extend the tenancy and accommodate the temporary vacate date, the Notice was issued.

The Agent for the Landlord testified that the Landlord did not need to obtain the necessary permits and approvals listed in the Notice as the property was already zoned for commercial use and none were necessary for the reversion to the resort rental pool.

The Tenant's relevant evidence included a typed summary and chronology outlining the Tenant's position of the facts in dispute, the Tenancy Agreement, and the unsigned addendums.

The Tenant gave affirmed testimony on relevant point, in short summary form, that she has been requesting a long term tenancy since at least mid April 2010. Later in May 2010, she received an email from the resort accommodation service that the owner booked the rental unit for a holiday booking.

The Tenant testified that she called the owner in mid June to let him know she was still in the rental unit and that she wanted a long term tenancy. The Tenant indicated that the owner was surprised there was still a tenant in the rental unit.

The Tenant acknowledged that she did agree to the holiday booking, but was pressured to make a decision and unaware of her rights as a tenant at that time and further, that if the Landlord had communicated with her in April, the owner would not have released the rental unit back into the resort rental pool.

The Tenant stated that there were several attempts to come to an agreement about a long term tenancy, but that ultimately the deal concerning the holiday vacate date fell apart when she realized the owner and/or Landlord tried to extract more money from her in return for the long term tenancy. The Tenant stated this was the Landlord's ulterior motive.

The Tenant testified that she asked the Agent for the Landlord if it was legal for the owner to make a booking in the middle of a month to month tenancy, and the response was that the owner had the right to use the property as he wanted and to issue the Notice.

The Tenant testified that she was required to be out of the country for an extended period of time to be with her ill mother, but that the Landlord was aware of this. The Tenant testified that she has paid three months of advanced rent, through the end of November, to verify that it is her intent to be a long term tenant.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

Once the Tenant made an Application to dispute the Notice alleging it has been given in bad faith, the Landlord became responsible to prove the Notice to End Tenancy is valid.

The Notice was issued pursuant to section 49(6)(f) of the *Act*, which requires the Landlord to have all necessary permits and approvals, and a good faith intention, to use the unit for the stated purpose, i.e., convert the rental unit to a non-commercial use.

Guidance for the interpretation of this section of the *Act* comes from other decisions, case law and the policy guideline.

The relevant Policy Guideline is section 2, and states, in part:

The "good faith" requirement imposes a two part test. 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.

For example, the landlord may intend to renovate or repair the rental unit as stated on the notice to end. That intention may, however, be motivated by dishonest or undisclosed purposes. If the primary motive for the landlord ending the tenancy is to retaliate against the tenant, then the landlord does not have a "good faith" intent.

If the "good faith" intent of the landlord is called into question, the burden is on the landlord to establish that he/she truly intends to do what the landlord

indicates on the Notice to End, and that he/she is not acting dishonestly or with an ulterior motive for ending the tenancy as the landlord's primary motive.

The Tenant here has disputed the good faith of the Landlord in issuing the Notice.

The Landlord must provide evidence to prove the "good faith" requirement for the reasons given on the Notice to End Tenancy by first truly intending to use the premises for the purposes stated, in this case that the Landlord intends to convert the rental unit to a non-residential use and secondly the Landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the Tenant vacate the residential premises.

I find that the evidence before me supports that it is exactly the Landlord's intention to convert the property to non residential use by virtue of the undisputed fact the owner released the rental unit back into the resort rental pool and holiday bookings were made. Further I accept that the Landlord did not require the necessary permits or approvals as the land was already zoned for commercial use.

I considered the Tenant's statement that the Landlord failed the second part of the test, that the Landlord had an ulterior motive, but I find on a balance of probabilities and insufficient evidence provided by the Tenant, this claim is not supported.

I find based on the documentary evidence, verbal testimony and a balance of probabilities that the Landlord intends in good faith to convert the rental unit to convert the rental unit to non-residential use and I hereby grant an **Order of Possession** to the Landlord effective on the date of the Notice, **November 30, 2010, at 1:00 p.m.**

This order must be served on the Tenant and may be filed in the Supreme Court and enforced as an order of that Court.

Under the Act, a Tenant who receives a Section 49 notice to end tenancy is entitled to receive from the Landlord on or before the effective date of the Landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement. Therefore **I further find** that the Tenant has fully paid rent through November 2010, and entitled to a monetary claim of \$1,500.00. I hereby **order** the Landlord to pay the Tenant **\$1,500.00** on or before November 30, 2010.

I grant the Tenant an **order** under section 67 for the amount of **\$1,500.00** in the event that amount is not paid by November 30, 2010.

This order may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

As the Tenant was not successful and the Landlord has neither applied for nor requested the filing fee, I decline to assess the filing fee against either party.

The Landlord and the Tenant are also advised of the provisions of section 51(2) of the *Act*, which stipulates that the landlord must pay the tenant the equivalent of two months rent payable under the tenancy agreement if steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 of the *Act* within a reasonable period after the effective date of the notice or if the rental unit is not used for that stated purpose **for at least six months** beginning within a reasonable period after the effective date of the notice.

[Emphasis added]

Conclusion

The tenancy will end and the Landlord is provided an Order of Possession effective November 30, 2010, at 1:00 p.m.

The Tenant is granted a monetary order in the amount of \$1,500.00 if that amount is not paid by the Landlord by November 30, 2010.

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 20, 2010.

Dispute Resolution Officer