

## **DECISION**

### **Dispute Codes:**

CNC, FF

### **Introduction**

This Hearing was scheduled to hear the Tenant's application to cancel a Notice to End Tenancy; and to recover the cost of the filing fee from the Landlord.

Both parties appeared and gave affirmed evidence at the Hearing.

### **Issue(s) to be decided**

- Should the Notice to End Tenancy for Cause issued October 26, 2010, be cancelled?

### **Background and Evidence**

The tenancy started on September 1, 2007. The tenancy agreement was signed by the parties on August 29, 2007. This tenancy is subsidized, and is adjusted from time to time based on 30% of the Tenant and her families' income. Market rent at the beginning of the tenancy was \$1,296.00 per month, payable on the first day of each month. The tenancy agreement allows four people to live in the rental unit, including the Tenant. The rental unit contains three bedrooms.

### **The Landlord's agent gave the following testimony:**

In May of 2009, the Tenant advised the Landlord that her son had moved out of the rental unit two months ago. The Landlord determined that therefore the unit was overhoused, because the Tenant and her husband shared one bedroom, one bedroom

was used by their daughter, and the third bedroom was not used as a bedroom. The Landlord referred to a clause in the tenancy agreement which states:

20. **Overhoused**

Our Operating Agreement with the Commission requires us to have a clause allowing for termination of this Tenancy Agreement if a Tenant becomes overhoused. Overhousing can occur when one or more members of the family moves out leaving the Tenant in the Rental Unit that is larger than the number of remaining residents are entitled to under the Occupancy standards in our Operating Agreement with the Commission. Therefore, if a Tenant becomes overhoused, they will be required to vacate the Rental Unit and a **Notice to End a Tenancy** may be served by the Landlord to enforce this clause.

The Landlord gave the Tenant written notice in February, 2010, that she was overhoused after her son moved out, and that the Landlord could terminate the tenancy. The letter also advised the Tenant that the Landlord preferred to re-house the Tenant in another unit. Policy states that the Tenant would be put on a list for all of the Landlord's subsidized buildings in her municipality, or any other of the Landlord's buildings the Tenant might request. The Tenant must accept the first unit offered.

In August, 2010, a 2 bedroom unit became available and the Tenant agreed to move into that unit. On September 13, 2010, the Tenant withdrew her agreement to move. On October 26, 2010, the Landlord issued and served a One Month Notice to End Tenancy for Cause, indicating that the Tenant had breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Landlord asked for an Order of Possession effective January 31, 2011.

The Tenant gave the following testimony:

When the Tenant signed the Tenancy Agreement, she was told by the manager that the rental unit was a 2 bedroom unit with a den. The Tenant does not believe she is overhoused, as she uses the den for an office and not a bedroom.

The Landlord gave the following reply:

There are no units in the rental property that have 2 bedrooms and a den. The Tenant's unit is a three bedroom unit.

### **Analysis**

When questioned, the Tenant agreed that the "den" had a closet. Therefore, I find that the "den" is in fact a bedroom and that the unit is a 3 bedroom unit.

In August, 2010, pursuant to the terms of the Landlord's written notice, the Landlord offered the Tenant a 2 bedroom unit. The Tenant ultimately declined to agree to move. The written notice was clear that the Tenant must accept the first offer to re-house her family. I find that clause 20 of the tenancy agreement is a material term of the agreement. Therefore, based on the testimony of the parties, I find that the Notice to End Tenancy is a valid notice. The Tenant's application is dismissed.

Section 55(1) of the Act states:

### **Order of possession for the landlord**

**55** (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,

(a) the landlord makes an oral request for an order of possession, and

(b) the director dismisses the tenant's application or upholds the landlord's notice.

Based on the undisputed testimony of the Landlord's agent, I am satisfied that the Tenant was served with the One Month Notice to End Tenancy on October 26, 2010. I find that the effective date of the end of the tenancy is November 30, 2010. However, the Landlord requested an Order of Possession to be effective January 31, 2011, in order to provide the Tenant more time to find suitable accommodation. Further to the

provisions of Section 55(1) of the Act, I hereby provide the Landlord with an Order of Possession **effective 1:00 p.m., January 31, 2011.**

**Conclusion**

The Tenant's application is dismissed without leave to re-apply.

I hereby provide the Landlord an Order of Possession effective 1:00 p.m., January 31, 2011. This Order must be served on the Tenant and may be filed in the Supreme Court of British Columbia and enforced as an Order 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*.

Dated: November 30, 2010.

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