DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for cancellation of the landlord's 1 Month Notice to End Tenancy (the 1 Month Notice). Although the tenant's application for dispute resolution referred to the landlord's 1 Month Notice as a notice to end tenancy for cause, the parties confirmed at the hearing that the landlord's 1 Month Notice was issued because the tenant's employment with the landlord has ended and the rental unit is needed for a new employee. For that reason, pursuant to the powers allowed under the *Act*, I have amended the tenant's application to show that the application was issued pursuant to section 48 of the *Act*.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The tenant confirmed that the landlord handed her the 1 Month Notice on August 27, 2011. The landlord's wife (the landlord), who provided most of the landlord's evidence at this hearing, testified that the landlord received a copy of the tenant's dispute resolution hearing package sent to by registered mail on September 2, 2011. I am satisfied that the parties served these documents and their written evidence to one another in accordance with the *Act*.

Issues(s) to be Decided

Should the landlord's 1 Month Notice to End Tenancy for End of Employment be cancelled? Is the landlord entitled to an Order of Possession on the basis of the 1 Month Notice to End Tenancy for End of Employment?

Background and Evidence

The tenant originally moved to this rental property in May 1992. On March 1, 1994, the tenant and her then spouse moved to the tenant's present rental unit on the fourth floor of this rental building. Monthly rent at that time for this periodic tenancy was set at $850.00, payable in advance on the first of each month.

On March 18, 1997, the tenant entered into an employment arrangement with the then owners of this property, one of whom is the current landlord, as the resident caretaker of this rental property As part of this arrangement, the tenant paid $350.00 in cash for rent and received a $375.00 rent credit for the rental unit. Although no formal change to the March 1994 residential tenancy agreement was made at that time, the parties agreed that the total amount of rent payment and rent credit given for the employment

relationship since 1997 has been $725.00 (i.e., $350.00 in cash and $375.00 in rent credit).

The parties agreed that the current landlord bought out his partner's interest in the rental property on July 1, 2011. Over the next seven weeks, the parties exchanged electronic mail messages (emails) and underwent discussions regarding the landlord's expectations for the resident caretaker of this rental property. During this period, the landlord expressed concern regarding the level of maintenance and service being provided by the tenant. Over these weeks, it became apparent that the landlord was seeking a higher level of service than the landlord believed the tenant was capable of providing. Written evidence of these emails was entered by both parties, some of which revealed that the tenant had physical challenges that made it difficult for her to provide the level of maintenance to the building that the landlord was expecting.

Some of these emails expressed the landlord's decided preference that the resident caretaker in this building reside on the ground floor. The landlord also stated in some of these emails that if the tenant did not feel that she could continue in her role as the resident manager and wished to remain in her fourth floor rental unit, the landlord would require her to pay $1,200.00 in monthly rate. The landlord maintained that this rental amount was below the current market rental.

The tenant's counsel submitted that the landlord terminated the tenant's employment relationship by way of an August 22, 2011 email. This information is somewhat at odds with an email that the landlord sent the following day which stated the following:

> *Following our meeting this morning we wondered if you would be able to let us know your thoughts by the end of the weekend.*
> *The issues for you to address are essentially, are you able to fulfill all the physical requirements of the caretaker position to a satisfactory level and prepared to move to the ground floor of the building.*

The landlord testified that there were a series of ongoing discussions and exchanges of emails in August 2011. The landlord maintained that the employment relationship did not actually end until the tenant chose to resign from her caretaker position effective August 31, 2011, by way of an August 25, 2011 email. However, in so doing, the tenant stated "Based on your email of August 22nd, I accept that any previous agreement/arrangement for my services/employment has been terminated..."

The tenant's counsel submitted that the true reason for the landlord's 1 Month Notice was the tenant's refusal to pay $1,200.00 in monthly rent for her fourth floor rental unit. He claimed that the tenant still had a residential tenancy agreement for an ongoing

tenancy commencing in March 1994 that pre-dated the employment relationship with the landlord. The tenant's counsel asserted that the landlord is bound by this existing residential tenancy agreement and that the landlord's current attempt to increase the tenant's rent is not authorized under the *Act*. The tenant's counsel maintained that the email exchanges demonstrated that the landlord wanted a ground floor caretaker for this building and was seeking significantly more rent for the fourth floor rental unit than the tenant should be required to pay.

The tenant's counsel asked that consideration be given to whether the landlord has met the "good faith requirement" set out in Residential Tenancy Policy Guideline #2 (Guideline #2) . At the hearing, the tenant's counsel alleged that the landlord was being dishonest and was seeking an end to this tenancy for an ulterior motive (i.e., to obtain an increase in the rent obtained from this rental unit).

Analysis

While I have turned my mind to all the documentary evidence, including miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings are set out below.

Section 48 (1) of the *Act* establishes the grounds by which a landlord may end the tenancy of a person employed as a caretaker of a residential property of which the rental unit is a part by giving notice to end the tenancy under the following terms:

> *(a) the rental unit was rented or provided to the tenant for the term of his or her employment,*
>
> *(b) the tenant's employment as a caretaker, manager or superintendent is ended, and*
>
> *(c) the landlord intends in good faith to rent or provide the rental unit to a new caretaker, manager or superintendent.*

The terms by which the employment relationship ended extend beyond my jurisdiction within the *Act*. However, I am satisfied that the tenant's employment relationship with the landlord ended on August 31, 2011. I find that the landlord's 1 Month Notice meets the requirements of subsections 48(1)(a) and (b) of the *Act*.

As was noted by the tenant's counsel at the hearing, there is a two part test established under Guideline #2. This test is set out as follows:

- *The landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy.*

- *The landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.*

Guideline #2 establishes that if the "good faith" intent of the landlord is questioned by the tenant, "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."

Based on the evidence provided by the landlord, I have little doubt that the landlord truly intends to use the rental premises for the purposes stated on the 1 Month Notice. The tenant's counsel did not dispute that the landlord needs a resident caretaker and that one has been in place for many years at this rental property. I find that the landlord has met the first of the two tests set out in Guideline #2.

The issue before me narrows to whether the landlord has met the burden of proving that the primary motive for seeking an end to this tenancy was not based on a dishonest or ulterior motive. In assessing motivations, I note that there can be a number of motivations for ending a tenancy.

In this case, the landlord did not present any written or oral evidence from the adult child who the landlord maintains is planning to move into the rental unit as a caretaker. The landlord stated that their daughter is in her thirties and is taking studies that will require her to remain in the area for at least two years. In the interim, the landlord testified that the landlord(s) will continue the search for a suitable resident caretaker who can take over responsibility for this rental building. She said that it can take considerable time to find a suitable resident caretaker.

As of late August 2011, it remained uncertain as to whether the tenant would continue in her duties as the resident caretaker for this building. Whether the landlord terminated the employment agreement or whether the tenant resigned, the landlord had little warning that the tenant's employment as the resident caretaker of this building would end on August 31, 2011. As of August 25, 2011, the landlord faced the difficult challenge of seeking an end to an existing tenancy in this building if the landlord wished to continue the practice of having a resident caretaker for this property. Since the landlord appears to have held the tenant responsible for initiating this process, the landlord selected the tenant's rental unit as the most logical suite for a new resident caretaker.

The landlord explained that the reason that the tenant's rental unit has been identified as the caretaker's unit is that all other units are presently rented. Locating the resident

caretaker to a ground floor rental unit would require evicting an existing tenant. She said that she knows that her daughter will be physically able to perform the tasks of a caretaker of this building and that the concerns that the landlord had about taking proper care of the building from a fourth floor rental unit would not cause concern if their daughter was performing these tasks.

I can appreciate that the landlord may have more confidence in a family member looking after the building as the resident caretaker than the previous situation where the landlord had concerns about the tenant's physical ability to fulfill the tasks required of a caretaker. However, this oral testimony is at odds with the landlord's repeated emails expressing a desire to have a ground floor caretaker.

The tenant has a lengthy history in this rental building and her residential tenancy agreement pre-dates her 14-year tenure as the resident caretaker. Once the tenant's employment relationship with the landlord ended, she returned to the only contractual arrangement between the two parties, that of her March 1994 residential tenancy agreement with the then landlords. At that point, I find that the tenant became similarly positioned to the other tenants of this rental building who also have existing tenancy agreements with the landlord, including those on the ground floor.

If the tenant had no such pre-existing residential tenancy agreement with the landlord, I might find more merit in the landlord's claim that the tenant's resignation as caretaker precipitated the need to use her fourth floor rental unit for a new resident caretaker. Similarly, I might find merit to the landlord's claim if there was evidence that, despite the landlord's preferences to have a ground floor resident caretaker, this fourth floor rental unit was the unit traditionally set aside for the resident caretaker. However, that is not the case. In fact, the tenant's counsel submitted undisputed oral and written evidence that the previous resident caretakers lived in a ground floor rental unit. In the tenant's undisputed sworn affidavit, the tenant asserted that the previous ground floor caretakers remained in their ground floor unit after their term as caretakers ended.

I find that the landlord would likely have acted on his distinct stated preference to have a ground floor resident caretaker if the landlord had truly placed all of the potential rental units on an equal footing for consideration as the next resident caretaker's suite. I do not find that this occurred as the landlord held the tenant responsible for the turn of events that led to the need to identify a suite for a new resident caretaker. Once a new caretaker for this building is located and the landlords' daughter gives up this role, there is every reason to believe that the landlord will choose to locate the caretaker unit on the ground floor in accordance with the landlord's stated preference. I find that the landlord did not provide convincing oral testimony, other than perceived expediency, to

explain why the landlord's repeated stated preference to secure a resident ground floor caretaker was set aside and the tenant's fourth floor rental unit was identified for the next resident caretaker. This occurred two days after the tenant resigned as the caretaker and after she had refused to pay higher rent for her fourth floor rental unit.

Based on the landlord's emails and the evidence presented by the parties, I find that the landlord's primary motivation for identifying the tenant's rental unit as the one to house the new resident caretaker is the fact that the tenant's rent is much lower than what the landlord believes could be obtained through the current rental market. In coming to this determination, I recognize and accept that there are other factors motivating the landlord's decision, not the least of which is the urgent need to obtain a resident caretaker when a more orderly and lengthy transition may have been anticipated.

As outlined above, Guideline #2 requires that both parts of the two-part "good faith" requirement must be met in order to end a tenancy when a landlord intends to provide the rental unit to a new caretaker. I find that the landlord has met the burden of proof required to establish that he truly intends to use the tenant's rental suite as the resident caretaker suite for this rental property. However, I find that the landlord has not met the burden of proving that he is not acting with an ulterior motive for ending the tenancy as the landlord's primary motive. I find that the selection of the tenant's rental suite for the caretaker's unit was contrary to repeated stated preferences that the landlord expressed for relocating the rental unit to the ground floor. The landlord has not successfully refuted the tenant's claim that the landlord selected her rental unit as the unit required for the new resident caretaker because she had a long term tenancy agreement at a favourable rent. For these reasons, I allow the tenant's application to cancel the landlord's 1 Month Notice to End Tenancy for End of Employment.

I also order that the monthly rent for this tenancy be returned to the original amount stated in the residential tenancy agreement of 1994. This results in a monthly rent of $850.00, payable in advance on the first of each month.

Conclusion

I allow the tenant's application to cancel the landlord's 1 Month Notice with the effect that this tenancy continues. I set the monthly rent for this tenancy at $850.00, payable in advance on the first of each month.

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*.