



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

The tenants apply to recover an amount equivalent to two months' rent, pursuant to s. 51 of the *Residential Tenancy Act* (the "Act") arguing that the landlord issued a two month Notice to End Tenancy for "landlord use of property" but that steps have not been taken to accomplish that stated purpose for ending the tenancy within a reasonable period after the effective date of the notice, or that the rental unit was not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice. Additionally, they argue the Notice was issued in bad faith.

At the start of the hearing it was disclosed that this arbitrator, while carrying on the practice of law some years ago, rented office space from and provided legal services to a company founded and lead by the late Mr. H.S.D. (throughout this decision, names have been abbreviated for privacy purposes). Further, it was disclosed that this arbitrator had also provided significant legal services and was retained counsel for the tenant Ms. W's employer, a local government. The parties were made aware that if either side chose, a new arbitrator would be assigned to determine the dispute. Both sides declined the offer and expressed their agreement and consent to continue on with this hear and this arbitrator.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show, on a balance of probabilities, that the landlord has violated s. 51 and that the two month monetary penalty has been activated?

Background and Evidence

The rental unit is a large three bedroom home. The tenancy started in October 2010 for a fixed term of one year, at a monthly rent of \$1800.00. The tenancy agreement was renewed for an addition year to September 30, 2012 and to continue after that as a month-to-month tenancy. The final monthly rent ended up being \$1884.60. The tenancy agreement shows the landlord to be "The Estate of H.S.D."

Near the end of July 2012, Mr. McC., one of the executors of the will of the late Mr. H.S.D., issued to the tenants the two month Notice to End Tenancy in question dated July 27, 2012. The Notice stated that the landlord was "ESTATE OF H.S.D." and that the Notice was given because the rental unit "will be occupied by the landlord or the landlord's spouse or a close family member (father, mother child) of the landlord or the landlord's spouse."

That reason is one of the very few reasons specifically permitted by law for a landlord to end a tenancy and evict a tenant though the tenant has not given cause.

It appears the tenants did not dispute the Notice. They vacated on the September 30, 2012 effective date and received both the return of their deposits and the one month rent equivalent payment required of a landlord who gives a two month Notice to End Tenancy.

In early 2013 the tenants determined that no one had moved into the rental unit. They took some photographs depicting the inside of the home as being vacant. They obtained the signed statement of a retired neighbour directly across the street to the effect that no one had been living in the rental unit since the tenants left.

The use of the premises in the months following the end of this tenancy is important because s. 51 (2) of the *Act* provides that where, as here, a two month Notice to End Tenancy has been given,

- (2) In addition to the amount payable under subsection (1), if
 - (a) steps have not been taken to accomplish the stated purpose 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.

(my emphasis)

Where the two month Notice has been given for what is commonly referred to as “landlord use of property” it is s. 51(2)(b) that is the operative provision. Refashioning that rule to the facts of this case; the rental unit must have been occupied by a close family member for at least six months within a reasonable time after September 30, 2012.

The tenants argue it was not so occupied. They also argue that the Notice was given in bad faith, saying it was given in response to the fact of two prior disputes between the parties. In one of the disputes a Residential Tenancy arbitrator in June 2012 ordered that the landlord provide the tenants with potable water because the tap water was contaminated with fecal coliform.

Counsel for the landlord submits the affidavits of Mr. McC., the executor, Ms. D.D., the daughter of the late Mr. H.S.D. and her son Mr. J.D. to show that there was a good faith intention when the Notice was given and that a close family member did indeed occupy the premises.

The landlord’s material shows that Ms. D.D. was managing this property for the estate. Her affidavit states that the two month Notice was issued, at least in part, because of “some of the difficulties we had...” with the tenants. She states in her affidavit that it was necessary to replace the roof of the house, do some painting and make some other repairs after the tenants left. Ms. D.S. states that she leased the premises from the estate commencing January 1, 2013 and that her son J.D. moved into the home in mid-December 2012.

Mr. J.D. swore an affidavit in which he explained that he did not have much furniture to move into the house and that he was away for significant periods of time. This might explain why the house appeared empty to the applicant tenants and the neighbour.

It appears that Mr. J.D. moved from the premises in question in early 2013. There is some conflict about whether he moved his belongings out in April 2013 as per his affidavit or in May 2013 as per Mr. M’s note, but from the facts relayed by Mr. McC. at hearing and in his affidavit, I find that new tenants, unrelated to the late Mr. H.S.D. or to the wider family, were sought and found for a tenancy commencing no later than May 1, 2013.

Analysis

Bad Faith

There are facts which cause some significant concern about the good faith or true motive with which the two month Notice to End Tenancy was given. Ms. D.D.'s affidavit indicates the Notice was given because of difficulties with the tenants. Mr. McC. testified that at the time the Notice was given, it was not yet certain who would move into the premises. It is within the realm of the possible that the primary reason for issuing the Notice was not to provide accommodation for a close family member.

Nevertheless, in my view the tenants cannot at this stage raise the argument that the two month Notice to End Tenancy was given in bad faith. The appropriate opportunity to make that argument would have been on an application by the tenants to cancel the Notice to End Tenancy. It is too late to make that application now. It is only permitted to be made within 15 days after receiving the Notice (s. 49(8) of the *Act*). If a tenant fails or declines to make an application to cancel the Notice, the tenant is "conclusively presumed to have accepted that the tenancy ends on the effective date of the notice" (s. 49(9)). That is very strong wording, intended to indicate the finality of an unchallenged Notice. A tenant cannot later argue that the Notice was somehow defective or improper and that the tenancy therefore didn't end or was ended wrongly.

Six Month Rule

The six month rule in s. 51(2), above, is a right specifically created for what happens after a two month Notice to End Tenancy takes effect.

There is conflicting evidence about whether anyone actually lived in the rental unit in the months after the eviction. In my view it does not matter.

According to Black's Law Dictionary the word "occupy" means to "hold in possession." It is not necessary for a person "occupying" premises to physically occupy them. I apply this legal definition of the word "occupy" to its use in the *Act*. And so, in s. 49, where it permits a landlord to issue a two month Notice to End Tenancy "if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit," I take it to mean that the landlord or close family member must intend to possess the rental unit to the exclusion of all others. There is no need of an intention to physically reside in the rental unit.

It was noted that Mr. J.D., the only person who moved in, is the grandson of the late Mr. H.S.D. and therefore does not come within the definition of “close family member” in s. 49 of the *Act*.

However, the landlord has submitted a written tenancy agreement between the estate as landlord and Ms. D.D. as tenant. It shows that it was Ms. D.D. who rented the property from the estate and she is a “close family member.” The son, Mr. J.D., lived in the rental unit with her permission under her tenancy agreement; under her right to exclusive possession (though he may have moved in a few weeks early).

That tenancy agreement indicates that her tenancy, her right to “occupy” the premises, did not start right after the applicant tenants left. It commenced some three months later on January 1, 2013. Given the re-roofing work attested to, it is not unreasonable to conclude that, in the circumstances, her tenancy, her “occupation” of the premises as a close family member, began “within a reasonable period” after the eviction.

That tenancy lasted until new, unrelated tenants moved in on May 1, 2013, a period of only four months, not the six months demanded by s. 51 of the *Act*.

It follows that the landlord is in violation of s. 51 of the *Act* and the tenants are entitled to recover an amount equivalent to two months’ rent.

Conclusion

The tenants are entitled to a monetary award of \$3769.20. They claim only \$3768.00 and so I award them that amount plus the \$50.00 filing fee. There will be a monetary order against the estate of the late Mr. H.S.D. in the amount of \$3818.00.

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 13, 2013

Residential Tenancy Branch