



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Tenant's Application: CNL, OLC, MNDC, AAT, RR, O
Landlord's Application: OPL, FF

Introduction

This hearing dealt with cross applications. The tenant applied for several remedies including: cancellation of a 2 Month Notice to End Tenancy for Landlord's Use; Orders for compliance; monetary compensation; authorization to change the locks, a rent reduction and other issues. The landlords applied for an Order of Possession for landlord's use of property. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

The tenant had filed an Application on July 17, 2014 to cancel a 2 Month Notice issued on July 10, 2014 and a hearing was set for this date on September 30, 2014. The tenant was subsequently served with another 2 Month Notice dated August 29, 2014 indicating the same reason for ending the tenancy. With a view to avoid any prejudice to the tenant for receiving another 2 Month Notice after initiating a dispute to deal with a 2 Month Notice, and considering the landlord had made submissions in support of the later Notice, I amended the Application to indicate the tenant was also disputing the 2 Month Notice issued on August 29, 2014.

With respect to the other remedies sought by the tenant, the Rules of Procedure authorize me to dismiss unrelated issues contained in a single application. Since the tenant indicated several matters of dispute on the Application for Dispute Resolution, the most urgent of which is the request to cancel the Notices to End Tenancy, I only considered the tenant's request to cancel the Notices to End Tenancy and I dismissed the balance of tenant's application with leave to reapply.

Issue(s) to be Decided

1. Should the 2 Month Notices to End Tenancy for landlord's use be upheld or cancelled?
2. Are the landlords entitled to an Order of Possession?

Background and Evidence

The one-year fixed term tenancy commenced October 1, 2013 and the tenant is required to pay rent of \$460.00 on the 1st day of every month. The tenancy agreement indicates that at the end of the fixed term “the tenancy may continue on a month-to-month basis or another fixed length of time”.

Despite issuance of the Notices to End Tenancy, the landlord’s representative put forth an argument that the tenancy should end September 30, 2014 by virtue of the terms of tenancy. The representative was of the position that since the tenancy agreement uses the word “may” in the term described above, and the word is inclusive, the tenancy may also end on that date. The tenant was of the position the tenancy would continue on a month to month basis. As there was no dispute as to what the tenancy agreement states is to happen at the end of the fixed term, I continued to hear from the parties with respect to the Notices to End Tenancy and I informed the parties that I would consider the above positions in my written decision, which I have done in the analysis section.

The landlord served the tenant with a 2 Month Notice to End Tenancy for Landlord’s Use of Property that was dated July 10, 2014 with an effective date of September 30, 2014 (herein referred to as the July 10 Notice). The July 10 Notice indicates the reason for ending the tenancy is that “the rental unit will be occupied by the landlord or the landlord’s spouse or a close family member (father, mother or child) of the landlord or the landlord’s spouse.” The tenant filed to dispute the Notice within the time limit for doing so.

The landlord issued another 2 Month Notice for the same reason on August 29, 2014 with a stated effective date of November 1, 2014. The landlord’s representative submitted that the stated effective date is incorrect and should read November 30, 2014. The landlord’s representative indicated that this later Notice was issued since the July 10 Notice was issued before the decision of the previous dispute resolution proceeding was received and the landlords and that after reading that decision there was a concern that the effective date on the July 10 Notice was not compliant.

I was provided with a considerable amount of written submissions, documentary evidence, and testimony over nearly two hours, which I have fully considered; however, I summarize the parties’ respective positions below with a view to brevity.

It was undisputed that the rental unit is located in the lower portion of a house and that the male owner and the owner’s two daughters reside in the upper portion of the house and the female owner maintains an office on the upper level. I heard the upper level includes two bedrooms and a den. The lower level includes two bedrooms, a bathroom, kitchen and living area.

The landlords submitted that the male owner uses the smaller bedroom located on the upper level while his two daughters share the master bedroom. I heard that sharing a bedroom by the two daughters has resulted in conflict given their different schedules and needs. Further, the male owner's mother wishes to move from Calgary to the residential property as she is elderly and the climate is milder than in Calgary which is beneficial for her health conditions. Further, moving to the subject property will provide the owner's mother with the care that she needs and avoid moving to a care facility. The landlord's representative pointed out that in the landlords' culture, elderly parents reside with their family members rather than be placed in care facilities. As such, the landlords seek to regain use of the two bedrooms in the lower level for use by the owner's daughter and the owner's mother.

The tenant's representative called into question the landlord's motivation for ending the tenancy, pointing to previous Notices to End Tenancy that were either withdrawn by the landlord in December 2013 or cancelled by an Arbitrator in a previous dispute resolution proceeding. The tenant's representative pointed out that there had been a dispute concerning use of the second bedroom in the lower level and whether the living space in the lower level is for the tenant's exclusive use or for shared use. A previous dispute resolution decision was favourable for the tenant and the landlord was ordered to cease trespassing in the lower level and to provide the tenant exclusive use of the lower suite, including the second bedroom. As further evidence as to the landlords' intention the tenant's representative submitted that following the issuance of the 2 Month Notice in December 2013 the landlord placed an advertisement for rental of the lower level for more rent.

The landlord responded by stating the advertisement referred to above was not placed in January but was an advertisement used before the tenancy commenced. The document indicating the advertisement was dated January 2, 2014 is actually a screen shot of her on-line account activity for all advertisements she has ever placed on that website and the date that populates that page is the date she last accessed the advertisement. Further, there is a copy of an advertisement with a date of April 22 and a temperature of 7.1 that day which demonstrates that the site populates the date the advertisement is accessed by the landlord as the account holder and does not reflect that the advertisement is posted for the public to view. The landlord also explained that the advertisement shows that the tenant had rented one room with shared access to the other living areas of the lower floor and that the tenant is paying one-half of the rent the unit would garner if both rooms were rented to the tenant. Further, the second bedroom had been used by the owner's mother when she visited in the past but this is now not possible since the landlord has been ordered to give the tenant exclusive use of the entire lower suite.

Upon enquiry, the tenant testified that she could not recall the content of the advertisement she responded to when she went to view the rental unit. The tenant did not deny that she has a bargain at \$460.00 per month for the use of the entire lower floor but claimed she achieved such a bargain because that is what she negotiated with the landlord.

Analysis

Upon consideration of everything presented me, I provide the following findings and reasons.

Section 44 of the Act provides for all of the ways a tenancy ends. With respect to the position put forth by the landlord's representative that the tenancy may end on September 30, 2013 by virtue of the terms reflected in the tenancy agreement I find that position conflicts with the Act. Section 44(3) of the Act provides as follows:

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms

[my emphasis added]

Since the tenancy agreement entered into by the parties does not require the tenant to vacate the rental unit at the end of the fixed term, and since the parties have not entered into another tenancy agreement, section 44(3) stipulates that the tenancy automatically renews on a month to month basis on the same terms. Therefore, for the landlord to end the tenancy, it must be done in manner that complies with the other ways permitted under section 44 of the Act. One of the ways a landlord may end a tenancy is by issuance of a 2 Month Notice under section 49 of the Act, as was done in this case, and I proceed to consider whether the tenancy should end based upon the 2 Month Notices before me.

The landlord has issued 2 Month Notices to End Tenancy for Landlord's Use and such Notices may be issued before the expiry of a fixed term provided the effective date is not before the expiry date of the fixed term. This is provided in section 49 of the Act which provides the following requirements for the effective date of a 2 Month Notice:

(2) Subject to section 51 [*tenant's compensation: section 49 notice*], a landlord may end a tenancy for a purpose referred to in subsection (3), (4), (5) or (6) by giving notice to end the tenancy effective on a date that must be

(a) not earlier than 2 months after the date the tenant receives the notice,

(b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, and

(c) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.

[my emphasis added]

I find the landlord was permitted to issue a 2 Month Notice with an effective date of September 30, 2014 since that date is not earlier than the expiry date of the fixed term.

The Act further provides that if an effective date is incorrect, it automatically changes to comply with the Act. As such, I find the effective dates on both of the 2 Month Notices before me are not an issue that would invalidate the Notice. However, with a view to avoid any prejudice to the tenant for receiving two Notices for the same reason but with different effective dates, I consider the July 10 Notice to be replaced with the Notice issued on August 29, 2014. Therefore, I have not considered the enforceability of the July 10 Notice further and I proceed to consider whether the 2 Month Notice issued on August 29 should be upheld or cancelled.

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove, based on a balance of probabilities, that the tenancy should end for the reason indicated on the Notice.

After reviewing the affidavits of the landlord's mother and daughter, and considering the limited space of the upper unit, I find I am compelled by the landlord's position that additional living space is required to accommodate the family's needs and I find I am satisfied the landlord intends to use the lower unit to accommodate a close family member.

A landlord that wishes to end a tenancy so that the owner or close family member of the owner may occupy the rental unit, must also have a good faith intention for doing so. This is provided under section 49(3) of the Act which states:

(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

[my emphasis added]

Residential Tenancy Policy Guideline 2: *Good Faith Requirement* provides a policy statement with respect to the good faith requirement. Essentially, the good faith requirement requires the landlord to have an honest intent to end the tenancy for the stated reason and without malice or an ulterior motive. Further, if the good faith intention is called into question, the landlord bears the burden to establish the landlord's motivation is of good faith. In this case, I consider the tenant to have called into question the landlord's good faith intention by referring to the previous dispute resolution proceeding, the previously issued 2 Month Notices and subsequent advertising of the unit for rent.

It is very clear to me that use of the lower suite as a shared unit or for the tenant's exclusive use had been a long-standing dispute between the parties. That dispute was heard by another Arbitrator on June 11, 2014 and a decision was issued on July 7, 2014. I have read that decision in its entirety and I note that as a result of that decision the landlords are effectively precluded from accessing the second bedroom or any other part of the lower suite for any reason, including use by their family members. Thus, in order to have use of that space for use by the owner or the owner's close family member, the tenancy must first be ended. In other words, had the landlord's argument that the lower suite was a shared unit been accepted by the Arbitrator, the landlords may have been able to use the second bedroom or other living areas of the lower suite for their family members without ending the tenancy. Since that option is currently not possible, the 2 Month Notice is now the avenue available to the landlord to regain use of any portion of the lower unit and does not automatically point to malice or an ulterior motive.

The tenant pointed to advertisements in support of her position that the landlord intends to re-rent the unit for more money; however, I find the landlord provided a reasonable and likely explanation for the dates that appear on the on-line advertising. I also noted that the tenant's copy of the advertisements was actually obtained from the landlord's evidence package for the previous dispute resolution proceeding and not from the on-line site directly. Therefore, I accept the landlord's position that the lower unit was not advertised for rent after issuance of the 2 Month Notices.

Considering all of the above, I am satisfied the landlords have a good faith intention to end this tenancy so as to use the rental unit to accommodate a close family member and I uphold the 2 Month Notice issued on August 29, 2014. Therefore, I dismiss the tenant's request to cancel the Notice and I grant the landlord's request for an Order of Possession based upon this Notice. As such, the landlords are provided with an Order of Possession shall be effective at 1:00 p.m. on November 30, 2014.

Since the landlords were successful with their Application, I award them recovery of the filing fee they paid. In satisfaction of this award, the landlords may deduct \$50.00 from the tenant's security deposit.

Conclusion

The tenancy shall end on November 30, 2014 pursuant to a 2 Month Notice issued on August 29, 2014 and the landlords are provided an Order of Possession effective at 1:00 p.m. on November 30, 2014. The landlords are authorized to deduct \$50.00 from the tenant's security deposit to recover the filing fee they paid for their Application.

The tenant's request to cancel the 2 Month Notice to End Tenancy has been dismissed. The other remedies sought by the tenant in her Application were severed and dismissed with leave.

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: October 03, 2014

Residential Tenancy Branch

