



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, O, OPC, FF

Introduction

This hearing dealt with an application by the tenant for an order setting aside a notice to end this tenancy and a cross-application by the landlord for an order of possession. Both parties participated in the conference call hearing.

At the hearing, the landlord advised that she had not received notice of the tenant's claim. The tenant testified that she had personally served the landlord with her claim and had posted evidence on the landlord's door. The landlord denied having received anything and claimed that the first time she became aware of the claim was when she attended the Residential Tenancy Branch to file her application for an order of possession at which time she was informed that there was already a hearing scheduled.

As the landlord attended the hearing prepared to respond to the tenant's claim, it was not necessary for me to make any findings as to whether or not the landlord had been properly served with the application for dispute resolution and notice of hearing. It was not necessary for me to refer to any of the tenant's evidence in making my decision and therefore I find that the landlord has not been prejudiced by any failure on the part of the tenant to serve documents on her and I note that I have made no finding on whether the tenant did indeed fail in that obligation.

Although the tenant also applied for an order compelling the landlord to comply with the Act, at the hearing she confirmed that the only issue she wished to address was whether the tenancy should end.

The landlord submitted into evidence a video on a USB flash drive. The tenant stated that she was unable to open the file on the flash drive. Because the tenant was unable to view that evidence, I have not considered it in my deliberations.

After the hearing had concluded, I was advised by the Branch receptionist that the landlord's advocate had submitted additional evidence. As I was not confident that the

tenant had received copies of this evidence and as she had not been given opportunity to respond to it, I did not view that evidence.

Issue to be Decided

Should the notice to end tenancy be set aside?

Background and Evidence

The parties agreed that the tenancy began approximately 3 years ago and that the rental unit is one of 2 tenanted suites in a home in which the landlord and her family occupy the upper floors. They further agreed that on December 26 the landlord served on the tenant a 2 month notice to end tenancy for landlord's use of property (the "Notice"). The Notice stated that the rental unit would be occupied by the landlord, her spouse or a close family member of the landlord or her spouse.

The landlord testified that her 2 children and her father-in-law live with her and her husband. She stated that her home has just 3 bedrooms upstairs and that her father-in-law, who has been living with her for the past 3 years, has not had a bedroom but has been sleeping in the living room. The tenant testified that she has been in the landlord's home many times over the course of the tenancy and that the landlord showed her that her home has 4 bedrooms upstairs with her father-in-law having his own bedroom. The tenant's daughter also testified at the hearing and testified that she too has been in the landlord's home on many occasions and has seen 4 bedrooms on the upper floor.

The landlord submitted a copy of a floorplan which she claimed showed that her home has just 3 bedrooms. At the hearing I advised that the copy provided to the Residential Tenancy Branch was so dark that it was not decipherable, but after the hearing I noted that an identical floorplan had been submitted as evidence for the tenant's application and that floorplan was easily readable. It clearly shows that the home depicted by the floorplan has just 3 bedrooms on the top floor.

The landlord further testified that her mother-in-law has an open Visa and often visits the landlord and her family. She claimed that at the time of the hearing, her mother-in-law was visiting and was expected to stay until March. The landlord stated that the rental unit would provide accommodation for both her father-in-law and mother-in-law.

The tenant testified that during the first two years of her tenancy, she enjoyed a positive relationship with the landlord's family and they became friends. However, the tenant claimed that after the tenant reported a domestic dispute to the police which resulted in the landlord's husband's arrest, the attitude of the landlord and her family changed

significantly. On June 30, 2014, the landlord served the tenant with a one month notice to end tenancy for cause. The tenant disputed this notice and on September 10 a hearing was held to resolve that dispute. The September 11 decision resulting from that hearing showed that the landlord testified that she wanted to end the tenancy in part because the tenant had telephoned the police and in part because she wanted to use the rental unit as a beauty salon.

The residential property contains 2 rental units. At the present hearing, the landlord provided evidence that she had converted the second rental unit into a beauty salon and testified that the unit in which the salon was located was no longer available to house her family. She acknowledged that the salon was not yet operational.

On September 26, 2014, shortly after the September 11 decision was received by the tenant, the landlord served the tenant with a 2 month notice to end tenancy alleging that a family member would occupy the unit. A hearing was held on November 19 to address that dispute and in a decision issued on November 21, the Arbitrator ordered that the notice to end tenancy be set aside as he found the notice was given in bad faith for an improper motive.

The parties were involved in a third dispute resolution hearing on December 30 when the tenant sought an order compelling the landlord to provide heat and hot water and reporting that power had been turned off to the unit and only restored upon police attendance. In a decision dated December 31, the Arbitrator favoured the tenant's version of events and ordered the landlord to install baseboard heaters and inspect the hot water tank to determine whether repairs were required. The tenant was also awarded compensation for loss of those services.

The tenant alleged that the landlord has continued to act in bad faith and is willing to do anything to end her tenancy. The landlord denied this and claimed that she was only seeking to end the tenancy because of her family's need for additional space.

Analysis

When a tenant disputes a notice to end tenancy, the landlord bears the burden of proving that there are grounds to end the tenancy and for this type of notice to end tenancy, must also prove that the Notice was given in good faith, which requires that there be no ulterior motive for ending the tenancy.

The Notice at issue was served just 3 months after the first notice to end tenancy for exactly the same reason was served and just 1 month after that notice was set aside. While the landlord may have provided more evidence to support her grounds for ending

the tenancy for this hearing than she did for the November 19 hearing, she did not provide evidence showing that there was a change in circumstances nor did she allege any new facts. I find that the Notice was served on grounds that are *res judicata*, meaning that those grounds have already been adjudicated. On this basis alone I would order that the Notice be set aside. However, while it was not the case in this hearing, I recognize that there are occasions in which the passage of time or a change in circumstances may create an entirely new environment which was not part of a previous decision on what was apparently the same issue and the doctrine of *res judicata* may not apply. For that reason, I find it appropriate to also consider the Notice on its merits.

It is clear to me that the landlord has an ulterior motive for ending the tenancy. The tenancy began some time after the landlord's father-in-law began living with her, yet housing the father-in-law in his own unit was never an issue until the relationship between the tenant and the landlord broke down. The landlord first attempted to end the tenancy when the tenant called the police when she became aware of a potentially dangerous situation and the landlord claimed also that she wished to turn the rental unit into a beauty salon. Within days of learning that this attempt to end the tenancy was unsuccessful, the landlord served the tenant with a second notice to end tenancy, this time claiming that she intended for her father to reside in the rental unit. She was unable to successfully rebut the tenant's allegation of bad faith and again, the notice to end tenancy was set aside. It is clear that the landlord then engaged in a more insidious campaign to force the tenant out of the unit by turning off the power and depriving the tenant of heat and hot water. Although no testimony was given on this latter point at the hearing over which I presided, these actions were clearly outlined in the December 31 decision. This history shows that the landlord has continually attempted to end the tenancy through lawful and unlawful means, I find that

I find that the question of whether the landlord's home has 2 or 3 bedrooms is irrelevant as the father-in-law has presumably slept on the couch throughout his stay with the landlord and this arrangement was apparently acceptable until the landlord decided she no longer wanted the tenant to occupy the rental unit.

I find that the landlord is acting in bad faith and therefore I order that the Notice be set aside and of no force or effect. As a result, the tenancy will continue.

I note that the tenant asked me to dismiss the landlord's claim as frivolous and vexatious. I have not done so, but caution the landlord that further attempts to end the tenancy for unlawful reasons or in bad faith may constitute harassment which could found a claim by the tenant for loss of quiet enjoyment.

Conclusion

The Notice is set aside and the tenancy will continue. The landlord's application is dismissed.

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: January 29, 2015

Residential Tenancy Branch

