



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW DECISION

Dispute Codes CNC MNDC

Introduction

This matter originally convened on July 20, 2015 in relation to the Tenant's application to obtain an Order to cancel a 2 month Notice to end tenancy for landlord's use (2 Month Notice) and a monetary order.

In his July 21, 2015 Decision the Arbitrator dismissed the Tenant's request for a monetary order with leave to reapply. The Arbitrator upheld the 2 Month Notice; dismissed the balance of the Tenant's application; and issued the Landlord an Order of Possession effective August 1, 2015.

On August 4, 2015 the Tenant filed a Request for Correction. That application was dismissed on August 18, 2015.

The Tenant filed an application for Review Consideration on August 4, 2015. The Review Consideration was granted and in her Decision of August 18, 2015 the Arbitrator ordered a New Hearing as follows:

I find therefore the tenant's evidence prepared for the Review Consideration application could be construed as new and relevant evidence as the tenant was not given prior knowledge of the landlord's intent to complete work on the main house due to a notice from her mortgage insurance company. The tenant could not have discovered evidence if the tenant was not informed by the landlord the reason the landlord served the Two Month Notice before the arbitration hearing. The application for Review Consideration is therefore granted and I grant a New Hearing pursuant to section 82(2)(c) of the Act.

[Reproduced as written]

The Tenant submitted documents to the Residential Tenancy Branch (RTB) on September 2, 2015 which she titled Summons of Documents. In those documents the Tenant requested the Landlord be summoned to submit the following: legal copies of the original documents that support the Landlord's argument that her insurance company requires repairs before they will issue insurance; copies of loan applications made by the Landlord to conduct the repairs; and signed statements from family investors.

Section 76(1) of the *Act* provides that the director may on request of a party, or on the director's own initiative, issue a summons requiring a person to either attend a hearing and give evidence or produce documents to the director relating to the subject matter of the dispute.

The issuance of a summons requires that the following rigorous test be met:

- 1) The request for the summons must be necessary for a fair hearing to be conducted;
- 2) There must be no other means or alternative way to acquire or secure the evidence being sought; and
- 3) The information being sought must be relevant to the proceeding.

Upon careful consideration of the Tenant's request for a summons I note the following:

- The burden to prove the reasons and good faith for issuing a 2 Month Notice lies with the Landlord. It is not up to the Tenant to request a summons of documents to prove the Landlord's arguments.
- There is insufficient evidence before me to prove the information had previously been requested from the Landlord in writing, and then denied.
- There was no evidence before me that indicated the Tenant attempted to acquire the information from the Landlord's insurance company through a Freedom of Information Request.

As per the aforementioned, I find that the Tenant's request to summon the Landlord to submit the aforementioned documents does not meet the required test for issuing a summons under section 76(1)(b) of the *Act*.

Finally, I am satisfied that the issuance of a summons is not necessary for a fair hearing to be conducted as the Tenant has provided other evidence to refute the Landlord's evidence.

The New Hearing granted upon review convened on October 30, 2015 at 9:00 a.m. by teleconference. The Landlord and Tenant were present and gave affirmed testimony. I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure.

The Landlord gave affirmed testimony that they served the Residential Tenancy Branch (RTB) with copies of the same documents she served the Tenant as new evidence for this new hearing. The Tenant acknowledged receipt of the Landlord's evidence and no issues were raised regarding service or receipt of that evidence.

The Landlord confirmed receipt of 55 pages of new evidence from the Tenant. The Tenant testified that she did not serve the Landlord with copies of her evidence pages 56 thru 68 because they were duplicates of her evidence submitted for the original hearing.

The Landlord testified that she did not receive copies of the Tenant's 5 pages of evidence that was received at the RTB on October 21, 2015. The Tenant argued that she mailed that evidence to the Landlord via regular mail on October 21, 2015.

When evidence is mailed it is not deemed to be received until five days after it was mailed pursuant to section 90 of the *Act*. Furthermore, Rule of Procedure 3.14 provides that the applicant's evidence must be received at the RTB and by the respondent no later than 14 day prior to the hearing.

Based on the above, I find the Tenant's October 21, 2015 submission of evidence was not served or received by the Landlord in accordance with Rule of Procedure 3.14. Therefore, that evidence will not be considered in my Decision. I did however consider all other relevant evidence and oral submissions from the Tenant and the Landlord.

As indicated in the July 21, 2015 Decision, RTB Rule of Procedure 2.3 provides that for disputes to be combined on an application they must be related. Not all the claims on this application are sufficiently related to the main issue relating to the Notice to end tenancy. Therefore, I dismissed the Tenant's request for a monetary order, with leave to reapply and I proceeded to hear the matters relating to the 2 Month Notice. Following is a summary of the submissions and evidence and includes only the relevant evidence which was presented before me.

Issue(s) to be Decided

1. Has the Landlord proven the good faith requirement for issuing the 2 Month Notice?
2. If so, should the July 21, 2015 Decision be confirmed or varied?
3. If not, should the July 21, 2015 Decision be set aside and a new Decision issued?

Background and Evidence

The parties entered into a written month to month tenancy agreement which began on February 1, 2015. Rent of \$600.00 is payable in advance on the first of each month. On January 15, 2015 the Tenant paid \$300.00 as the security deposit.

On May 23, 2015 the Landlord served the Tenant a 2 Month Notice to end tenancy for landlord's use pursuant to section 49 of the *Act*. The 2 Month Notice listed an effective date of August 1, 2015 and the following reason for issuing the Notice:

The rental unit will be occupied by the landlord or landlord's spouse or a close family member (father, mother, or child) of the landlord or landlord's spouse

The Landlord testified that the 2 Month Notice was issued because she needed full use of the Tenant's rental unit (the cabin). Upon further clarification the Landlord stated she

needed use of the rental unit because she had to have the wrap around deck replaced on the main house.

The Landlord submitted that as part of renewing her house insurance she is required to answer questions about any improvements or maintenance work that has or will be completed. She argued that she was required to replace the deck in order to reduce liability as the deck was in need of replacement.

The Landlord confirmed that the insurance company did not conduct an inspection of her house or deck and did not issue a written order for the deck to be replaced. Rather, she simply knew the work on the deck needed to be completed to show she was complying with the requirements of her insurance by maintaining the property. The aforementioned discussion to renew her insurance took place sometime in March or April 2015.

The Landlord described the deck as being on three sides of the house. She submitted that the deck on one side of the house had been removed in November 2014. The remaining two sections were supposed to be removed sometime after the 2 Month Notice was issued.

The Landlord argued that the decision to move out of the house during the deck renovations was her own "personal preference". She submitted that she did not want to be in the house when concrete trucks and construction was being performed. She stated that the work to remove and replace the full deck and install footings would take approximately one month.

When I asked the Landlord if there was any other reason why she issued the 2 Month Notice back in May 2015 she answered "no". She then began to speak about acquiring information at the end of August 2015 regarding the rental unit being considered an illegal suite. The Landlord confirmed this new information was not relevant to the reasons why the 2 Month Notice was issued May 23, 2015.

The Tenant testified that at the time she was served the 2 Month Notice the Landlord did not mention that she needed to do repairs to the main house. Rather, she was told that the Landlord's family investors were telling the Landlord that she had to move so they could collect a higher rent from the upper level of the house. She argued that the Landlord's timeline of events simply does not make sense.

The Tenant submitted that when she first entered into her tenancy there was a tarp covering part of the roof. She said a conflict arose with the Landlord when she began to question when the roof would be repaired. The Tenant referenced an email sent to her by the Landlord on May 12, 2015 which suggested that the Tenant move out of the rental unit.

The Tenant testified that the roof was repaired on May 20, 2015. She said that at that time the Landlord tried to get her to move out again. Then on May 21, 2015 the

Landlord came to the unit and asked to come in and see the skylight. The Tenant said that when the Landlord came in she had a camera and began to take pictures of the Tenant's possessions and not the skylight.

The Tenant asserted that on May 22, 2015 the Landlord told her that the Landlord's family investors wanted the Landlord to reside in the Tenant's rental unit so they could rent out the upper level of the main house for a higher rental income. Then on May 23, 2015 the Landlord served her the 2 Month Notice.

The Tenant stated that the Landlord did not tell her an honest reason as to why she was being evicted. She argued that the Landlord admitted that she knew about the required deck repairs long before April 2015 so that cannot be the reason she was given the Notice. She said the Landlord just keeps creating new stories as to why she has to be evicted. First it was the deck needing repairs. Then she said she could not get insurance which meant her mortgage would not be approved. In this hearing the Landlord said it was a personal choice to move out during the repairs.

The Landlord submitted that from the time the Tenant moved in she has been asking for things to be repaired or changed because the Tenant keeps saying things are too dark. She repaired the roof and changed a window and then the Tenant wanted a new door installed. She stated that she gave the Tenant everything she requested before telling the Tenant things were not working out.

The Landlord confirmed that she took pictures of the Tenant's possessions; however, she also took pictures of the sky light. She argued that she was concerned about the manner in which the Tenant's possessions were kept and that they may cause damage or a fire hazard. The Landlord then stated that the Tenant continued to be dissatisfied wanting a new door to which the Landlord replied that the tenancy was not working out.

I asked the Landlord if the Tenant's constant request for repairs was the real reason she issued the 2 Month Notice. The Landlord responded that the Notice was issued so the deck on the main house could be removed. The Landlord confirmed that she did not submit evidence to support her submissions and argued that was her personal business.

Analysis

Where a 2 Month Notice to End Tenancy comes under dispute, the Landlord has the burden to meet or satisfy a two part test as set forth under the Act. Section 49 (3) of the *Act* states that 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.

The *Residential Tenancy Policy Guideline # 2* sets out the two part test for the "good faith" requirement as follows:

- 1) The landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy; and
- 2) the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.

Upon review of the volumes of documentary evidence submitted by the Tenant, I note that each time the Landlord submitted a reason as to why the tenancy should end, the Tenant responded with documentary evidence consisting of written statements, communications with municipal building and bylaw employees, photographs and emails.

In the case of verbal testimony when one party submits their version of events, in support of their claim, and the other party disputes that version, it is incumbent on the party making the claim to provide sufficient documentary evidence to corroborate their version of events. In the absence of any evidence to support their version of events or to doubt the credibility of the parties, the party making the claim would fail to meet this burden.

It must be clarified that the good faith requirement is determined based on events leading up to the issuance of the May 23, 2015 Notice. After careful consideration of the foregoing, relevant documentary evidence, and on a balance of probabilities I find as follows. When considering the 2 Month Notice on its merits, I do not find that its issuance was driven solely by the Landlord's intention to occupy the rental unit during a one month construction project.

I do not accept the Landlord's initial submissions that she had to evict the Tenant because she could not get insurance without repairing the deck. The Landlord began the deck renovations in November 2014, when the first section was removed, and she did not engage in discussions to renew or acquire house insurance until sometime in March or April. The insurance company did not inspect the property and there was no evidence before me that would support the Landlord's submission that her insurance was at risk of being cancelled if she continued to occupy the main house during a one month construction project.

I found that absence of testimony or evidence from the Landlord regarding the first reason the Tenant was told she was being evicted to be presumptuously suspicious. Specifically that first reason was that the Landlord's family investors wanted the Landlord to move into the Tenant's unit so they could rent the upper level of the house for more money.

In the October 30, 2015 hearing the Landlord contradicted her own submissions by stating she needed to move into the Tenant's rental unit because it was her "personal preference" not to reside in the house during the 1 month renovation. That contradicted her initial reasons were she argued she could not live in the house without access to the deck in case of an emergency.

It is clear to me that the Landlord had an ulterior motive for ending the tenancy. In her submissions the Landlord stated that she had given the Tenant everything she wanted and then finally told the Tenant the tenancy was not going to work out.

I do not accept that it is a mere coincidence that the 2 Month Notice was issued May 23, 2015, two days after the Landlord inspected the rental unit. Rather, I find that when the Landlord saw the manner in which the Tenant kept her possessions inside the rental unit it was the last straw and the Landlord decided she would end the tenancy. In addition, I find the Tenant's submission that the Landlord simply keeps creating new stories why she was served the 2 Month Notice to be accurate. Therefore, I find the Landlord has failed to meet the good faith requirement.

Section 82(3) of the *Act* stipulates that following the review, the director may confirm, vary or set aside the original decision or order.

Based on the above, I find the Landlord provided insufficient evidence to uphold the 2 Month Notice to end tenancy. Accordingly, I order the July 21, 2015 Decision and Order be **set aside**, pursuant to section 82(3) of the *Act* and I grant the Tenant's application to cancel the Notice. As such I order the 2 Month Notice to end tenancy issued May 23, 2015 cancelled. The 2 Month Notice is of no force and effect. As a result the Tenant is no longer entitled to compensation equal to one month's rent.

Conclusion

The July 21, 2015 Decision and Order were ordered to be **set aside**. The 2 Month Notice to end tenancy issued May 23, 2015 was cancelled and is of no force or effect.

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 30, 2015

Residential Tenancy Branch

