



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNL CNC

Introduction

This is the Tenant's application to cancel a 1 Month Notice to End Tenancy for Cause and a 2 Month Notice to End Tenancy for Landlord's Use of Rental Property.

The parties and the Landlord's witness gave affirmed testimony at the Hearing.

The Tenant testified that she mailed the Notice of Hearing documents and copies of her documentary evidence to the Landlord, by registered mail, but she could not locate the receipt and tracking numbers. The Landlord acknowledged being served with the Notice of Hearing documents by registered mail, but stated that she did not receive the Tenant's documentary evidence. I described the Tenant's documentary evidence, and the Landlord stated that the same documents were in the Landlord's documentary evidence.

The Landlord's witness testified that she was with the Landlord when the Landlord served the Tenant with the Landlord's documentary evidence, by handing the documents to the Tenant, on October 23, 2015.

Issue(s) to be Decided

- (1) Should the Notices to End Tenancy be cancelled?

Background and Evidence

The Tenant moved into the rental unit on August 1, 2007. On September 30, 2014, the parties signed a new tenancy agreement. A copy of the September 30 Agreement was provided in evidence. Monthly rent is \$725.00, due on the 30th day of each month. The tenancy agreement is for the upstairs and the yard of the rental property only, and shared access to laundry and downstairs entrance.

The Tenant acknowledged receiving both Notices on August 24, 2015.

Landlord's evidence

- With respect to the Notice to End Tenancy for Cause, the Landlord alleges that the Tenant uses areas of the rental property which are not hers to use. The Tenant stores her belongings in the downstairs portion of the rental property which is not included in the tenancy agreement signed September 30, 2014. The Landlord has given her three written notices to remove her belongings, as they are impeding the Landlord's ability to make renovations to the rental property. The Tenant has not removed her belongings. Copies of the Landlord's notices to remove belongings were provided in evidence, along with photographs of those belongings.
- The Landlord originally wanted to renovate the downstairs portion of the rental property in order to rent to out to an additional occupant. Because of zoning and bylaw issues, the Landlord was not allowed to have another tenant in the rental property. The Landlord then decided to renovate the downstairs portion for her own use. Renovations included turning the existing garage into a living room and adding a bathroom. In addition, the cost was going to be prohibitively expensive for the Landlord. The Landlord provided a copy of a letter from the builder, indicating that the cost would be between \$40,000.00 and \$60,000.00. The Landlord and her husband are both on pensions and they have a very large debt with the bank. The Landlord provided documents in evidence which indicate the Landlord's and her husband's income, and the amount currently owing on their line of credit.
- The Landlord currently owns and lives in another property, which she is selling. Because of the Landlord's "black hole situation", the Landlord has decided to move back into the rental property. The Landlord provided written statements from five people, confirming the Landlord's intent to move into the rental property.
- The Landlord asked for an Order of Possession.

Tenant's evidence:

- When the Tenant first moved into the rental unit in August, 2007, she rented the whole house. The Tenant was "made to sign" a new tenancy agreement. She was told that if she "didn't sign I might lose my housing". The Landlord wanted the Tenant to pay \$200.00 more a month "under the table".
- The Tenant did not move her belongings from the downstairs because she is a senior and "cannot afford to throw things away".
- The Tenant questions the "good faith" intent of the Landlord. The Tenant submits that the Landlord will lose \$750.00 of income if they move into the rental unit.
- The Tenant called the building inspector to see if she should have a metal or wooden door between the rental unit and the downstairs. The building inspector recalled the rental property and said the whole thing is illegal and that the Landlord is not allowed to build a suite in the rental property.
- The Tenant has already paid rent for November. She deposited the funds directly into the Landlord's bank account on October 28, 2015. The Tenant submits that the Landlord did not accept the funds for "use and occupancy only" and that therefore the Landlord has reinstated the tenancy.

Landlord's reply:

- The Landlord cannot confirm that the Tenant has paid anything towards November rent. They have not checked their bank statement recently.

Analysis

I do not accept the Tenant's submission that the Landlord has reinstated the tenancy by accepting rent for the month of November, 2015. Residential Tenancy Policy Guideline 11 provides, in part:

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.

In this case, I find that the Tenant deposited the rent directly into the Landlord's bank account and therefore the Landlord did not "accept" the rent. I also find that it is clear from the conduct of the Landlord that she did not intend to reinstate the tenancy.

In an application such as this, where the Landlord has issued a Notice to End Tenancy for Cause, the onus is on the Landlord to provide sufficient evidence that the tenancy should end for the reasons provided on the Notice. With respect to a Notice to End Tenancy for Landlord's Use of Property, the burden is on the Landlord to establish that she truly intends to do what she indicated on the Notice to End Tenancy. The Landlord must establish that she does not have an ulterior motive for ending the tenancy as her primary motive.

The Notice to End Tenancy for Cause provides the following reasons for ending the tenancy:

Tenant or a person permitted on the property by the tenant has:

1. Significantly interfered with or unreasonably disturbed another occupant or the landlord,
2. Seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

Tenant has engaged in illegal activity that has, or is likely to:

1. Adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord,
2. Jeopardize a lawful right or interest of another occupant or the landlord.

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

While I accept that the Tenant's belongings may have hindered the workers' ability to manoeuvre around the basement while doing renovations, I do not find that the Landlord was significantly interfered with or unreasonably disturbed.

The Landlord provided a letter dated October 16, 2015, from her doctor, which describes various illnesses and medical treatments provided to the Landlord and her husband over the "past twelve months". The doctor also writes that, "[the Landlord's husband] has been suffering personally from various medical conditions and he also had extra stressors regarding his wife's health over the past twelve months. In summary, [the Landlord's husband and the Landlord], both in their sixties, have been hit by a few unfortunate and unplanned events which have caused anxiety and distress, specifically since 2014." The Landlord's legal counsel submitted that the unfortunate and unplanned events referred to in the doctor's letter were the Tenant's fault. While I accept that the Landlord and her husband have fallen on difficult financial times, I find that there is insufficient evidence that the Tenant is the root cause of this. Therefore, I find that this reason for ending the tenancy has not been proven.

The Landlord did not allege that the Tenant has engaged in any illegal activity. Therefore, I find that this reason is not proven.

Residential Tenancy Policy Guideline 8 provides, in part:

Material Terms

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

In this case, I find that the tenancy agreement is not clear as to whether or not the parties agreed that the term was a material term. The Landlord did not dispute the Tenant's testimony that she had originally rented the whole rental property. The warning letters provided to the Tenant did not state that the Landlord believed the problem is a breach of a material term of the tenancy agreement. In the first letter, dated January 25, 2015, asks the Tenant to remove all of her belongings "from the laundry room and the 2 bedrooms all in the downstairs area". This letter also indicates that the Landlords expect the Tenant's belongings to be moved "this week. Bathroom by tomorrow."

The second letter, dated July 30, 2015, provides, in part, "As of Sept. 1st you will have to pay the \$800.00 to rent downstairs if your things are not removed."

The third letter, dated August 24, 2015, the Landlord advises the Tenant that she had decided to move into the rental unit and asks the Tenant to remove her belongings by August 31, 2015.

I find that none of the letters identify that the Landlord believes the problem is a breach of a material term of the tenancy agreement. I further find that the Landlord did not state that if the problem was not fixed, the Landlord would end the tenancy.

For the reasons provided above, I find that the Notice to End Tenancy for Cause is not a valid notice and it is cancelled.

However, I find that the Notice to End Tenancy for Landlord's Use is a valid notice to end the tenancy. On page 2 of the Notice, the Landlord alleges 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)". I find that there was insufficient evidence that the Landlord would be losing money by selling their home and moving into the rental unit. I accept that the Landlord and her husband had chosen to live in the rental unit because it made the most financial sense and that this is the primary motive for ending the tenancy.

During the Hearing, the Tenant stated that she was aware of the compensation equivalent to one month's rent allowed under Section 51(1) of the Act.

Both parties are hereby advised of the provisions of Section 51(2) of the Act, which states:

Tenant's compensation: section 49 notice

51 (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.

The Notice to End Tenancy for Landlord's Use was served on the Tenant on August 25, 2015, and therefore the effective end of tenancy date was October 31, 2015. The Landlord asked for an Order of Possession of the rental unit. Section 55 of the Act provides that I must provide an Order of Possession if the Landlord asks for it at the Hearing and I have upheld the Notice. I hereby provide the Landlord with an Order of Possession effective November 30, 2015.

Conclusion

The Notice to End Tenancy for Cause is canceled. The Notice to End Tenancy for Landlord's Use is upheld. I hereby provide the Landlord with an Order of Possession effective **1:00 p.m., November 30, 2015**, for service upon the Tenant. This Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

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: November 05, 2015

Residential Tenancy Branch

