



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, OLC, FF

Introduction

This hearing dealt with an application by the tenants for orders setting aside a 2 Month Notice to End Tenancy for Landlord's Use and compelling the landlord to comply with the Act, regulation or tenancy agreement. Both parties appeared and had an opportunity to be heard.

Issue(s) to be Decided

- Is the 2 Month Notice to End Tenancy for Landlord's Use dated September 18, 2015, valid?
- Should any other order be made and, if so, on what terms?

Background and Evidence

This tenancy commenced July 15, 2014 as a one year fixed term tenancy. There is a written tenancy agreement. The tenants pay a monthly rent of \$1550.00, which includes a \$100.00 surcharge because of the third occupant. The tenancy agreement also specifies that the rent includes water, electricity and heat.

The tenancy agreement did not specify that at the end of the term the tenants must move out and so, pursuant to section 44(3) of the *Residential Tenancy Act*, the tenancy has continued as a month-to-month tenancy.

The rental unit is the lower level of a two story house. The upper level is a separate two bedroom living unit.

The landlord bought the house on February 6, 2015. This summer she tried to negotiate a new tenancy agreement with the tenants. In particular, she would like them to agree to pay 40% of the utilities in addition to the rent. In their discussions the landlord has pointed out that rents for comparable properties are higher than the rent currently paid by the tenants. The tenants are prepared to agree to a rent increase equal to the annual allowable rent increase but nothing else.

The tenants were served with a 2 Month Notice to End Tenancy for Landlord's Use on September 24, 2015. The reason stated on the notice was that: "The rental unit will be occupied by the landlord or the landlord's spouse or a close family member of the landlord or the landlord's spouse." The tenants filed this application for dispute resolution on October 5, within the fifteen day time limit.

The house has been listed for sale for much of the time that the landlord has owned it. The tenants' evidence is that there were multiple showings of the property until September 24, 2015. The "For Sale" sign has been removed from the front yard but there are still two active real estate listings on-line for the property.

The landlord testified that she was divorced in April 2015. Her husband and fourteen year old son live in Taiwan; her ten year old daughter lives with her. She does not receive any financial support from her ex-husband. Until recently she lived in a three bedroom home that she also owns.

The landlord testified that she has to sell some property for financial reasons. At first she listed this house for sale but when it did not sell she decided to move into it and sell the three bedroom home. She said she told the realtor to cancel this listing. The landlord testified that she moved into the upstairs unit on December 2, 2015. Her plan is to fix up the other home before putting it on the market, hopefully in January.

The landlord testified that she needs the additional space to accommodate family visits. Her sister is coming from China for the month of February; maybe longer.

The plan is that her son will stay with her during the school holidays. The landlord wants her son to have his own room and to feel that he is living in his own home whenever he stays with her.

The tenants had provided the landlord with post-dated cheques for the rent. The cheque for the December rent was cashed but no receipt was given to the tenants.

The landlord did not ask for an order of possession in the hearing.

Analysis

The *Residential Tenancy Policy Guidelines*, available on-line at the Residential Tenancy Branch web site, provide succinct summaries of the legislation and the common law applicable to residential tenancies in British Columbia. Those guidelines will be referenced in the course of this decision.

Section 49 of the *Residential Tenancy Act* allows a landlord to end a tenancy if a close family member of the landlord intends, in good faith, to occupy the rental unit.

“Close family member” is defined by s. 49(1) as the landlord’s mother, father, spouse, child, mother-in-law, father-in-law, or step-child. Landlords are not allowed to end a tenancy because any other member of their family or extended family, such as a brother or sister, is going to use the unit.

The *Act* does not define “occupy”. Dictionary definitions of “occupy” include “to take or maintain possession of a landlord or building” or to “reside in or use a building as an owner or tenant”. All of these definitions imply an element of longevity or permanence; not a temporary stay as a visitor.

As explained in *Residential Tenancy Policy Guideline 2: Good Faith Requirement When Ending a Tenancy* if the evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the arbitrator may consider motive when determining whether to uphold a Notice to End Tenancy. If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for end the tenancy.

The sequence of events in this case does raise questions: attempt to change the terms of the tenancy; issue notice to end tenancy; move into smaller home before the larger home, that would actually meet the landlord’s declared needs, is placed on the market. On the other hand, this sequence of events is also consistent with the actions of a person attempting to respond to a difficult personal financial situation. Based on the evidence before me I am not prepared to conclude that the landlord has served the notice to end tenancy in bad faith.

Finally, as explained on the Residential Tenancy Branch website and in *Residential Tenancy Guideline 11: Amendment and Withdrawal of Notices*, when a landlord has served a notice to end tenancy and the tenant has disputed the notice the landlord continues to be entitled to payment of rent or payment for use and occupancy while awaiting the resolution of the dispute. When a landlord accepts the rent for the period after the effective date of the notice (in this case November 30, 2015) the question is whether the landlord intended to reinstate the tenancy by doing so. The usual means

by which landlords make clear that they do not intend to reinstate the tenancy by accepting the rent is to give the tenant a receipt that clearly states that the rent is being accepted “for use and occupancy only” and/or specifically telling the tenants that the money was for use and occupancy only. In this case the landlord did neither.

After considering all of the above I find that the 2 Month Notice to End Tenancy for Landlord's Use dated September 18, 2015 is not valid for the following reasons:

1. Her son, who is the only person who fits within the definition of “close family member”, is only going to be visiting his mother for a short period of time; this will not be his permanent home.
2. The landlord did not make clear that the December rent was accepted “for use and occupancy only”.

The tenants' application is granted. As the tenants were successful on their application they are entitled to reimbursement from the landlord of the \$50.00 fee they paid to file it. Pursuant to section 72 this amount may be deducted from the next rent payment due to the landlord. In light of the evidence, no further order is required at this time.

Conclusion

The tenants' application is granted. The 2 Month Notice to End Tenancy for Landlord's Use dated September 18, 2015 is set aside 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: January 05, 2016

Residential Tenancy Branch

