



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FF

Introduction

This hearing was convened by way of conference call concerning an application made by the tenant seeking an order cancelling a notice to end the tenancy for landlord's use of property and to recover the filing fee from the landlord for the cost of the application.

The tenant and the landlord attended the hearing, each gave affirmed testimony, and the landlord called one witness who gave affirmed testimony. The parties were given the opportunity to question each other and the witness with respect to the testimony and evidence provided, all of which has been reviewed and is considered in this Decision.

No issues with respect to service or delivery of documents or evidence were raised.

Issue(s) to be Decided

- Does the *Residential Tenancy Act* apply to this tenancy?
- Should the 2 Month Notice to End Tenancy for Landlord's Use of Property be cancelled?

Background and Evidence

The landlord testified that this tenancy began on September 1, 2013 and the tenant still lives in the rental unit. Rent in the amount of \$600.00 per month is payable on the 1st day of each month and there are no rental arrears. Prior to the beginning of the tenancy the landlord collected a security deposit from the tenant in the amount of \$300.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a rustic cabin which has no cable or internet service.

The landlord further testified that the parties agreed to a monthly term that is renewed at the landlord's discretion each month. The rental unit is the landlord's vacation property, and the agreement, albeit not in writing, was meant to ensure that the landlord would not be denied access when he or his family want to use it. The tenant has been renting monthly and the landlord was very clear with the tenant at the beginning that it was considered vacation property regardless of how long the tenancy lasted, and was required to be renewed each month, or the tenant would have to move out of the rental unit. The tenant hasn't signed any written agreements because the landlord lives in a different community, and the tenant told him it

wasn't necessary to drive all that distance to get the tenancy agreements signed, and that the tenant understood the terms of the agreement. The landlord told the tenant to consider it a holiday as long as he was there.

The landlord served the tenant with a 2 Month Notice to End Tenancy for Landlord's Use of Property by registered mail on April 3, 2016, a copy of which has been provided. It is dated April 3, 2016 and contains an effective date of vacancy of July 1, 2016. The reason for issuing the notice is: The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child, or the parent or child of that individual's spouse). The landlord testified that he will be moving into the rental unit on June 30, 2016, and that the agreement is to renew the tenancy agreement every month to protect the landlord.

The landlord also testified that he is retiring on October 1, 2016 and wants the tenant to move out.

The landlord's witness testified that he is the brother-in-law of the landlord and was present when the agreement was made for the tenant to rent the cabin. The tenant was advised that he was only paying rent for 11 months of the year and that either in July or August each year the landlord's family would have access to it. The tenant agreed to move out for that one month per year, and would be provided with lots of notice about which month. The tenant said that wasn't a problem. The 12th month was the landlord's so the landlord and family had the option of taking that much time, but haven't done so for more than about 10 days.

The witness has recently retired and testified that he will be using the cabin a lot, but is not sure what the landlord's plans are.

The tenant testified that when the rental agreement was made, the tenant only spoke to the landlord's sister. The verbal agreement was that rent was \$600.00 per month, no phone, no cable or internet, and the tenant has to vacate for 1 week each summer for the landlord to use the property. That was not a problem for the tenant because he works in a hotel and could stay there for one week, and it worked out fine. However, in January, 2016 the landlord's sister sent an email to the tenant saying she was going to stay there for the whole month of August, and the tenant replied that wasn't possible. The landlord's sister reduced it to 3 weeks, being the last week of July and first 2 weeks of August.

The tenant also denies that the parties ever agreed to consider it vacation rental, nor was it presented to the tenant as such. The tenant testified that he would never have agreed to rent a place that he could be thrown out of each month. The tenant submits that it's a month-to-month tenancy and the landlord cannot evict the tenant without cause.

The tenant also testified that the landlord won't be retiring and the parties discussed that the landlord won't be moving in for years.

Analysis

Jurisdiction:

The *Residential Tenancy Act* does not apply to living accommodation occupied as vacation or travel accommodation, and the landlord testified that he told the tenant to consider it vacation rental regardless of how long the tenancy lasted. He also testified that the parties agreed to renew each month to ensure that the landlord had constant access or would never be denied entry onto the property. The tenant testified that he would not have rented property if he was faced with having to sign a new tenancy agreement each month or move out. It's clear to me that the landlord considered it to be his vacation property, but I am not convinced that the tenant rented it to occupy it as vacation property.

The parties agree that for some period, whether it would be a week or a month per year the tenant would have to vacate the rental unit. That in itself is contrary to the *Residential Tenancy Act* in that a tenant under a tenancy agreement is given exclusive rights to reside on the property.

The *Residential Tenancy Act* contains specific definitions:

"fixed term tenancy" means a tenancy under a tenancy agreement that specifies the date on which the tenancy ends;

"periodic tenancy" means

(a) a tenancy on a weekly, monthly or other periodic basis under a tenancy agreement that continues until it is ended in accordance with this Act, and

(b) in relation to a fixed term tenancy agreement that does not provide that the tenant will vacate the rental unit at the end of the fixed term, a tenancy that arises under section 44 (3) [*how a tenancy ends*];

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

Given that the parties agree that the tenant would move out for a period of time each year and only paid rent for 11 months of the year, I find that a license to occupy applies, and the *Residential Tenancy Act* applies to a tenancy agreement and a license to occupy. Therefore, I find that the *Residential Tenancy Act* applies to this tenancy.

With respect to the landlord's testimony that the tenancy agreement, albeit verbal, requires the tenant to vacate every month, that testimony is disputed by the tenant. I also find it is contrary to the *Act*, and not enforceable.

Good Faith Requirement:

Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was given in accordance with the *Residential Tenancy Act*, which

can include the reasons for issuing it. I have reviewed the notice and I find that it is in the approved form and contains information required by the *Act*. With respect to the reason for issuing it, the landlord testified that he is retiring on October 1, 2016 and that he intends to move in June 30, 2016. The witness, brother-in-law of the landlord, testified that the family is going to be using the cabin. In the circumstances, I am not satisfied that the landlord has established good faith intent to move into the rental unit. The landlord must be able to establish that the landlord or a close family member (father, mother or child) intends to occupy the rental unit on a full time basis commencing at a reasonable time after the effective date of the notice to end the tenancy. Once the landlord is closer to the date of retirement and prepared to move into the rental unit, the landlord may issue another 2 Month Notice to End Tenancy for Landlord's Use of Property effective on a date that is reasonable in the circumstances.

Since the tenant has been successful with the application the tenant is also entitled to recovery of the \$100.00 filing fee. I hereby grant a monetary order in favour of the tenant for that amount and I order that the tenant be permitted to reduce rent for a future month by that amount or may otherwise recover it.

Conclusion

For the reasons set out above, the 2 Month Notice to End Tenancy for Landlord's Use of Property is hereby cancelled.

I hereby grant a monetary order in favour of the tenant as against the landlord pursuant to Section 67 off the *Residential Tenancy Act* in the amount of \$100.00, and I order that the tenant be permitted to reduce rent for a future month by that amount or may otherwise recover it.

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: June 03, 2016

Residential Tenancy Branch