



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, CNR, OLC, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) pursuant to section 49;
- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") pursuant to section 46;
- an Order that the landlord perform repairs to comply with the *Act*, regulation and tenancy agreement (the "Repair Order") pursuant to section 62; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The parties agreed that the landlord's 2 Month Notice was served on the tenant personally on November 15, 2016. The parties agreed that on or about November 29, 2016 the tenant served the tenant's notice of dispute resolution on the landlord by registered mail. I find that the landlord was duly served with the tenant's application in accordance with section 89 of the *Act*.

The landlord testified that she posted the landlord's 10 Day Notice on the rental unit door on December 2, 2016. The tenant confirmed receipt of the 10 Day Notice. In accordance with section 88 of the *Act*, I find that the tenant was served with the 10 Day Notice on December 5, 2016, five days after posting.

The tenant testified that he filed an Amendment to an Application for Dispute Resolution to add the cancellation of the 10 Day Notice to the current application on December 6, 2016. The parties disagreed on the date and the manner by which the Amendment was

served on the landlord. However, during the hearing the parties testified that the full rental amount was paid to the landlord by the tenant on December 5, 2016. As full payment was made in response to the 10 Day Notice there is no need to consider an application for cancellation of the 10 Day Notice as well. I make no finding on the service of an extraneous Amendment.

Late in the hearing the tenant testified that the landlord has performed repairs and he is no longer seeking a Repair Order. The tenant's application for a Repair Order is withdrawn.

At the outset the landlord argued that the tenant's package of written evidence was not served on the landlord until December 29, 2016 and was prejudicial to the landlord. The landlord confirmed receipt of the evidence and did not make an application to have the material excluded but asked that it be given minimal weight in my consideration.

Rule 3.15 sets out that a respondent must receive evidence from the applicant not less than 7 days before the hearing. The tenant's evidence was not served within the timelines prescribed by rule 3.15 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

While I make a note of the landlord's argument I do not find the tenant's written evidence to be unreasonably prejudicial and allow it as part of the hearing record.

Issue(s) to be Decided

Is the tenant entitled to cancellation of the 2 month Notice pursuant to section 49? If not, should the landlord be issued an order of possession on the basis of the 2 Month Notice?

Is the tenant entitled to recover the filing fees for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and my findings around each are set out below.

Based on the evidence provided by both parties, it seems clear that there are many issues unrelated to the landlord's 2 Month Notice that remain contentious between the parties and which may unfold over time. In considering the tenant's application, I find as did the previous arbitrator that the tenant supplied a great deal of evidence unrelated to this dispute. My jurisdiction is limited to the *Act*, the tenant's current application to cancel the 2 Month Notice, and the landlords' oral request for an Order of Possession.

The parties agreed on the following evidence. This tenancy began in May, 2013. The current monthly rent is \$700.00 payable on the first of each month. The rental unit is located in the basement of the landlord's family home. The basement also houses a second suite that is rented out to a separate tenant. The landlord lives upstairs with her family.

There was a previous hearing regarding this residential address under the file number noted on the first page. That hearing dealt with the tenant's application to cancel a 1 Month Notice to end tenancy for cause (the "1 Month Notice") and was heard on November 25, 2016 by another arbitrator. While that matter was scheduled for hearing the landlord issued the 2 Month Notice on November 15, 2016. The landlord's agent testified that the 1 Month Notice was filed in error and there were always plans for the rental unit to be occupied by the landlord's close family member. The landlord's agent testified that he had requested the merits of the 2 Month Notice be heard at the earlier hearing but was refused by the other arbitrator. The landlord's agent testified that while the 1 Month Notice was filed in error he believed there was sufficient cause to end the tenancy and proceeded with the earlier hearing. At the earlier hearing the previous arbitrator cancelled the 1 Month Notice and allowed the tenancy to continue.

The landlord's agent testified that the landlord's family has always intended for their son to occupy one of the rental units in the property. The landlord's agent testified that the landlord's son is a student at a local college with an expected graduation date of 2018. He is currently enrolled in a practicum which lasts from January 2017 to May 2017. He testified that the family wanted to allow the son to assert his independence while remaining close by. The landlord's agent testified that the other rental unit is a fixed term tenancy with an end date of August 31, 2017 and is thus unsuitable for the family. The landlord's agent testified that the family intends for the son to move into the rental unit and the son's room within the family residence will be occupied by another relative. The landlord's agent testified that the monthly rent amount for January has not been collected from the tenant as it would not be required under the 2 Month Notice.

The landlord's son testified that he is a student and the college requires that he live on his own. He testified that this is a family tradition and the family has been planning the

move for about one year. He testified that he intends to pay the full rent of \$700.00 to his parents as any tenant would.

The tenant testified that he was not told about the landlord's intention to move their son into the rental unit until receiving the 2 Month Notice. The tenant said that he believes the repeated service of notices to end tenancy to be evidence of the landlord's bad faith. The tenant testified that the monthly rent is always paid in cash and the landlord picks up the rent from his suite. The tenant testified that the landlord sometimes does not come to his suite to pick up the rent and on those occasions he seeks her out. The tenant testified that the landlord appears to be avoiding receiving the rent as he has found that she is often unavailable at the start of the month. The tenant testified that he is able to pay the January rent amount but the landlord has not accepted it.

Analysis

In order to evict a tenant for landlords' use of the property the landlord has the burden of proving the reasons on the Notice.

The tenant raised the issue of the intention of the landlord and his confidence in the plan the landlord says they have; what I found was essentially a good faith argument.

Residential Tenancy Branch Policy Guideline number 2 notes that good faith is an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage. A claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the Notice to End the Tenancy.

This Guideline reads in part as follows:

If 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 Residential Tenancy Branch 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 ending the tenancy.

The tenant has raised the good faith intention of the landlord which I find has some basis. From the evidence before me I find that there is sufficient confusion about the various notices to end tenancy that have been issued. While the landlord has provided an explanation for the various notices I find the explanation to be somewhat unconvincing. If the landlord's family has always intended for their son to move into the rental unit as part of a family tradition one would expect that intention to have been known well in advance. I find the fact that the 2 Month Notice was issued while the earlier hearing was scheduled is instructive. I also note that the required vacancy date of the 2 Month Notice is in the midst of both a school term and the practicum for the landlord's son. This raises questions about how much this proposed move was planned in advance. From the evidence before me I do not find that the landlord's reason for seeking to end this tenancy is primarily motivated to allow a family member to reside in the unit.

I find on the balance of probabilities that the intention and motivation of the landlord is to end this tenancy, and any future occupancy of the rental unit is a secondary concern. Therefore, the 2 Month Notice is cancelled. The tenancy will continue until it is ended in accordance with the Act.

As the application has merit I find that the tenant may deduct the \$100.00 filing fee from the next months' rent due.

Conclusion

The tenant's application for a Repair Order is withdrawn.

The tenant's application for cancellation of the 10 Day Notice is withdrawn. The 10 Day Notice is of no further effect.

The tenant's application to cancel the 2 Month Notice is allowed. The 2 Month Notice is of no continuing force or effect. This tenancy will continue until ended according to the Act.

As the tenant's application was successful, the tenant is entitled to recovery of the \$100.00 filing fee for the cost of this application. As this tenancy is continuing, I allow the tenant to recover his \$100.00 filing fee by reducing his monthly rent by that amount on his next monthly rental payment to the landlord. In the event that this is not feasible, I issue a monetary Order in the tenant's favour in the amount of \$100.00. The tenant is provided with these Orders in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with these Orders, these

Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

This decision is final and binding and 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 13, 2017

Residential Tenancy Branch