



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, CNC, FF

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause, dated June 28, 2016 ("1 Month Notice"), pursuant to section 47;
- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property, dated June 28, 2016 ("2 Month Notice"), pursuant to section 49; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord and the tenant both attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 55 minutes in order to allow both parties to fully present their submissions.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package and the tenant confirmed receipt of the landlord's written evidence package. In accordance with sections 88, 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application and the tenant was duly served with the landlord's written evidence package.

As advised to both parties during the hearing, I did not receive a complete version of the landlord's faxed evidentiary package. The tenant confirmed that she had received it in its entirety. The landlord was asked to fax the remaining portions of the evidentiary package following the conclusion of the hearing. I received the entire portion of the landlord's evidence on January 17, 2017.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession for landlord's use of property?

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession for landlord's use of property?

Is the tenant entitled to recover the filing fee for her application?

Background and Evidence

Both parties agreed that this tenancy began on January 2009 and began as a fixed term tenancy agreement, transitioning into a month-to-month tenancy after one year. Monthly rent in the amount of \$2,100.00 is due on the first day of each month. A security deposit of \$950.00 was paid by the tenant and the landlord continues to retain this deposit. This damage deposit reflects the original rent of \$1,900.00. On December 12, 2016 a hearing was convened before the Residential Tenancy Branch where the landlord sought an additional rent increase above the legislated amount for 2016. This application was denied by the arbitrator conducting the hearing.

On November 26, 2016 a 1 Month Notice for unpaid rent was sent to the tenant by Registered Mail. The tenant could not recall on which day exactly she received the notice. As the tenant could not remember the exact date of receipt, the tenant is deemed to have been served with the 1 Month Notice on December pursuant to section 90 of the *Act* on December 1, 2016. The tenant disputed this 1 Month Notice and sent her Application for Dispute Resolution by Registered Mail on December 12, 2016. This is within the allowable 10 day time limit, pursuant to section 47 of the *Act* as December 11, 2016 was a Sunday.

In his 1 Month Notice, the landlord stated that the tenant has been repeatedly late paying rent and is asking for an Order of Possession pursuant to section 47(1)(b) of the *Act*. Specifically, the landlord said that “rent was late on several occasions” but he was pursuing a 1 Month Notice based on late rent for the months of April, March and July 2015. Additionally, he wished to include June 2016 as this rent cheque was dishonoured by the bank.

The tenant argued that she had issued the landlord with post-dated cheques for the 1st of every month, and that the landlord had repeatedly deposited the cheques after this date. The landlord acknowledged that these cheques were on occasion deposited later than the 1st of the month; however, he maintained that was his prerogative to deposit the cheques when he saw fit. Furthermore, he stated that rent is due on the 1st of the month and therefore the rent should be ready for the 1st of the month. The landlord entered into evidence, a series of text messages between himself and the tenant whereby extension of time on rent being paid was referenced. When asked why he waited almost 2 years to pursue this claim for repeated late rent, he said, “I am a compassionate person and did not want to pursue this matter at that time.”

On December 12, 2016 the tenant sent an application for dispute resolution to the landlord's agent by Registered Mail. The landlord acknowledged receipt of this notice.

On December 23, 2016 the tenant was served with a 2 Month Notice by way of a courier company. The tenant explained that her 19 year old son signed for the document and that she had received it. While not a recognized form of service under section 88 of the *Act*, the tenant acknowledged service and is therefore found to have been served with the 2 Month Notice on December 23, 2016.

On December 28, 2016 the tenant submitted an amendment to her application for dispute resolution. This was served on the landlord's agent by hand on December 29, 2016. The landlord acknowledged receipt of this amendment. In her amendment the tenant challenged the 'good faith' requirement of the landlord's 2 Month Notice. The tenant alleges that the landlord has made repeated attempts to raise her rent, and is looking to evict her so that he may renovate the rental unit and re-rent it for a greater amount of rent.

As evidence of her position, the tenant provided a photocopy of an email that she had received from the landlord in the fall of 2016. Here the landlord provided the tenant with two options concerning the future of her tenancy.

- i) Vacate premises at the earliest opportunity. Refund partial rent for the month of October. No involvement of the Residential Tenancy Branch.
- ii) Sign a new lease for January 2017 for \$3,000.00 per month. Allow a kitchen renovation to take place.

In addition, the landlord noted that "a rent-to-own scheme will not be entertained. I am simply not interested but may well sell the house outright in early 2017 and stop this unsustainable landlord subsidy business."

The landlord maintained that he had made arrangements to move back to Vancouver following the recent change of administration in the United States. The landlord said he originally planned to live in a central neighbourhood in Vancouver; however, upon investigation of the rental market he explained that "it did not make financial sense to live elsewhere." The landlord provided testimony that he had recently spoken with the Canadian Revenue Agency to take steps to regulate his tax status and that he was planning on booking a moving truck to transport his goods from his current home in Southern California. The landlord acknowledged that he would not be in the house full-time as his business often takes him to Asia and that he regularly spends 1/3rd of his

time in the region. The landlord did, however; express a strong desire to occupy the rental unit.

Analysis – 1 Month Notice

The landlord served a 1 Month Notice on the tenant for non-payment of rent pursuant to section 46 of the Act. The landlord sought an order to end tenancy for non-payment of rent for the months of April, March and July 2015. Additionally, he wished to include June 2016 as this rent cheque was dishonoured by the bank. When asked why he waited nearly two years to pursue these actions, the landlord replied that he was a “compassionate person.” Following these instances cited by the landlord for late rent, the landlord continued to accept rent, indicating he was comfortable with a continuation of the tenancy.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day Notice:

A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

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.*

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the

belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

Following direction from this guideline, it is evident that the landlord was not accepting rent for *use and occupancy only* and was satisfied accepting rent as a means of continuing the tenancy. As such, the tenant is successful in canceling the landlord's 1 Month Notice.

Analysis – 2 Month Notice

Subsection 49(3) of the Act states that a landlord may end a tenancy in respect of a rental unit where the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

Residential Tenancy Policy Guideline 2: Good Faith Requirement When Ending a Tenancy states:

A claim of good faith requires honesty of intention with no ulterior motive...

...

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 that they do not have an ulterior motive for ending the tenancy.

During the course of the hearing, the tenant sought to establish that the landlord was acting in bad faith. She cited the landlord's attempt to increase the rent, the landlord's email directing her to accept one of the "offers" that he made her, and the landlord's 1 Month Notice as evidence of his desire to remove her from the premises.

While I acknowledge that the landlord is acting very aggressively towards the tenant, I do believe that the landlord does intend to occupy the rental unit. The landlord explained that he made his decision to return to Canada following the change of

administration in the United States. He stated that he has contacted the Canadian taxation authorities in an attempt to regulate his status, and he testified that his true intentions are to occupy the home. Furthermore, the landlord stated that he occupied the home for 8 years prior to living in the United States and it was natural for him to want to return to the house that he had previously occupied.

The tenant's application to cancel the landlord's 2 Month Notice is dismissed and the 2 Month Notice is valid. The landlord will be granted an Order of Possession for February 28, 2017. In accordance with the provisions of the Act with respect to the issuance of 2 Month Notices, the landlord is directed to waive rent for the month of February 2017.

Conclusion

The tenant was successful in her application to cancel a 1 Month Notice.

The tenant's application to cancel a 2 Month Notice is dismissed and the landlord is granted an Order of Possession for February 28, 2017. The landlord is provided with formal Orders in the above terms. Should the tenant fail to comply with these Orders, these Orders may be filed and enforced as Orders of the Supreme Court of British Columbia.

The tenant must bear the cost of the filing fee associated with this application.

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 24, 2017

Residential Tenancy Branch