



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, OPT

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 for an Order of Possession for the tenant.

The tenant attended the hearing, gave affirmed testimony and was assisted by a Legal Advocate. The landlord also attended, gave affirmed testimony and was assisted by an agent who also gave affirmed testimony.

The landlord's agent also called 2 witnesses who gave affirmed testimony, one of whom testified that she had received an email from the landlord's agent without instructions, and that the witness did not serve the landlord's evidentiary material on the tenant. Upon hearing that testimony the landlord's agent applied to adjourn the hearing, which was opposed by the tenant, and I declined to adjourn to allow service of the evidence. As a result, the landlord's evidentiary material is not considered in this Decision.

Issue(s) to be Decided

- Has the landlord established that the 2 Month Notice to End Tenancy for Landlord's Use of Property was issued in accordance with the *Residential Tenancy Act*, specifically with respect to good faith intent?
- Should the tenant be granted an Order of Possession of the rental unit?

Background and Evidence

The landlord's agent testified that this fixed term tenancy began on September 1, 2015 and expired on August 31, 2016 thereafter reverting to a month-to-month tenancy. However an error was made on the tenancy agreement which was supposed to end the tenancy on August 31, 2016. The tenant still resides in the rental unit. Rent in the

amount of \$500.00 per month is payable on the 1st day of each month and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of \$250.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a suite in a row-house type of complex with 3 other suites, all of which are owned by the landlord and a partner, and neither the landlord nor the partner resides there. All 3 other units are currently tenanted with fixed term tenancies.

The landlord's agent further testified that the tenant was served with a 2 Month Notice to End Tenancy for Landlord's Use of Property on December 29, 2016, a copy of which has been provided by the tenant. It is dated December 29, 2016 and contains an effective date of February 28, 2017, and was posted to the door of the rental unit. The reason for issuing it states: "The landlord intends to convert the rental unit for use by a caretaker, manager or superintendent of the residential property."

The landlord's agent further testified that the landlords' insurance requires the landlords to attend to the rental units every 3 months to check the apartments and the property. The laundry room door had been left open which could have caused pipes to freeze if someone hadn't noticed, and in mid-January, 2017 another tenant's hatch which houses pipes under the building was busted. The insurance company would prefer an on-site caretaker. The landlord's agent spoke to all tenants asking if any of them had a desire to leave prior to the end of their fixed terms before issuing the 2 Month Notice to End Tenancy for Landlord's Use of Property, but they all declined.

The landlord became very sick around mid-December, 2016 and can't travel anymore to the rental unit which is in a different City than the landlord's residence. The landlord's partner has cancer and is blind so cannot deal with the tenancies. The landlord's agent spoke to a realtor about recommending a trust-worthy person to reside on the rental property and act as caretaker, and was advised to get a suite vacant and then advertise.

The landlord previously served the tenant with a 1 Month Notice to End Tenancy for Cause which was disputed by the tenant, and the parties attended a dispute resolution hearing on December 1, 2016. A copy of the resulting Decision has been provided by the tenant. The landlord's agent referred to it testifying that although it states that the evidence of the landlord was fabricated, there was an alleged assault on the landlord, and the landlord felt unsafe.

The landlord testified that he has never dealt with a property management company for the rental units.

The landlord's first witness (NK) testified that the landlord's agent emailed to the witness a 2 Month Notice to End Tenancy for Landlord's Use of Property, and the witness printed it and delivered it to the rental unit on December 29, 2016. It was posted to the door of the rental unit and the witness took a photograph of it. The witness also received other documents from the landlord's agent but no instructions, so the evidentiary material of the landlord was not served to the tenant. The witness did receive notices for 2 other units within the complex, and testified that they were letters that had to do with vacating for a caretaker.

The landlord's witness also testified that her father was a caretaker for the rental complex and the witness helped, but her father passed away. The witness was not officially a property manager for the landlord, but just helped out and does not have the time to manage the properties now.

The landlord's second witness (AJ) testified that he has resided in one of the suites in the rental complex for exactly a year. The fixed term tenancy was up in December, 2016 but the witness is not sure if it expired at the beginning or the end of December, and was renewed to expire on August 1, 2017. The witness received an email from the landlord's agent and replied on December 23, 2016. The landlord's agent was letting the witness know that one suite had to be converted to a caretaker's suite, but the witness replied that it could not be his suite because of the fixed term. The witness was also told by another tenant in the complex that the landlord's agent had contacted that tenant who also refused to vacate for a caretaker due to a fixed term tenancy.

The tenant testified that the landlord had served the tenant with a 1 Month Notice to End Tenancy for Cause alleging an assault on the landlord which stemmed from an incident in August, 2016 wherein the landlord entered the rental unit without knocking and the tenant's wife yelled at him. The tenant believes this 2 Month Notice to End Tenancy for Landlord's Use of Property is a continuance of that, in that it was served days after the previous hearing that resulted in a cancellation of the 1 Month Notice to End Tenancy for Cause.

During closing submissions the tenant's advocate stated that this is the third hearing between the parties. The first was the landlord's application for an Order of Possession stating that the tenancy ended in August, 2016 but the Arbitrator ruled that since rent had been collected the tenancy would continue. The second hearing was about the alleged assault, and the Arbitrator found that the landlord's evidence was fabricated and the 1 Month Notice to End Tenancy for Cause was cancelled. Now the landlord has served another notice to end the tenancy claiming that this is the unit that needs to be used by a caretaker, but the landlord has provided no evidence that the landlord is unfit

to travel and no insurance documents suggesting that a caretaker is required or preferred.

The landlord's agent submits that none of the evidence of the December 1, 2016 hearing was fabricated, and does not understand how the Arbitrator came up with that conclusion. Further, the landlord has the intent in good faith to have a caretaker on the property to satisfy the insurance company. The landlord's agent did due diligence in contacting all tenants asking if any of them had a desire to leave before issuing the 2 Month Notice to End Tenancy for Landlord's Use of Property. Two of the other units have fixed terms expiring in July, 2017 and the other in February, 2018.

Analysis

The *Residential Tenancy Act* permits a landlord to issue a 2 Month Notice to End Tenancy for Landlord's Use of Property on a month-to-month tenancy if the landlord intends in good faith to use the property for the purpose set out in that notice, in this case to convert the rental unit for use by a caretaker, manager or superintendent of the residential property. Where a tenant disputes such a notice, the onus is on the landlord to establish that it was issued in accordance with the *Residential Tenancy Act*, which can include the reason for issuing it and good faith intent.

I explained to the parties the legal principle of *res judicata* which is a doctrine that prevents rehearing of claims and issues arising from the same cause of action between the same parties, after a final judgment was previously issued on the merits of the case. I indicated that I would be reviewing the previous Decisions to ensure that I did not make a finding on a matter that had already been heard and decided upon.

I have searched the Case Management System and did not find a third hearing as submitted by the tenant's Advocate. The hearing on December 1, 2016 dealt with applications made by the landlord and by the tenant. The landlord had applied for an Order of Possession for unpaid rent and for cause as well as a monetary order for \$11,110.00. The tenant had applied to cancel a 1 Month Notice to End Tenancy for Cause, to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, and for a monetary order for \$5,600.00. The applications of both parties for monetary orders were dismissed with leave to reapply.

I have read the December 1, 2016 Decision, and it is clear that the Arbitrator, after hearing testimony and considering evidence, felt that the landlord's evidence was fabricated and as such did not establish that neither the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities nor the 1 Month Notice to End Tenancy for Cause was issued in accordance with the *Residential Tenancy Act*.

In this hearing, the landlord's agent stated that the landlord does not understand how that conclusion was arrived at, and that it is not relevant to this hearing. I disagree. It is relevant, and it is explained very well in the Decision as to how the Arbitrator made a finding of fabrication. Not only did the evidentiary material not match the landlord's testimony, the landlord's witness' testimony does not match it. Further, the landlord's agent in this case stated that the landlord and agent did their due diligence in asking other tenants if they would agree to end their tenancies, and I accept that, however the landlord did not provide evidence of the date the landlord became ill, or the date of the witness' new tenancy agreement, or more importantly something from the insurance company to corroborate the testimony of the landlord's agent. Due diligence would have included ensuring that all evidence is provided to the tenant. It is relevant that a previous hearing resulted in a finding of fabrication in a case where the onus is on the landlord to establish good faith intent to use the rental unit for the purpose contained in the 2 Month Notice to End Tenancy for Landlord's Use of Property, particularly where it was issued less than a month after 2 previous notices were cancelled at Arbitration.

In the circumstances, I am not satisfied that the landlord has established good faith intent and I cancel the notice.

The tenant's application also seeks an Order of Possession, however the tenant has possession of the rental unit.

Conclusion

For the reasons set out above, the 2 Month Notice to End Tenancy for Landlord's Use of Property dated December 29, 2016 is hereby cancelled and the tenancy continues.

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: February 02, 2017

Residential Tenancy Branch