



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL OLC FF CNQ

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Tenants on January 30, 2017. The Tenants application indicated they filed seeking an order to cancel a 2 Month Notice to end tenancy for landlord's use; to Order the Landlord to comply with the Act, Regulation, or tenancy agreement; to recover the cost of the filing fee; and to cancel a Notice to end tenancy because the tenant does not qualify for subsidized housing.

The hearing was conducted via teleconference and was attended by the Landlord, the female Tenant, and the Tenant's assistant. The Landlord and Tenant gave affirmed testimony. The female tenant affirmed she would be representing both Tenants in these matters. Therefore, for the remainder of this decision, terms or references to the Tenants importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process; however, each declined and acknowledged that they understood how the conference would proceed.

Each party confirmed receipt of the documents and evidence served by the other party. Each party affirmed they served the other with copies of the same documents that they had served the Residential Tenancy Branch (RTB). No issues regarding service or receipt were raised by either party. As such, I accepted the submissions from both parties as evidence for these proceedings.

Upon review of the above, the Tenant confirmed they had only been served with one 2 Month Notice to end tenancy that had been issued for landlord's use of the property. As such, I determined the Tenants' request to cancel a Notice to end tenancy issued for the reason the tenant does not qualify for subsidized housing, was a clerical error which occurred when the Tenants completed their on-line application. As a Notice had not been issued for that reason the request to cancel it is moot. As such, I proceeded to hear the evidence relating to the remainder of the requests listed on the Tenants' application for Dispute Resolution.

Both parties were provided with the opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Although I was provided various forms of

evidence including: verbal testimony; written submissions; documents; and photographic evidence; with a view to brevity in writing this decision I have only summarized each party's respective positions below.

Issue(s) to be Decided

1. Does the 2 Month Notice issued January 27, 2017 list a correct effective date?
2. Has the Landlord provided sufficient evidence to meet the good faith requirement to uphold the 2 Month Notice?
3. If not, how long with this tenancy continue?

Background and Evidence

The parties entered into a one year written fixed term tenancy agreement which commenced on October 14, 2016. As per that written agreement, (a copy of which was provided in evidence), the length of tenancy was for a fixed length of time ending on 14 Oct 2017. Neither option at section 2 b)i) or 2b)ii) of the tenancy agreement were selected to indicate if the tenancy would continue on a month to month basis or on another fixed period of time; or that the Tenants would be required to vacate the rental unit at the end of the fixed term.

As per the tenancy agreement, rent of \$950.00 was payable on the first of each month and on 9 Sept 2016 the Tenants had paid \$950.00 as the security deposit. There was an amount of \$200.00 listed in section 4B beside where it stated "The tenant is **required to pay** a pet damage deposit of".

As of this hearing date: the Tenants had not paid the \$200.00 security deposit; the Tenants had acquired a puppy; and the Landlord remained in possession of the full \$950.00 that was paid as a deposit on September 9, 2016. During this hearing I heard the Landlord and Tenant both state they had no issues or concerns with specifying that the \$950.00, which was being held by the Landlord, as being a \$475.00 security deposit and a \$475.00 pet deposit.

On January 27, 2017 the Tenants received a 2 Month Notice to end tenancy which had been posted to their door. That Notice was issued on January 27, 2017; listed an effective date of March 31, 2017; for the following reasons:

The landlord has all necessary permits and approvals required by law to demolish the rental unit, or renovate or repair the rental unit in a manner that requires the rental unit to be vacant.

The Landlord put forth the following submissions in support of her position that she required vacant possession of the rental unit as of March 31, 2017:

- She was of the opinion she could end the tenancy with a 2 Month Notice for renovations; regardless of the end date of the fixed term tenancy agreement.
- She informed the male Tenant of the presence of rot in the house deck when they were negotiating the terms of the tenancy; prior to the start of the tenancy.
- The Tenants had complained about a sewage smell coming up through the floor which the Landlord has since determined to be an environmental and health concern.
- I heard the Landlord state that now that she had done her due diligence and inspected the house she had determined the greywater was being discharged into the ground near the water and not into the septic system. She asserted she was not aware of the location of the septic tank for this property.
- The Landlord spoke about the provincial building code; plumbing code; and code relating to the requirements for a sewage system; arguing that the rental units septic and greywater system was not up to code which required her to have the unit connected to the municipal sewage system.
- The Landlord asserted the rental unit house was not safe to go under to hook up the sewer because the house: sits on pilings, which in some sections are less than 18" above ground level; the central beams of the house had extensive rot; and there was a soft spot in the floor.
- The Landlord argued the house needed: to be vacant so it could be raised to complete the required work; needed a sump pump installed; and needed to have the greywater and sewage pipes connected.
- The Landlord stated permits were not required to complete the work; rather, the municipality only required an application for sewer service connection to be completed. The Landlord submitted a copy of an application for sewer service connection into evidence which was signed by her on Jan 19, 2017. That application was not signed by the building inspector.
- The Landlord asserted the work needed to be completed over the spring and summer months due to their location on a remote island which often experienced gale force winds and snow during the fall and winter months.
- The Landlord initially stated she purchased the rental unit in December 2014 and then changed her submission to state she purchased it in 2012. I heard her state she had had tenants occupy the unit starting in January 2013; she would have short term tenants in a bed and breakfast style rental starting from March; the Landlord occupied the unit from August 2014 to April 2015; and then she returned to having longer term tenants for periods of 4 months during the winter months (Oct to Feb) and would return to bed and breakfast or short term style rentals during the spring and summer months for vacation rentals.

Throughout her submissions, the Landlord referenced her photographic and documentary evidence.

The Tenant disputed the 2 Month Notice and argued she only recalled the Landlord mentioning to the male Tenant issues relating to rot in the front deck, which had been

replaced. The Tenant and her assistant put forth additional arguments as summarized below:

- The Landlord did not submit evidence from experts that indicated the repairs were urgent.
- The Landlord admitted she knew of the existing rot before entering into their fixed term tenancy.
- The Landlord did not submit documentary evidence that the current situation presented a health risk or that the Tenants should be concerned about their health.
- There was no evidence to support the Landlord had acquired permits for the required work.
- The Tenants had reported a sewage smell to the Landlord and since then they flushed a septic product down the toilet which had resolved or lessened the smell for now.
- The Tenants intended to live in the rental unit for the period of the full lease as they were professionals who worked in the remote community which had no other available housing.

In closing, the Landlord submitted that there were no experts located on the island to provide such reports; she would need to arrange for an electrician and other experts and equipment to come to the island to perform the required work; she was not aware that the greywater needed to run together with the septic as of the start of this tenancy; she has no idea where the septic pipes are; and it is common knowledge that it is “a health hazard to have sewage discharged into the land”.

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

Neither the Landlord nor the Tenant raised any issues with the \$950.00, currently held by the Landlord, as being considered a \$475.00 security deposit and a \$475.00 pet deposit. Accordingly, as per section 19 (1) of the *Act* which provides that a landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement, I order the tenancy agreement to be amended to read that on September 9, 2016 the Tenants paid \$475.00 as the security deposit and \$475.00 as the pet deposit.

Upon review of the 2 Month Notice to End Tenancy, I find the Notice was completed on the prescribed form in accordance with the requirements of section 52 of the *Act* [form and content]. However, I further find that Notice listed an incorrect effective date of March 31, 2017.

I made the aforementioned finding pursuant to section 49(2)(c) of the *Act* which stipulates that subject to section 51 [*tenant's compensation: section 49 notice*], a landlord may end a tenancy for a purpose referred to in subsection (3), (4), (5) or (6) by giving notice to end the tenancy effective on a date **that must be not earlier than** the date specified as the end of the tenancy if the tenancy agreement is a fixed term tenancy agreement.

Section 53 (1) of the *Act* provides that if a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) as applicable.

Subsection (2) of Section 53 states that if the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section. As such, I find the effective date of the 2 Month Notice issued January 27, 2017 automatically corrected to be **October 14, 2017**.

When a tenant disputes a 2 Month Notice to end tenancy, the landlord bears the burden of proof that the Notice was given in good faith. Residential Tenancy Policy Guideline 2 provides 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. I concur with the aforementioned and find this Policy is relevant to the issues before me.

Based on the aforementioned good faith requirement, the Landlord had the burden to prove the following two part test:

- 1) The landlord must truly intend to use the premises for the purposes stated on the notice to end tenancy; and
- 2) The Landlord must not have an ulterior motive as the primary motive for seeking to have the tenant vacate the rental unit.

In determining the good faith requirement, I must consider the events leading up to this tenancy as well as during this tenancy just prior to the issuance of the 2 Month Notice.

In this case I am not satisfied that the 2 Month Notice was issued January 27, 2017 due to a requirement for renovations or repairs that required the unit to be vacant as of March 2017. Rather, in the presence of the Tenants' disputing evidence; and in absence of: (1) documentary evidence from the municipality or a licensed contractor to prove the repairs were required at this time; (2) proof the Landlord's application for sewer service connection had actually be submitted to the municipality; (3) proof that sewer service application was approved by the municipal building inspector; (4) and documentary evidence to prove the work was required to be completed in 2017 for health and/or safety reasons; I find there to be insufficient evidence to support the unit needed to be vacant for the reasons listed on the Notice.

Furthermore, I find there was sufficient evidence to support the Landlord may also have had an ulterior motive for attempting to end the tenancy prior to the end of the fixed term. I make this finding, in part, based on the Tenant's submissions that there were little to no other rental accommodations on the remote island as well as the Landlord's own submissions that she had established a pattern of operating her landlord business by entering into tenancy agreements for four month periods during the fall and winter months and then switching her business to operate as a bed and breakfast or short term rental business during the spring and summer months for vacation rentals.

I find the Landlord's actions of entering into the written fixed term tenancy on September 9, 2016 and then issuing the 2 Month Notice three months later to be presumptuously suspicious that she never intended this tenancy to continue for a year. Rather, the pattern of her rental business would indicate she agreed to the fixed term to secure the rental income from the Tenants during the winter months, a time that may be harder to secure tenants, all the while thinking she could issue the 2 Month Notice in the spring to end the tenancy so she could start up her short term vacation rentals again.

Based on the totality of the evidence before me, I concluded there to be insufficient evidence to prove the 2 Month Notice, dated January 27, 2017, was issued in good faith. Therefore, I find in favor of the Tenants' application and order that that the 2 Month Notice issued January 27, 2017 be cancelled.

As stated above, as per the tenancy agreement submitted into evidence, neither option at section 2 b)i) or 2b)ii) of the tenancy agreement were selected to indicate whether this tenancy would continue on a month to month basis or on another fixed period of time; or that the Tenants would be required to vacate the rental unit at the end of the fixed term.

Based on the above, I direct the parties to section 44(3) of the *Act* which stipulates:

If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

[Reproduced as written]

Accordingly, I order that this tenancy will continue, until such time as it is ended in accordance with the *Act*.

Section 72(1) of the *Act* stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Tenants have succeeded with their application; therefore, I award recovery of the filing fee in the amount of **\$100.00**, which is to be paid by the Landlord; pursuant to section 72(1) of the Act.

The parties are reminded of the provisions of section 72(2)(a) of the *Act*, which authorizes a tenant to reduce their rent payments by any amount the director orders a landlord to pay to a tenant, which in these circumstances is \$100.00.

In the event the Tenants' rent is paid in a manner that does not provide for recovery of the filing fee from future rent payments, the Tenants have been issued a Monetary Order for **\$100.00**. In that case, the Order would need to be served upon the Landlord and may be enforced through Small Claims Court.

Conclusion

The Tenants were successful with their application. The 2 Month Notice was cancelled and the Tenants were awarded recovery of their filing fee.

This decision is final, legally 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: March 01, 2017

Residential Tenancy Branch