



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

CNL, OPT, FF

Introduction

This hearing was convened by way of conference call in response to the tenant's application for an Order to cancel a Two Month Notice to End Tenancy for landlord's use of the property; for an Order of Possession for the tenant; and to recover the filing fee from the landlord for the cost of this application.

At the outset of the hearing the tenant agreed he still has possession of the rental unit and therefore he withdraws his application for an Order of Possession.

The tenant, the landlord and a translator/agent for the landlord (the landlord's daughter) attended the conference call hearing. The parties were given the opportunity to be heard, to present evidence and to make submissions under oath. The tenant only provided a copy of the Two Month Notice to End Tenancy (the Notice) in documentary evidence to the Residential Tenancy Branch. This was not provided to the landlord but as the landlord had a copy of this Notice I will accept the Notice as evidence. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure.

Issue(s) to be Decided

Is the tenant entitled to an Order to cancel the Two Month Notice to End Tenancy for landlord's use of the property?

Background and Evidence

The parties agreed that this month to month tenancy started on March 15, 2014. Rent for this unit is \$800.00 per month due on the 1st of each month. The tenant paid a security deposit of \$400.00 which continues to be held in trust by the landlord.

The landlord's agent provided testimony on behalf of the landlord and testified that the landlord has three adult children who live elsewhere. The landlord has an orchard and wants the children to eventually take over the business as the landlord is getting old. Last summer all of the children went to work on the orchard for a trial period; however, this was difficult for the landlord as he goes to bed so early because he has to get up at 4.00 a.m. for work. This prevented the children from having a social life when they were there and they could not have their friends over due to the noise.

The landlord's agent testified that it was agreed that the landlord's children should all stay in the rental house when they come again this year from May to help with the orchard and to learn the business. The children will not always come at the same time but the rental house will be occupied by the landlord's children whenever they are there. The children have jobs elsewhere and have organised time off during the summer months to come to help the landlord in the orchard. The children need their own space to live in so they can socialize with friends without disturbing the landlord.

The landlord's agent testified that there is a suite in the landlord's house but this is located under the landlord's bedroom. The landlord did have tenants in that suite but the house is not sound proofed so the landlord had to ask those tenants to vacate as it was too noisy. The landlord's children were also able to access that suite last year as they knew the tenants but the landlord found it was too noisy to sleep so this was another reason they decided that the rental house would be the better option.

The tenant testified that both he and his wife have disabilities and it is hard to find somewhere else to move. The tenant testified that he did see the landlord's children there last summer but they only came for a few weekends and maybe a few extra days. There is no reason they could not use the separate suite in the landlord's house and this should not be sufficient to evict the tenant and his wife.

The tenant testified that he has a Small Claims Court action against the landlord and feels this Notice was served because of that. The tenant testified that it is unlikely the landlord's children

used the separate suite in his house last summer as the other tenants were still living there then.

Analysis

After careful consideration of the testimony and documentary evidence before me and on a balance of probabilities I find as follows:

Section 49(3) of the *Act* stipulates that a landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

The tenant questioned the good faith intent of the landlord as the parties have a Small Claims Court action before them brought by the tenant and the tenant testified that he feels this Notice may be in retaliation to that action.

In considering whether the landlord has acted in good faith, a two part test is imposed, namely, that landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy and that the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.

I have therefore considered the oral evidence before me from the landlord's daughter. This evidence suggests that the unit will be occupied for some of the summer months when the landlord's children visit the landlord and that this temporary occupation will enable the landlord's children to carry on their social life without disturbing the landlord. This occupation will not be permanent but only when the landlord's children come home to help on the orchard and to learn the business.

In considering this evidence and the arguments put forth in this matter I find the landlord's agent's oral evidence is not sufficient as it is disputed by the tenant. I also find the landlord's agent testified that all of the landlord's children live elsewhere and have jobs elsewhere. I therefore find that the level and use that the landlord's children want to have does not constitute occupancy that meets the requirement for the tenancy to be ended as it is temporary in nature. Furthermore, the Small Claims Court action brings into question the good faith requirement of

the LL which in this case suggests there may be an ulterior motive to end the tenancy due to the dispute between the parties. As the landlord's children will not permanently reside in the rental unit I find that the landlord has alternative accommodation that his children could use when they come to visit the landlord and work temporarily on the orchard.

As the landlord has the burden of proof in this matter to show that there is no dishonest or ulterior motive in ending this tenancy it is my decision that without further corroborating evidence to show the landlord's children truly intend to occupy this rental unit then I find in favor of the tenant's application to dispute the Notice. The Notice is therefore cancelled.

As the tenant has been successful with this application I find the tenant may recover the filing fee of \$100.00 from the landlord pursuant to s. 72(1) of the Act. The tenant may deduct the **\$100.00** from the next rent payment when it is due.

Conclusion

The tenant's application is allowed. The One Month Notice dated February, 2017 is cancelled.

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: March 22, 2017

Residential Tenancy Branch