



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes DRI CNL 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;
- an Order that the landlord to comply with the *Act* pursuant to section 62;
- a Dispute of an additional rent increase pursuant to section 43 of the *Act*; 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 landlord was represented at the hearing by their counsel, J.A. (the "landlord").

The parties agreed that the landlord's 2 Month Notice was served on the tenant personally on April 1, 2017. The parties agreed that on or about April 8, 2017 the tenant served the tenant's notice of dispute resolution on the landlord in person. On or about April 14, 2017, the tenant served his evidentiary package on the landlord in person. I find that the landlord was duly served with the tenant's application and evidentiary package in accordance with sections 88 and 89 of the *Act*.

On May 2, 2017, the tenant amended his application for dispute resolution, increasing his request for a Monetary Order from \$1,200.00 to \$1,400.00.

Issue(s) to be Decided

Can the tenant cancel the landlord's 2 Month Notice? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to a Monetary Order?

Can the tenant recover the filing fee?

Can the tenant dispute an additional rent increase?

Background and Evidence

Testimony was provided by both parties and a copy of the residential tenancy agreement was submitted to the hearing demonstrating that this tenancy began on June 1, 2009. Rent was \$650.00 per month and a security deposit of \$325.00 continues to be held by the landlord. In February 2016, the parties mutually agreed to a rental increase of \$100.00 bringing the current rent to \$750.00 per month.

On February 28, 2016, the landlord issued a 2 Month Notice to End Tenancy for Landlord's Use of Property ("2 Month Notice") indicating that the rental unit was to be occupied by the landlord or the landlord's spouse or a close family member. On March 27, 2016, the landlord rescinded this notice and the tenancy continued uninterrupted.

On April 1, 2017, the landlord issued the current 2 Month Notice with the same reason stated in the February 28, 2016 Notice, for ending this tenancy.

During the course of the hearing, the landlord explained that his house is currently occupied by himself, his wife, his 22 year old son, his daughter and her husband, as well as one grandchild. The landlord testified that he seeks the use of the downstairs space, presently occupied by the tenant, so that his family may have access to the area because they are relatively crowded on the main floors of the house. Additional testimony was provided by the landlord that his daughter and her husband sold their house in February 2017 and, for this reason, the main floors are increasingly congested.

The tenant disputed this notion and explained that the 2 Month Notice was issued in bad faith and as a way for the landlord to evict him from the rental unit so that the suite could be re-rented for a higher sum. The tenant stated that the previous 2 Month Notice issued on February 28, 2016 was only withdrawn because the parties agreed that the tenant would pay an extra \$100.00 in rent. Furthermore, the tenant explained that he had spoken with both the landlord and his daughter and they indicated that he could stay in the rental unit if he agreed to pay an increased amount of rent. Counsel for the landlord explained that the rental unit is "significantly under market value."

The tenant submitted as part of his evidentiary package a conversation between himself and the landlord's daughter, that was recorded without the landlord's consent. It clearly demonstrates that the tenant was offered the option of accepting a significant rent increase or facing a 2 Month Notice. Before this breakdown in their relationship, the tenant testified that he enjoyed a good relationship with the landlord and had done a fair amount work and repairs on the basement suite at his own expense. The landlord

acknowledged that this exchange between his daughter and the tenant took place but explained that this was simply a conversation and not a formal offer.

In addition to cancelling the 2 Month Notice, the tenant is seeking a Monetary Order of \$1,400.00. The amount reflects the 14 months of increased \$100.00 rent that the tenant has paid at \$750.00 after the issuance of a 2 Month Notice in February 2016. The tenant argued that while this increase was done by way of mutual agreement, it represents a figure above the 3.7% allowable rent increase.

Finally, the tenant is seeking to dispute the rent increase from February 2016 and an Order for the landlord to comply with the *Act* and only issue rent increases in accordance with section 41, 42 and 43 of the *Act*.

Analysis – 2 Month Notice

In order to successfully apply for an Order of Possession against a tenant for landlord's use of the property under section 49 of the *Act*, the landlord has the burden of proving the reason for the issuance of the Notice, in this case that a close family member intends to occupy the rental unit.

The tenant disputed the intention of the landlord and said that he was offered an arrangement whereby he would be allowed to stay in the unit if he agreed to pay more rent.

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 disputed 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 to leave me in doubt about the true intent of the landlord's intentions. While the landlord has provided an explanation for the 2 Month Notice issued on April 1, 2017, I find the explanation to be somewhat unconvincing when considered against the offer that the landlord acknowledged discussing with the tenant. Additionally, counsel for the landlord noted that the current rate of rent being paid by the tenant is significantly below what the landlord could now command for the rental unit.

If the landlord's family has always intended for their son to move into the rental unit one would expect that intention to have been known well in advance. I find troubling the fact that a 2 Month Notice was issued in February 2016 and later withdrawn when the tenant agreed to a rental increase of \$100.00. I also note that much of the landlord's evidence submitted to the hearing centered on the tenant's guest versus any information speaking to the current living arrangements on the upper floors of the home. This raises questions as to the true intention of the 2 Month Notice. From the evidence before me, I do not find that the landlord has proven that his reason for seeking to end this tenancy is primarily motivated to allow a family member to reside in the unit. Therefore, the 2 Month Notice is cancelled. The tenancy will continue until it is ended in accordance with the Act.

Analysis – Monetary Order

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the tenant to prove his entitlement to a claim for a monetary award.

The tenant explained that he sought \$1,400.00 to recover the amount of rent that he has paid above the allowable rental increase mandated by legislation. The tenant stated that he agreed to the terms offered to him by the landlord so that he could remain in the rental unit.

I do not find this argument compelling as the tenant faced a similar situation in this present matter and followed the proper recourse of disputing the matter with the *Residential Tenancy Branch*. The tenant acknowledged that he agreed to the rental increase but stated that he was not aware of his legal rights. A party must inform themselves of their legal rights and are responsible for any agreement that they enter into under their own free will. While the *Act* sets limits on rent increases it also contemplates that a tenant may agree to an increase above this amount.

The tenant acknowledged that he agreed to the rental increase and has paid it for over 1 year, the tenant cannot therefore now look to change the terms of his agreement with the landlord. The tenant's application for a Monetary Order of \$1,400.00 is dismissed without leave to reapply.

Analysis – Order to Comply with the *Act* and *Dispute an Additional Rent Increase*

The tenant is seeking an Order under section 62 of the *Act* for the landlord to comply with the *Act*. Specifically, the tenant maintained that he has been unreasonably paying an amount of rent over and above the allowable legislated amount. Section 62 notes that an Arbitrator “may make any order necessary to give effect to the rights, obligations and prohibitions under this *Act*, including an order that a landlord comply with this *Act*, the regulations or a tenancy agreement and an order that this *Act* applies.”

The tenant repeatedly noted that he felt the landlord was acting in bad faith in issuing repeated 2 month notices to end tenancy and was only being offered a reprieve from eviction if he agreed to an increase in rent. Evidence and testimony was presented by both parties that the tenant agreed to a \$100.00 rent increase in February 2016. This amount is clearly beyond the 3.7% currently permitted under the legislation; however, the tenant acknowledged that he agreed to this increase. The amount of rent that the tenant presently pays will stand until the rent is increased in accordance with sections 41, 42 and 43 of the *Act*.

I find that the landlord has previously acted beyond the scope of the *Act* by increasing the rent beyond what is allowable under the *Act*. The landlord is ordered to only increase the rent pursuant to sections 41, 42 and 43 of the *Act*. Further information on allowable rent increases can be found at: <http://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/during-a-tenancy/rent-increases>

As the tenant was successful in the majority of his application, he may recover the \$100.00 filing fee from the landlord.

Conclusion

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*.

The tenant's application for a Monetary Order is dismissed.

The landlord is ordered to only increase the rent by the allowable percentage, currently 3.7%, every 12 months. This is in accordance with the amount permitted by law and this increase must conform with the manner set out in the *Act* and the associated *Regulation*

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 a future rent payment by that amount on one occasion.

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: May 29, 2017

Residential Tenancy Branch