



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNL FF

Introduction

Both parties attended the hearing and gave sworn testimony. They confirmed the Two Month Notice to End Tenancy for landlord's use of the property dated June 20, 2017 to be effective August 30, 2017 was legally served. The effective date on the Notice is automatically corrected to August 31, 2017 pursuant to section 53 of the *Residential Tenancy Act* as a Notice to End Tenancy for landlord's use of the property must give a full two months' notice and end the tenancy on the day before the day in the month that rent is payable under the tenancy agreement according to section 45 (1) (b). The tenant /applicant gave evidence that they personally served the Application for Dispute Resolution dated June 30, 2017 on the landlord's agent and the landlord agreed they received it. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing. The tenant applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) To cancel a notice to end tenancy for landlord's use of the property pursuant to section 49; and
- b) To recover the filing fee for this application.

Issue(s) to be Decided:

Has the landlord proved on the balance of probabilities that they need in good faith to end the tenancy in order to have the property for their own use? Or is the tenant entitled to any relief? Is the landlord entitled to an Order of Possession if the tenant is unsuccessful in the application?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to provide evidence and to make submissions. The undisputed evidence is that the tenancy commenced June 1, 2014, it is now a month to month tenancy, rent is \$1970 a month and a security deposit of \$987.50 was paid. The tenants have not received a free month's rent yet pursuant to the section 49 Notice. The landlord served a Notice to End Tenancy for the landlord's use of the property, stating that he or a close family member would occupy the unit.

The landlord said he had been married since May 17, 2014 and he planned to come to Vancouver in September from his eastern country and renovate the unit a little for his wife and him to occupy. He has a return ticket in evidence. In evidence is an approved Visa application

paid July 27, 2017 for a Visa expiring in 2204. The landlord is not yet a resident of Canada. A sponsorship application has been made by his new wife who is a Canadian citizen who is living and working in his country at this time. He said he has to be resident in his own country for the process of the application. An agency was retained to help him on May 2, 2017. He was in Vancouver from May 18, 2017 to April 2, 2017 and is returning September 22 to October 7, 2017 according to the airline tickets in evidence. He bought the unit with a closing date of April 1, 2017 and tried unsuccessfully to negotiate a short term fixed term tenancy agreement. An email from the agent said they wanted a fixed term as the owner planned to move back in September 2017. Rent was increased as of June 1, 2017 pursuant to legal Notice from the former owner.

The tenants and their counsel contend that the landlord's evidence is inconsistent. First, he said he was returning in September for a short visit and again in November for a short visit. Counsel asked for supporting documents and evidence as to the intended use and was only told of the plane tickets noted above and of the application for sponsorship. They contended in their documents with court cases on the point that short term stays would not meet the requirements of section 49 as this would not meet the definition of 'occupancy'. In the hearing today for the first time, the landlord introduced evidence that his wife who is a Canadian citizen would return to the province and live in the unit commencing in November. She gave evidence that she is independent and it is culturally common for spouses to live apart for long periods of time while immigration documents are processed. She said she came originally from another province, is doing a university program through a university in the United States and has no job here. Currently she works in the same country as her husband but has given notice on August 7, 2017 by letter which is not in evidence. She said she had not submitted any evidence of her intention previously as it was handled by her husband. She has no plane tickets for November as this date is tentative. She said she had told the tenants in March 2017 when she met them for the first time that she had the intention of returning to Canada.

The tenant's counsel submitted the landlord's reasons for issuing the Notice to End Tenancy at this time make no rational sense and are inconsistent. He pointed out that

- The sponsorship program takes at least 12 months. His secretary researched this and provided evidence supporting this
- The wife has no ties to this province, she is taking her university qualification from the United States, she has no job and no evidence of close family ties here so why choose to live here by herself for a long period of time?
- It appears that the Notice to End Tenancy was issued for indefinite future visits and the story changed after the landlord got the evidence of the tenant concerning occupancy
- The landlord was invited numerous times to provide any relevant documents and at no time did he state that his wife would be taking up residency in the suite, specifically he sent a letter dated June 22, 2017 asking who would occupy the suite to the agent who said by letter dated June 26, 2017 the owner would be occupying for a short time in September and December.

- The landlord's evidence submitted for the hearing suggests no continuous occupancy as there is no set date for move-in, no plane tickets have been bought, the wife has no job and is not tied to a university in this province. Counsel suggests the wife's evidence is self serving to gain control of the unit.
- Various legal authorities have found vacation or intermittent visits do not constitute 'occupancy'

Included with the evidence are copies of the Notice to End Tenancy, immigration documents, emails, the passport of the wife, the tenancy agreement, government information available on the internet of processing times for sponsorship applications and legal authorities. On the basis of the documentary and solemnly sworn evidence presented for the hearing, a decision has been reached.

Analysis:

As discussed with the parties in the hearing, the onus is on the landlord to prove on a balance of probabilities that they have good cause to evict the tenant.

I find the landlord has not proven on a balance of probabilities that he or his wife intend to occupy the unit on a full time basis commencing at a reasonable time after the effective date of the Notice to End tenancy. I find Residential Policy Guideline #2 requires a landlord (or close family member) to move into a rental unit in order to end the tenancy for reasons of landlord's use of the property. This implies a degree of permanency. In 2005, a BC Court of Appeal in *Wright v. Canadian Northern Shield Insurance Company*, 2005 BCCA 599, stated "...for a dwelling place to be in a state of occupation, there must be the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous but that must be the place of usual return and habitual stoppage"

I find the online Merriam Webster dictionary defines occupy as "to reside in as an owner or tenant"

I find the weight of the evidence is that the landlord's residence is in another country and his evidence is that he needs to continue that residence while his wife's sponsorship application is processed. I find the evidence is that this might take a year and may not be successful. His wife currently resides with him and works in that country also. Although she alleged she has given notice at work, she provided no documentation to support this. I find the landlord's and wife's statements inconsistent with letters and documents they provided as earlier evidence to the tenants' counsel. I find it improbable that this young couple suddenly choose to live apart so the wife may occupy the premises herself on a full time basis. I do not find the tenant's evidence credible and find it may be self serving.

I find the wife's purpose of occupancy by herself was not mentioned at any point during the exchange of evidence since the application to dispute was filed by the tenants on June 30, 2017. I find counsel for the tenants specifically asked the agent by letter in June who was the

intended occupant and the wife was not mentioned. I find the court cases provided by the tenants' counsel in evidence weigh heavily against part time occupancy as a sufficient reason to end the tenancy for landlord's use of the property and are consistent with previous arbitrators' decisions on this issue. I find it was after receiving these and considering them that the wife gave her testimony for the first time orally at the hearing.

For all of the above reasons, I find the application of the tenant to cancel the Notice to End Tenancy is successful. I suggest if the landlord or wife intends to occupy the property as their continuous residence and customary abode, they serve a Notice to End Tenancy for their own use when their time to move and occupy becomes clearer and is supportable by their evidence.

Conclusion:

The Application of the Tenant to set aside the Notice to End Tenancy is successful. The Notice to End Tenancy dated June 20, 2017 is hereby set aside and cancelled. The tenancy continues on a month to month basis at a rental of \$1970 a month until legally ended in accordance with the Act. I find the tenants entitled to recover their filing fees for their application.

I HEREBY ORDER the tenants may deduct \$100 from their rent to recover the filing fee.

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: September 12, 2017

Residential Tenancy Branch