Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC

Introduction

This hearing was convened by way of conference call in response to the Tenant's Application for Dispute Resolution (the "Application") filed on June 16, 2017 for money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), the regulation or tenancy agreement.

The Tenant, the Landlords, and a legal advocate for the Landlords appeared for the hearing. The Tenant provided affirmed testimony and the Landlord's advocate provided submissions for the Landlords who are the owners of the rental unit.

The advocate confirmed receipt of the Tenant's Application. The parties then confirmed exchange of their USB evidence prior to this hearing. No issues were raised with respect to the timing and service of that evidence.

The parties were informed as to how the dispute resolution hearing would be conducted and no questions about the hearing process were asked. The parties were given a full opportunity to present evidence, make submissions to me, and to cross examine the other party on the evidence provided. While I have considered all of the evidence before me, not all of the submissions and evidence have been reproduced in this Decision.

Issue(s) to be Decided

- Did the Landlord use the rental unit for the reason given to end the tenancy?
- Is the Tenant entitled to monetary compensation pursuant to Section 51(2) of the Act?

Background and Evidence

The parties agreed that this tenancy started on March 1, 2016 for a fixed term of one year which then continued on a month to month basis thereafter. A written tenancy

agreement was signed which required the Tenant to pay the Landlords rent of $1,750.00 on the first day of each month.

The parties explained that the residential home is split into two parts; an upper portion (the “rental unit”) and a basement portion (the “basement suite”). The Tenant occupied the rental unit which comprises 3 bedrooms with two bathrooms and a living room which was accessed by the front door to the home. The Landlord’s son (referred to in this Decision by his first and last initial, EY) occupied the basement suite which is separated from the rental unit by a locked door. EY accessed the basement suite through his own side gate and door going into the basement.

On March 14, 2017 the Landlords served the Tenant with a 2 Month Notice to End Tenancy for Landlord’s Use of Property (the “2 Month Notice”). The reason the Landlords served the 2 Month Notice was because their son EY, wanted to occupy the entire home.

The Tenant filed an application to dispute the 2 Month Notice. The Landlords filed a cross application requesting an Order of Possession. In that April 25, 2017 hearing to hear those applications, the Tenant was unsuccessful in cancelling the 2 Month Notice because the Landlord had proved a good faith intention that EY was going to be moving into the rental property. The Landlord was accordingly issued with an Order of Possession and the Tenant moved out of the rental unit early on May 5, 2017 and received her one month’s rent as compensation under the 2 Month Notice.

The Tenant now applies for compensation under Section 51(2) of the Act which requires a landlord to pay two months’ of rent if the landlord fails to use the rental unit for the purpose on which the tenancy was ended. The Tenant was informed that she had the burden to prove the application for the relief being sought from the Landlord. As a result, I asked the Tenant to present her evidence first.

The Tenant testified that on June 1, 2017, her mother had cause to visit the rental property which was recorded by video and provided into evidence. When she knocked on the door, she was greeted by an occupant who informed her that the Landlord’s son was out and that he was renting a room in the rental unit and had moved in on May 30, 2017. The Tenant explained that her mother and the video show the door separating the basement suite from the rental unit was still there.

The Tenant then pointed me to advertisements she had provided into evidence from a website showing that the upper portion of the home was listed for re-rental on May 24,

2017. The advertisement shows the contact number of EY and asks for roommates to rent the master bedroom for $850.00 and $700.00 each for the remaining two bedrooms. This is for a total amount of $2,250.00.

The Tenant pointed me to the fact that the advertisement is only for the rental unit of the home as it has no details or photographs of the basement suite. The advertisements provides full use of the kitchen, dining room, bathroom and laundry room, as well as access to the sun deck which the Tenant explained could only be accessed from the rental unit.

The Tenant submitted that she had been illegally evicted on the basis that the EY was going to reside at the rental unit; instead EY has now re-rented the rental unit and is now profiting from the ending of her tenancy because she was only paying $1,750.00, whereas the EY is now receiving $2,250.00 in rent payments from the roommates.

The Landlords' advocate rebutted stating that when the Tenant had been served with the 2 Month Notice and with their application to obtain an Order of Possession, it was made clear on the application that the intention was for EY to occupy the rental unit and have roommates.

The advocate stated that pursuant to EY's signed affidavit, EY has occupied the rental unit by taking on the responsibility for the entire home and now pays his parents (the Landlords) approximately $2,200.00 to cover their mortgage payment and for him to have access to more room than what he previously had in the basement.

EY explains in the affidavit that after the Tenant vacated on May 5, 2017, he moved into the rental unit and intended to rent out the remaining two rooms to roommates in order to help cover the cost of his financial responsibility, However, EY who has a dog, realised that because his dog suffered from hip dysplasia it would be too difficult for the dog to go up and down the stairs that were used to access the rental unit.

Therefore, EY moved back downstairs so that his dog could have easy access to the back yard and this is whether the dog lives. In support of this the Landlord provided a statement from a veterinarian dated November 16, 2017 which confirms EY's dog's medical condition and that it impairs his mobility and he is better off not having to climb stairs.

The advocate pointed out that this was the reason that EY then placed an advertisement for roommates for all three of the bedrooms on May 24, 2017. However,

EY submits in the affidavit that he still uses and has access to the living room area of the rental unit where he relaxes, watches television, hosts guests and uses a recreation room which he does not have in the basement suite. In addition, EY has converted an area in the rental unit where he stores his drum kit and where he has band practice.

The advocate also pointed to the affidavit which explains that when the Landlords often visit EY, they cook in the rental unit. The Landlord provided his bank statements into evidence to show points of sale made when he visits EY at the home. In addition, EY now parks in the main parking space where the Tenant used to park which is shown in the Tenant's video evidence. The advocate pointed me to photographs showing EY's truck parked in the main driveway of the home as well as his parents visiting where they can be seen gardening.

EY continues to state in his affidavit that the first group of roommates moved in on May 30, 2017 and left on November 6, 2017 because his parents are going to be staying with him in December 2017. However, after the holiday season, EY intends to find more roommates to meet his financial burden. The Landlord provided video footage of the inside of the rental unit which shows that the three bedrooms in the rental unit were not being occupied because the roommates had since moved out.

The advocate submitted that while EY still sleeps in the basement suite, he still occupies the rental unit and uses it for activities that he was unable to do when the Tenant was renting it. The advocate stated that while the door separating the basement suite and the rental unit is still there, the door is not locked and EY is free to travel between them at his leisure.

The Landlord provided a statement from the neighbours in the adjacent property who confirm that since the Tenant vacated the rental unit, EY has taken over the whole house and uses the front door as oppose to using the side door and gate which he previously did.

The advocate then pointed me to EY's bank statements and stated that the total cost of running the home is approximately $2,150.00 with taxes and utilities. The advocate stated that the Tenant paid a similar amount after taking into consideration that she was also required to pay 75% of the utilities. The advocate submitted that the rent EY has received from his roommates covers the cost for running the home, therefore, the Landlords are not profiting from the ending of the tenancy as suggested by the Tenant. The advocate submitted that it is EY's prerogative to decide how he covers his financial responsibility for the running of the entire home and his obligation towards his parents.

The advocate then pointed me to an appeal decision from the Ontario Superior Court of Justice, Divisional Court which found that an original decision made on the ending of a tenancy with a notice for the landlord's use of the property was justified because it correctly applied the statutory test and was given in good faith for the purpose of requiring possession.

The Landlord also provided two decisions made by the Residential Tenancy Branch (RTB); the first one sets out similar circumstances to this dispute in that the tenancy was ended with a notice to end tenancy for the landlord's use of the property. When the tenant in that dispute vacated on October 20, 2014, the rental unit was advertised for re-rental on June 28, 2015. In that case, the tenant asserted that because the rental unit had been vacant during that period of time, the landlord had not occupied it. In that Decision, the Arbitrator provides that in the Arbitrator's view, the definition of "Occupy" does not necessarily require that a person reside in the rental unit and therefore, a landlord has a right to end the tenancy if they simply wish to use the property for storage and or other personal reasons. That Arbitrator concluded that there was insufficient evidence to establish that the rental unit was not used by the landlord's daughter for personal or business reasons for at least six months.

The second decision the Landlord provides relates to an application by a tenant to cancel a notice to end tenancy for the landlord's occupation of the rental unit. In that decision, the advocate pointed to the finding made by that Arbitrator that the definition of "Occupy" does not require a landlord to live in or reside in the rental unit. That Arbitrator then went on to make findings regarding the good faith intention of that landlord and upheld the notice to end tenancy.

The Tenant rebutted stating that the Landlord had stated that EY was going to be vacating the basement suite and living in the rental unit which was the reason why the tenancy ended. The Tenant submitted that EY continues to reside in the basement suite and does not have use of the rental unit as it was rented out to roommates.

The Tenant doubted the Landlord's evidence regarding the dog, submitting that EY's dog often went up and down stairs on a regular basis. The Tenant stated that the Landlords often came to visit EY when he was in the basement suite so their visits to the home do not prove the Landlord's case. The Tenant also doubted the authenticity of the Landlord's video evidence showing the empty rental unit citing the fact that it was likely taken before the roommates moved in as it shows no date. The Tenant stated that the neighbour's letter reads as if the contents had been dictated and the neighbours had been coerced into signing it.

The Landlords' advocate rebutted stating that the medical evidence of the vet had more weight than the Tenant's assertions which comprised of her opinions and the witness letter was not coerced.

Analysis

When a landlord ends the tenancy for landlord's use of property the landlord is bound to use the rental unit for the purpose stated on the 2 Month Notice. Otherwise, the landlord must pay the tenant additional compensation equivalent to two month's rent, as provided under Section 51(2) of the Act. This compensation is payable in addition to the compensation paid or payable under Section 51(1) which the Tenant has already received from the Landlord. Section 51(2) of the Act states:

> ***51*** *(2) In addition to the amount payable under subsection (1), if*
>
> > *(a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or*
> >
> > *(b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,*
>
> *the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.*
>
> [Reproduced as written]

When a tenant applies for relief under this section of the Act, the tenant bears the burden to prove the claim. Therefore, I must examine the evidence before me and determine if the Tenant has met that burden.

I have placed little emphasis on the Ontario Superior Court decision and the second decision of the RTB provided by the Landlords. These decisions dealt with the issue of whether a notice to end tenancy should be cancelled and required extensive analysis on the good faith intention of the Landlord in cases where there were not roommates.

I note that Section 51(2) of the Act does not involve a good faith component. Therefore, I am not required to make any findings of good faith in the application before me as that matter was dealt with in the previous hearing between these parties where the Tenant had disputed the 2 Month Notice.

However, I do accept from the RTB decisions that the definition of “Occupy” does not necessarily limit a party to reside in a rental unit and that there could be other ways that a person may use a rental unit that can be still considered to be occupied. “Occupy” is defined in Black's Law Dictionary as “To take or enter upon possession of, to hold possession of; to hold or keep for use; to possess; to tenant; to do business in; to take or hold possession".

I accept that in the application the Landlords had filed for an Order of Possession which was determined in the April 25, 2017 hearing, the Landlords had informed the Tenant that EY was going to be moving into the rental unit and having roommates.

The Tenant relies on the video evidence and the advertisement to show that EY has not moved into the rental unit and has instead rented the rental unit to other renters.

While the Tenant doubted EY had moved back into the basement suite because of the reason his dog has hip dysplasia, the medical evidence certainly supports the Landlord’s assertion that this was indeed the reason why EY moved back.

However, the Landlords rely on their evidence, that while EY moved into the rental unit and then moved back into the basement suite, he is only sleeping there but still has use of the rental unit and therefore he “occupies” it.

Had EY moved into one of the bedrooms of the rental unit and rented out the remaining rooms, then this for me would have satisfied the reason on the 2 Month Notice. However, if EY had moved back into the basement suite and had re-rented the rental unit under a tenancy agreement that provided for two separate properties, as was the case when the Tenant was living there, then this would have entitled the Tenant to compensation. Therefore, I must determine whether EY still retains sufficient control and possession of the rental unit that meets the definition of “occupy” as detailed above.

In this case, the advertisement provided by the Tenant into evidence requests roommates for the rental unit and does not specifically detail this as a rental agreement that involved a landlord and tenant relationship that would be governed by the Act.

The Tenant provided insufficient evidence that the occupant seen in the video was renting the entire rental unit under a tenancy agreement and/or that EY’s access to the rental unit was restricted. Certainly, the video evidence does not show EY accessing the basement suite from the side gate as he had done so when the Tenant was there, and the statement from the neighbors provides credibility to the assertion that EY accesses

the property using the front door. This is further supported by the fact that EY parks his vehicle in the main parking space of the property.

In addition, the Landlord provided video evidence to verify that while he had roommates from May 30, 2017 to November 6, 2017, these roommates have now left and the rental unit is empty for the December 2017 period to allow visits by the Landlords.

Furthermore, EY states that during the time the roommates were present, and to this date, he uses the common areas of the rental unit to cook, relax and entertain guests in and uses other areas that he did not otherwise have access to. The Tenant presented insufficient evidence to prove this was not the case.

In relation to the claims of the parties with regards to profiting from the ending of the tenancy, I accept that when the tenancy was alive, the Landlords were receiving a total of approximately $2,350.00 in rent ($1,750.00 plus utilities from the Tenant and $600.00 from EY). If I accept that EY is now responsible for the entire home, then I find the Landlords are still being provided with the same amount of monies in rent coming from the roommates, which equates to $2,250.00. Therefore, I find that while this is certainly a good deal for EY, as he now gets roommates to pay all of the rent owed to the Landlords, this is not evidence that the actually Landlords have gained financially from ending the Tenant's tenancy.

Conclusion

Based on the foregoing, I find the Tenant has not presented sufficient evidence before me that would suggest that the Landlords were not using the rental unit for the purpose indicated on the 2 Month Notice. Therefore, I dismiss the Tenant's Application for monetary compensation under the Act without leave to re-apply.

This Decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: December 1, 2017

Residential Tenancy Branch