



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC OLC FFT**

Introduction

This hearing dealt with an application by the tenants under the Residential Tenancy Act (the *Act*) for the following:

- Cancellation of One Month Notice to End Tenancy for Cause (“One Month Notice”) under section 47;
- An order requiring the landlord to comply with the *Act*, regulation, and/or the tenancy agreement under section 62; and
- Recovery of the filing fees to this application from the landlord pursuant to section 72 of the *Act*.

At the outset the parties agreed to add SO as a tenant. The parties explained the tenant WR sublet the unit with the consent of the landlord to SO and his spouse CO. I amended the name of the tenants accordingly.

WR and SO attended on behalf of all the tenants (the “tenants”). The landlords attended. Each party was given the opportunity to make affirmed submissions as well as present oral and written evidence.

The landlords acknowledged receipt of the Notice of Hearing and Application for Dispute Resolution. The tenants acknowledged receipt of the landlords’ materials. No issues of service were raised. I find the parties were served in accordance with the *Act*.

I note that section 55 of the *Act* requires that when a tenant applies for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy in compliance with the *Act*.

Preliminary Issue

Before considering the substantive issues in this matter, the issue of jurisdiction was raised by the tenants. The tenants claimed there was no jurisdiction under the *Act* to hear the claims. The tenants claim the *Act* does not govern the agreement between the parties and the landlords cannot issue a valid One Month Notice under the *Act*. The basis for the tenants' claim is that the parties signed an option to purchase the property over which the *Act* has no jurisdiction.

I will consider the issue of jurisdiction in the Analysis section of this Decision.

Issue(s) to be Decided

The issues are as follows:

- Does the *Act* have jurisdiction over these claims;
- Are the tenants entitled to a cancellation of the One Month Notice under section 47 of the *Act*;
- If the tenants are not successful in cancelling the One Month Notice, is the landlord entitled to an order of possession under section 55 of the *Act*;
- Are the tenants entitled an order requiring the landlords to comply with the *Act*, regulation, and/or the tenancy agreement under section 62;
- Are the tenants entitled to recovery of the filing fees to this application from the landlord pursuant to section 72.

Background and Evidence

The tenants SO and CO live on the main floor of a house owned by the landlords, the unit being the subject of a residential tenancy agreement. The landlord GS lives in a suite in the basement.

The parties agreed on the following facts. The tenants SO and CO lived in the unit with their family for four years and continue to do so without interruption. There was no written tenancy agreement.

Although the tenants SO and CO did not vacate the unit in 2017, the tenant WR nevertheless entered into a tenancy agreement with the landlords for the unit starting August 1, 2017 for a 3-year fixed term ending July 31, 2020 ("tenancy agreement"). The

landlords signed the agreement on July 4, 2017 and tenant WR signed on June 16, 2017.

The tenants submitted a copy of the tenancy agreement as evidence. It is a standard form RTB residential tenancy agreement. Rent was \$1,700.00 a month payable at the first of the month. The tenancy agreement states in section 3(b) that the tenant “can sublet without permission”. The tenancy agreement does not require the payment of a security deposit.

The tenants testified that WR sublet the unit to the tenants SO and CO on or about the time WR and the landlords signed the tenancy agreement. The tenants SO and CO did not vacate the unit and continued to live in the unit without interruption. The tenant WR never resided in the unit. The tenants testified that SO and CO paid rent at the beginning of the sublet to WR who in turn paid the landlords. However, early in the sublet, the parties agreed that SO and CO would pay rent directly to the landlords.

The tenants did not submit a copy of the sublet agreement. The tenants testified the sublet agreement contained the same terms as in the tenancy agreement. In all respects, SO and CO are the primary tenants under the tenancy agreement and the tenants with whom the landlords continued to have principal communication.

The parties agreed the tenant WR and the landlords entered into an agreement titled “Option to Purchase Real Estate” (“the option agreement”). WR and the landlords signed the option agreement on July 4, 2017, the same day they signed the tenancy agreement. The tenants submitted a copy of the document as evidence.

In the option agreement, the landlords give WR a 3-year option to purchase the property which WR can exercise after August 1, 2019 subject to many terms. The agreement expires on August 1, 2020. The sum of \$5,000 was payable on the signing of the agreement. The parties agreed that WR paid this amount to the landlords. The option agreement does not require that the rent under the tenancy agreement, or any portion of it, applied to the purchase price.

The option agreement does not directly refer to the tenancy agreement. The only mention of the tenancy is the following:

6 (c) Payment of the monthly lease payment is required to keep this agreement from being in breach of contract. However, being a mere day or two late will not

constitute an immediate breach of contract. There will be an allowable grace period of 10 days given to rectify and keep this agreement in good standing.

The landlord testified that the tenants were late paying rent under the tenancy agreement eleven times in the 12-month period from December 1, 2017 to December 1, 2018; on two occasions, the overdue period was greater than ten days. The landlord submitted a copy of a ledger showing the amount and date of rent payments made by the tenants. The tenants acknowledged the landlords' evidence was correct.

The landlords state that it was a term of the tenancy agreement that rent was payable on time on the first of the month. The tenants claimed that pursuant to the terms of the option agreement, the payment for rent is not late under the tenancy agreement until it is more than 10 days overdue. The tenants point to the above-mentioned term in the option agreement that "being a mere day or two late will not constitute an immediate breach of contract": The tenants testified that, as only two payments in the one-year period were more than ten days late, the landlords have only established they were late two times. As well, the tenants testified the landlords always agreed to the payments being late and testified they had texts from the landlords to this effect. The tenants did not submit any documentary evidence that the landlords ever agreed to late payment of rent.

The landlords denied they had ever agreed to late payments. The male landlord testified that in January 2018, the relationship with the tenants SO and CO deteriorated sharply when their marijuana growing operation caused the male landlord to suffer severe respiratory problems; this required emergency hospitalization and extensive rehabilitation in his son's home off the property. The male landlord testified the tenants SO and CO refused to move the production out of the building and he continued to suffer negative health consequences. The male landlord testified that when he returned to his suite in July 2018, the smell of the marijuana was overpowering, and to continue living in the suite, he installed plastic on the ceiling, sealed vents, and took other steps to assure that air and air born particles did not enter his suite from the area of the building occupied by the tenants. The landlords submitted pictures of the repairs and renovations. They also submitted pictures of bags of soil stored near his unit from the marijuana growing operation which the landlord believed affected his health. The landlord testified the tenants CO and SO continued to grow marijuana in a locked area in the building after his return and continued to do so. The landlords testified the parties stopped speaking to one another.

The tenant SO testified that as soon as he learned about the male landlord's medical condition in January 2018, he moved the operation to a recreational vehicle he had moved to the site. He testified he ran extension cords to the recreational vehicle. He denied he continued to grow marijuana in the building.

The landlords issued a One Month Notice and personally served it upon the tenants on October 26, 2018, which the tenants acknowledged. The tenants submitted a copy of the One Month Notice as evidence which sets an effective date of November 31, 2018 for the tenants to vacate. The Notice sets out the following as reasons for issuance:

- The tenant is repeatedly late paying rent.
- The tenant or a person permitted on the property by the tenant has
 - Significantly interfered with or unreasonably disturbed another occupant or the landlord.
 - Seriously jeopardized the health or safety or lawful right of another occupant or the landlord.
 - Put the landlord's property at significant risk.
- Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to:
 - Damage the landlord's property.
 - Adversely affect the quiet enjoyment, security, safety or physical well-being of the other occupant
 - Jeopardize a lawful right or interest of another occupant or the landlord.
- Tenant has not done required repairs of damage to the unit/site.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.
- Tenant has assigned or sublet the rental unit/site without landlord's written consent.

The male landlord testified that he agreed in 2017 that the tenants could grow a small number of marijuana plants in the building. However, as mentioned, he testified to resultant health consequences and the refusal or failure of SO to remedy the situation and move the operation away from the building.

The landlords also testified that SO and CO failed to keep the grounds of the building maintained pursuant to their obligations in the tenancy agreement. The landlords submitted pictures of debris including areas with overgrown vegetation, tarp-covered mounds of unidentifiable items belonging to the tenants near the building, uncleaned gutters, and rubble. The landlords testified that SO and CO ran electrical cords to a

recreational vehicle without permission thereby endangering insurance coverage and causing a safety/fire concern. They also testified to unbearable noise from the unit including screaming arguments between SO and CO, noise which they could hear despite noise-cancelling headphones. Finally, the landlords testified to damage to the unit and submitted photographs of damage to a wall and flooring.

The tenants denied all the landlords' claims. The tenants testified they moved the marijuana growing operation out of the building in response to the landlords' health concerns. They claimed the property was in better condition with respect to landscaping than when they moved in. They acknowledged installing the electrical cord from the building to the recreational vehicle but stated they were paying all costs associated with the supply of power. They acknowledged creating noise but stated that it was no more than what could reasonably be expected from a family.

The tenants SO and CO continue to occupy the unit and have no intentions to vacate.

Analysis

Preliminary Issue of Jurisdiction

The relevant sections of the *Act* are as follows:

2 (1) Despite any other enactment [...] this Act applies to tenancy agreements, rental units and other residential property.

Section 1 of the *Act* defines "tenancy agreement":

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Residential Tenancy Act Policy Guideline # 27 – Jurisdiction addresses jurisdictional matters. This Guideline stated that if the relationship between the parties is that of seller and purchaser of real estate, the *Act* would not apply as the parties have not entered into a "tenancy agreement" as defined in section 1 of the *Act*. It does not matter if the parties have called the agreement, a tenancy agreement. If the money that is changing hands is part of the purchase price, there is no tenancy agreement.

In the case of a tenancy agreement with a separate option to purchase, the issue of jurisdiction depends on the construction of the agreements. If the tenancy meets the test outlined above, the *Act* may not apply. However, if the parties intended a tenancy to exist prior to the exercise of the right to purchase, the right has not been exercised, and the money paid was not applied to the purchase price, then the *Act* may apply.

In this case, I find the parties entered into a tenancy agreement which is enforceable between the parties separately from the option agreement, over which I have no jurisdiction. I find the landlords did not apply the tenants' rent to the purchase price. I find the option has not been exercised. I find the relationship in the tenancy agreement between the parties was that of landlord and tenants and not of purchaser and seller. I find the tenancy agreement does not incorporate any of the terms of the option agreement expressly or by implication. I therefore find I have jurisdiction under the *Act* to consider the tenants' application and to consider whether to issue an order of possession to the landlords under the *Act*.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if the tenant has failed to comply with a material term and has not corrected the situation within a reasonable time after the landlord gives written notice to do so. Pursuant to section 88 of the *Act*, and based on the submissions of both parties, I find the tenants were served with the One Month Notice on October 26, 2018.

Section 47 of the *Act* provides that upon receipt of a One Month Notice, the tenants may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. The tenants filed the Application within 10 days. If the tenant files an application to dispute the notice, the landlord bears the burden to prove, on a balance of probabilities, the grounds for the One Month Notice.

The onus is now on the landlords to establish the cause upon which the One Month Notice is based. The landlords must now show on a balance of probabilities, that it is more likely than not, that the tenancy should be ended for the reasons identified in the One Month Notice. In the matter at hand, the landlord must demonstrate that the tenants have been repeatedly late paying rent, the primary cause relied upon by the landlords.

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice if the tenant is repeatedly late paying rent. *Residential Tenancy Policy Guideline # 38* states that three

late payments are the minimum number sufficient to justify a notice under these provisions.

The parties both acknowledge the tenants have been late paying rent eleven times in the last twelve months. The tenants stated that it is a term of the option agreement, and therefore of the tenancy agreement, that only payments greater than 10 days late are significant and to be taken into account. There have been only two such overdue payments. The tenants also claim the landlords always agreed to late payments.

I find the tenancy agreement is an independent agreement separate from the option agreement. I find the term in the option agreement regarding late payments is irrelevant, applies only to the option agreement, and does not apply to the tenancy agreement. I find the tenancy agreement is clear that rent is payable on the first of the month. From the testimony of both parties, I find there is no dispute that the tenants were late paying rent eleven times in a 12-month period. I accept the landlords' evidence that they were not on speaking terms with the tenants SO and CO and that the tenants did not ask for permission to pay rent late. I find the landlords did not consent to payments being late.

I find the landlords have established cause for ending the tenancy and that the tenants have been repeatedly late paying rent.

I therefore dismiss the tenants' application to cancel the One Month Notice.

I now consider whether the landlord is entitled to an order of possession pursuant to section 55.

Pursuant to section 55(1), the director must grant to the landlord an order of possession of the rental unit if the landlords' notice to end tenancy complies with section 52 and the tenants' application is dismissed.

Section 52 of the Act requires that any notice to end tenancy issued by a landlord must be signed and dated by the landlord; give the address of the rental unit; state the effective date of the notice, state the grounds for ending the tenancy; and be in the approved form.

I find the One Month Notice issued by the landlords complies with the requirements set out in Section 52.

As I have determined the landlords' notice to end tenancy form complies with section 52 and I have dismissed the tenants' application, I grant the landlords an order of possession effective two days after service upon the tenants.

The tenants have not submitted any evidence in support of the application for an order requiring the landlord to comply with the *Act*, regulation, and/or the tenancy agreement under section 62; I therefore dismiss this claim without leave to reapply.

As the tenants' application is not successful, they are not granted an award for reimbursement of the filing fee.

Conclusion

I grant the landlords an order of possession which is effective two days after service on the tenants. This order of possession must be served on the tenant. If the tenants fail to comply with this order, the landlord may file the order with the Supreme Court of British Columbia to be enforced as an Order of that Court.

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: December 11, 2018

Residential Tenancy Branch