



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL, OL, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession on the basis of the 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) pursuant to section 55;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72; and
- an "other" remedy pursuant to the *Act*.

The tenant, the landlord, and the landlord's advocate appeared at the hearing. All parties present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord testified that the tenant was served the notice of dispute resolution but could not recollect the exact date. The tenant confirmed receipt of the dispute resolution package and agreed that the package was received within the timelines as prescribed in the Residential Tenancy Branch Rules of Procedure. Therefore, I find that the tenant was served with the dispute resolution package, and accompanying evidence, in accordance with the *Act*.

The landlord confirmed receipt of the tenant's evidence.

Issues(s) to be Decided

Is the landlord entitled to end this tenancy on the basis of the 2 Month Notice and to obtain an Order of Possession? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

The parties agreed that the tenancy began on October 01, 2017. The monthly rent was determined to be due on the first day of each month, and the monthly rent was set at \$750.00 and has not been changed. The parties agreed that the tenant provided a security deposit in the amount of \$375.00 which continues to be held by the landlord. The landlord provided as evidence a copy of a written tenancy agreement signed by both parties, which confirms the details provided by the parties.

The landlord issued the 2 Month Notice, dated September 28, 2018. The landlord testified that the 2 Month Notice was incorrectly dated, and should have been dated August 28, 2018, which represents the date on which it was served. The landlord testified that the 2 Month Notice was served to the tenant by hand, in the presence of a witness. The 2 Month Notice provided an effective date of October 31, 2018.

The landlord provided a copy of the Proof of Service of the Notice form asserting that the landlord served the 2 Month Notice to the tenant by way of personal service via hand-delivery on August 28, 2018. The Proof of Service form establishes that the service of the Notice was witnessed and a name and signature for the witness are included on the form. The tenant testified that although he did not recall the date on which the 2 Month Notice was served, he does recall that another woman was present with the landlord when the document was served.

The landlord's 2 Month Notice, entered into written evidence by the landlord, identified the following reasons for seeking an end to this tenancy by October 31, 2018:

- *The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse)*

The tenant did not apply to cancel the landlord's 2 Month Notice. The landlord testified that the subject rental property is a lower, one-bedroom unit within a single-family detached home, which includes an upper and lower floor. The landlord testified that she currently resides in the upper portion of the house, and wishes to use the lower portion of the house for her own use, and to ensure that there is a place to permit her daughter or other family members to stay during their visits. The landlord denies the tenant's assertion that her intention is to sell the property; rather, the landlord asserted that she wishes to use the entire home, including the lower portion which comprises the rental suite, for her own purpose.

The landlord testified that the tenant has already been compensated in accordance with section 51(1) of the *Act*, as the tenant withheld rent for what was supposed to be the final month of his tenancy, October 2018, thereby being compensated an amount that is the equivalent of one month's rent payable under the tenancy agreement.

The landlord testified that the tenant did not vacate the rental unit on the effective date of the 2 Month Notice. The landlord understood that the tenant was actively seeking to find other accommodation but was having difficulty doing so.

As the tenant remained on the property, the landlord accepted payment for the months during which the tenant continued to occupy the rental unit. The landlord asserted that she accepted payment, in the full amount of \$750.00, for the months of November 2018, December 2018, and January 2019. The landlord testified that on each occasion that she accepted payment for occupancy of the rental unit, she issued a receipt on which she noted that the payment was being accepted for use and occupancy only, and that the payment was not meant to reinstate the tenancy.

The tenant confirmed receipt of the 2 Month Notice. The tenant testified that since receiving the 2 Month Notice, he has been diligently and actively searching to find new accommodation, and that his intention remains to vacate the rental unit once he has found new accommodation. The tenant asserted that he has faced difficulty in finding new accommodation, as the rental market in the geographic area in which he currently resides is quite competitive.

The tenant entered into evidence a document dated August 20, 2018, which is an agreement between the parties that depicts that the tenant is to vacate the rental unit on November 01, 2018. The document also provides that the landlord agreed to be flexible in accepting the tenant's attempt to procure new accommodations, such that she would permit him to occupy the unit for an additional month at a rate of \$800.00 per month.

The tenant testified that he did not provide payment of \$800.00 for each subsequent month that he continued to occupy the rental unit; rather, he continued to pay \$750.00 for each month subsequent to the effective date of the 2 Month Notice.

In response to the August 20, 2018 agreement, the landlord testified that subsequent to the agreement, she served the 2 Month Notice. She testified that her only intention in accepting payment for the months of November 2018, December 2018, and January 2019 were to accept payment for use and occupancy while the tenant expressed having difficulty in finding new accommodation. She did not sign the August 20, 2018 agreement with the intention of creating a new tenancy, and stated that the agreement reflected a mutual agreement whereby the tenant would vacate the rental unit on November 01, 2018, and that any payment accepted subsequent to that date was for use and occupancy only.

Analysis

Based on the testimony provided by the parties, and based on the documentary evidence provided by the landlord in the form of a Proof of Service of the Notice form, I find that the tenant was duly served with the 2 Month Notice on August 28, 2018. Although the landlord provided an incorrect date of September 28, 2018, I find that by doing so, the 2 Month Notice is not rendered invalid, as the form and content of the 2 Month Notice adheres to the requirements of section 52 of the *Act*. I have amended the date of the 2 Month Notice to be August 28, 2018, to match the testimony and documentary evidence provided by the landlord, pursuant to section 68(1) of the *Act* as it is reasonable to do so under the circumstances.

Section 49(8) of the *Act* provides that upon receipt of a 2 Month Notice to end tenancy the tenant may, within fifteen days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. I find that the tenant has failed to file an application for dispute resolution within fifteen days of having been deemed to have been served with the landlord's 2 Month Notice. Accordingly, I find that the tenant is conclusively presumed under section 49 (9) of the *Act* to have accepted that the

tenancy ends on the effective date of the 2 Month Notice, October 31, 2018, and requires the tenant to vacate the rental premises by that date.

Section 49(7) of the *Act* requires that “a notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.” I am satisfied that the landlord's 2 Month Notice entered into written evidence was on the proper RTB form and complied with the content requirements of section 52 of the *Act*.

Residential Tenancy Policy Guideline #11 provides, in part, the following, with respect to the issue of “waiver” as it pertains to a Notice to End Tenancy:

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- *whether the receipt shows the money was received for use and occupation only.*
- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

With respect to the information provided above, I find that the landlord's conduct implied that she intended to adhere to the provisions of the 2 Month Notice, such that she understood that the tenancy would end on the effective date of the 2 Month Notice, by accepting payment beyond the effective date for the purpose of use and occupation only.

Furthermore, based on the tenant's conduct and testimony, I find that the tenant understood that he was required to vacate the rental unit pursuant to the 2 Month Notice. The tenant also testified to actively seeking new accommodation since November 2018, and maintained that his intention is to vacate the rental unit as soon as he procures new accommodation. Therefore, I find that the landlord's actions do not amount to her tacitly or expressly withdrawing the 2 Month Notice.

With respect to the August 20, 2018 agreement signed by the parties, I accept the landlord's position that it was signed prior to issuing the 2 Month Notice, and that, in effect, the agreement contains almost the same effective date, such that the tenant agreed to vacate the rental unit by November 01, 2018. The August 20, 2018 agreement, in effect, adheres to the criteria as set out in section 44 of the *Act*, which provides that a tenancy may end pursuant to a mutual agreement between a landlord and tenant.

The 2 Month Notice provides an effective date of October 31, 2018. In effect, the August 20, 2018 agreement seems to have similar effect as a mutual agreement to end tenancy, and does not adhere to the requirements of a tenancy agreement as defined under section 13 of *Act*, therefore, I find that the August 20, 2018 does not create a new tenancy agreement between the parties.

For these reasons set out above, I find that the landlord is entitled to an Order of Possession pursuant to the 2 Month Notice, and pursuant to the August 20, 2018 mutual agreement by the parties, which dictates that the tenant must vacate the rental unit. The Order of Possession must be served on the tenant.

As the tenant has provided full payment in the amount of \$750.00 for occupation of the rental unit during the month of January 2019, I find that the tenant is entitled to occupy the rental unit until the end of January 2019. Therefore, the Order of Possession takes effect by 1:00 p.m. on January 31, 2019.

Since the landlord has been successful in this application, I allow the landlord to recover the \$100.00 filing fee from the tenant.

Conclusion

I allow the landlord's application to end this tenancy based on the 2 Month Notice. The landlord is provided with an Order of Possession effective by 1:00 p.m. on January 31, 2019. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a monetary Order in the landlord's favour in the amount of \$100.00, to enable the landlord to recover the filing fee from the tenant. The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as

possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: January 21, 2019

Residential Tenancy Branch