



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Lynn Valley Lions Housing Society and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNQ

Introduction

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

- cancellation of the landlord's Two Month Notice to End Tenancy Because the Tenant Does not Qualify for Subsidized Rental Unit (the "Two Month Notice") pursuant to section 49.1.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenants testified that they served the notice of dispute resolution and their evidence package on the landlord by registered mail on December 20, 2018. The tenants provided a copy of the Canada Post registered mail receipt. I find that the landlord was served with the tenants' notice for dispute resolution and evidence package in accordance with sections 89 and 90 of the *Act*. The tenants acknowledged receipt of the landlord's evidence.

Both parties were informed of Section 55 of the *Act* which requires that when a tenant submits an application 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*.

Issue(s) to be Decided

Are the tenants entitled to cancellation of the landlord's Two Month Notice pursuant to section 49.1?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, I do not reproduce all details of the respective submissions and/or arguments in my decision. I reference only the facts that are relevant to my decision herein.

The parties agreed that the tenants resided in their rent subsidized rental unit since April 19, 1995. The parties further agreed that the rental unit was occupied by tenants HH and BH and their adult daughter KH. The tenants testified that they pay \$474.00 per month in rent for themselves and their daughter KH pays an additional \$140.00 for her rent contribution.

The landlord testified that the rent subsidy rules required an annual income audit to determine the tenants' rent and subsidy. The landlord testified that this income evaluation process is conducted in January of each year. The landlord testified that this income validation process is a mandatory BC Housing requirement.

The landlord testified that they requested disclosure of KH's financial records but the information was not provided. The landlord testified that the tenants told them that KH was currently out of the country and she was unable to provide the documents until she returned.

The landlord testified that they became aware that KH had returned from overseas on May 8, 2018. The landlord testified that they again demanded the financial records in writing on May 31, 2018. The tenants testified that KH dropped off her financial records, including copies of her bank statements and tax return, at the landlord's office on June 7, 2018. The landlord testified that they never received any financial records from the tenants.

The landlord testified that they served KH a One Month Notice to End Tenancy for Cause (the "One Month Notice") on KH by registered mail on October 26, 2018. The landlord provided a copy of the Canada Post registered mail tracking receipt and a copy of the One Month Notice.

The One Month Notice stated an effective vacancy date of December 1, 2018. The One Month Notice stated that the notice was issued because KH had breached a material term of the tenancy agreement. The landlord testified that the One Month Notice was

issued because KH had failed to provide the mandatory financial disclosure after multiple requests.

The parties agreed that KH did not file an application for dispute resolution to contest the One Month Notice. The landlord testified that they considered KH's tenancy terminated by the non-opposition of KH to the One Month Notice.

The tenants acknowledged receipt of the One Month Notice but they testified that they did not dispute the notice because they were having personal difficulties at the time. They testified that tenant BH was recovering from surgery and they were mourning a recent family death.

The landlord testified that the tenants became overhoused after KH's tenancy ended. The landlord testified that the tenants HH and BH are residing in a two-bedroom rental unit which is too large for a couple pursuant to the landlord's policies. The landlord testified that the tenants' current family size of two people no longer qualifies for a two-bedroom unit. The landlord also testified that they do not have a one-bedroom rental unit available for the tenants to downsize into. Accordingly, the landlord testified that the tenants no longer qualified for a two-bedroom subsidized housing with the landlord.

The landlord testified that they mailed the tenants a Two Month Notice on December 5, 2018. The Two Month Notice stated a move out date of February 28, 2019. The stated reason to end tenancy on the Two Month Notice was: "The tenant no longer qualifies for the subsidized rental unit > Empty Nesters [sic]." The landlord submitted a copy of the Two Month Notice.

The tenants testified that they tried to arrange a meeting with the landlord to resolve this matter, however, they were unable to get a meeting with the landlord. The tenants also testified that KH still resides in the rental unit.

Analysis

Section 47(1)(h) of the *Act* authorizes a landlord to give notice to end a tenancy if the tenant has failed to comply with a material term and the tenant has not corrected the situation within a reasonable time after the landlord gives written notice to do so. The undisputed evidence in this matter establishes that the landlord did deliver a One Month Notice to KH for breach of a material term on October 26, 2018.

Pursuant to section 47(4) of the *Act*, a tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

In this matter, the tenants argued that KH did not breach a material term of the tenancy agreement because, according to the tenant's testimony, KH provided the required financial disclosure on June 7, 2018. The landlord disputed this testimony and they testified that KH never provided the required financial disclosures. In addition, the landlord argued that a determination of whether or not KH breached a material term is now moot because KH did not file an application for dispute resolution to contest the One Month Notice.

Section 47(5) of the *Act* states that:

If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant

- (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
- (b) must vacate the rental unit by that date.

The landlord argued that since KH did not dispute the One Month Notice, she is conclusively presumed to have accepted that her tenancy ended on December 1, 2018, the effective move out date of the One Month Notice. Furthermore, based on the One Month Notice served on KH, the landlord argued that KH's tenancy has ended.

However, I do not find that the One Month Notice is a proper notice. The One Month Notice was based on a claim that KH breached a material term of the tenancy agreement. However, KH is not named as a tenant on the tenancy agreement.

The *Act* defines a tenancy as "...a tenant's right to possession of a rental unit under a tenancy agreement." However, since KH was not named on the tenancy agreement, KH does not have a right to possession of the rental unit under the tenancy agreement.

Accordingly, I find that KH is not a tenant in this matter.

A person residing in rental unit who is not a tenant is an occupant. As such, I find that KH is an occupant of the rental unit.

Residential Tenancy Policy Guideline No. 13 addresses the rights and responsibilities of occupants and states:

Where a tenant allows a person who is not a tenant to move into the premises and share the rent, the new occupant has **no rights or obligations under the tenancy agreement**, unless all parties agree to enter into a tenancy agreement to include the new occupant as a tenant. [**emphasis added**]

Since KH is an occupant of the rental unit, KH did not have any obligations under the tenancy agreement to the landlord. As KH did not have any obligations to the landlord under the tenancy agreement, the landlord's One Month Notice could not validly state a claim of breach of material term of the tenancy agreement against KH.

Furthermore, I find that the conclusive presumption set forth in section 47(5) of the *Act* does not apply to KH. Section 47(5) of the *Act* stated that:

If a **tenant** who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the **tenant** is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice... [**emphasis added**]

Section 47(5) specifically applies to tenants not occupants. Since KH is an occupant of the property, I find that the conclusive presumption in section 47(5) does not apply to this matter.

In addition, I find that the One Month Notice is not effective because it was not served properly. Section 47 of the *Act* requires that the One Month Notice be served on the tenants. In this matter, the landlord only served an occupant, KH. I find this to be inadequate service of the tenants.

For the forgoing reasons, I find that One Month Notice is not valid and the notice has not ended the KH's occupancy.

The landlord's Two Month Notice is based upon KH no longer residing in the rental unit. As set forth above, I find that the One Month Notice has not terminated KH's right to reside in the rental unit and the tenants' testified that KH still resides in the property. As such, I find that the landlord has failed to provide satisfactory evidence that the tenants no longer qualify for a subsidized two-bedroom unit.

Accordingly, I grant the tenants' application to set aside the Two Month Notice. The Two Months Notice is cancelled and of no effect. This tenancy shall continue until it ends according to the *Act*.

Conclusion

Accordingly, I grant the tenants' application to set aside the Two Month Notice. The Two Months Notice is cancelled and of no effect. This tenancy shall continue until it ends according to the *Act*.

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: February 11, 2019

Residential Tenancy Branch