Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

This hearing dealt with a tenant's application for a Monetary Order for damages or loss under the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure. Only one of the two named landlords, referred to by initials HS, appeared at the hearing. HS confirmed that the other named landlord, HS's husband, was aware of this proceeding and that the HS would be representing both of them.

Preliminary and Procedural Matters

At the outset of the hearing, I explored service of hearing documents and evidence upon each other. The tenant gave two copies of her hearing package, including the tenant's Amendment, and evidence to HS, in person at the landlords' business on October 3, 2018 and January 9, 2019. HS confirmed that she gave the second copy of the hearing documents to her husband.

The tenant was required to serve each respondent under section 89(1) of the Act. However, having confirmed with HS that she gave a copy of the tenant's hearing documents to her husband, that he was aware of this proceeding, and that they had decided HS would represent both of them at the hearing, I deemed the other landlord, referred to by initials BS, sufficiently served pursuant to the authority afforded me under section 71 of the Act.

The landlords served their evidence and response to the tenant on January 15, 2019, which the tenant confirmed.

In light of the above, I admitted and considered the documents submitted by both parties in making this decision.

The tenant stated that she had a witness standing by to testify. The witness was excluded from the proceeding until called to testify. The witness was called to testify and the witness was subject to questioning and examination by me, the tenant and the landlord.

Issue(s) to be Decided

Has the tenant established that the landlord(s) did not occupy the rental unit within a reasonable amount of time after the tenancy ended and for at least six months? If so, is the tenant entitled to the compensation claimed against the landlords?

Background and Evidence

The tenant entered into a tenancy for the subject property with a former owner of the property. The tenancy started on December 15, 2014 and the tenant was required to pay rent of $1,200.00 per month. The property was sold to another former owner of the property in April 2016 and the rent was increased to $1,300.00 per month. In June 2016 the property was sold once again to the landlords that are the subject of this proceeding.

On June 9, 2016 HS sent a text message to the tenant to advise the tenant the rent would be increasing to $1,700.00 per month. The tenant objected to the improper rent increase.

On July 21, 2016 the landlord served the tenant with a 2 Month Notice to End Tenancy for Landlord's Use of Property ("2 Month Notice") with a stated effective date of September 30, 2016. The reason for ending the tenancy, as stated on the 2 Month Notice, was that:

> "*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 filed to dispute the 2 Month Notice and a hearing was held on September 28, 2016 and both parties appeared at the hearing and made their respective submissions to the Arbitrator. On September 29, 2016 the Arbitrator issued a decision

whereby the Arbitrator accepted that the landlords intended to occupy the rental unit and an Order of Possession effective two (2) days after service was issued to the landlords.

The tenant had paid rent for October 2016 and the landlords permitted occupancy of the rental unit to the tenant until October 31, 2016. The landlord did refund $1,300.00 to the tenant as compensation payable to tenants who receive a 2 Month Notice. The parties also met at the property at the end of the tenancy to inspect the unit and the landlords refunded the security deposit to the tenant.

The tenant submitted that the landlords did not move into the rental unit after the tenancy ended and re-rented the unit; thus, the landlords did not use the rental unit for the purpose stated on the 2 month Notice. As such, the tenant seeks compensation from the landlords. As for the amount of compensation sought by the tenant, the tenant requested compensation totalling: $18,012.87. This amount is the sum of moving costs, pain and suffering related to having to move and being displaced, additional commuting costs, the equivalent of 12 months of rent provided under section 51(2) of the Act, and the filing fee for this application and the tenant's previous application filed to dispute the 2 Month Notice. I informed the tenant that the Act provides a specific remedy to tenants where a landlord does not use a rental unit for the stated purpose under section 51(2) and that I would apply that remedy if applicable and I dismissed the remainder of the tenant's claims summarily, except for the filing fee paid for this application, as explained further in the analysis section of this decision. Further, the filing fee paid for the previous dispute proceeding may only be awarded by way of the decision issued for that proceeding. Therefore, I did not hear further evidence with respect to the costs incurred to move, commute or pain and suffering.

The landlords submitted that they did move into the rental unit and occupied the rental unit until June 2017 when they sold the property. The landlords were of the position they did everything they were required to do with respect to the end of the this tenancy including giving the tenant compensation equivalent to one month's rent and returning the security deposit to her, and they moved into the rental unit.

Below, I have summarized the parties' respective submissions and evidence.

The tenant testified that she returned to the property on November 12, 2016 to retrieve the deep freeze that she had left behind and observed that the rental unit was still vacant. The landlord also indicated that the house remained vacant for a couple of weeks after the tenant moved out.

The tenant testified that she saw an online advertisement for the rental unit on November 23, 2016 whereby the rental unit was being advertised for rent at the monthly rate of $2,400.00 starting December 1, 2016. The tenant provided a copy of the advertisement as evidence. The landlord acknowledged that the landlords posted a advertisement for the rental unit online as submitted by the tenant. The landlord testified that the landlords and their children moved in to the rental unit approximately two weeks after the tenant moved out but that their son was experiencing allergies and/or asthma so the landlords explored the option of moving out and re-renting the unit. The landlord testified that they never did re-rent the unit and maintained the rental unit as their residence until they sold the property in June 2017. The landlords provided copies of gas bills, a water bill, and bank statements to show that the landlord's mailing address was that of the rental unit. The landlords also provided copies of prescription medication receipts in an effort to demonstrate their son had/has allergies or asthma.

The tenant testified that when she contacted the landlord to pick up mail that may be going to the rental unit the landlord advised the tenant not to go to the property and to pick up her mail from the landlords' place of business, which the tenant did on a few occasions. However, the tenant testified that she decided to go to the property to pick up her mail in December 2016 and when she knocked on the door a woman of Korean decent answered the door. When the tenant asked for HS, the Korean woman stated HS was the landlord of the property and did not reside at the property. The tenant returned to the rental unit a few times after that and the Korean family was still residing in the unit.

The tenant testified that after discovering that the rental unit was not being occupied by the landlords, the tenant approached the woman living next door to the rental unit (the witness referred to by initials MO) about those living in the rental unit. The tenant testified that MO confirmed that the landlords did not reside in the rental unit and that the rental unit was tenanted.

The landlord testified that she has no idea who the Korean family is that the tenant described. The landlord explained that the tenant picked up her mail at the landlords' place of business because it was more convenient and because the landlord wanted to meet the tenant in a public location out of fear of the tenant.

The landlord submitted that the neighbour of the rental property was a friend of the tenant and that the neighbour is motivated to harm the landlords because the landlords

had a dispute with the neighbour concerning the neighbour's dog coming on the rental unit property.

The tenant submitted that she and MO were not friends but that they had friendly interactions while the tenant lived next door to MO. The tenant refuted the landlord's allegation that the landlord had a reason to be fearful of her. The tenant described how the parties were cordial at the move-out inspection and other than objecting to the unlawful rent increase and the 2 month Notice there was no threats of violence

The tenant requested her witness be called. MO joined the hearing and testified as follows:

- MO and her husband and children have lived next door to the rental unit since 2011.
- MO and the tenant's children played together in the yard while the tenant resided in the rental unit and in doing so MO and the tenant would chat in the yard but they were not close friends.
- MO and the tenant did not maintain a friendship after the tenant moved out of the rental unit.
- After the tenant moved out of the rental unit a Korean family moved into the rental unit and MO knows this because the children of that family played with her children and because the rental unit and MO's residence are located on a small cul-de-sac.
- The Korean family lived in the rental unit approximately 4 – 6 months before other tenants of south-Asian decent moved into the rental unit in the springtime of 2017 along with their children before moving out approximately 6 months later. In the fall of 2017 another south-Asian family moved into the rental unit and were there until the summer of 2018 when the house was vacated. The rental unit has remained vacant since the summer of 2018.
- MO did not have any conflict with the landlords.
- MO was unaware of any complaints concerning her dog. MO testified that her dog is always on a lead or otherwise confined to their own property, which has a fenced back yard.
- MO denied meeting the landlords or seeing the landlords cutting the grass or sweeping the sidewalk although MO acknowledged that perhaps there had been interactions between the landlords and her husband.

After MO testified and was subject to examination, MO was excluded from the hearing.

The parties were provided the opportunity to make their final arguments and point to inconsistencies.

Analysis

Section 49 of the Act provides that a landlord may end a tenancy for landlord's use of property where the landlord, or close family member of the landlord, intends to occupy the rental unit by issuing a *2 Month Notice to End Tenancy for Landlord's Use of Property*. The landlord served the tenant with such a notice under section 49 of the Act and the notice was upheld, bringing the tenancy to an end so that the landlord or landlord's close family member could occupy the rental unit.

Where a tenancy ends under section 49 of the Act, a tenant is entitled to compensation pursuant to section 51 of the Act. Section 51 contains two separate provisions for compensation for tenants. First of which is compensation provided under section 51(1) that is payable to every tenant who receives a notice to end tenancy under section 49 of the Act. This compensation is equivalent to one month's rent and the tenant has received this compensation by way of a refund given by the landlord.

Secondly, a tenant may receive additional compensation under section 51(2) of the Act where the landlord does not use the rental unit for the purpose stated on the 2 Month Notice. The tenant requested compensation under section 51(2) and for recovery of various other costs associated with moving from the rental unit. Section 91 of the Act provides that the common law applies to landlords and tenants "except as modified or varied under this Act". I find the additional compensation provided to tenants under section 51(2) is a specific remedy for tenants in circumstances where a landlord does no use the rental unit for the stated purpose. Thus, I find the Act has varied or modified damages or loss that may have been available under the common law and I limit the compensation payable where a landlord does not use the rental unit for the stated purpose to the compensation provided under section 51(2).

In seeking compensation under section 51(2) the tenant used the calculation that came into effect as of May 17, 2018. The legislative changes of May 17, 2018 provide tenants with much greater compensation than that provided before the changes but the current provision also provides landlords an exemption in extenuating circumstances. The legislative changes were not made retroactive. In this case, the landlord gave the tenant a 2 Month Notice and the tenancy ended prior to the legislative change of May 17, 2018. As such, I find the tenant is limited to seeking the amount provided in section 51(2) before the legislative change of May 17, 2018. Accordingly, any reference I make

to section 51(2) compensation from this point forward shall be as it was written prior to the changes of May 17, 2018.

Section 51(2) provides for further compensation to a tenant, in addition to compensation payable under section 51(1), where

> (2) In addition to the amount payable under subsection (1), if
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> (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
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> (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,
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> 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.

[My emphasis underlined]

The tenant is of the position that the landlord did not occupy the rental unit for at least six months after the tenancy ended and the landlord re-rented the unit. The landlords submitted that they, along with their children, moved into the rental unit starting in mid-November 2016 and resided in the unit until the property sold in June 2017.

Upon consideration of the evidence before me, I find that I prefer the tenant's position over that of the landlords, on a balance of probabilities. I make this finding when I consider all of the following factors together:

- The landlord demanded the tenant pay a much higher rent and when the tenant objected the landlord issued the 2 Month Notice.
- Shortly after the tenancy ended, the landlord advertised the rental unit for rent at a much higher rate of rent.
- The landlord instructed the tenant to not go to the rental unit after the tenancy ended to retrieve her mail but to meet the landlord at the landlord's place of business and I find the landlords failed to provide evidence to support the allegation this was done out of fear of the tenant.

- I found the tenant to be very detailed, thorough and consistent in her submissions, leading me to find her very credible and I accept her testimony that she went to the rental unit a few times starting in December 2016 and spoke with the occupant of the rental unit, who was not the landlord.
- I found the tenant's witness to be very consistent, genuine and credible and I accepted her testimony that she had observed a few different families residing in the rental unit after the tenancy ended and that none of the people residing in the rental unit were the landlords.

As for the landlords' evidence, I have made the following findings:

- I accept that the landlords' child had/has allergies or asthma; however, that does not satisfy me that the landlords occupied the rental unit.
- The landlords had one water bill and gas bills showing those utilities were in the landlord's name; however, a landlord may include utilities when a living accommodation is rented or require the tenants to pay the landlord for the utilities instead of having utilities put in the tenant's name.
- I also found the lack of other utility accounts, such as hydro, internet, cable and telephone indicative of the landlords not residing at the rental unit.
- I also find it reasonable to expect that the landlords would have provided other evidence of residency such as the address provided to Motor Vehicles, Medical Services Plan, Canada Revenue Agency, and the like if the landlords were in fact residing the rental unit.
- The landlords did provide two bank statements that appear to have the landlord's mailing address as that of the rental unit; however, I note that one of the statements is dated August 16, 2017 and the landlord had testified that they had sold the property in June 2017 and moved out of the rental unit. This evidence appears to demonstrate that the landlords may have been using the rental unit address as a mailing address even if the landlords were not residing at the rental unit.

Considering all of the above, I find I am satisfied that, on a balance of probabilities, the landlords did not occupy the rental unit for at least six months after the tenancy ended and I find the tenant entitled to compensation payable under section 51(2) of the Act, or $2,600.00. I further award the tenant recovery of the $100.00 filing fee she paid for this application. Accordingly, the tenant is provided a Monetary Order in the total amount of $2,700.00 to serve and enforce upon the landlords.

Conclusion

The tenant is provided a Monetary Order in the amount of $2,700.00 to serve and enforce upon the landlords.

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 07, 2019

Residential Tenancy Branch