Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on December 22, 2018 (the "Application"). The Tenant applied for an order that the Landlord comply with the Act, regulation and/or the tenancy agreement.

The Tenant filed an amendment to the Application dated January 15, 2019 (the "Amendment"). The Amendment adds a monetary claim for $400.00 as compensation for harassment.

The Landlord appeared at the hearing with his son as a witness. His son was outside of the room until required.

The Tenant had not called into the teleconference at the outset. I waited 10 minutes to allow the Tenant to call in; however, the Tenant did not do so. I proceeded with the hearing as the Landlord sought an Order of Possession for the rental unit. The Tenant called into the hearing at 11:23 a.m. He advised that he had trouble getting through at the scheduled hearing time. I went over the preliminary matters with the Tenant and went over the relevant testimony of the Landlord up to that point.

The Tenant confirmed that his request for the Landlord to comply with the Act, regulation and/or the tenancy agreement was based on his position that the Two Month Notice to End Tenancy for Landlord's Use of Property dated December 17, 2018 (the "Notice") was illegal. This was clear from the Application. I have considered the Application to be a dispute of the Notice.

Pursuant to rule 2.3 of the Rules of Procedure (the "Rules"), I told the Tenant I would not consider his request for compensation as the main issue before me was the validity

of the Notice. This request is dismissed with leave to re-apply. This does not extend any time limits set out in the *Residential Tenancy Act* (the "*Act*").

I explained the hearing process to the Landlord and Tenant. Neither had questions when asked. The Landlord, Tenant and witness provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence.

The Landlord testified that he did not receive the hearing package for the Application or the Tenant's evidence. He said he did receive the Amendment. The Landlord confirmed he was fine with proceeding despite not receiving the hearing package and I did not hear from the parties further on this issue.

Given the nature of the evidence submitted by the Tenant, the only issue was a statement the Tenant wrote dated December 22, 2018. I asked the Tenant whether admission of the statement was an issue given he is permitted to provide whatever testimony he wished at the hearing. The Tenant agreed that admission of the statement was not an issue given he could testify at the hearing and I did not hear from the parties further on this issue. I have not considered the statement.

The Tenant testified that he did not receive the Landlord's evidence. The Landlord testified that the evidence was served to the Tenant in person January 22, 2019. He said his son was with him at the time.

The witness came into the room and provided testimony on the issue of service. He testified that he was "pretty sure" the evidence was served on the Tenant on January 22, 2019 at the rental unit. The Tenant asked the witness whether he was sure it was the 22nd or if could have been the 24th. The Tenant continued to say he was "pretty sure" it was served on the 22nd.

It is the Landlord who has the onus to prove service. I am satisfied the evidence was served on the Tenant given the Landlord testified that his son was present and his son testified that this was done. I acknowledge that the witness said he was "pretty sure" the evidence was served on the 22nd; however, I found the uncertainty related to the date of service, not that the evidence was served. I do not find it relevant whether it was served on the 22nd or 24th as both dates comply with rule 3.15 of the Rules.

Given I am satisfied of service, the Landlord's evidence is admissible.

The parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. I have considered all admissible documentary evidence and oral testimony of the parties and witness. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. If the Notice is not cancelled, is the Landlord entitled to an Order of Possession?

Background and Evidence

There was no written tenancy agreement submitted as evidence for this hearing.

The Landlord testified as follows in relation to a tenancy agreement. There is a written tenancy agreement between him and the Tenant in relation to the rental unit. The tenancy started May 1, 2013 and was for a fixed term of one year. The tenancy then became a month-to-month tenancy. Rent is $400.00 due on the first of each month.

The Tenant testified that the agreement outlined by the Landlord is not the agreement between the parties. The Tenant said the agreement was not signed on the date alleged but signed months later. The Tenant testified that he had a verbal agreement with the Landlord that the tenancy would be long term and a minimum of ten years. The Tenant testified that the agreement was that the Landlord would never try to occupy the property. The Tenant said his mother witnessed this. The Tenant also referred to medical evidence in this regard.

These parties had attended a prior dispute resolution hearing. The prior decision was submitted as evidence for this hearing. At the previous hearing, the Tenant agreed he signed a tenancy agreement with a one-year fixed term.

The Notice was submitted as evidence. The Tenant did not take issue with the form or content of the Notice other than the effective date.
The Notice includes the following two grounds:

1. The rental unit will be occupied by the landlord or the landlord’s close family member…

2. The landlord is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

The Landlord said the “family corporation” ground was checked off because he owns the rental unit with his brother. I confirmed the Landlord is the landlord, is an individual and is not a family corporation. Once “family corporation” was explained to the Landlord, he acknowledged that it did not apply and was a mistake.

The Tenant agreed the Landlord is the landlord and is not a family corporation. The Tenant took no issue with this aspect of the Notice.

Both parties agreed the Notice was served on the Tenant in person December 17, 2018.

The Landlord testified that he issued the Notice because his son wants to move into the rental unit.

The Landlord called his son as a witness. The witness testified that he wants to move into the rental unit.

In response to a question from the Tenant, the witness testified that he had no intention of moving into the rental unit next door in July.

In response to my questions, the witness testified as follows. He is 26 years old. He currently lives upstairs at the rental unit address with his parents. He has always lived with his parents. He wants to move out. His father still wants him to be close. The compromise was that the witness would move into the rental unit. The best rental unit for him on the property is the rental unit as it is smaller than the other ones and he does not require the additional space.

When he first called in, the Tenant took the position that this matter had been dealt with previously and that I could not re-consider it. The Tenant had submitted the prior decision and a review consideration decision.

The Tenant testified that there were two empty suites on the property when he was served with the first notice to end tenancy. He pointed out that the Arbitrator mentioned in his decision that the Landlord should have had his son present. The Tenant submitted that the Landlord realised what it took to win and had his son appear at this

hearing. He said the original adjudicator refused to re-hear the matter because the Landlord was trying to re-argue the case. The Tenant submitted that the Landlord is now doing what the original adjudicator would not allow him to do.

The Tenant submitted that I should not accept the witness' evidence given the history of this matter. The Tenant submitted that the Notice was not issued in good faith.

The Landlord denied that he told another tenant at the property that his son was going to move into their rental unit in July. The Landlord denied that there were two open suites at the time the original notice to end tenancy was issued.

Analysis

In relation to the history of this matter, the original notice to end tenancy was dated October 5, 2018. The Tenant disputed that notice and a hearing was held November 23, 2018. The only evidence the Landlord presented at the original hearing was his own testimony. The Landlord did not call his son as a witness. The Arbitrator found the Landlord failed to provide sufficient evidence to prove the Notice and cancelled the Notice.

The Landlord applied for review consideration based on new and relevant evidence and fraud. The Arbitrator dismissed the request for review consideration and confirmed the decision issued November 23, 2018.

The original decision and review decision relate solely to the notice to end tenancy dated October 5, 2018. It is correct that the Landlord could not have sought an Order of Possession based on the October 5th notice given the original decision and review decision. It is also correct that the Landlord was not granted a review hearing which would have been a second consideration of the October 5th notice.

However, neither the original decision nor the review consideration decision prevented the Landlord from issuing a new notice to end tenancy. The Landlord is not precluded from ever issuing a notice to end tenancy under section 49 of the *Act* because the October 5th notice was cancelled. It was open to the Landlord to issue a new notice under section 49 of the *Act* and I do not accept the submissions of the Tenant arguing otherwise.

Further, it is appropriate for me to hear this matter and determine the validity of the Notice as this issue has not been addressed before. This is not a reconsideration of the

October 5th Notice. It is a consideration of an entirely different notice to end tenancy subsequently served on the Tenant.

It was open to the Tenant to dispute the Notice and he did so. I will consider whether the Notice is valid.

The Notice was served on the Tenant December 17, 2018 and therefore the new legislation that came into force May 17, 2018 applies.

The Notice was issued under section 49(3) and (4) of the *Act*. The Tenant had 15 days from receiving the Notice to dispute it pursuant to section 49(8)(a) of the *Act*. Based on our records, I find the Tenant filed the Application within the 15-day time limit set out in the *Act*.

Section 49(3) and (4) of the *Act* state:

> (3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.
>
> (4) A landlord that is a family corporation may end a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

Both parties agreed the Landlord is the landlord and is not a "family corporation" as that term is defined in section 49 of the *Act*. I accept that the ground in the Notice relating to a family corporation was checked by mistake. I do not find this mistake to impact the validity of the Notice. The Tenant did not raise this as an issue. The Tenant knew the Landlord is an individual and not a "family corporation". The grounds are the same other than that one should be used by landlords that are individuals and one should be used by landlords that are "family corporations". I do not find that the mistake caused prejudice to the Tenant. I will consider the Notice to have been issued under section 49(3) of the *Act*.

Pursuant to rule 6.6 of the Rules, the Landlord has the onus to prove the grounds for the Notice. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

Policy Guideline 2 deals with the good faith requirement that has been called into question by the Tenant. At page two, the Policy Guideline states:

> In *Gichuru v Palmar Properties Ltd.* (2011 BCSC 827) the BC Supreme Court found that a claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the notice to end tenancy. When the issue of an ulterior motive or purpose for an eviction notice is raised, the onus is on the landlord to establish that they are acting in good faith: *Baumann v. Aarti Investments Ltd., 2018 BCSC 636.*

In relation to the tenancy agreement, the parties disagreed about the term of the agreement. This issue was not decided in the previous decision. The Landlord testified that the tenancy agreement was a one-year fixed term agreement that became a month-to-month agreement. The Tenant testified that the Landlord verbally agreed to a minimum ten-year term. The Tenant testified that the Landlord agreed not to end the tenancy based on the grounds in the Notice.

At this hearing, the Tenant referred to his mother being present for the discussion between him and the Landlord. He also referred to some medical evidence from a doctor. However, the Tenant did not submit this evidence to me for this hearing.

I will not consider evidence submitted by the parties for the previous hearing as that was a separate matter. If the parties had wanted to rely on evidence submitted at the first hearing, they were required to submit it for this hearing and serve it on each other.

The Tenant did not submit any evidence on this hearing to support his position about the verbal agreement. I note that the Tenant acknowledged signing a one-year fixed term tenancy agreement at the previous hearing. I will consider this as it is testimony from the parties themselves, not documentary evidence that was referred to but not before me to asses.

I do not accept that the Landlord agreed to a ten-year tenancy. I find this would be an unusual term for a tenancy. I would expect such an agreement to be noted in writing in some form. I would expect evidence of this to be presented at the hearing. Further, the Tenant signed a one-year fixed term agreement. I cannot accept that the Tenant would do so if the agreement was for a ten-year term.

Nor do I accept that the Landlord agreed he would not end the tenancy based on the grounds listed in the Notice. Again, there is no evidence of this before me. I find this

would be an unusual term as landlords have the right to end a tenancy in accordance with the *Act*. I would expect such a term to be reduced to writing. I would expect some evidence that this was the agreement to be produced at the hearing.

The Landlord testified that his son wants to move into the rental unit. The Landlord called his son as a witness who testified that he wants to move into the rental unit. There was nothing about the testimony of the Landlord or witness that caused me to question their credibility. The testimony of the witness accords with common sense and human experience.

The Tenant asked the witness about whether he had an intention of moving into the rental unit next door in July to which the witness said he did not. I understand this to be a reference to evidence submitted at the prior hearing. Again, such evidence is not before me on this hearing. The Landlord denied telling another tenant that his son was moving into their rental unit. There is no evidence before me that the Landlord did so.

In relation to the Tenant's testimony that there were two empty suites at the time the October 5th notice was issued, the Landlord denied this. The Tenant did not submit evidence supporting his testimony in this regard. In any event, I do not find this relevant as the witness explained why he wanted to move into the rental unit rather than other suites on the property. I find his explanation makes sense.

The Tenant did not pose any questions to the witness that caused me to question the testimony of the witness. The Tenant did not submit any evidence that causes me to question the testimony of the witness. I acknowledge that it is the Landlord who has the onus to prove the Notice; however, I am satisfied he has done so based on his testimony and the testimony of the witness.
I acknowledge that there has been a history with this matter. However, I do not find this affects my assessment of the credibility of the Landlord and witness. The position of the Landlord has not changed since the October 5th notice was issued. He stated then that his son wanted to move into the rental unit. He maintains that this is the case and called his son as a witness who confirmed this. Based on the testimony of the Landlord and witness, I am satisfied on a balance of probabilities that the Landlord's son intends to move into the rental unit. The Landlord has met his burden to prove the Notice.

I have reviewed the Notice and find it complies in form and content with section 52 of the *Act* as required by section 49(7) of the *Act*.

The effective date of the Notice is corrected to February 28, 2019 pursuant to section 53 of the *Act*.

I uphold the Notice and dismiss the dispute of the Notice without leave to re-apply.

Section 55(1) of the *Act* requires me to issue the Landlord an Order of Possession given I have upheld the Notice, dismissed the dispute of the Notice and found the Notice complies with section 52 of the *Act*. The Landlord asked that the Order of Possession be effective February 28, 2019 if issued based on the Notice. I grant the Landlord an Order of Possession effective at 1:00 p.m. on February 28, 2019.

I note that the Tenant is entitled to receive the equivalent of one month's rent payable under the tenancy agreement pursuant to section 51(1) of the *Act* if this has not already been addressed.

I also note that, if the Landlord does not follow through with the stated purpose of the Notice, the Tenant can apply for the equivalent of 12 month's rent payable under the tenancy agreement pursuant to section 51(2) of the *Act*.

Conclusion

The Notice is upheld and the Landlord is issued an Order of Possession effective at 1:00 p.m. on February 28, 2019. This Order must be served on the Tenant and, if the Tenant does not comply with this Order, it may be filed and enforced in the Supreme Court 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 *Act*.

Dated: February 05, 2019

Residential Tenancy Branch