



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL OPL CNL FFT OLC

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 for Landlord's Use of Property (the "Two Month Notice") pursuant to section 49;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement regarding repairs to the rental unit pursuant to section 62; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

This hearing dealt with the landlord's application pursuant to the *Act* for:

- an order of possession of the rental unit pursuant to section 55; and
- authorization to recover his filing fee for this application from the tenants pursuant to section 72.

Both parties attended the hearing and had full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions. Each party acknowledged receipt of the other party's Notice of Hearing and Application for Dispute Resolution. Neither party raised issues of service. I find the parties were served in accordance with the *Act*.

Both parties were informed of Section 55 of the *Act* which requires, when a tenant submits an Application for Dispute Resolution seeking to cancel a One Month Notice to End Tenancy for Cause 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 Issues

Severance of Portion of Tenant's Application

Residential Tenancy Branch Rules of Procedure, section 2.3 states that:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the validity of the Two Month Notice is not related to the tenants' other claim for an order for landlord to comply with the *Act* or tenancy agreement regarding repairs to the rental unit. I find that this claim regarding repairs is unrelated to the claim regarding the validity of the Two Month Notice in that it does not pertain to facts relevant to the grounds for ending this tenancy as set out in the Two Month Notice. I exercise my discretion to dismiss all of the tenants' claims with leave to reapply except for the cancellation of the Two Month Notice and recovery of the filing fee for this application.

Admissibility of New Evidence from the Landlord

During the hearing the landlord sought to introduce documentary evidence in support of his cross-application which was not served on the tenants before the hearing. The tenants objected to the admissibility of this evidence.

Residential Tenancy Branch Rules of Procedure, Rule 3.3 states that:

3.3 Evidence for cross-Application for Dispute Resolution

Evidence supporting a cross-application must:

- be submitted at the same time as the application is submitted, or within three days of submitting an Online Application for Dispute Resolution;
- be served on the other party at the same time as the Notice of Dispute Resolution Proceeding Package for the cross-application is served;
- and

- be received by the other party and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.

The landlord did not serve his undisclosed evidence in accordance with the *Residential Tenancy Branch Rules of Procedure*. I find that the admission of this nondisclosed evidence would prejudice the tenants and result in a breach of the principles of natural justice. Accordingly, landlord's undisclosed evidence is excluded pursuant to *Residential Tenancy Branch Rules of Procedure*, section 3.12.

Issue(s) to be Decided

Are the tenants' entitled to cancellation of the Two Month Notice pursuant to section 49?

Are the tenants entitled to recover their filing fee for this application from the landlord pursuant to section 72?

If the tenants are not successful in their application, is the landlord entitled to an order of possession of the rental unit pursuant to section 55?

Is the landlord entitled to recover his filing fee for this application from the tenant pursuant to section 72?

Background and Evidence

The parties agreed that the tenancy started on August 1, 2016. At the beginning of the tenancy the rent was \$1,500.00 payable on the first day of the month. The tenants paid a \$750.00 security deposit. A copy of the tenancy agreement was submitted as evidence.

The landlord testified that the rental unit is the upper level of a house. The rental unit consists of three bedrooms and a den. The lower level of the house was rented separately to other tenants.

The tenants testified that in late November or early December 2018, the oven in the rental unit stopped working. The tenants testified that the landlord tried to replace the oven with an old, used oven which the tenants testified they rejected. The tenants further testified that eventually the landlord replaced the oven. However, the tenants

argued that this dispute over the oven was the real reason that the landlord subsequently issued the Two Month Notice.

The landlord testified that he served the Two Month Notice on December 18, 2018. by placing the Two Month Notice in the tenants' mailbox and by leaving a copy on the tenants' doorstep. The landlord testified that he also notified the tenants of the Two Month Notice by text message. The tenants acknowledged receipt of the Two Month Notice. The parties provided a copy of the Two Month Notice.

The Two Month Notice stated a move out date of February 28, 2019.

The Two Month Notice stated that the reason for the end of the tenancy was:

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 landlord testified that he issued the Two Month Notice so that he and his spouse could move into the rental unit. The landlord testified that he plans to spend a few days cleaning the rental unit after the tenants vacate and then move into the rental unit himself, shortly thereafter.

The landlord testified that it became even more urgent for him to move into the rental unit after his current residence had a fire on January 22, 2019. The landlord testified that he is currently staying in a vacation rental property and that he needs to move into the rental property as soon as possible.

The tenants testified that they have been good tenants and that they always paid their rent timely. The tenants testified that they need to continue the tenancy because their children are enrolled in local schools and they do not want to uproot them during the school year. In addition, the tenants testified that it is difficult for them to find an alternative tenancy for a family of five people. The tenants also testified that it is difficult to move in the winter.

Furthermore, the tenants testified that the landlord is a sophisticated real estate agent and owns multiple properties. The tenants testified that, as such, the landlord is well aware of residential tenancy laws and the tenants argued that the landlord has issued a sham notice to end tenancy to circumvent the tenants' rights under the *Act*.

In addition, the tenants testified that the landlord delivered a notice of rent increase on November 29, 2019 with the rent increasing as of March 1, 2019. The tenants provided a copy of the notice of rent increase. The tenants argued that the timing of the rent increase showed that the landlord was not genuinely intending to move into the rental unit on February 28, 2019.

Analysis

Section 49(3) of the *Act* permits a landlord to end a tenancy "...if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit."

Residential Tenancy Policy Guideline No. 2 explains the good faith requirement as Section 49(3) of the *Act* as follows:

Good faith is a legal concept, and means that a party is acting honestly when doing what they say they are going to do or are required to do under legislation or a tenancy agreement. It also means there is no intent to defraud, act dishonestly or avoid obligations under the legislation or the tenancy agreement.

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.

Documentary evidence that may support that a landlord is acting in good faith includes, but not limited to:

- a notice to end tenancy for a rental unit that the landlord or close member is moving out of ((for RTA section 49 (3) or section 49 (4));
- a contract of purchase and sale and the purchaser's written request for the seller to issue a notice to end tenancy (for RTA section 49 (5));
- or
- a local government document allowing a change to the rental unit (e.g., building permit) and a contract for the work (for RTA section 49 (6)).

If a tenant claims that the landlord is not acting in good faith, the tenant may substantiate that claim with evidence. For example, if a tenant does not believe a landlord intends to have a close family member move into the rental unit, an advertisement for the rental unit may raise a question of whether the landlord has a dishonest purpose for ending the tenancy.

If the good faith intent of the landlord is called into question, the onus is on the landlord to establish that they truly intended to do what they said on the notice to end tenancy. The landlord must also that they do not have another purpose or an ulterior establish motive for ending the tenancy.

In this matter the landlord testified that he intends to reside in the rental unit with his spouse. The landlord's testimony is supported by the Two Month Notice signed by the landlord wherein the landlord stated that he intended to use the property for his use or his close family's use.

However, I find that the good faith intent of the landlord has been called into question by tenant's testimony that a dispute had arisen between the landlord and the tenant regarding the oven in late November or early December 2018. The timing of the landlord's issuance of the Two Month Notice shortly after the dispute arose regarding the oven tends to make the issuance of the notice to end tenancy appear retaliatory. The timing of the notice is particularly suspicious since the landlord delivered a notice of rent increase on November 29, 2019 with the rent increasing as of March 1, 2019 which is after the move out date on the Two Month Notice. I find that this timing of the issuance of the Two Month Notice does call the good faith intent of the landlord into question.

Since the good faith intent of the landlord has been called into question, the landlord has onus to prove that he truly intended to occupy the rental unit he did do not have another purpose or an ulterior establish motive for ending the tenancy pursuant to *Residential Tenancy Policy Guideline No. 2*

However, I find that the landlord has failed satisfy his burden of proof. The landlord did not provide any evidence as to why he wanted to move into the rental until at the time he issued the notice. The landlord testified that he had a fire at his current residence on January 22, 2019. However, the Two Month Notice was issued on December 18, 2018, before the fire which occurred on January 22, 2019. Events that occurred after the issuance of the notice are not relevant in the determination of whether the landlord acted in good faith when he issued the notice.

I find that the landlord has failed to satisfy his burden of proof of establishing that he issued the Two Month Notice in good faith. Accordingly, I grant the tenants' application to cancel the landlord's Two Month Notice pursuant to section 49(8) of the *Act*. I also dismiss the landlord's application for an order of possession pursuant to section 55 of the *Act*. The tenancy shall continue until it ends in accordance with the *Act*.

Since the tenants have prevailed in this matter, I grant the tenants' request for reimbursement of the filing fee pursuant to section 72 of the *Act*. The tenants may deduct the \$100.00 filing fee from one future rent payment. Since the landlord has not prevailed in this matter, I dismiss the landlord's application for reimbursement of the filing fee.

Conclusion

I grant the tenants' application to cancel the landlord's Two Month Notice pursuant to section 49(8) of the *Act*. The tenancy shall continue until it ends in accordance with the *Act*.

I dismiss the landlord's application for an order of possession pursuant to section 55 of the *Act*.

I grant the tenants' request for reimbursement of the filing fee pursuant to section 72 of the *Act*. The tenants may deduct the \$100.00 filing fee from one future rent payment.

I dismiss the landlord's application for reimbursement of the filing fee.

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: March 07, 2019

Residential Tenancy Branch