Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL FFT LRE MNDCT OLC

Introduction

This decision is in respect of the tenant's application for dispute resolution under the *Residential Tenancy Act* (the "Act") made on January 27, 2019. The tenant sought the following remedies:

1. an order cancelling a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice");
2. an order restricting or suspending the landlord's right to enter the rental unit;
3. an order that the landlord comply with the Act, regulations or the tenancy agreement;
4. compensation for loss of quiet enjoyment and for inability to use part of the rental unit due to surveillance and loss of privacy; and,
5. compensation for the filing fee.

A dispute resolution hearing was convened on March 12, 2019 and the landlord, the landlord's agent, and the tenant attended. The tenant confirmed that, despite there being a second tenant's name on his application, he is the sole tenant. I have corrected the cover page to reflect this. The parties were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses.

I have reviewed all oral and documentary evidence submitted meeting the requirements of the *Rules of Procedure,* under the Act, and to which I was referred, but only evidence relevant to the issues of this application are considered in my decision.

I note that section 55 of the Act requires that when a tenant applies 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's notice to end tenancy complies with the Act.

Issues to be Decided

1. Is the tenant entitled to an order cancelling the Notice?
2. If not, is the landlord entitled to an order of possession?
3. Is the tenant entitled to an order restricting or suspending the landlord's right to enter the rental unit?
4. Is the tenant entitled to an order that the landlord comply with the Act, regulations or the tenancy agreement?
5. Is the tenant entitled to compensation for loss of quiet enjoyment and for inability to use part of the rental unit due to surveillance and loss of privacy?
6. Is the tenant entitled to compensation for the filing fee?

Background and Evidence

I explained at the beginning of the hearing that, given the large number of issues and limited time available, I would hear first about the application to dismiss the Notice, and then would hear the remaining issues if time permitted. The tenant understood.

Re Two Month Notice for Landlord's Use of Property

The landlord testified and confirmed that the tenancy commenced on March 1, 2018 and was a fixed term tenancy that would turn into a periodic (month to month) tenancy after a year. Monthly rent is $1,350.00 and the tenant paid a security deposit of $675.00. A copy of the written tenancy agreement and an addendum to the agreement were submitted into evidence.

Regarding the Notice, the landlord testified that he served it on the tenant in-person on January 14, 2019. A copy of the Notice was submitted into evidence. He explained that the landlord's son wants to move into the rental unit and wants to have "his own privacy and own place." The son is 28 years old, works full-time, and moving into the rental unit "is a good move for him."

In support of this reason, the landlord referred to a receipt from IKEA reflecting the purchase of furniture, and a TELUS confirmation of sign up for TV and internet. The landlord testified that the installation is to occur on April 15, 2019. A copy of the receipt and sign up confirmation were submitted into evidence.

“Well, that’s interesting,” the tenant exclaimed, and noted that the landlord’s son currently lives upstairs, and has acted as the landlord’s agent or representative in many of the tenant’s interactions with the landlord on tenancy issues. The tenant argued that it is rather “coincidental timing” that the son would be intending to move into the rental unit and that the Notice was issued shortly after the tenant complained about various matters, including a security camera and noise issues.

The tenant argued that the landlord did not issue the Notice in good faith, evidenced by the timing of the Notice after complaints were made. “The landlord would rather evict [me]” than deal with the issues that are subject of his complaints, remarked the tenant. He further argued that there is “no reason for the son to need to immediately move into the rental unit” given that upstairs is 2500 ft^2. The Notice was issued, the tenant alleges, out of spite.

The tenant argued that he and his teenage son, who is in high school, have nowhere to go and will end up on the street if they are evicted. In response, the landlord testified that he, too, has a family and that it is not his intention to put the tenant and his son on the street.

Re Compensation for Loss of Privacy

The tenant’s application described his claim for compensation as follows:

> Tenant unable to use patio area due to surveillance. Tenant has been paying for use of the area in the cost of monthly rent and would like to be reimbursed for loss of use of this area due to surveillance camera and landlords refusal to stop. Tenant is also requesting additional lump sum amount of $3500 for violation of privacy as per privacy act. Tenant had to vacate the unit on numerous occasions due to noise from landlord. Tenant is requesting reimbursement for resulting loss if use.

The total compensation sought is $5,625.00. This figure was arrived at based on the amount the tenant is paying per square foot of the rental unit multiplied by the square footage of the patio (300 ft^2) and then multiplied by the number of months that he has lost the use of the patio.
During my review of the tenant’s claim for compensation, the tenant clarified that he sought an additional $3,500.00 in aggravated damages under the *Personal Information Protection and Electronic Documents Act.*

The tenant testified that when he moved into the rental unit he was aware of a security key pad, and the presence of two security cameras. One of the cameras is affixed above the top-left corner of the rental unit's entrance door and appeared (based on the testimony of the parties and photographs submitted) to be pointing down, by my estimation at about a 45° angle, toward a cement patio area. A video clip submitted by the landlord confirmed this.

The tenant argued that the presence of the camera prevented him using the patio area and that the landlord's use of the camera is in violation of his right to privacy, and a breach of his right to quiet enjoyment under the Act. He has covered up the camera at various times only to have the landlord remove the tape. The parties, based on text message conversations submitted into evidence, appeared to have a running dispute over the camera. The tenant stated that the landlord has refused to remove the camera.

There are two cameras, one of which look down on the walkway. It is the camera above the tenant's door that is the one that the tenant dislikes. Based on a video submitted by the landlord, there appears to be two additional cameras for other parts of the property.

The tenant moved into the rental unit on March 1, 2018, and first took issue with camera in July or August 2018. The camera records, the tenant pointed out. And, while he could not provide definitive evidence of such, the tenant suggested that "there is a possibility" that the camera, given its 180° viewing angle, might see inside the rental unit. The tenant submitted no physical evidence of this, however.

The landlord testified that the "tenant was aware . . . was O.K. at the start" of the tenancy that there was the camera. The house came preinstalled with the camera and security system. The camera is there for both the landlord's and tenant's security, it does not look into the rental unit, is not attached to the security system, does not record 24 hours a day, and it is to "give the tenant and family a sense of security" and "peace of mind." The landlord further explained that his wife experienced a home break and enter a few years ago and the security cameras help alleviate her fear.

The landlord submitted that the tenant has had all year, all summer, to bring this forward to dispute resolution but only now brings it forward after the landlord issued the Notice. In respect of the patio, the landlord submitted that the patio and adjacent storage space (in the photographs it appears as one large covered patio, with no furniture) are not part of the rental unit and are not included in the rent. The landlord testified that he made it clear at the start of the tenancy that it was not the tenant's space. He argued that the

tenancy agreement makes it clear that the patio is not included in the rent. The area is used for storing tires and a lawnmower.

The tenant, in rebuttal, argued that the Condition Inspection Report, which he submitted into evidence late (but which the landlord would presumably have had a copy) shows that the patio was referenced in the move-in inspection, thus demonstrating that the patio was, in fact, covered in the rent and thus formed part of the rental unit.

The Condition Inspection Report has tick marks (indicating a “good” condition) for the following items listed under the “EXTERIOR” section of the report: Front and Rear Entrances, Patio/Balcony Doors, Garbage Containers, Grounds and Walks, and a few other items.

The addendum to the tenancy agreement has the following term: “Tenant must clean their walkway when it’s snowing; there is no liability covered.”

The hearing ended before I had the opportunity to hear additional evidence from the tenant in respect of noise issues that were referred to in his application.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Order to Cancel the Notice

Where a tenant applies to dispute a Two Month Notice to End Tenancy for Landlord’s Use of Property, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the Notice is based.

In this case, the Notice was issued under section 49 (1) of the Act, which states that “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.” The tenant disputed the ground on which the Notice was issued, submitting that it was “interesting” and rather “coincidental” considering that the landlord’s son already lived up stairs, and that the Notice was issued as a result of complaints being made by the tenant about various issues. It was, he argued, issued out of spite. And, that the landlord was not acting in good faith when he issued the Notice.

Good faith is an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage. (See pages 1 and 2 of *Residential Policy Guideline 2. Good Faith Requirement when Ending a Tenancy.*) Moreover, 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. A landlord's intentions might be documented by, for example, a Notice to End Tenancy at another rental unit, or, an agreement for sale and the purchaser's written request for the seller to issue a Notice to End Tenancy.

If the good faith intent of the landlord is called into question, the burden then falls on the landlord to establish that they truly intend to do what they said on the Notice. The landlord must establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy.

The landlord argued that his son would be moving into the rental unit, and that he purchased furniture and set up a TELUS installation to occur on April 15, 2019. The Notice was issued on January 14, 2019. The IKEA receipt is dated February 16, 2019, and the TELUS installation confirmation is dated February 6, 2019.

If the Notice was issued in the absence of the deterioration between the parties, I might find these purchases supportive of the landlord's claim. However, I find the timing to be orchestrated after-the-fact. In the words of the tenant, the timing is indeed coincidental and "interesting" and raises a significant doubt as to the landlord's true intentions.

Further, if the son is to occupy the rental unit, works full-time, and wants to "have his own privacy and own place" then I find it rather unusual that the TELUS installation confirmation is made out in the landlord's name. Finally, the one person who might have provided evidence to resolve the landlord's burden in this respect—the son—did not testify or provide any evidence. That might have fulfilled the landlord's onus in this respect.
Taking into consideration all the oral testimony and the documentary evidence presented before me, I do not find that the landlord has proven on a balance of probabilities that they intend for the son to occupy the rental unit. I find that, taking all the circumstances into account that there is an ulterior motive for ending the tenancy.

Given the above, I cancel the Two Month Notice, dated January 14, 2019. The Notice is cancelled and of no force or effect. The landlord is not entitled to an order of possession

under section 55 of the Act, and the tenancy will continue until it is ended in accordance with the Act.

Re Compensation for Loss of Privacy

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act states that if damage or loss results from a party not complying with the Act, the regulations or a tenancy agreement, an arbitrator may determine the amount of, and order that party to pay, compensation to the other party.

When an applicant seeks compensation under the Act, the applicant must prove each of the following four criteria, on a balance of probabilities, for me to consider whether I grant an order for compensation:

1. has the respondent party to a tenancy agreement failed to comply with the Act, the regulations, or the tenancy agreement?

2. if yes, did loss or damage result from that non-compliance?

3. has the applicant proven the amount or value of their damage or loss?

4. has the applicant done whatever is reasonable to minimize their damage or loss?

In this case, the tenant seeks compensation for the landlord's failure to comply with section 28 of the Act, which states:

> A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
> (b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
(d) use of common areas for reasonable and lawful purposes, free from significant interference.

The tenant testified that the presence of the security camera above his door has violated his privacy and the ongoing surveillance has essentially caused him to lose the ability to use the patio.

First, I must turn to the issue of whether the patio is included in the rent and is thus part of the rental unit. If it is, then there is a higher expectation of privacy than if the patio is not part of the rental unit; if it is the latter then it would be akin to a common area where there is little if any expectation of privacy.

The tenancy agreement is silent on whether the patio is included in the rent. Most tenancy agreements do not include whether a tenant is entitled to a balcony, for example. Such parts of a rental unit are simply assumed to be included. The addendum to the tenancy agreement requires the tenant to “clean their walkway,” implying that while the walkway to the entrance is part of the rental unit (although this is unlikely, given that the landlord would have access to it), it does not follow that a “walkway” includes the patio area.

The tenant pointed me to the Condition Inspection Report as proof that the patio is part of the rental unit, or that it is included in the rent. The report lists the following items, *inter alia,* that were marked as being in good condition: “Front and Rear Entrances [. . .] Grounds and Walks”. While the front and rear entrances are not synonymous with a patio, “grounds and walks” is a broader term that may include the patio. The tenant argued that the patio is part of the rental unit. The landlord argued that it is not.
In cases were there is an ambiguous term of an agreement or document, where the parties dispute the term, and where neither party has provided additional evidence that might bring clarity to the term, I must apply the *contra proferentem* rule.

Contra proferentem is a legal rule of contractual interpretation which provides that an ambiguous term will be construed against the party responsible for its inclusion in the contract. This interpretation will therefore favour the party who did not draft the term, because the party not responsible for the ambiguity should not be made to suffer for it. This rule endeavours to encourage the drafter to be as clear as possible when crafting an agreement or document upon which the parties will rely.

In this case, while the landlord did not draft the Condition Inspection Report, he was the party who chose to use and apply the “EXTERNAL” section of the report and checked off the box titled “Grounds and Walks.” Had the landlord intended to omit the patio from the rental unit, this clarification ought to have been included in the report. And, while it would be absurd to take such an interpretation to the extreme of expecting the tenant to be responsible for *all* grounds and walks around the property, it is not absurd to interpret grounds and walks to include the disputed patio area onto which the camera points.

Having found that the grounds and walks term is indeed ambiguous, I apply the rule of *contra proferentem* to that language of the Condition Inspection Report and find that the patio, as it extends from the rental unit’s door to the edges of the patio as depicted in the photographs, to be included in the rent and is thus part of the rental unit. The landlord cannot expect a tenant to be responsible for maintaining the condition of grounds and walks (and thus the patio) and then turn around and declare that the tenant has no access to said grounds and walks and that he does not have a patio.

What is “reasonably privacy”? Reasonable privacy is not having a surveillance camera pointed toward the entrance to a tenant’s home, potentially being viewed and recorded by the landlord. While I appreciate that the landlord intends to maintain a certain level of security, comfort, and well-being for both the tenant and the landlord’s family (especially given the landlord’s wife’s experience of having a prior break and enter) by having a camera, the tenant is entitled to reasonable privacy in coming and going to his home without being surveilled. Likewise, the tenant is entitled to use the patio, or even the area immediately outside the entrance, without a surveillance camera pointed at him.

That the security camera “came with the house” is not a defense or reasonable explanation for not removing it, moving it, or disconnecting it.
I find, based on the above, that the landlord breached section 28 of the Act. But for the landlord’s breach of the Act the tenant would not have suffered the loss of reasonable privacy provided by the Act.

The next issue is whether the tenant had proven the amount of value of this loss. On the issue of whether the tenant is entitled to aggravated damages under the *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5), he is not. The Act restricts my ability as an arbitrator to award damages arising only under the *Residential Tenancy Act*, and not for damages resulting from the breach of other legislation. An applicant would need to pursue such damages in Federal Court.

The tenant based the amount claimed on a square footage loss of use of the patio. However, I do not find that he lost all use of the patio, and he most certainly did not lose the use of the patio during the entire duration of the tenancy. His argument is that the presence of the surveillance camera prevented him from doing anything on the patio. But, there is no evidence that he otherwise attempted to use the patio for anything. There is no evidence of the tenant asking the landlord to remove the camera early in the tenancy, so the tenant could sit outside and use the patio, for example. While a tenant does not need to always use every part of a rental unit, I do not find that the tenant truly lost all use of the patio due to the camera. As such, I do not find that the amount claimed to be reasonable or persuasive. However, the tenant is entitled to nominal damages, to which I turn in a moment.

Finally, I must determine whether the tenant has done whatever is reasonable to minimize his damage or loss. In this case, the tenant moved into the rental unit on March 1, 2018, but did not raise any issues (or start covering up the camera) until almost 5 or 6 months into the tenancy. Granted, he covered up the camera at times with duct tape, and then scotch tape, but the entirety of the steps taken are limited to the last several months of the tenancy, thus reducing any amount that the tenant might be entitled to receive. Again, this does not mean that the tenant is not entitled to compensation, but rather, he is entitled to a lesser amount.

“Nominal damages” are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right. The tenant has not proven that he suffered a significant loss of privacy, but he has, I find, suffered a reasonable loss of privacy.

Determining damages in loss of privacy claims is difficult, as stated in the Federal Court case of *Chitrakar v. Bell TV,* 2013 FC 1103:

> [24] The fixing of damages for privacy rights’ violations is a difficult matter absent evidence of direct loss. However, there is no reason to require that the violation be egregious before damages will be awarded. [. . .]
>
> [25] Privacy rights are being more broadly recognized as important rights in an era where information on an individual is so readily available even without consent. It is important that violations of those rights be recognized as properly compensable.

In this case, taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenant has met the onus of proving a claim for compensation for his loss of reasonable privacy under section 28(a) of the Act. As such, I grant the tenant an award for nominal damages in the amount of $500.00.

As the tenant was largely successful in his application, I grant him a monetary award of $100.00 for recovery of the filing fee, pursuant to section 72 of the Act.

Pursuant to section 62 of the Act, I order the landlord to disconnect or remove the surveillance camera that is the subject of this dispute within 5 days after receiving a copy of this Decision.

Conclusion

I hereby cancel the Two Month Notice, dated January 14, 2019. The Notice is of no force or effect. The landlord is not entitled to an order of possession under section 55 of the Act, and the tenancy will continue until it is ended in accordance with the Act.

I hereby grant the tenant a monetary order in the amount of $600.00, which must be served on the landlord. The order may be filed in, and enforced as an order of, the Provincial Court of British Columbia.

I hereby order the landlord to disconnect or remove the surveillance camera that is the subject of this dispute within 5 days of receiving a copy of this Decision.

Having not heard any evidence regarding the tenant's application for an order restricting or suspending the landlord's right to enter the rental unit (due to the limited time of the hearing) I dismiss this aspect of the tenant's claim with leave to reapply. The tenant is at liberty to reapply for dispute resolution in respect of this aspect of his claim if the parties are unable to resolve the issue of noise.

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: March 13, 2019

Residential Tenancy Branch