Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the Landlords: OPB FFL
For the Tenants: CNL CNR MNDCT FFT

Introduction

This hearing dealt with cross applications for dispute resolution filed by the parties under the *Residential Tenancy Act* (the "Act").

The landlords' application for dispute resolution was filed on April 11, 2019 (the "landlords' application"). The landlords applied for the following relief under the Act:

1. an order of possession for breach of a vacate clause, pursuant to section 55 of the Act; and,
2. a monetary order for recovery of the filing fee, pursuant to section 72 of the Act.

The tenants' application for dispute resolution was filed on April 20, 2019 (the "tenants' application"). The tenants applied for the following relief under the Act:

1. an order to cancel a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice"), pursuant to section 46(4) of the Act;
2. an order to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property (the "2 Month Notice"), pursuant to section 49(8) of the Act;
3. an order for compensation under section 67 of the Act; and,
4. a monetary order for recovery of the filing fee, pursuant to section 72 of the Act.

A dispute resolution (arbitration) hearing was held on Thursday, May 30, 2019 and one of the landlords, and both tenants, attended the hearing. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The parties did not raise any issues with respect to the service of evidence.

While I have reviewed all oral and documentary evidence submitted, only relevant evidence pertaining to the issues of these applications is 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.

Preliminary Matter – Severing Unrelated Issue in Tenants' Application

Rule 2.3 of the *Rules of Procedure* states that "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."

The tenants' application contained a monetary issue that I find is unrelated to the central issues to be decided, namely, are the notices to end tenancy valid and will this tenancy come to an end?

I explained to the parties that I would be dismissing the tenants' monetary claim with leave to reapply. The tenants are therefore at liberty to reapply on their monetary claim within 2 years from the date that the tenancy ends.

I make no findings of fact or law in respect of this aspect of their application.

Issues

1. Are the tenants entitled to an order cancelling the 10 Day Notice?

2. Are the tenants entitled to an order cancelling the 2 Month Notice?

3. If the tenants are not entitled to an order cancelling either the 10 Day Notice or the 2 Month Notice, are the landlords entitled to an order of possession on the 10 Day Notice, the 2 Month Notice, or both?

4. Are the landlords entitled to an order of possession for breach of a vacate clause?

5. Is either party entitled to recovery of the filing fee?

Background and Evidence

The tenancy began on February 15, 2018 and the tenants currently reside in the rental unit. A written tenancy agreement went into effect on February 15, 2018 and was for a one-year fixed-term tenancy ending February 14, 2019. A copy of the tenancy agreement (which was submitted into evidence, and which I shall refer to as the "first tenancy agreement") indicates that rent was $2,000.00, due on the fifteenth day of the month. The tenants paid a security deposit of $1,000.00, and no pet damage deposit.

I note that in section 2 of the tenancy agreement, where the landlords have checked the box indicating that when the tenancy ends the tenants must move out of the rental unit, the tenants did not initial in the boxes to the right. Only the landlord's initials appear.

Due to a change in the landlord's job circumstances, the landlord, his wife, and their two babies needed to move into the rental unit earlier than anticipated. The landlord was supposed to be posted to a job in China for two years, but this changed on February 28, 2019, when his employer cancelled the overseas deployment due to changing markets. A copy of the landlord's employer's cancellation correspondence was submitted into evidence.

Living in his mother's house along with his family, the landlord approached the tenants and presented them with a new tenancy agreement (I will call this the "second tenancy agreement"), wherein he would let them reside in the rental unit from April 15, 2018 until July 14, 2019. The tenants were still residing in the rental unit when the landlord presented them with the second tenancy agreement. This agreement increased the monthly rent from $2,000.00 to $2,050.00. In addition, the tenants would now be responsible for 1/3 of the hydro bills, to be shared with other tenants in the property.

The tenants testified that they were "caught off guard," and had no choice in signing the second tenancy agreement: they needed a place to live and did not feel that they had any option but to sign in order to remain in the rental unit. They did not, however, agree with the increased rent nor the newly added utilities obligation.

The tenants also testified that they felt that the landlord's stories kept changing as to whether or when he and his family would move in. Tenant M.A. commented that the landlord's changing stories lead the tenants to thing that "something fishy's going on here."

Finally, the tenants submitted that the landlord is using a family member as a mechanism for going about renovations on the house, instead of moving in.

A copy of the second tenancy agreement was submitted into evidence. In this agreement, it is noted that the reason why the tenants must vacate is because of a "RENOVATION OF THE HOUSE FOLLOWED BY OWNER MOVING IN". The landlord's and the tenants' initials appear in the required boxes of the agreement.

On April 16, 2019, the day after the second tenancy agreement was dated, the landlords issued the 2 Month Notice. A copy of this notice was submitted into evidence, and the notice indicated that the tenancy is to end on July 14, 2019. Page two of the 2 Month Notice indicates that the reason for the tenancy being ended is that the "rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; of the parent or child of that individual's spouse).

But the 2 Month Notice was not all that was issued to the tenants that day. The landlord also issued the 10 Day Notice for unpaid rent in the amount of $50.00. While the second tenancy agreement stated that rent was now $2,050.00, the tenants failed to pay anything but the previous amount of $2,000.00. A copy of the 10 Day Notice was submitted into evidence.

The landlord testified that while he could have had the tenants leave in two months, he was "trying to be as lenient as I can with respect to [both the tenants] and my own family." So, he gave the tenants three months instead of two months. He reiterated that living with his wife and their two babies in his mother's place—which is a "very, very small space"—necessitates his moving in.

In his submissions, the landlord stated that he filed the 2 Month Notice because he wanted to ensure that the tenants would vacate the rental unit on July 14, 2019. And, he issued the 10 Day Notice because the new rent amount had not been paid in full.

In terms of the renovations that are to be done, the landlord testified that he is going to add new carpets to the second floor, and that this will take two to three days; it is "not a major renovation," he remarked.

In rebuttal, the tenants testified that they were told by the landlord that all the windows would have to be replaced, along with a new furnace. (They were purportedly without heat for eight months, which is the issue of their monetary claim.) The tenants disputed

that the 2 Month Notice was the correct notice, and that because of the intended renovations that a Four Month Notice to End Tenancy (RTB form 29) ought to have been issued instead.

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.

Are tenants entitled to order cancelling 10 Day Notice?

Before addressing the 10 Day Notice, I must turn first to the rather problematic second tenancy agreement. The tenancy began on February 15, 2018 as per the first tenancy agreement. While the first tenancy agreement indicated that the tenancy would be a one-year fixed term tenancy, the tenants did not initial the required boxes indicating that they accepted that it was a one-year fixed term tenancy.

Where one of the two parties fail to initial the boxes indicating their agreement to a one-year fixed term tenancy under which they must vacate at the end, then the agreement automatically reverts to the clause under 2. b) i) of the tenancy agreement. That is, at the end of the fixed term, the tenancy continues month-to-month or another fixed length of time.

What this means is that the tenancy will end when the landlord provides sufficient notice to end the tenancy (which will be addressed shortly) or when both parties mutually agree to end the tenancy through a Mutual Agreement to End a Tenancy (RTB form 8).

The introduction of the second tenancy agreement did not create a new tenancy, nor did it extinguish the terms of the first tenancy agreement. While the landlord appears to have attempted to create some semblance of certainty through the second tenancy agreement, the legal effect of having the tenants sign a new agreement is simply a roundabout way of amending or changing the terms of the first tenancy agreement.

The terms of the first tenancy agreement—terms which were in effect on April 15, 2019—included rent in the amount of $2,000.00 and that utilities were not the responsibility of the tenants. While section 14(1) of the Act states that

> A tenancy agreement may be amended to add, remove or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment.

section 1(2) of the Schedule, under the *Residential Tenancy Regulation,* states that

> Any change or addition to this tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. If a change is not agreed to in writing, is not initialed by both the landlord and the tenant or is unconscionable, it is not enforceable.

"Unconscionable" is defined (in section 3 of the *Residential Tenancy Regulation)* as a term of a tenancy agreement that is oppressive or grossly unfair to one party. Unconscionability is a legal principle in contract law whereby a contract may be unenforceable because of terms that are unreasonably favorable to one party while precluding meaningful choice for the other party.

In this case, the tenants testified that they felt they had no choice but to sign the second tenancy agreement to remain living in the rental unit. Indeed, I find that the terms of the rental agreement regarding both the increased rent and the addition of the obligation to now pay utilities were unreasonably favorable to the landlord while precluding any practical choice for the tenants.

Given the above, I find that the second tenancy agreement's change to the first tenancy agreement's terms regarding the rent increase and the requirement to pay hydro are unconscionable and unenforceable.

Having concluded that these terms are of no force or effect, I order that the rent shall remain at $2,000.00 and that the tenants are not obligated to pay 1/3 the cost of the utilities as required by the second tenancy agreement.

Further, I order that all terms of the first tenancy agreement shall continue until the tenants vacate the rental unit, unless any such amendments are made in full compliance with the Act. Finally, I order that any increase in rent during this tenancy must be implemented by the landlord in full compliance with sections 41 to 43, inclusive, of the Act.

Having found that the tenants were, and are, not required to pay more than the monthly rent of $2,000.00, I hereby order that the 10 Day Notice is cancelled and of no force or effect.

Are tenants entitled to order cancelling 2 Month Notice?

Regarding the the 2 Month Notice, where a tenant disputes a notice to end a tenancy, 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 landlord testified that he issued the 2 Month Notice because he, his wife, and his two babies will occupy the rental unit. His evidence regarding an overseas job posting being cancelled is consistent with the reasons given in the 2 Month Notice. Moreover, I note that the tenants did not dispute that the landlord and his family would be moving into the rental unit. Rather, they took issue with the fact that the 2 Month Notice referred to renovations occurring before the landlord took occupancy.

A Four Month Notice to End Tenancy for Landlord's Use of Property may be issued for six different reasons under section 49(6) of the Act. Section 49(6)(b) of the Act allows a landlord to end a tenancy as follows:

A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following: [. . .] renovate or repair the rental unit in a manner that requires the rental unit to be vacant;

Neither party provided any evidence for me to find that the renovations intended will required that the rental unit be vacant. While the parties offered differing testimony on the type and extent of renovations (ranging from new carpets to new window and a furnace), neither established that the renovations would be so extensive such that the rental unit must be vacant and therefore that a Four Month Notice would be the appropriate mechanism for ending the tenancy.

Certainly, this section of the Act is in place to prevent, among other things, what are commonly referred to as "renovictions." That is, a landlord evicts a tenant in order to renovate the rental unit and then re-rent the rental unit at a substantially higher rent. None of the evidence in this dispute leads me to make such a conclusion that this is the landlord's intent.

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 landlords have met the onus of establishing that they intend to occupy the rental unit as stated in the 2 Month Notice.

As such, I dismiss the tenants' application for an order cancelling the 2 Month Notice without leave to reapply. The 2 Month Notice dated April 16, 2019, having an effective end of tenancy date of July 14, 2019, is hereby upheld.

Section 55(1) of the Act states that if a tenant applies to dispute a landlord's notice to end tenancy and their Application for Dispute Resolution is dismissed, or the landlord's notice is upheld, the landlord must be granted an order of possession if the notice complies with all the requirements of section 52 of the Act. Having reviewed and found that the 2 Month Notice complies with section 52 of the Act, I grant the landlords an order of possession effective 1:00 PM on July 14, 2019.

As an aside, I need not mention the potential consequences for the landlords should they fail to accomplish, or use, the rental unit for the purpose as stated in the 2 Month Notice. The parties should review section 51 of the Act.

Are landlords entitled to order of possession for breach of vacate clause?

A landlord may apply for an order of possession for breach of a vacate clause under section 55 of the Act. Here, however, there is no evidence before me to find that the tenants have breached the clause. They do not have to vacate the rental unit until July 14, 2019. As such, they cannot be said to have breached the clause.

I conclude that as the tenants have not breached the vacate clause that it would be premature for me to grant the landlords an order of possession for a breach of a vacate clause. I thus dismiss the landlords' application for this type of order of possession.

Is either party entitled to recovery of filing fee?

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee.

As the tenants were successful in dismissing the 10 Day Notice I grant them recovery of the filing fee in the amount of $100.00. I order that the tenants may deduct $100.00 from their rent for June or July 2019.

Conclusion

I order that the 10 Day Notice is hereby cancelled and of no force or effect.

I uphold the 2 Month Notice and grant the landlords an order of possession, which must be served on the tenants and which is effective at 1:00 PM on July 14, 2019. The landlords must serve this notice on the tenants no later than June 14, 2019. This order may be filed in, and enforced as an order of, the Supreme Court of British Columbia.

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: May 31, 2019

Residential Tenancy Branch