Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, OLC

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on July 25, 2019, wherein the Tenant sought to cancel a 2 Month Notice to End Tenancy for Landlord's Use issued on July 24, 2019 (the "July Notice") and an order that the Landlord comply with the *Residential Tenancy Act,* the *Residential Tenancy Regulation* and the residential tenancy agreement.

The hearing was scheduled for 11:00 a.m. on September 27, 2019. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The parties confirmed their email addresses during the hearing as well as their understanding that this Decision would be emailed to them

Issues to be Decided

1. Should the Notice be cancelled?

2. Should the Landlord be ordered to comply with the *Residential Tenancy Act,* the *Residential Tenancy Regulation,* and/or the residential tenancy agreement?

Background and Evidence

At the outset of the hearing the Tenant advised that this was the third 2 Month Notice to End Tenancy for Landlord's Use that he had received wherein the Landlord cited that it was his intention to have his son reside in the rental unit. The Tenant asked that the July Notice be cancelled. He also argued that this was an abusive of process and sought an Order preventing the Landlord from issuing any further 2 Month Notices to End Tenancy for Landlord's Use. The Tenant also sought an administrative penalty pursuant to section 95 of the *Act.*

This tenancy has been the subject of B.C. Supreme Court proceedings as well. The history of these proceedings are aptly detailed in the May 13, 2019 B.C. Supreme Court Decision of the Honourable Mr. Justice Davies; the relevant portions of that Decision are reproduced as follows:

> [3] The history of this matter is somewhat complicated.
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> [4] On October 5, 2018, the landlord provided the tenant with a two-month notice to end tenancy for the landlord's use of the property pursuant to s. 49(3) of the Act on the basis that his son, who is 26 years old, and who lived with him at the time, planned to move into the petitioner's rental unit.
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> [5] The petitioner applied for dispute resolution arguing that that the notice should be cancelled because the landlord did not have an honest intention to move his son into the rental unit and based also upon a submission that he and the landlord had an oral agreement that the petitioner would be a long-term tenant.
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> t[6] The hearing of that first notice before the Residential Tenancy Branch occurred on November 23, 2018.
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> [7] The arbitrator, Arbitrator Wellman, issued a decision granting the tenant's application to cancel the first notice on the basis that the respondent failed to prove that he had a good faith intention to move his son into the rental unit.

[8] The decision read:

> As the landlord's "good faith" was questioned regarding the issuance of the Notice, I considered that the only submission that the Landlord provided was his own testimony that his son was going to move in. I find that the Landlord could have provided further evidence to prove beyond a balance of
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> probabilities that, his son in, good faith, was intending to move into the rental unit in accordance with s. 49 and 51 of the Act. As such, I find that the Landlord has failed to provide sufficient evidence that the reasons for the issuance of the Notice were valid. As a result, I cancel the Notice and order the tenancy to continue until it is ended in accordance with the Act.

[9] The respondent landlord was unsatisfied with that decision and applied to have it reviewed. On December 6, 2018, Arbitrator Holloway issued a reconsideration decision dismissing the respondent landlord's application for reconsideration. In dismissing that application the Arbitrator stated:

> I find the new evidence submitted on this application for review is more in the nature of an attempt to reargue the same matters that were before the arbitrator at the original hearing. The review process is not intended to provide a party with an opportunity to present additional evidence that was available but not presented at the original hearing in order to strengthen arguments that were considered but rejected by the arbitrator at the original hearing. In this case the arbitrator rejected the good faith intention of the landlord.

[10] Eleven days after the issuance of that review consideration decision, the respondent landlord issued a second two-month notice to end the tenancy for the landlord's use of property. He again did so under s. 49(3) of the Act again stating that he intended to move his son into the rental unit.

[11] The petitioner again applied for dispute resolution with the Residential Tenancy Board seeking to cancel the second notice.

[12] On February 5, 2019, a second dispute resolution hearing concerning the petitioner's application to cancel the second notice was heard.

[13] During that second hearing the respondent's son attended as a witness and testified that he intended to move into the rental unit. The respondent provided no other additional evidence.

In the second dispute resolution hearing Arbitrator Selbee found that the Landlord was not precluded from issuing another 2 Month Notice to End Tenancy for Landlord's use.

On Judicial Review, the Honourable Mr. Justice Davies found Arbitrator Selbee's Decision to be patently unreasonable for the following reasons:

[19] …

1) The second notice to terminate was issued for exactly the same reasons as the first notice.

2) The validity of the first notice had been determined against the position of the landlord.

3) There was a determination of a lack of good faith.

4) That first decision resulted in a reconsideration which was also resolved against the landlord.

5) The facts had not changed in any way when the second notice was issued.

6) In my view, the second notice to end the tenancy was an abuse of the process of the Residential Tenancy Branch in an attempt to do an end run on the first decision.

The Tenant advised that days following receipt of the Supreme Court Judicial Review Decision he received the July Notice.

The Reasons cited on the July Notice were that "[t]he 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)."

In support of the July Notice, the Landlord submitted a letter from his son, S.S., in which the son wrote:

> *"I am [Landlord's] son. I have been wanting to move in to our suites for a while. [Tenant]'s suite is ideal for me. I have been living with my parents since I was born. For me to live on my own will help me grow as an individual. I personally have anxiety and depression so to see all the work that my parents have put in to building our home angers me and is depressing to see all that work be destroyed by a tenant.*
>
> *I would like to move in to the suite. Now I have become officially one of the owners and am still wanting to move in to the suite."*

The Landlord also stated that the title to the property is now held jointly with his son S.S. The Landlord failed to submit any documentary evidence to support this claim.

Analysis

After consideration of the testimony and evidence before me and on a balance of probabilities, I find as follows.

A review of the proceedings confirms that at the hearing of the first notice to end tenancy on November 23, 2018, the Landlord advised the Arbitrator as follows:

> "The Landlord stated that his son, who currently lives with him, plans to move into the rental unit. As a result, the Landlord issued the Tenant the Notice by personally serving it to the Tenant on October 5, 2018. The Notice included a move-out date of December 6, 2018. The reasons for the Notice stated that the rental unit will be occupied by the Landlord or the Landlord's close family member, specifically, his child/son.
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> The Landlord testified that his son doesn't want to live with him anymore and that he is not planning to find new tenants for the rental unit. "

At the hearing on November 23, 2018, the Landlord did not present his son to provide evidence. The Arbitrator found the Landlord had submitted insufficient evidence to prove that his son intended in good faith to occupy the rental unit.

Following receipt of the November 23, 2018 Decision, the Landlord issued the second notice to end tenancy on December 17, 2018.

During the hearing of the second notice on February 5, 2019, Arbitrator Selbee recorded the Landlord's evidence as follows:

> 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.
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> 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.
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> 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.

At the hearing before me, the Landlord stated that he wishes his son to move into the rental unit. The son's reasons are set forth in the document previously reproduced.

I find that the July Notice was issued for exactly the same reasons as the first and second notices to end tenancy, namely, that the Landlord's son wishes to move into the rental unit.

While the Landlord stated that the property was now owned jointly with his son S.S., I find he has provided insufficient evidence to support a finding that S.S. is now an owner.

That said, even in the event the Landlord could prove that S.S. is a joint owner, I find this to be inadequate to warrant a reconsideration of this matter. I find that I am precluded from considering the Landlord's request to end this tenancy for the purposes of his son living in the rental unit due to the legal principle of issue estoppel. As described by Justice Davies:

> [23] Issue estoppel as a doctrine of res judicata applies to avoid re-litigation. It is applied to ensure that the parties bring forward their best case to be decided by the decision maker and that they are therefore at the end of the day precluded from bringing another application on the same facts to try to attempt a different result.
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> [24] In its decision in *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, the Supreme Court of Canada stated:
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> > 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
> >
> > 19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice….
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> [25] For issue estoppel to apply it is required 1) that the same question has previously been decided; 2) that the judicial decision which is said to create the estoppel was final; and, 3) that the parties to the decision or their privies were the same as the parties to the proceedings in which the estoppel is raised.

Issue estoppel prevents a party from attempting to relitigate a matter that has already been decided. In this case, Arbitrator Wellman already decided the merits of the Landlord's request to end the tenancy for his son to occupy the rental unit. As such,

I find that issue estoppel applies in the case before me as well. The same question has been previously decided, namely whether the notice was issued in good faith and in particular, whether the Landlord's son intends in good faith to occupy the rental unit. Further, the decision of Arbitrator Wellman was final. Finally, clearly the parties to that decision are the same as the parties to the matter before me. To allow the Landlord to continually issue 2 Month Notices to End Tenancy for the same reason, while at the same time bolstering his case to add more and more evidence in support, would constitute an abuse of process.

I wish to point out that even in the event I had found it appropriate to consider the merits of the July Notice, I would have found that the Landlord did not issue the July Notice in good faith. It is notable that the Landlord's son writes "I personally have anxiety and depression so to see all the work that my parents have put in to building our home angers me and is depressing to see all that work be destroyed by a tenant." This statement suggests an ulterior motive for ending the tenancy, namely, that the Landlord and his family have concerns over the Tenant's treatment of the rental unit.

Residential Tenancy Branch Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member provides in part as follows:

> **B. GOOD FAITH**
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> In *Gichuru v Palmar Properties Ltd*. (2011 BCSC 827) the BC Supreme Court found that a claim of good faith requires honest intention with no ulterior motive. When the issue of an ulterior motive for an eviction notice is raised, the onus is on the landlord to establish they are acting in good faith: *Baumann v. Aarti Investments Ltd.,* 2018 BCSC 636.
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> Good faith means a landlord is acting honestly, and they intend to do what they say they are going to do. It means they do not intend to defraud or deceive the tenant, they do not have an ulterior motive for ending the tenancy, and they are not trying to avoid obligations under the RTA and MHPTA or the tenancy agreement. This includes an obligation to maintain the rental unit in a state of decoration and repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant (s.32(1)).
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> If a landlord gives a notice to end tenancy to occupy the rental unit, but their intention is to re-rent the unit for higher rent without living there for a duration of at least 6 months, the landlord would not be acting in good faith.
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> If evidence shows the landlord has ended tenancies in the past to occupy a rental unit without occupying it for at least 6 months, this may suggest the landlord is not acting in good faith in a present case.

> If there are comparable rental units in the property that the landlord could occupy, this may suggest the landlord is not acting in good faith.
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> The onus is on the landlord to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no other ulterior motive.

The Tenant seeks an Order that the Landlord be prohibited from issuing any further notices to end tenancy under section 49. As section 49 permits a landlord to end a tenancy for a variety of reasons such an Order is not appropriate. Similarly, although the Landlord has been unsuccessful ending this tenancy for his son to move into the rental unit, that does not preclude him from issuing a further notice under section 49(3) should he have a good faith intention for another family member to occupy the rental unit. The validity of such a subsequent notice, and the good faith intention of the Landlord in the circumstances, as they may, be will be decided by the Arbitrator considering the merits of such a claim. Presumably the history of these proceedings will be a consideration on any question of the good faith intention of the Landlord.

I therefore decline the Tenant's request for an Order prohibiting the Landlord from issuing a further notice pursuant to section 49. The Landlord is cautioned however, against issuing another notice for the purposes of his son residing in the rental unit unless he has clear and compelling evidence that circumstances have changed significantly, and to such an extent that reasons for ending the tenancy are not the same as they were when he issued the October 5, 2018, December 17, 2018 and July 24, 2019 Notices.

The Tenant also seeks an administrative penalty pursuant to section 95 of the *Act;* that section reads as follows:

> **Offences and penalties**
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> **95** (1)A person who contravenes any of the following provisions commits an offence and is liable on conviction to a fine of not more than $5 000:
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> (a)section 13 (1), (2) or (3) *[requirements for tenancy agreements]*;
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> (a.1)section 15 *[no application or processing fees]*;
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> (b)section 19 (1) *[limits on amount of deposits]*;
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> (c)section 20 (a), (b), (c), (d) or (e) *[landlord prohibitions respecting deposits]*;

(d)section 26 (3) *[seizing or interfering with access to tenant's property]*;

(e)section 27 (1) *[terminating or restricting services or facilities]*;

(f)section 29 *[landlord's right to enter a rental unit restricted]*;

(g)section 30 (1) or (2) *[tenant's right of access protected]*;

(h)section 31 (1) or (1.1) *[prohibitions on changes to locks]*;

(i)section 34 (3) *[assignment and subletting]*;

(j)section 38 (1) *[return of security deposit and pet damage deposit]*;

(k)section 42 (1) or (2) *[timing and notice of rent increases]*;

(l)section 43 (1) *[amount of rent increase]*;

(m)section 57 (2) *[what happens if a tenant does not leave when tenancy ended]*.

(2)A person who coerces, threatens, intimidates or harasses a tenant or landlord

(a)in order to deter the tenant or landlord from making an application under this Act, or

(b)in retaliation for seeking or obtaining a remedy under this Act

commits an offence and is liable on conviction to a fine of not more than $5 000.

(3)A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000.

(4)A person who gives false or misleading information in a proceeding under this Act commits an offence and is liable on conviction to a fine of not more than $5 000.

(5)A tenant, or a person permitted on residential property by a tenant, who intentionally, recklessly or negligently causes damage to the residential property commits an offence and is liable on conviction to a fine of not more than $5 000.

(6)If a person convicted of an offence under this Act has failed to comply with or contravened this Act, the court, in addition to imposing a fine, may order the person to comply with or to cease contravening this Act.

(7)Section 5 of the *Offence Act* does not apply to this Act or the regulations.

The current circumstances do not fit within the above parameters. However, should the Landlord issue a further notice for the purposes of his son residing in the rental unit contrary to this my Decision, such behaviour may attract administrative penalties pursuant to section 95(3).

Conclusion

The July Notice is cancelled.

The Landlord is cautioned against issuing any further notices to end tenancy for the purposes of his son residing in the rental unit.

The Tenant's request for an administrative penalty pursuant to section 95 is dismissed with leave to reapply should circumstances warrant such a request.

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: October 9, 2019

Residential Tenancy Branch