



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution, filed on August 22, 2019, in which the Tenants sought to cancel a 2 Month Notice to End Tenancy for Landlord's Use issued on July 30, 2019 (the "July Notice") as well as recovery of the filing fee. The Tenants filed an amendment seeking an order canceling a second 2 Month Notice to End Tenancy for Landlord's Use issued on August 26, 2019 (the "August Notice").

The hearing of the Tenants' Application was scheduled for teleconference at 9:30 a.m. on October 24, 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 Landlord did not call into the hearing and was represented by her realtor K.W.

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 July and August Notice be cancelled?
2. In the event the Notices are not cancelled, is the Landlord entitled to an Order of Possession?
3. Are the Tenants entitled to recover the filing fee?

Background and Evidence

Residential Tenancy Branch Rules of Procedure—Rule 6.6 provides that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenants applied for dispute resolution and are the Applicants in this case, the Landlord's agent presented their evidence first.

Introduced in evidence was a copy of the residential tenancy agreement confirming that this fixed term tenancy began September 2015, initially for a one-year fixed term, and continuing on a month to month basis thereafter.

The Landlord's agent confirmed that the Tenants currently pay \$2,800.00 in rent.

The Agent testified that the Landlord entered into a contract of purchase and sale on July 18, 2019. The conditions of sale were removed on July 24, 2019. The buyers, E.C. and K.A., provided a letter to the seller/Landlord, dated July 25, 2019, confirming that they intended to move into the rental unit and therefore wanted vacant possession of the rental unit. This letter was provided in evidence before me.

The Landlord then issued the July Notice on July 30, 2019. The reasons cited on the Notice were noted as follows:

all the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit.

The Agent testified that they intended to personally serve the Tenants, however, that was not possible and as such the July Notice was posted to the door on July 30, 2019. As posting to the door is effective three days later, they were unable to serve the Tenants in time for the July Notice to be effective on September 30, 2019.

At the time the Landlords were unaware of the automatic correction of effective dates provided for in section 53 of the *Residential Tenancy Act*, which would cause the effective date of the July Notice to be October 31, 2019. As such, on August 26, 2019 the Landlord issued a second 2 Month Notice to End Tenancy for Landlord's Use (the "August Notice"), again indicating the property had sold and the purchaser's wanted vacant possession. The effective date of the August Notice was October 31, 2019, the same as the corrected effective date of the July Notice.

On their Application for Dispute Resolution the Tenants allege that the sale of the rental unit collapsed. During the hearing before me the Landlord's Agent denied this. She stated that on September 1, 2019 the Landlord sent a message to the Tenants after receiving their rent in which she stated that she was disappointed that the Tenants had paid rent and that they had "messed up the sale". The text of that message includes the following:

"...But you have messed up the sale. So now I want you out before the place goes on the market again. So hence you got notice in time !! Wish you well."

The Agent submitted that the Tenants only provided the September 1, 2019 text message and failed to provide the one sent by the Landlord on September 6, 2019 in which the Landlord confirmed that the rental unit had sold; that message includes the following:

"The condo is sold now and the new owners have served you. I know we have a court hearing which is your choice so you got your extra month I need to do a walk through with you to return your deposit please let me know when thank you [Landlord's first name]"

The Agent confirmed that at no time did the sale collapse, rather, the Landlord had to reduce the sale price to accommodate a later completion date due to the late delivery of the July Notice. A copy of the Contract of Purchase and Sale Addendum, dated

September 24, 2019, was provided in evidence and which confirmed the purchase price was reduced from \$725,000.00 to \$720,000.00.

The Agent confirmed that the purchasers are aware that if they do not use the property for the purpose stated on the Notice to End Tenancy they may be liable for paying the Tenants the equivalent to 12 month's rent.

In response to the Landlord's testimony and submissions the Tenant, G.C., gave affirmed testimony as follows.

G.C. stated that when they initially applied for Dispute Resolution, they were applying to dispute the July Notice. On September 11, 2019 the Tenants filed an Amendment providing that they were intending to dispute the August Notice as well.

The Tenant stated that they were provided a copy of the Contract of Purchase and Sale when they received the July Notice. The Tenant also confirmed that they also received a copy of the letter from the purchaser's confirming they want vacant possession of the rental unit. The Tenant stated that they did not dispute the fact the new owners wish to occupy the rental unit.

The Tenant noted however, that in a text message received from the Landlord on September 1, 2019 the Landlord wrote that the unit was going back on the market. The Tenant argued that by telling the Tenants that the rental unit was going back on the market the Landlord implied that the July and August Notices were no longer valid. The Tenant also claimed that as a result of the September 1, 2019 email they stopped looking for alternate accommodation as they believed the sale had collapsed.

The Tenant confirmed that they received the Addendum from the Landlord on September 27, 2019; a copy of that email was provided in evidence before me.

The Tenant confirmed that at no time did the Landlord formally withdraw the August Notice, however he testified that the Landlord also did not inform them at any time between September 1, 2019 to September 27, 2019 that the sale was in fact going ahead.

In reply to the Tenant's testimony the Landlord's agent noted that on September 6, 2019 the Landlord confirmed the rental unit had sold.

Analysis

Ending a tenancy is a significant request and must only be done in accordance with the *Residential Tenancy Act*.

Section 49 of the *Act* allows a Landlord to end a tenancy when they wish to regain possession of their property. Section 49(5) allows a Landlord to issue a 2 Month Notice to End Tenancy in the event the rental unit has sold and the purchaser intends in good faith to occupy the rental unit; for clarity I reproduce the relevant section as follows:

49 (5)A landlord may end a tenancy in respect of a rental unit if

- (a)the landlord enters into an agreement in good faith to sell the rental unit,
- (b)all the conditions on which the sale depends have been satisfied, and
- (c)the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
 - (i)the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;
 - (ii)the purchaser 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.

Based on the documentary evidence before me, and in particular the contract of purchase and sale, as well as the addendum to the contract, I find that the Landlord entered into an agreement in good faith to sell the rental unit. I further find that at the time the July and August Notices were issued, that all condition on which the sale depended had been satisfied and the purchaser asked the Landlord in writing to give notice to the Tenants as they intended in good faith to occupy the rental unit.

The Tenants did not dispute the Landlord's evidence that the purchaser's wanted to occupy the rental unit. The Tenants' dispute arises from the fact they feel the Landlord misled them as to the status of the sale. In particular, the Tenants allege that by sending the email on September 1, 2019, the Landlord implied that the sale had collapsed, and that the property was going back on the market, thereby invalidating the July and August Notice.

Although not specifically argued, the Tenants are suggesting that, by informing the Tenants that the sale had collapsed and the rental unit was put back on the market, the

Landlord “waived” their right to enforcement of the notice to end tenancy. This issue is dealt with in *Residential Tenancy Branch Policy Guideline 11--Amendment and Withdrawal of Notices* which provides in part as follows:

“...
“

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- whether the receipt shows the money was received for use and occupation only.
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional. A Notice to End Tenancy given by the landlord must also be in the form approved by the Director of the Residential Tenancy Office.

...”

In the case before me I find that both the July and August Notices were clear, unambiguous and unconditional. The Notices were also in the approved form, #RTB-32 and comply with section 52 of the Act. Pursuant to section 53, the effective date of the July Notice is the same as the August Notice, namely: October 31, 2019.

As provided above, a landlord cannot unilaterally withdraw a notice to end tenancy. The Tenants conceded that the Landlord did not formally communicate that she was attempting to withdraw the July or August Notice. There was also no suggestion that both parties consented to the Landlord withdrawing the July or August Notice.

Further, the documentary evidence confirms that while the Landlord sent a text message to the Tenants on September 1, 2019 indicating the sale had been “messed up”, she did not expressly waive her right to enforce the August Notice.

I further find there was no implied waiver. Again, while the Landlord sent a text message to the Tenants on September 1, 2019, five days later on September 6, 2019 she sent a further message confirming that the property had sold. In doing so she confirmed her intention to proceed with ending the tenancy.

The Tenants testified that upon receiving the September 1, 2019 text message they ceased looking for alternate accommodation. They did not, however, cancel the hearing of their Application before the Residential Tenancy Branch. Although they may have reduced their housing search efforts, I find that the September 1, 2019 text message was not sufficient to change the Tenants’ position to their detriment. I further find that the September 6, 2019 text message was clear that the rental unit had sold such that I cannot find that there was a clear, unequivocal and decisive act on the Landlord’s part amounting to estoppel.

I therefore find the July and August Notice to be valid. The Tenants’ request for an Order canceling the Notices is dismissed. The tenancy shall end on October 31, 2019.

As the Tenants have been unsuccessful in their Application their request for recovery of the filing fee is denied.

Conclusion

The Tenants’ Application for an Order canceling the July and August Notice and recovery of the filing fee is dismissed.

The tenancy shall end in accordance with the July and August Notice.

Pursuant to section 55 of the *Act*, The Landlord is granted an Order of Possession effective 1:00 p.m. on October 31, 2019.

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 28, 2019

Residential Tenancy Branch