



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, MT

Introduction

This hearing was scheduled to deal with the tenant's application to cancel a *2 Month Notice to End Tenancy for Landlord's Use of Property* and more time to make this application.

Both parties appeared or were represented at the hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

At the outset of the hearing, I confirmed that both parties had served their respective hearing documents and evidence upon each other and their evidence has been admitted for consideration in making this decision.

Preliminary Matter – when did the tenant receive the 2 Month Notice?

Section 49(8)(a) of the Act provides that a tenant has 15 days from the date they receive a *2 Month Notice to End Tenancy for Landlord's Use of Property* ("2 Month Notice") to the to file an Application for Dispute Resolution to dispute the 2 Month notice. The tenant filed to dispute a 2 Month Notice dated August 15, 2019 on October 4, 2019 and as a preliminary issue I must determine whether the tenant when the tenant received the 2 Month Notice.

The landlord's lawyer had signed the subject 2 Month Notice on August 15, 2019. The landlord's representative submitted that it was sent to the tenant via registered mail on August 21, 2019 but that it was returned to sender as it was unclaimed by the tenant. The landlord's law office then re-sent another copy of the 2 Month Notice to the tenant, along with a letter, via regular mail on September 25, 2019.

The tenant submitted that she did not receive the registered mail or registered mail notice cards indicating she had registered mail to pick up; however, she did receive the letter and copy of the 2 Month Notice that was sent to her regular mail. The tenant submitted that she received the package sent regular mail on September 30, 2019.

The landlord's representative argued that a person is deemed to have received their mail five days after mailing even if they do not pick it up. As such, the tenant is deemed to have received the 2 Month Notice five days after mailing on August 21, 2019 which would be August 26, 2019 and the tenant filed her Application for Dispute Resolution outside of the time limit for doing so.

Section 90 of the Act provides the deeming provision to which the landlord's representative referred. Section 90 states, in part:

90 A document given or served in accordance with section 88 [*how to give or serve documents generally*] or 89 [*special rules for certain documents*], unless earlier received, is deemed to be received as follows:

(a) if given or served by mail, on the 5th day after it is mailed

The Supreme Court of British Columbia has considered the deeming provision of section 90 and has held that the presumption is rebuttal. Under section 12 of the Residential Tenancy Policy Guideline 12: *Service Provisions*, the policy guideline provides, in part:

In the event of disagreement between the parties about the date a document was served and the date it was received, an arbitrator may hear evidence from both parties and make a finding of when service was effected.

The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done. [*Atchison v. British Columbia, [2008] B.C.J. No. 1448*].

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received.

It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

In this case, the tenant is rebutting that she received notification of the registered mail sent to her on August 21, 2019.

Both parties pointed to a text message the tenant sent to the landlord on September 30, 2019. In the text message the tenant states, in part, that this was the first she was hearing of an eviction notice and that she did not receive the eviction notice that was sent at the end of August.

The landlord's representative pointed out that the tenant had communicated to the landlord, via text message, asking to extend the effective date of the 2 Month Notice to November 30, 2019. The tenant stated that she was intending to communicate to the landlord that she had just received the 2 Month Notice on September 30, 2019 and given she had just received it she asked if the landlord would consider the effective date to be November 30, 2019. I note that the landlord's response to the tenant, via text message, was "sure but you have to pay the rent". I have considered this exchange between the parties but I find it to be of no consequence in proceeding to make a determination as to whether the 2 Month Notice should be upheld or cancelled since section 49(8) gives every tenant in receipt of a 2 Month Notice the right to dispute the notice and the only excluding criteria is that it must be disputed with 15 days of receiving the 2 Month Notice.

As proof of service by registered mail, the landlord submitted a copy of a registered mail receipt, including tracking number, and the print out from Canada Post showing the history of the registered mail. The receipt provided and the tracking report do not indicate the recipient's address other than to indicate which town it was sent to.

As for not receiving the registered mail or registered mail notice cards, the tenant stated that there have been issues in the neighbourhood where the rental unit is located whereby people do not receive their mail. The tenant stated she occupies the basement suite on the property and the upper unit is also tenanted. The tenant described that she ordinarily receives mail in the common mailbox that is shared with the tenants occupying the upper rental unit. The tenant also questioned whether the registered mail was addressed correctly.

When I look at the landlord's proof of service, I note that the landlord did not include a copy of the registered mail envelope that was returned so that I may verify it was

addressed correctly. Also of consideration is that the rental unit is a basement suite and it does not appear to have a legal separate mailing address, meaning the mail carrier is likely to knock on the main door of the house, which is not the rental unit door, and leave a registered mail notice card in a mailbox that is shared with other tenants. The landlord did not call the upper tenants to testify with respect to receiving or seeing registered mail notice cards left for the tenant. All of these things considered together, I find it reasonably likely the tenant did not receive the notice cards for the registered mail, as she claims, and I find the deeming provision of section 90 has been successfully rebutted. Therefore, I find the tenant to be in receipt of the 2 Month Notice on September 30, 2019 as this is the date both parties communicated with each other with respect to the tenant receiving the 2 Month Notice.

Having found the tenant received the 2 Month Notice on September 30, 2019 and filing her Application for Dispute Resolution to dispute the 2 Month Notice on October 4, 2019 I find the tenant met the 15 day time limit for doing so and an extension of time is not required.

I informed the parties of my decision to proceed on the basis the 2 Month Notice was received on September 30, 2019 and the tenant filed to dispute the notice within the time limit for doing so. I proceeded to explain the hearing process where a notice to end tenancy is under dispute and provided the parties the opportunity to ask questions about the process.

Issue(s) to be Decided

Should the *2 Month Notice to End Tenancy for Landlord's Use of Property* be upheld or cancelled?

Background and Evidence

The landlord and the tenant entered into an oral tenancy agreement for a tenancy that started in August 2011. The landlord collected a security deposit of \$400.00 and the monthly rent was set at \$800.00, payable on the first day of every month.

Approximately two years ago the monthly rent increased to \$925.00 although the parties provided a different version of events when the rent was increased. The rent was increased again on November 1, 2018 to \$962.00.

On August 15, 2019 the landlord's agent signed a 2 Month Notice to End Tenancy for Landlord's Use of Property with an effective date of November 1, 2019. The reason for ending the tenancy, as stated on the 2 Month Notice is that:

Reason for this Two Month Notice to End Tenancy (check the box that applies)

☒ 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).

For reasons already provided in the Preliminary Matter section of this decision, I have determined the 2 Month Notice was received on September 30, 2019 and the tenant filed to dispute the 2 Month Notice within the time limit for doing so.

The landlord did not provide any details as to the landlord's intended use of the rental unit in the written submissions or documents served upon the tenant prior to the hearing. During the hearing, the landlord testified that his son will be moving into the rental unit. The landlord stated that his son currently resides at home with him but that his son "is working now".

The landlord's representative submitted that the landlord has not collected rent from the tenant for the month of November 2019 as the tenant had requested and the landlord had agreed to extend the effective date of the 2 Month Notice to November 30, 2019 and the landlord recognizes that the tenant is entitled to compensation for receiving a 2 Month Notice. The tenant testified that she sent the landlord a message informing him that she has the rent available for him to pick up, like they do every month, and he declined to collect it from her.

The tenant questioned the landlord's good faith intention in ending her tenancy. The tenant is of the position the landlord is motivated to end the tenancy to raise the rent and renovate or make repairs to the rental unit.

I noted that in the tenant's written submissions it was apparent that she had prepared to question whether the landlord's in-laws or parents would be moving into the rental unit. The tenant confirmed that the first she learned of the landlord's stated intention to have his son move into the rental unit was during this hearing. The tenant explained that she had assumed the landlord would be making submissions that his in-laws or parents would be moving into the rental unit because that was the reason he gave her two years ago, until the tenant agreed to pay an additional \$125.00 in rent to bring the monthly rent to \$925.00; and because the landlord's sons are only teenagers.

I asked the landlord how old his son is, the one intending to occupy the rental unit, to which the landlord stated his son “will be 18 in March”. I asked the landlord to confirm that his son is currently 17 to which the landlord responded that his son is “17 plus”.

The landlord acknowledged that a few years ago he talked to the tenant about his in-laws moving into the rental unit and that she offered to increase the rent once he explained to her that he could not find other living accommodation for his in-laws at the rate of \$800.00 per month. The landlord pointed out that prior to that he had not increased the rent for 5 – 6 years.

The parties were in dispute as to the reason the former tenants occupying the upper unit were evicted. The tenant claimed that the landlord told the neighbour that he would evict the upper tenants any way he could including a notice that his family members would be moving in. The landlord submitted the upper tenants were evicted for other issues, including drug use, and the tenant even wrote a letter in support of that allegation.

The landlord referenced the photographs of the rental unit the tenant had submitted as evidence and was of the position the photographs do not accurately reflect the current condition of the rental unit. The landlord also stated that the tenant had complained that her fridge was not working and when he replaced it he took the old fridge to his home and the old fridge works. The landlord also indicated that the tenant needs to clean the rental unit more.

Analysis

Where a notice to end tenancy comes under dispute, the landlord bears the burden to prove the tenancy should end for the reason(s) indicated on the Notice.

Where a landlord seeks to end the tenancy for landlord's use of property, the landlord must prove, on the balance of probabilities, that the landlord truly intends to use the rental unit for the purpose stated and have a good faith intention in doing so.

Residential Tenancy Branch Policy Guideline 2a provides information and policy statements with respect to ending a tenancy for landlord's use of property. The policy guideline provides the following with respect to the good faith intention:

B. GOOD FAITH

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.

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)).

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.

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.

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.

In this case, the tenant questioned the landlord's good faith intention to end the tenancy and the landlord has the burden to prove he has a good faith intention to use the rental unit for the reason he stated.

The landlord submitted that he intends for his son to occupy the rental unit.

I find the landlord did not satisfy me that it is likely his 17 year old son will occupy the rental or that this would be accomplished due to no ulterior motive on part of the landlord. In making this determination I have considered the following:

- The landlord did not call his son to testify at the hearing to be examined further and I am unable to determine what the landlord's son's intentions are with respect to his living accommodation.
- The landlord stated the reasons his son is going to occupy the rental unit is because his son works now but he landlord did not provide any evidence in support of that or any particulars such as location of work, whether his son works full or part time, the amount of his son's earnings, or the like, that would support a position that it is desirable for the landlord's son to live in the rental unit and away from his family home, especially at such a young age.
- I note that the rental unit and the landlord's home, where the landlord's son currently resides, are located in different cities and the landlord did not provide any information with respect to whether his son is still in school and the location of school compared to the location of the landlord's home versus the rental unit.
- The landlord stated on a number of occasions that he had not raised the rent for several years which may be consistent with the tenant's position that the landlord's intention is to raise the rent.
- The landlord's comments concerning the tenant's request for repairs and lack of cleaning may be consistent with wanting to end the tenancy for an ulterior motive.

In light of the above, I grant the tenant's request to cancel the 2 Month Notice and the tenancy continues at this time.

Since the 2 Month Notice has been cancelled and the tenancy continues, the tenant is obligated to pay rent for November 2019. The tenant is ordered to immediately upon receipt of this decision make the rent for November 2019 available for the landlord to pick up. I further order that the landlord may not consider the rent for November 2019 to be paid late since it had been made available to the landlord and the landlord chose not to collect it.

The tenant was successful in her application and I award the tenant recovery of the \$100.00 filing fee she paid for this application. By way of this decision, the tenant is hereby authorized to deduct \$100.00 from the rent otherwise payable to the landlord to satisfy this award and in doing so the landlord must consider the rent to be paid in full.

Conclusion

The 2 Month Notice is cancelled and the tenancy continues.

The tenant is ordered to immediately upon receipt of this decision make available the November 2019 rent for the landlord to pick up. The landlord may not consider the payment for November 2019 to be late since he had declined to pick it up on an earlier date.

The tenant is awarded recovery of the filing fee. The tenant is authorized to deduct \$100.00 from rent otherwise payable to the landlord to satisfy this award and in doing so the landlord must consider the rent to be paid in full.

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: November 12, 2019

Residential Tenancy Branch