Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, OLC, MNDCT, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("*Act*") for:

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property, dated September 26, 2019 ("2 Month Notice"), pursuant to section 49;
- an order requiring the landlord to comply with the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 62;
- a monetary order for compensation for damage or loss under the *Act, Regulation* or tenancy agreement, pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 93 minutes. The tenant's agent and the landlord attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenant's agent confirmed that he had permission to represent the tenant at this hearing. The tenant's agent spoke for most of the hearing time, at approximately 60 minutes.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application.

The landlord stated that he posted the 2 Month Notice to the tenant's rental unit door on September 28, 2019. The tenant's agent confirmed receipt of the 2 Month Notice on October 1, 2019. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was duly served with the landlord's 2 Month Notice on October 1, 2019.

Both parties confirmed receipt of my interim decision, dated November 16, 2019, issued for this application. The interim decision was made in an ex-parte proceeding after a request by the tenant for a summons for documents, a witness, and an official Court transcript. The tenant's request was denied. The tenant made the same request at a previous RTB hearing, which was denied by a different Arbitrator in an interim decision, dated September 9, 2019. The file number for the September 2019 hearing is on the front page of this decision.

At the outset of the hearing, the tenant's agent and the landlord both affirmed, under oath, that they were not recording this hearing. Both parties affirmed that they were aware that they were not permitted to record this hearing. Recording of hearings is prohibited by Rule 6.11 of the Residential Tenancy Branch *Rules of Procedure*.

Preliminary Issue – Inappropriate Behaviour by the Tenant's Agent during the Hearing

Rule 6.10 of the RTB *Rules of Procedure* states the following:

> *6.10 Interruptions and inappropriate behaviour at the dispute resolution hearing*
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> *Disrupting the hearing will not be permitted. The arbitrator may give directions to any person in attendance at a hearing who is rude or hostile or acts inappropriately. A person who does not comply with the arbitrator's direction may be excluded from the dispute resolution hearing and the arbitrator may proceed in the absence of that excluded party.*

Throughout the conference, the tenant's agent interrupted me, talked at the same time as me, and argued with me. When I questioned the tenant's agent about relevant issues regarding the tenant's application, he became upset, argued with me, and spoke at the same time as me. When I notified the tenant's agent that he was misquoting and mischaracterizing the *Act* and the case law referenced in Residential Tenancy Policy Guideline 2A, he denied doing so, and became upset and argued with me.

While the tenant's agent was cross-examining the landlord, I cautioned him to stop interrupting the landlord, allow the landlord to respond to questions, and to stop arguing with the landlord's answers. The tenant's agent became upset and argued with me. The hearing took longer because of the tenant's agent's disruptive behaviour.

I cautioned the tenant's agent multiple times to stop interrupting me, to allow me to speak, and to stop arguing with me, but he continued with this behaviour. However, I allowed the tenant's agent to attend the full hearing, despite his disruptive behaviour, in order to provide him with a fair opportunity to respond to the landlord's application.

I caution the tenant's agent to not engage in the same inappropriate and disruptive behaviour at any future hearings at the RTB, as this behaviour will not be tolerated, and he may be excluded from future hearings. In that event, a decision will be made in the absence of the tenant's agent.

Issues to be Decided

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement?

Is the tenant entitled to a monetary order for compensation for damage or loss under the *Act, Regulation* or tenancy agreement?

Is the tenant entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on August 15, 2016. Monthly rent in the current amount of $922.50 is payable on the first day of each month. A security deposit of $400.00 was paid by the tenant and the landlord continues to retain this deposit. The tenant continues to reside in the rental unit. The rental unit is a

basement on the lower floor, where a different tenant occupies the upper floor. Both parties attended two previous RTB hearings for this tenancy in May 2019 and September 2019, both for the tenant's applications to cancel two different 2 Month Notices issued by the landlord. The file numbers for those hearings appear on the front page of this decision. The first hearing in May 2019 resulted in a settlement which I recorded. The second hearing in September 2019 cancelled the landlord's 2 Month Notice and the landlord did not appear at that hearing.

A copy of the 2 Month Notice was provided for this hearing. Both parties agreed that the effective date on the notice is December 1, 2019. Both parties agreed that the landlord identified the following reason for seeking an end to this tenancy on page 2 of the notice:

- *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).*

The landlord claimed that he issued the 2 Month Notice to the tenant because he personally wants to move into the rental unit. He said that he is having financial problems, as he cannot afford to pay rent where he currently lives now. He confirmed that he does not own any other properties, except for the rental property. He stated that the other tenant living on the upper floor of the rental property is paying more rent than the tenant currently pays of $922.50 per month, so he does not want to end her tenancy because he is obtaining more money from her rent. He explained that the tenant living upstairs does not want a roommate, so he cannot live with her. He maintained that he does not have any other residential addresses besides the one where he is currently residing. He responded that he does not have a residential address at a fitness center, as alleged by the tenant's agent.

The tenant disputes the landlord's 2 Month Notice. The tenant's agent maintained that the notice was given to the tenant in bad faith. He confirmed that there have been issues between the landlord and tenant for the last 10 months. He said that on September 6, 2018, the landlord told the tenant he could get $1,200.00 per month for rent for her rental unit. He explained that the landlord can apply at the RTB for a rent increase above the allowable amount if he wants a higher rent, he does not have to evict the tenant. He testified that the tenant was given an option to sign a lease ending in February or March 2020 and it was legally binding. He said that both parties settled on an increase in rent for $100.00 more, based on the landlord's request for increased

hydro utility payments from the tenant. He maintained that the landlord told the tenant that if she paid more in utilities, she could stay in the rental unit.

The tenant's agent stated that the landlord was being "deceitful" in his collection of increased hydro utility payments from the tenant, that the agreement was only 1/3 of the hydro bills, and that the tenant had been paying much more than 33% of the bills. The tenant's agent claimed that the landlord was engaging in a pattern of "lies" and was preventing the tenant from exercising her rights, by coercing and intimidating her, contrary to section 95 of the *Act*. He maintained that he landlord was "paranoid" and was "spying" on the tenant and harassed her and another person that was living at the rental unit with the tenant. The landlord denied these allegations, saying that he has not been to the rental unit in a long time, he does not spy on or harass the tenant, and he has not been lying.

The tenant's agent maintained that the landlord has other units he can occupy, as he provided four different addresses to the tenant. The landlord denied same, claiming he lives in one unit and he only owns the rental property. The tenant's agent disputed that the landlord is obtaining more rent from the tenant living on the upper floor of the rental property, based on the tenant's calculations of the square footage of the rental property. The landlord disputed same, confirming he does not charge rent to the upstairs tenant based on the square footage of the rental property.

The tenant's agent said that the landlord's reasons for ending this tenancy keep changing. He stated that at the first RTB hearing in May 2019, the landlord said he was getting evicted from his residence, he did not get evicted, and he only withdrew the 2 Month Notice at the last minute at the hearing, where both parties reached a settlement. He claimed that at the second RTB hearing in September 2019, the landlord did not show up and the 2 Month Notice was cancelled. He confirmed that at this current hearing, the landlord is claiming financial difficulties.

The tenant's agent referenced Residential Tenancy Policy Guideline 2A and two Supreme Court of B.C. ("SCBC") cases noted in that guideline. The tenant did not provide full copies of those two SCBC cases. The tenant's agent maintained that the SCBC said that if there were previous 2 Month Notices and previous RTB hearings, it indicated bad faith and ulterior motives by the landlord.

The tenant's agent stated that the tenant seeks an order for the landlord to comply with the *Act*, by refunding all of the hydro utilities paid by the tenant to the landlord, to date. The tenant seeks a monetary order of $1,164.99 for this repayment, plus the $100.00 application filing fee.

The tenant's agent agreed that heat and electricity were not included in the tenant's monthly rent in section 3 of both the parties' written tenancy agreements, supplied by the tenant for this hearing. He maintained that section 6(3) of the *Act* meant that if the landlord did not include heat and electricity in the tenant's monthly rent, she did not have to pay for it. He said that the landlord was required to draft a clear tenancy agreement outlining the payment of utilities or the tenant did not have to pay. He stated that the landlord never gave copies of the utility bills to the tenant, he was trying to "cover up" charging the tenant for additional utilities, the "gentlemen's agreement" between the parties was for the tenant to pay 1/3, and she did so until the end of the hydro billing period on March 28, 2019. The tenant's agent said that even though the tenant agreed to pay 1/3, she would not do so at this hearing, because the landlord was "lying" and "covering up" the hydro bills, so she wanted a full refund of all utilities paid.

The tenant's agent maintained that the tenant asked the provincial hydro company to "reverse-engineer" the hydro bills for the rental unit and the tenant provided her charts for same. The tenant provided a breakdown of each bill she paid for each billing cycle, including the total percentage of the bill. The landlord agreed that the tenant paid those amounts in the chart located at Exhibit E, document 1 at page 4 of the tenant's evidence.

The landlord disputes the tenant's monetary application of $1,164.99. The landlord confirmed there was no agreement for how much the tenant would pay him each month for utilities, hydro was not included in the tenant's rent, and the amounts were at his discretion between 30 to 50%. He said that the tenant has not paid the last 8 months of hydro bills, he gave her copies of bills from April to July 2019, and because she failed to pay them, he did not provide her with copies of the most recent bills after July 2019. He stated that the tenant paid him for hydro based on his calculated requests, from 2016 to 2018, a period of two years, without complaint.

The landlord claimed that the tenant uses more hydro utilities than the upstairs tenant because she has baseboards for heat, as opposed to natural gas which costs less upstairs. The landlord maintained that he did not agree to a 1/3 share of the utility bills, despite being directed to emails referenced by the tenant's agent from February 21 and

25, 2019. The landlord claimed that for certain bills, he allowed the 1/3 amount, but he did not backdate this 1/3 amount to the year 2016, nor did he say that the tenant only had to pay 1/3 for her entire tenancy. He said that going forward, from April 2019 to present, he would agree to the tenant paying a 1/3 share of hydro utilities.

Analysis

Credibility

Overall, I found the landlord to be a more credible witness than the tenant's agent. Throughout the hearing, I found that the landlord provided his testimony in a calm, candid, consistent and forthright manner. When I questioned the landlord, he answered in a straightforward manner, admitting if he did not know the answer, if he did not have the information, or if the information was not helpful to him. For example, the landlord admitted that he was not evicted from his current residence and agreed that he did not provide the most recent hydro bills to the tenant.

Conversely, I found the tenant's agent to be a less credible witness than the landlord. The tenant's agent was argumentative, focused on irrelevant matters, and conducted himself in an agitated manner throughout the entire hearing. I found that much of the tenant's agent's submissions had little to do with the tenant's application and more to do with attacking the landlord. For example, the tenant's agent repeatedly accused the landlord of "lying," "covering up," "spying," and "harassing" the tenant. When the landlord denied these allegations, the tenant's agent continued to yell at the landlord and accuse him of lying. When given the opportunity to cross-examine the landlord, the tenant's agent chose to ask irrelevant personal questions rather than substantive questions. The tenant's agent continually interrupted the landlord's answers, shouting his disagreement.

When I allowed the tenant's agent to present the tenant's case, he became upset and questioned why I did not ask him questions or make comments while he was speaking. I informed the tenant's agent that I wanted to give him a full opportunity to speak without interruption, so I could hear his submissions.

Accordingly, where the evidence of the parties differed, I preferred the evidence of the landlord, as I found him to be a more credible witness, as compared to the tenant's agent.

2 Month Notice

According to subsection 49(8) of the *Act*, a tenant may dispute a 2 Month Notice by making an application for dispute resolution within fifteen days after she receives the notice. The tenant received the 2 Month Notice on October 1, 2019 and filed her application to dispute it on October 14, 2019. Therefore, the tenant is within the fifteen-day time limit under the *Act*. Where the tenant applies to dispute the notice within the timeline, the burden of proof is on the landlord to prove the reason on the notice, based on a balance of probabilities.

Section 49(3) of the *Act* sets out that a landlord 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.

Residential Tenancy Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member, states the following, in section "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.*
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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.*

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

I accept the landlord's testimony that he intends, in good faith, to move into the rental unit and that he has no ulterior motive. I accept the landlord's testimony that he is having financial difficulties and he intends to move out of his current rented residence. I accept the landlord's testimony that he rents the upper floor of the rental property at a higher rate than the tenant's unit, so he does not want to evict that other tenant for financial reasons and the other tenant does not want any roommates so the landlord cannot live with that tenant. I accept the landlord's testimony that he does not own any other properties which he can move in to, as alternative options.

I accept that these parties had two previous RTB hearings regarding two different 2 Month Notices issued by the landlord. However, the first hearing before me in May 2019, resulted in a settlement between the parties, and I was not required to make a decision based on the merits of the tenant's application. At the second hearing between the parties in September 2019, the landlord did not appear at that hearing, so the Arbitrator depended solely on the undisputed testimony provided by the tenant's agent regarding the 2 Month Notice. For the above reasons, I find that the two previous RTB hearings regarding the two previous 2 Month Notices do not sufficiently question the good faith or ulterior motives of the landlord.

I do not find that the hydro dispute between the parties to question the landlord's good faith intentions regarding the 2 Month Notice. I accept the landlord's undisputed evidence that the tenant has failed to pay eight months of hydro utilities to the landlord, from April 2019 to date. During the hearing, the landlord agreed with the tenant's calculations of what she has paid towards hydro utilities prior to April 2019. However, the landlord has not even filed a monetary application to recover these unpaid hydro amounts, nor has he issued a 10 Day Notice for Unpaid Rent or Utilities ("10 Day Notice") to the tenant. Therefore, while the parties may dispute what the tenant owes

with respect to hydro utilities for this tenancy, I do find that this affected the landlord's good faith intentions regarding the 2 Month Notice.

I find that the tenant's claims regarding good faith are mainly based on speculation. For example, the tenant's agent alleged that the landlord had four different residences to live in, based on addresses that he said were previously provided to the tenant. The tenant's agent contended that the above two SCBC cases referenced in Policy Guideline 2A, indicated that if the landlord had other residences, he had to provide these addresses to the tenant and he had to live there, or it was "bad faith." When I asked the tenant's agent to provide the specific references in those cases to establish his points, he became upset and claimed that was not what he had said.

I disagree with the tenant's agent's interpretation of the SCBC cases and the policy guideline. While the above Policy Guideline 2A refers to other comparable units in the property that the landlord *could* occupy, I found above that the landlord obtains more rent from the upper floor tenant and that tenant does not want a roommate, so the landlord does not want to move into that rental unit.

I find that the tenant failed to provide sufficient documentary proof that the landlord owns other properties, such as title searches, to show that the landlord is able to reside in other properties. The landlord denied this fact and confirmed that he only owns the one rental property and that he does not reside at a fitness centre, as alleged by the tenant's agent.

Based on a balance of probabilities and for the above reasons, I find that the landlord intends to move in to the rental unit in good faith to occupy it. I find that the landlord has met his onus of proof under section 49 of the *Act*.

I dismiss the tenant's application to cancel the 2 Month Notice, without leave to reapply. I uphold the landlord's 2 Month Notice, dated September 26, 2019.

Pursuant to section 55 of the *Act*, I grant an **order of possession to the landlord effective two (2) days after service on the tenant.** The landlord confirmed that the tenant did not pay rent for December 2019 and the tenant's agent did not dispute this fact during the hearing. Since the effective date of the 2 Month Notice passed on December 1, 2019, I find that the landlord is entitled to an order of possession immediately. I find that the landlord's 2 Month Notice complies with section 52 of the *Act*.

Monetary Claim

On a balance of probabilities and for the reasons stated below, I dismiss the tenant's application for an order for the landlord to comply with repaying the tenant hydro utilities and for the tenant's monetary application of $1,164.99, without leave to reapply.

I find that heat and electricity utilities are not included in the tenant's monthly rent, as per section 3 of both written tenancy agreements signed by the parties and provided for this hearing. Both parties agreed that these utilities were not included in the tenant's monthly rent. The landlord agreed that the tenant paid the hydro utility amounts reflected in the chart provided by the tenant for this hearing, located at Exhibit E, document 1 at page 4.

While the tenancy agreement does not specify the amount of utilities to be paid by the tenant, I find that the parties established an acceptable conduct of the landlord specifying the amount to be paid by the tenant for each bill and the tenant paid that amount. While the amounts and percentages of payment fluctuate for each billing cycle, which occurs every two months, so do the amounts on each bill, depending on the winter and summer months, as confirmed by the landlord.

Although the tenant's agent referenced an agreement for the tenant to pay the landlord 1/3 of utility bills, he pointed to emails from February 2019. The landlord agreed that for the unpaid amounts from April 2019 forward, he would accept 1/3, but claimed that he did not agree to this for the entire tenancy. I find that for the previous bill amounts, prior to April 2019, the tenant paid the amount requested by the landlord, based on her voluntary willingness to do so.

I find that the tenant's conduct and actions of paying hydro utilities to the landlord, based on his requests, for a period of over 2.5 years from the beginning of her tenancy on August 15, 2016 to March 28, 2019, which is the last billing cycle paid by the tenant according to her chart, to be an established and agreed form of conduct between the parties.

Therefore, I find that the tenant is not entitled to a refund of the hydro utilities paid by her for this entire tenancy in the amount of $1,164.99. The tenant agreed to amounts requested by the landlord and I find these amounts to be reasonable. These amounts range from $40.00 at the lowest end to $94.59 at the highest end, according to the

tenant's chart, for a two-month billing period cycle. This amounts to between $20.00 to $47.30 per month.

As the tenant was unsuccessful in her application, I find that she is not entitled to recover the $100.00 filing fee from the landlord.

Conclusion

The tenant's entire application is dismissed without leave to reapply.

I grant an **Order of Possession to the landlord effective two (2) days after service on the tenant.** Should the tenant fail to comply with this Order, this Order may be filed 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 *Residential Tenancy Act*.

Dated: December 09, 2019

Residential Tenancy Branch