Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDCT FFT

Introduction

In this dispute, the tenants seek compensation in the amount of $11,160.00, against their former landlord, under section 51 of the *Residential Tenancy Act* (the "Act"). They also seek recovery of the $100.00 filing fee under section 72 of the Act.

The tenants applied for dispute resolution on August 17, 2019 and a dispute resolution hearing was held on December 17, 2019. The tenants, the landlord, and an articling student assisting the landlord, attended the hearing. All parties were given a full opportunity to be heard, to testify, to make submissions, and to call witnesses. The parties were duly sworn.

While there were some initial service issues shortly after the tenants' application, no issues were raised at the hearing and all parties acknowledged serving their evidence on the other side. And, all parties confirmed that they had sufficient opportunity to review the other sides' evidence in advance of the dispute resolution hearing.

I have reviewed evidence submitted that met the *Rules of Procedure,* under the Act, and to which I was referred, but have only considered evidence relevant to the issues of this application.

Issues

1. Are the tenants entitled to compensation under section 51 of the Act?

2. Are the tenants entitled to recovery of the filing fee under section 72 of the Act?

Background and Evidence

I start by noting that the tenants provided clear testimony and supporting documentary evidence throughout the hearing. Likewise, the landlord's articling student provided clear, logical, and

well-written submissions, which included a chronology of events, written argument, and caselaw.

I further note at the outset that, except where specifically noted below, the tenants did not dispute most of the landlord's description of the events, and vice versa. Finally, it should be noted that while both sides submitted a significant volume of evidence, neither party disputed most of that evidence. Where the parties disputed each other's testimony and argument was limited to issues of good faith, the intentions of the landlord, and, the frequency and nature of the landlord's use of the rental unit between February 28, 2019 and August 31, 2019.

The facts about the tenancy itself are rather straightforward. For thirteen years the tenants lived in the rental unit, a one-bedroom suite in the upper-level of an old character house. The old house contains seven individual rental units in total. The house itself is situated in an idyllic, suburban neighbourhood.

While the tenants had lived in the rental unit for thirteen years, they had also signed a one-year fixed-term tenancy which commenced March 1, 2018 and ended February 28, 2019. A written tenancy agreement, a copy of which was submitted into evidence, indicated that monthly rent was $930.00. A security deposit was paid; this the landlord returned.

In another city lived the landlord. He lived in a rather less-than-idyllic urban neighbourhood. He got married in September 2018 and he, and his spouse, decided to try, at some point, move into the rental unit and look for work in that city. They were both unemployed at the time and looked forward to new opportunities in either city.

After deciding that they wanted to move, on October 30, 2018, the landlord served the tenants with a Two Month Notice to End Tenancy for Landlord's Use of Property ("Notice"). The Notice stated that the tenancy would end December 31, 2018.

The Notice, a copy of which was entered into evidence, stated that the reason the tenancy was ending was because "rental unit will be occupied by the landlord or the landlord's close family member."
After some discussions and wanting to ensure that the Notice complied with subsection 49(2)(a)(iii) of the Act (requiring that such a notice does not end a fixed-term tenancy earlier than the end date), the landlord and tenants confirmed that the date of the tenancy ending would self-correct to February 28, 2019. This occurred on November 1, 2018.

The next day, the landlord asked the tenants to sign a Mutual Agreement to End Tenancy ("MAET"). In an email exchange dated November 2, 2018, the landlord asked if the tenants would consider signing the MAET "as a favour to us." To which the tenants respond, "We are not actually asking any favors of you."

Why the MAET? Because the landlord did not want to run afoul of subsection 51(2) of the Act, which requires a landlord to use a rental unit for the reason they ended the tenancy (as was done here) after the tenancy actually ends. In this case, the landlord planned on, and eventually did, have a wedding and go on a honeymoon in March 2019. In order to make some money and help pay for the wedding and honeymoon, the landlord thought it would be a good idea to rent out the rental unit for a few weeks through Airbnb. He was worried that, if he simply rented out as an Airbnb, he would not be using it for the purpose that the tenancy would end.

But the tenants ultimately chose not to sign the MAET and told the landlord as such on November 4, 2018. In testimony, the tenants explained that they felt rather bitter about being served an eviction notice – after calling the rental unit home for 13 years — but then mere days later being asked to mutually end the tenancy so that the landlord could rent it out as an Airbnb. In their email response to the landlord on November 4, the tenants write "We had no intention of moving out before receiving your eviction notice and therefore don't feel compelled to sign a mutual agreement."

The following month, December 2018, the landlord's spouse successfully found work and signed a one-year contract on December 31, 2018; the new job was, and is, located in the city in which they and the landlord ordinarily reside, and not the city in which the rental unit is located. The landlord's spouse commenced her new job on January 16, 2019.

Over he next few months the landlord and his spouse had their wedding and took a honeymoon to México. The landlord and his spouse were away March 13 to 27, 2019.

On February 28, 2019, the tenants vacated the rental unit and moved away. However, they later discovered that the landlord had, in their opinion, never completely or fully occupied the rental unit, and, eventually re-rented it to new tenants. The tenants were taken "for a shock" and felt that "we were evicted unfairly."

The tenants testified, and argued, that the evidence illustrates that the landlord "didn't occupy or use it [the rental unit] as storage." Instead of occupying the rental unit, the landlord instead replaced the flooring and completed some painting. The rental unit, according to the tenants, remained largely empty, despite the landlord telling them that he was going to move into it.

Between February 28, 2019, the date on which the tenants moved out, and August 10, 2019, the landlord testified, and provided documentary evidence supporting his testimony, that he was physically present at the rental unit. After returning from the wedding and honeymoon in March, the landlord was physically present at the rental unit, and at the property, and in the rental unit city on April 7, 8, 14, 26, 27, May 21 and 22 (on which date the landlord asked another tenant in the property if he could use the wifi). And, he was there May 23, 28, June 8, 26, July 9, and 17.

In June 2019, one of the other tenants (in another unit in the house) died. The landlord told the tenants in June 2019 that the rental unit would be re-rented. On June 19, 2019, the tenants

went to visit the landlord at the rental unit and from their observations (as stated in their written submission) that “It was very clear no one was living there.”

In an email dated June 26, 2019 the landlord wrote to the tenants the following (edited):

> I talked to [another tenant in the character house] he said [tenant] was concern [*sic*] About me not moving in and evicted you guys for no reason. I am changing the floor myself and and my wife is going through a training program in Vancouver. Our moving will take longer than anticipated. The place is empty if circumstances change, you guys will be the first to know. Thank you

At some point between the death in June and the end of July 2019 the landlord decided to move into the deceased tenant’s rental unit (it was smaller) and listed the now-nearly empty rental unit on Craigslist on August 4, 2019 available for rent September 1, 2019.

A copy of the Craigslist advertisement was submitted into evidence. The advertisement indicated that the rental unit was newly renovated and available for $1,650.00 a month. On August 10, 2019, the tenants discovered the listing and noted that some of the landlord’s personal effects were visible in the advertisement’s photographs. They also visited the house and spoke to some other tenants who told them that the rental unit was being rented out.

During his testimony, I asked the tenant how he could be certain that the other tenants with whom he spoke would know which rental unit he meant. The tenant explained that “it was a small [or close knit] community”; there was no mistaking which rental unit they were talking about.

Finally, on September 1, 2019, and a full 6 months since the tenancy ended, new tenants moved into the rental unit.

I note that the tenants did not dispute that the landlord was present in the rental unit or in the city on the dates in question. The landlord testified that throughout this period, he commuted to and resided in the rental unit when he needed to for business; the landlord “was in the rental unit here and there.” He had furnished the rental unit sparsely but had a bed there and lived in the rental unit when he was not living with wife.

Both parties throughout the hearing occasionally referred to the rental unit as the landlord’s “secondary residence” and variations thereof, versus the rental unit being the landlord’s “primary residence.”

During her final submissions the landlord’s articling student submitted that the Notice was issued in good faith by the landlord and that he had no intention of ever breaching the Act. The landlord added that he believes in karma, and, that it would have never been his intention to not issue the Notice in good faith.

To date, the landlord's spouse continues to work in the city and the landlord continues to commute back and forth when necessary. He uses the smaller rental unit when not living with his wife.

During their final submissions the tenants argued that "The landlord was not living there. The place [was] empty." And, that the landlord "was not there as often as he said." There was, they admit, a "bed in the suite, and maybe a few personal items."

They further submitted that the whole purpose for issuing the Notice was a deliberate, premeditated job, with the sole end goal of putting the rental unit back on the rental market in September of 2019.

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. In this case, the onus is on the tenants to prove that they are entitled to compensation under section 51 of the Act.

Compensation under section 51 of the Act

Section 51 of the Act speaks to compensation that a tenant may receive when given a notice to end tenancy under section 49 (landlord's use of property). Subsection 51(2) of the Act states as follows:

> Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
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> (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Subsection 51(3) of the Act permits extenuating circumstances to excuse a landlord from having to compensate a tenant under subsection 51(2) of the Act.

Application of subsection 51(2)(a) of the Act

In this dispute, the purpose of the Notice was that the landlord or a close family member of the landlord intended in good faith to occupy the rental unit. The effective date of the Notice, that is, the date on which the tenancy would end, was February 28, 2019.
The tenants argue that the Notice was issued in a premeditated manner and thus not in good faith. And, it was argued that the landlord's occasional use of the rental unit does not constitute "occupation" as contemplated by the Notice or the Act. The phrase "secondary residence" was used occasionally during arguments.

However, the landlord testified that throughout the time period February 28 to September 1, 2019, exclusive, they occasionally stayed in the rental unit when they were in town. That the landlord did not reside full-time in the rental unit does not, I find, exclude a determination that the landlord was indeed occupying the rental unit.

Indeed, many individuals occupy (or live in, or reside) their homes sporadically for any numbers of reasons, such as military personnel on overseas deployments, travelling sales professionals, and individuals like the landlord who conduct business in two cities.

The tenants testified that they observed a bed and some of the landlord's personal belongings in the rental unit and did not dispute (and they did not provide any contradictory evidence) that the landlord did, in fact, occupy the rental unit when they were in town. In other words, after the honeymoon was over, the landlord appears to have taken steps to, and began to, occupy the rental unit as soon as April 7, 2019, and then on many occasions thereafter.

I note that the tenants did not present any argument or submissions as to what constitutes a "reasonable period after the effective date of the notice." As such, I am left with the facts themselves, and find that the landlord took steps – such as putting in a bed and personal effects into the rental unit, and then ultimately staying there on an occasional basis commencing in early April 2019 – within a reasonable period after February 28, 2019 to accomplish the stated purposes for ending the tenancy, which was to occupy the rental unit.

Five weeks between the tenants' moving out and the landlord taking up occasional occupancy is, I find, a reasonable period. For this reason, I find that the tenants have not established on a balance of probabilities that they are entitled to compensation under subsection 51(2)(a) of the Act.

Any claim advanced under this subsection is therefore dismissed.

Application of subsection 51(2)(b) of the Act

I must now decide whether subsection 51(2)(b) of the Act applies. That is, was the rental unit used for the stated purpose for at least 6 months' duration beginning within a reasonable period after the effective date of the notice? I find that it was not.

The landlord occupied the rental unit from late March or early April 2019 to (as stated in his testimony and reflected in the articling student's submissions) July of 2019 when

> [the] Smaller unit on lower floor becomes available to rent once former tenant passes away in June, decease [*sic*] tenant's cat previously adopted by Tenants, Landlord moves into smaller unit

On August 4, 2019, and again to quote from the articling student's written submission, the landlord "places premises for rent on Craigslist, available as of September 1, 2019." A few days later, the tenants discover the Craigslist advertisement on August 10, 2019, and see some of the landlord's personal items in the photo of the rental unit.

Thus, the landlord admits to vacating the rental unit in July 2019 for the clear purpose of placing the rental unit on the rental market. While it is reasonable to allow a landlord to occupy the rental unit on an occasional basis as he did, it is, I hold, unreasonable to accept that the landlord sets up multiple occupied rental units within the very same building. That he left some of his personal items in the rental unit out of which he moved does not, I find, establish continued occupancy as contemplated by the Act.

In the circumstances, I find that the stated purpose and reason for ending the tenancy – that the landlord intended in good faith to occupy the rental unit – entered its final phase when the landlord moves into the smaller rental, and, comes to an end the moment the landlord placed the ad on Craigslist. For me to find that the landlord "occupied" the rental unit after he placed an ad for the rental unit on Craigslist, and while living in the smaller unit would be, I conclude, contrary to the intentions of the Act.

This approach to statutory interpretation as it pertains to "occupancy" is consistent with *Residential Tenancy Policy Guideline 2A,* which notes that

> Other definitions of "occupy" such as "to hold and keep for use" (for example, to hold in vacant possession) are inconsistent with the intent of section 49, and in the context of section 51(2) which – except in extenuating circumstances – requires a landlord who has ended a tenancy to occupy a rental unit to use it for that purpose (see Section E). Since vacant possession is the absence of any use at all, the landlord would fail to meet this obligation. The result is that section 49 does not allow a landlord to end a tenancy to occupy the rental unit and then leave it vacant and unused.

Given the above, I find that the rental unit was not used for the stated purpose for at least 6 months' duration starting within a reasonable period after the effective date of the notice.

Rather, the rental unit was used for the stated purpose for only a period of more than 4 but less than 5 months.

For this reason, I find that the landlord must pay the tenants an amount that is equivalent of twelve times the monthly rent payable under the tenancy agreement, which totals $11,160.00.

Application of subsection 51(3) of the Act ("Extenuating Circumstances")

Having found that the landlord is required to compensate the tenants under subsection 51(2)(b) of the Act, I must now turn to the issue of whether the landlord may be excused from paying the tenants pursuant to subsection 51(3) of the Act, which states as follows:

> The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
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> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
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> (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Before applying this exception to the landlord's case, it is useful to first briefly turn to the Residential Tenancy Branch policy regarding "extenuating circumstances."

Residential Tenancy Policy Guideline 50 speaks, albeit briefly, to the issue of extenuating circumstances. It states that an arbitrator "may excuse a landlord from paying compensation if there were extenuating circumstances that stopped the landlord from accomplishing the purpose or using the rental unit." The policy then provides three examples of what might constitute an extenuating circumstance and two examples of what might not constitute such a circumstance.

To cite further from the policy, examples of an extenuating circumstance are "A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before moving in. [. . .] A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire. [and] A tenant exercised their right of first refusal, but didn't notify the landlord of any further change of address or contact information after they moved out."

Where the following are "probably not extenuating circumstances: […] A landlord ends a tenancy to occupy a rental unit and they change their mind. […] A landlord ends a tenancy to renovate the rental unit but did not adequately budget for renovations."

These examples imply and suggest that what makes a circumstance “extenuating” is a lack of reasonable foreseeability. A death in the family or a wildfire cannot be said to be reasonably foreseen, while a landlord’s change in mind or inadequate budgeting is not only reasonable, but predicable based on normal and ordinary human conduct.

Applying this approach to the landlord’s circumstances, I find that, while another tenant’s death may be unforeseeable, the death itself did not prevent or necessitate the landlord from occupying the rental unit or from deciding to put it back on the rental market.

The death of the tenant was an impetus for the landlord’s move into the smaller rental unit, but it is not itself an extenuating circumstance that prevented the landlord from using the rental unit for the stated purpose for another few months. Rather, he decided to move out of a personal preference.

With respect to the landlord’s articling student’s argument, the landlord’s wife’s unanticipated contract to work in the other city or the landlord’s wedding and honeymoon are not extenuating circumstances that apply to, or in any way relate to, the failure of the landlord to occupy the rental unit for a duration of six months. Those two events occurred earlier in time and are unrelated to the landlord’s decision to occupy the rental unit for a period of only 4 or 5 months.

He moved out long after these events.

Good Faith

As to the matter of good faith, the tenants argued that the Notice was issued with some sort of premeditation (which calls into question good faith). The landlord argued that there was nothing less than good intentions (and thus good faith) in issuing the Notice.

The landlord’s articling student submitted that “the intention of the landlord at the time the notice to vacate was given is critical.” She cited a County Court of Vancouver case *Holdom v. Lucas,* 1982 CanLII 3339 (BC SC), in which the issue before the court was “whether the failure to occupy for the full 12-month period is determinative or whether that simply raises a rebuttal able presumption as to the *bona fides* of the landlord.” The court held that failure to occupy simply raises a rebuttable presumption as to the *bona fides* of the landlord.

With respect, *Holdom* deals with the *Residential Tenancy Act*, R.S.B.C. 1979, a statute that has evolved substantially over the past 40 years to the point of unrecognizability. Moreover, this previous Act to which the case pertains did not include an equivalent section 51, which provides an “out” for landlords when there exist extenuating circumstances. Indeed, the Notice was issued under the current version of the Act.

In summary, neither the absence or presence of good faith is determinative in my concluding that (1) the landlord did not use the rental unit for the stated purpose for a period of six months,

and (2) the landlord did not have extenuating circumstances preventing him from using the stated purpose for a period of six months.

Recovery of the Filing Fee

As the tenants were successful in their application, pursuant to section 72 the Act I grant the tenants compensation in the amount of $100.00 for the cost of the filing fee.

Summary and Monetary Award

In summary, 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 tenants have met the onus of proving their claim for compensation under subsection 51(1)(b) of the Act. As such, I order that the landlord pay, including the cost of the filing fee, to the tenants an amount $11,260.00.

Conclusion

I hereby grant the tenants a monetary order, in the amount of $11,260.00, which must be served on the landlord. The order may be filed in, and enforced as an order of, the Provincial Court of British Columbia.

This decision is final and binding, except as otherwise permitted by the Act, and is made on authority delegated to me under section 9.1 of the Act.

Dated: December 20, 2019

Residential Tenancy Branch