



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, CNL, FFT, OLC

Introduction

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

- cancellation of the landlord's Two Month Notice to End Tenancy for Landlord's Use of Property issued January 22, 2019 (the "**Notice**") pursuant to section 49;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- a monetary order in the amount of \$5,000 for reimbursement of legal fees incurred disputing the Notice and a previous Two Month Notice to End Tenancy for Landlord's Use of Property pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

This application was heard on March 16 and April 21, 2020. I issued an interim decision following the March 16, 2020 hearing. The tenant attended both hearings and was represented by two counsel at the March 16, 2020 hearing and by a single counsel only at the April 21, 2020 hearing. The landlord was represented by the same counsel at both hearings. The landlord's property manager ("**TK**") attended both hearings. Two of the landlord's agents ("**GM**" and "**PM**") attended the March 16, 2020 hearing but did not attend the April 21, 2020 hearing.

I addressed sufficiency of service of the parties' application materials in the interim decision and will not repeat the reasons here.

Issues to be Decided

Is the tenant entitled to:

- 1) an order cancelling the Notice;
- 2) a monetary order of \$5,000;
- 3) an order that the landlord comply with the Act;
- 4) recover his filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenant entered into a written tenancy agreement in March 1994 with a previous owner of the residential property. The residential property contains 10 rental units. The tenant occupies a rental unit on the top floor. The residential property does not have an elevator. There is a shared laundry room for all the units. In May 2019, the landlord purchased the residential property. Monthly rent is currently \$870. The tenant paid a security deposit of \$290 at the start of the tenancy which the landlord continues to hold in trust for the tenant.

The landlord is a corporation that was incorporated on May 9, 2019. It has a solitary director, "**CL**". The sole shareholder of the landlord is CL as trustee of a joint spousal trust (the "**Trust**"). A copy of the instrument creating the Trust was not entered into evidence, but the parties agree that CL is the sole beneficiary of the Trust.

On June 1, 2019, the landlord proposed to enter into a new tenancy agreement with the tenant, but the tenant refused.

In June 2019, the landlord issued a two-month notice to end tenancy for landlord's use (the "**June Notice**"). Counsel for the landlord stated that the landlord issued the June Notice so that CL's daughter and son-in-law ("**GM**" and "**PM**", respectively) intended to move into the rental unit.

The tenant retained legal counsel and disputed the June Notice. Prior to the matter coming to a hearing, the landlord agreed to withdraw the June Notice.

The landlord's counsel stated that the reason for withdrawing the Notice was because GM and PM were living in Vietnam at the time, where PM worked, and they "immensely enjoyed their stay" there. As such, PM decided to extend his employment contract until July 31, 2020. Accordingly, GM and PM had to remain in Vietnam, and did not require use of the rental unit.

On October 24, 2019, the landlord's agent gave the tenant a notice of rent increase raising the rent from \$848 to \$870, effective February 1, 2020.

PM suffered a number of health issues in 2019 including swelling of the knees, dengue fever, fainting spells, bronchitis, and pneumonia. This caused GM and PM to hasten their return to Canada. PM testified that these health issues are ongoing, but controllable.

On January 22, 2020, the landlord served the tenant with the Notice. It specified an effective date of May 31, 2020. It cited as the reason for ending the tenancy as:

The landlord 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.

In this case, the landlord asserts that GM and PM intend to live in the rental unit, once vacated.

GM and PM gave evidence at this hearing. They testified that they lived in a modest, one-bedroom apartment in Vietnam. They testified that they were aware the rental unit had limited amenities, was on the third floor, and had shared laundry. They admitted that they themselves owned an apartment in a neighboring municipality to the rental unit, and that it was currently rented out to a tenant ("**GM and PM's Apartment**"). They purchased this apartment in July 2019.

Counsel for the tenant suggested that the fact that GM and PM's Apartment was purchased in 2019 is proof of the fact that they intended to return to Canada in the summer of 2019 and live in that apartment, and that they had no intention to move into the rental unit, as the June Notice suggested. GM and PM denied this. They testified that they want to move into the rental unit as it is a ten-minute drive from where CL lives, whereas GM and PM's Apartment is much further away.

GM and PM testified that they wanted to reside in a quiet, shaded rental unit upon their return to Canada, and they understood that the rental unit met these requirements. TK testified that the rental unit was both quiet and shaded. GM and PM testified that they had seen photographs of the rental unit (taken by TK) a few days prior to the hearing, and that it appeared to meet their needs.

The tenant testified that the rental unit was not quiet or shaded. He testified that, while the rental unit is at the rear of the residential property, the rental unit overlooks a back alley in which six dumpsters are unloaded daily. He testified that the walls are thin and that he frequently hears dogs barking. He testified that sometimes he has to wear earplugs due to the loud noises. He testified that he has installed black-out curtains to keep the "very, very bright" light out of the rental unit. The tenant testified that other rental units in the residential property are quieter and are darker due to their positioning.

No documentary evidence was submitted by the parties relating to the other rental units in the residential property. However, the counsel for the landlord stated that the tenant's unit has the lowest rent of all 1-bedroom units in the residential property (by approximately \$150). She provided the following information, which the tenant did not contest, regarding 1-bedroom units in the residential property:

Unit Number	Start of Current Tenancy	Monthly Rent
1	2018	\$1,500
2	2016	\$970
3	2006	\$976
6	2012	\$992
7*	1994	\$848
9	2015	\$970

*the tenant's rental unit

Tenant's counsel submitted, and the landlord did not deny, that CL holds either directly or as a beneficiary of a principal residence trust (different from the Trust) 13 properties in the lower mainland valued in excess of \$44 million, in addition to the residential property she holds a beneficial interest in via the Trust.

Tenant's Position

1. Notice Invalid

a. No Good Faith

The tenant's counsel argued that the Notice was not issued in good faith by the landlord. She submitted that "it defies logic" that CL's daughter and son-in-law would require residence in a modest apartment such as the rental unit, given CL's apparent wealth and that they own their own apartment (GM and PM's Apartment).

The tenant's counsel submits that the Notice and the June Notice were issued due to the tenant's refusal to sign a new tenancy agreement in on June 1, 2019. She argued that such a request by the landlord was improper and that the tenant was entitled to maintain the tenancy on the terms of the original tenancy agreement.

The tenant's counsel argued that the issuance of the June Notice (causing the tenant to incur significant legal fees to dispute it), then withdrawing it before the matter could come to a hearing only to issue the Notice in January 2020 (causing the tenant to incur further legal fees) indicates bad faith of the party of the landlord. She characterized this as a "bad faith campaign" as retribution for the tenant's refusal to enter into a new tenancy agreement.

b. No Individual Shareholder of Landlord

The tenant's counsel argued that the rental unit is owned by the corporate landlord, the shares of which are owned by the Trust. She submitted that the Trust is not an individual, as contemplated by section 49 of the Act. Accordingly, the landlord is not a "family corporation" as defined by the Act. As such, the Notice must be invalid.

In the alternative, tenant's counsel submitted that, if the owner of the shares of the landlord is CL, as trustee for the Trust, then CL does not "own" the shares to the extent necessary for the landlord to meet the definition of "family corporation" under the Act.

The tenant's counsel agreed that CL, as trustee for the Trust, is the sole shareholder of the landlord. She argued, as trustee, CL possesses legal title only to the landlord's shares. As trustee for the Trust, CL does not have a beneficial interest in the landlord's shares; this interest belongs to the beneficiary of the Trust.

The tenant's counsel argued that the fact that CL is the sole beneficiary of the Trust should not cause the landlord to be considered a "family corporation", however. She submitted that the fact that CL is both the trustee and the sole beneficiary of the Trust is incidental. She argued that trusts often require the same person to occupy different roles, and each of these roles must be kept separate and distinct. She argued that attributing the interests of a beneficiary of a trust to the legal owner of the assets held in trust for the beneficiary would defeat the purpose of a trust (that is, bifurcating the ownership interests and assigning them to separate entities).

2. Monetary Claim

The tenants counsel argued that the tenant is entitled to a monetary order of \$5,000 due to the landlord's multiple "baseless eviction notices and illegal demands". She characterized this amount as both a "penalty" and a recover of legal costs. She conceded that, under ordinary circumstances, legal costs are not recoverable at RTB hearings, but argued that the landlord's conduct was so egregious that it warranted compensation of the landlord's legal fees as its own head of damages, rather than as costs. She did not provide any authority for considering legal fees incurred as their own head of damages, rather than as a cost of litigation.

Landlord's Position

1. Notice is Valid

Counsel for the landlord argued that the Notice was issued in good faith. She argued that the financial circumstances of CL are not relevant to assessing if the Notice was issued in good faith. She submitted that the tenants provided no evidence that the Notice was not issued in good faith. She stated that there was no evidence of "tenant flipping" on the part of the landlord, or that the landlord had any other motive to end the tenancy other than to allow GM and PM to move into the rental unit.

Counsel for the landlord argued that GM and PM demonstrated a *bona fide* intention to move into the rental unit upon their return to Canada. She stated that the fact they did not move back after June Notice was issued should not influence whether the Notice is valid, as the reason for their not having done so was a valid one.

In her written submissions, counsel for the landlord stated that the notion that GM and PM do not actually want to live in the rental unit due to the wealth of CL to be “offensive” to the landlord. She argued that GM and PM currently live in a modest apartment, and that the idea they would not live in an apartment of a similar character once in Canada is “based solely on assumptions”.

Counsel for the landlord stated that the rental unit was selected for the PM and GM as it met the requirements of PM and GM (that it was quiet and shady), and that it required the least amount of work as opposed to the other units to get move-in ready. No evidence was provided as to the condition of other units considered by the landlord or by CL for PM and GM to occupy, or indeed, what other units were considered at all.

In light of the lack of reasonable bases for the position that the Notice was not issued in good faith, landlord’s counsel argued that the Notice must be found valid.

2. CL is an individual shareholder of the landlord

Counsel for the landlord argued that the share in the landlord are not owned by the Trust, but rather by CL in her capacity as trustee. She argued that a trust is not a legal entity, and as such, cannot hold property. She provided an article entitled *Legal Capacity of Trusts* in support of this position. She also argued that, under BC trust law, there is no requirement that the settlor, trustee and beneficiaries of a trust be different individuals. She provided a Tax Bulletin entitled *Understanding Trusts* in support of this position.

Landlord’s counsel argued that CL is the owner of the shares not the trust. As such, the landlord meets the definition of “family corporation” as defined by section 49 of the Act, and GM and PM are “close family members” as defined by the section 49 of the Act. Accordingly, the landlord was entitled to issue the Notice.

3. Monetary Claim

In her written submissions, counsel for the landlord wrote:

As per section 67 of the Act, the Landlord submits that issuing the Notice and the Tenant’s choice to retain legal counsel is not a “damage or loss [that] results from a party not complying with [the] Act, the regulations or a tenancy agreement.” Legal fees are not something that the RTB orders compensation for as it is not a damage or loss that results from a breach of the Act. The Landlord reiterates that it has complied with the Act, regulations and tenancy agreement.

Additionally, as it has complied with the Act, counsel argued, the landlord should not face any monetary penalty.

Analysis

1. Notice issued in Good Faith

Policy Guideline 2A discuss the presence of good faith when a landlord issues a notice to end tenancy. It states:

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.

So, the landlord bears the onus prove, on a balance of probabilities, that it possessed an honest intention with no ulterior motive when issuing the Notice.

Based on the evidence before me, I find that it is more likely than not that the landlord possessed an ulterior motive when issuing the Notice.

I should note that I accept that PM and GM possess the intention to move into the rental unit. I do not find that they have acted in bad faith in relation to the Notice. However, the

Act does not require those individuals moving into the rental unit to possess good faith. Rather, the issuer of the Notice (in this case the landlord, and by extension, the landlord's sole shareholder and director CL) is required to possess the requisite good faith.

CL did not provide any evidence at the hearing, so assessing her intentions when issuing the Notice is difficult. Her intentions, however, may be inferred from evidence tendered by the parties at the hearing.

In the course of their testimony, I got impression that PM and GM had no particular attachment to the rental unit in particular, or its features. Rather they were satisfied that a unit had been selected for them that met the specification of being proximate to GM's mother. The fact that they had not seen photos of the rental unit until a few days prior to the hearing (which means that they had not seen the rental unit prior to the June Notice or the Notice being issued) indicates that the rental unit was selected for them, rather than that they had selected the rental unit themselves.

As such, I find that it was CL, and not PM or GM, that selected the rental unit for PM and Gm's use. Therefore, I must assess the criteria upon which CL relied to select the rental unit. I accept PM and GM's testimony that they wanted a quiet, shady apartment. I have conflicting evidence that the rental unit is quiet or shady (the tenant denied this and TK confirmed this). I accept that "quiet" and "shady" may be a matter of degree and opinion.

However, what is not disputed is that the rental unit is located on the third floor of a residential property that does not have an elevator. Additionally, it is not disputed that PM has serious health issues which include swelling of knees. I accept that these health issues may be controllable. However, I am unsure why, if PM has ongoing knee issues, the rental unit, being on the top floor of the residential property, would have been selected by CL for him and GM to move into, when other rental units on lower floors on the same side of the residential property exist.

I have no evidence before me to assess whether the rental unit was in better condition (or more move-in ready) than any other unit in the residential property.

Indeed, the lack of evidence from CL makes it difficult to determine what other units were considered for GM and PM to move into. In this absence of evidence, I cannot find that the rental unit was any more or less move-in ready than any other unit in the residential property (or in any other property owned or controlled by CL).

It is not disputed that the rental unit is has the lowest rent of any 1-bedroom unit in the residential property. I find that it is this characteristic, and not the rental unit's condition, its quiet nature or the amount of shade it receives, that distinguished the rental unit from other units located in the residential property.

As such, I find that the landlord possessed an ulterior motive when selecting the rental unit as the unit where the PM and GM would move to. The fact that the rental unit had the lowest rent of any unit in the residential property was a factor in issue the Notice. Therefore, per Policy Guideline 2A, the landlord did not possess the good faith intention required when issuing the Notice. Accordingly, the Notice is invalid and of no force or effect. The tenancy shall continue.

As I have already determined that the Notice is invalid, it is not necessary for me to determine if the landlord is a “family corporation” as defined by the Act.

2. Monetary Claim

Legal fees and disbursement incurred in the course of RTB proceedings are not compensable under section 67 of the Act. The only fee or disbursement incurred in the course of prosecuting a claim that the Act permits to be reimbursed is the filing fee.

The tenant’s counsel also argued that the landlord should be penalized for acting in bad faith when issuing the Notice. Policy Guideline 16 states:

D. AMOUNT OF COMPENSATION

In order to determine the amount of compensation that is due, the arbitrator may consider the value of the damage or loss that resulted from a party’s non-compliance with the Act, regulation or tenancy agreement or (if applicable) the amount of money the Act says the non-compliant party has to pay. The amount arrived at must be for compensation only, and must not include any punitive element.

[emphasis added]

As such, I decline to order a penalty against the landlord for its failure to act in good faith when issuing the Notice. I also note that the Act, at Part 5.1, does allow for administrative penalties to be issued against parties in breach of the Act. However, the authority to issue such penalties has not been devolved to arbitrators by the Director. Instead, it lies with the RTB’s Compliance and Enforcement Unit, and members of the public who report an issue to this unit are not entitled to receive any portion of any monies collected through the administrative penalty process.

Accordingly, I dismiss the tenant’s monetary claim.

Conclusion

Pursuant to section 49 of the Act, I order that the Notice is cancelled and of no force or effect.

Pursuant to section 72(1) of the Act, as the tenant has been partially successful in his application, he is entitled to recover his filing fee from the landlord. Pursuant to section 72(2) of the Act, he may withhold \$100 from one future month's rent payment in satisfaction of this amount owed.

The portion of the tenant's application for a monetary order is dismissed, without leave to reapply.

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: May 20, 2020

Residential Tenancy Branch