



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC FF

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution. The participatory hearing was held on September 24, 2020. The Tenant applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement, pursuant to section 51; and,
- recovery of the filing fee.

The Tenant attended the hearing. The Landlord attended the hearing, along with her former agent, S.L. The Landlord confirmed receipt of the Tenant's application and evidence packages (3 packages total), and did not take issue with the service of those documents. The Tenant confirmed receipt of the Landlord's evidence package and did not take issue with the service of those documents. I find both parties sufficiently served each other with the required documents, and evidence.

All parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The property owner/Landlord was present at the hearing, and explained that they used to employ an agency to assist with managing this rental unit. The Landlord explained that this agent is no longer employed by them, and stopped managing their rental unit

when the tenancy ended, at the end of October 2019. The former agent was present at the hearing (was initially named on this application as the Respondent) to confirm this information. I note the issue in this application is whether the Tenant is entitled to compensation based off a 2-Month Notice to End Tenancy for Landlord's Use of the Property. The ground that was selected was that the Landlord, or close family member, would occupy the unit. Given it is the owner, and Landlord, who is responsible for fulfilling the obligations under this type of Notice to End Tenancy, I amend the Tenant's application to remove the previously employed agent, and to add the owner and Landlord as the respondent. The Landlord was present and confirmed that they were ready to proceed with the hearing and were in agreement with this amendment. Neither party took issue with this amendment.

Issues to be Decided

- Is the Tenant entitled to compensation for money owed or damage or loss under the Act?

Background and Evidence

Both parties agree that monthly rent was set at \$2,280.00 at the end of the tenancy. The Tenant moved out of the unit at the end of October 2019. The Tenant stated that when she vacated the rental unit, she moved a matter of blocks away, and as a result, she was able to keep an eye on the property after she moved out.

The Tenant spoke to some of the issues she had with the Landlord leading up to the issuance of the 2-Month Notice to End Tenancy for Landlord's Use (the Notice). The Tenant stated that the Landlord was often not complying with the Act, and would make them fight hard just to get things they were already entitled to. More specifically, the Tenant stated that they were given a rent increase one year into the tenancy, and as part of this increase, they were only given one month's notice as to when it would take effect. The Tenant now realizes that she should have been given 3 months notice at least. The Landlord did not refute giving the rent increase in this manner.

The Tenant also stated that they had an issue with mould in the basement wall. Although the Landlord responded to the issue, eventually, the Tenant feels she had to fight too hard to get the issue remediated properly. The Tenant stated that there was visible mould in the basement wall and it took months to get it addressed. The Landlord feels they responded in an appropriate manner and did the best they could.

The Tenant also pointed out that the Landlord was unhappy they obtained a dog. The Tenants stated they had permission to get a dog, but the Landlord pointed to the tenancy agreement to show that it was never agreed upon, formally.

The Tenant also pointed out that when they had the mould issue, they had to threaten arbitration in order to get the Landlord to properly deal with the issue and give them compensation. The Tenant also noted that after getting this Notice in the summer of 2019, they again had to threaten arbitration in order to get the one month's rent as compensation under section 51 of the Act. The Tenant stated that this compensation should be automatic but despite it being a clear requirement under this type of Notice, the Tenant stated that the Landlord demanded payment right until the Tenants moved out. The Tenants stated it was not until they threatened arbitration and cancelled cheques that they received their free month's rent.

The Tenant stated that they had a friend on the block who would routinely walk her dog past the subject property after the Tenant moved out. This friend, T.A., wrote a letter in support of this application. She stated that she walked by daily, and between November 2019 and April 2020, it did not appear as though anyone was living in the house. She noted that the blinds were always closed, the mailbox was usually overflowing, lights were always off, there was never a vehicle in the driveway. T.A. noted that she saw the house go up for sale on May 9, 2020.

The Tenants uploaded a photo of the sold sign on the house which was taken on August 9, 2020.

The Landlord explained that she moved in right after the Tenant moved out, on November 2, 2019, as per the photo she provided. The Landlord provided copies of electricity and gas bills under her name, to show she used the property for herself, and didn't rent it out to anyone else. The Tenants noted that the energy consumption noted on the bills was less than half of what they paid. The Landlord explained that it was mostly just her living in the house, and she was often away working, so it makes sense that her bills were lower.

The Landlord stated that she lived in the house from November 2, 2019, until August 28, 2020, which is when the new owners took possession of the house after it sold. The Landlord explained that she listed the house on May 6, 2020, got an offer and a deposit on August 9, 2020, and accepted the offer and lifted all conditions on August 20, 2020.

The Landlord stated that, from November to March (when COVID hit), she worked during the weekdays, and was only home on evenings and weekends. The Landlord stated that after the COVID lockdown began, she worked from home, and was mostly at the house on a full-time basis. The Landlord further explained that she has a medical condition called Graves Disease. The Landlord provided a letter from her endocrinologist showing she had appointments, and more recently, a thyroid surgery. The Landlord attached literature to show that her thyroid condition can cause inflammation of the eyes, and swelling of the eye tissue. The Landlord stated that she routinely keeps the blinds closed and the lights down low because of her eye sensitivity, and insists she was in fact living in the house after the Tenants moved out.

The Landlord provided a video as part of her evidence which shows her playing badminton in the living room of her (dark) home. The video shows an empty coat rack, and little to no furniture in the living room. The Landlord provided a copy of a text message thread where she sent this video to a friend on March 19, 2020.

The Landlord explained that the mail appeared as though it was not being collected because she would leave previous tenant mail in the outside mailbox so that they could come and get it at their own convenience. The landlord provided a text message sent to her previous agent in February 2020, regarding some mail that for was previous tenants. The Landlord provided several photos as part of her evidence package. However, the photos are embedded in a document, and there is no timestamp on the photos. The Landlord provided photos showing she changed some lightbulbs, moved a table in, had a few personal items in the house, and that she was eating some meals in the house.

The Landlord also provided a couple of text messages, largely in Chinese, but the dates and photos were legible. The Landlord provided text message threads showing that she had a soil delivery in April. The Landlord took this photo from within the house. The Landlord also provided photos of the greens she was growing in the backyard, along with photos of her family next to the garden. The Landlord explained that she and her family had soil delivered so that some veggie greens could be grown, sometime in April and May 2020. The Landlord also provided undated photos of the kitchen, showing some appliances, paper towels etc, plus some of the meals she prepared over the months she was living in the house.

The Landlord stated she feels her lifestyle is being disrespected, as she spends most of her time being quiet at home, with little signs of activity from the outside of the home.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. In this case, the Tenant is seeking 12 month's compensation, pursuant to section 51(2) of the Act, (12 x \$2,280.00) because she believes the Landlord did not use the rental unit in the manner they indicated on the Notice that was issued.

In this case, the landlord selected the following ground on 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 Tenant does not believe the Landlord ever moved into or occupied the house. If the tenant can show that the landlord who ended their tenancy under section 49 of the RTA has not:

- taken steps to accomplish the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice to end tenancy, or
- used the rental unit for that stated purpose for at least six months beginning within a reasonable period after the effective date of the notice

the tenant may seek an order that the landlord pay the tenant additional compensation equal to 12 times the monthly rent payable under the tenancy agreement. Under section 51(3) of the RTA, a landlord may only be excused from these requirements in extenuating circumstances. This is specified clearly under section 51 of the Act, below.

I turn to the following portion of the Act:

Tenant's compensation: section 49 notice

51 (2) 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

- (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*
- (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.*

(3) 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

- (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or*
- (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.*

I note the Tenant does not believe the house was ever occupied by the Landlord. The Tenant provided a witness statement and testimony speaking to the fact that there were very little signs of life in the subject property after the Tenant moved out. The Landlord has rebutted this argument, with explanations and evidence of her own.

I turn to *Policy Guideline #2A - Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member*. I find this policy guideline has some useful definitions regarding a Notice issued under section 49. It says:

OCCUPYING THE RENTAL UNIT

Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see also: Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that "occupy" means "to occupy for a residential purpose." (See for example: Schuld v Niu, 2019 BCSC 949) The result is that a landlord can end a tenancy to move into the rental unit if they or their close family member, or a purchaser or their close family member, intend in good faith to use the rental unit as living accommodation or as part of their living space.

Vacant possession

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.

Reclaiming a rental unit as living space

If a landlord has rented out a rental unit in their house under a tenancy agreement (for example, a basement suite), the landlord can end the tenancy to reclaim the rental unit as part of their living accommodation. For example, if a landlord owns a house, lives on the upper floor and rents out the basement under a tenancy agreement, the landlord can end the tenancy if the landlord plans to use the basement as part of their existing living accommodation. Examples of using the rental unit as part of a living accommodation may include using a basement as a second living room, or using a carriage home or secondary suite on the residential property as a recreation room.

The Tenant pointed out that the Landlord (or agent of) has failed to comply with the Act, and made it difficult, on a few occasions to receive things they were entitled to. More specifically, the Tenant pointed to a rent increase with improper notice, disagreements over pets, having to threaten arbitration to get compensation for a mold issue in the basement, and also having to fight to get the one month's worth of compensation they are rightfully owed after receiving a Notice of this type. The Tenant believed that the Landlord wanted them out, in part, because they had challenging interactions and not because she was actually going to move in. I accept that there may have been challenges, but this must be viewed within the overall context of all evidence and testimony presented.

It is undisputed that the house went up for sale in early May, 2020. The Landlord stated this happened on May 6, 2020, and the house eventually sold in August 2020. I note the tenancy ended on October 31, 2019, which is over 6 months prior to when the house was listed for sale.

In order for the Tenant to be successful on this application, she must demonstrate that the Landlord failed to use the property, as listed on the Notice for at least 6 months.

I note the Tenants do not feel the Landlord ever moved into the house. I accept that the Tenant frequently passed by the rental house, and rarely saw any activity. She also noted the blinds were never open, the mailbox was full, few lights were on, and there was little vehicle activity. The Landlord provided some explanations for some of these issues. More specifically, the Landlord stated that she would never open the blinds and only used a few interior lights largely due to the fact that she has light sensitivity due to a medical condition. The Landlord stated that she has Graves Disease, and has recently had surgery to remove her thyroid. As per the medical documentation provided (surgery preparation document, info bulletin, appointment confirmation), one of the side effects of this disease is inflammation of the eyes. The Landlord stated that she rarely turns the lights on, even at night. The Landlord also stated that she does not open the blinds for similar reasons, as it is easier to control the light level by using light switches, as needed. I note that neither the Tenant, nor their witness, T.A, saw any lights on. However, it is not clear exactly when they went by, and whether it was at night, or during the day.

In any event, I accept that the Landlord has Graves Disease, and has recently undergone treatment for this disorder, including surgery. It is not inconsistent for someone with this type of disease to have issues with their eyes. Although light sensitivity is not a noted side effect, eye inflammation is, and it seems reasonable that these issues could be linked.

I also note the Landlord provided an explanation regarding the mail, in that she left the mail in the mailbox so that previous Tenants could retrieve it. The Landlord provided a text message from February which she sent to her previous agent in order to try and get the previous Tenants to pick up their mail.

I note that the Landlord has provided a series of photos and text messages. All of the photos are not timestamped. However, the Landlord provided screenshots of the text message threads they were embedded in. These threads show the dates that the photos were transmitted to friends and family. Many of the photos show very little furniture. However, some furniture and personal belongings are apparent in a few of the photos. I note there are no photos of closets, clothing, or bedrooms. However, there are a couple photos of the bathroom, dining room, and kitchen. More specifically, the Landlord sent a text message on March 30, 2020, which contained a photo of the

bathroom. In that photo, there are several bottles of lotions, and shampoos present, some of which were in the shower stall.

Further, the Landlord provided another photo as part of a text message thread on April 14, 2020, which appears to be taken from within the house, looking out into the yard. The photo shows a fresh soil delivery in the backyard for planting a veggie garden. The Landlord provided a subsequent photo showing the vegetable greens she grew with her parents. The Landlord also provided utility bills in her name, starting right after the Tenant moved out, up until when this dispute was filed.

I accept that the manner in which the Tenant chose to use the house was somewhat unconventional, made it appear as though the house was vacant, from an outside perspective. However, I do not find the Tenant has sufficiently demonstrated that the Landlord did not occupy the rental unit for a 6 month period (November – May). It is undisputed that the house went up for sale around May 6, 2020, which is just over 6 months after the Landlord took possession of the house. If I am satisfied the Landlord occupied the house for this period of time, then the Landlord fulfilled the obligations of the Notice she issued. The key question is whether or not the Landlord occupied the rental unit for residential purposes, and whether she used the rental unit as living accommodation or as part of her living space.

I find there is no evidence that the Landlord rented the house out to anyone else for the 6 month period following the effective date of the Notice. I accept that all utilities were immediately placed in the Landlord's name, and it showed some usage, despite it being lower than when the Tenants were living there previously. The Landlord has provided little to no evidence showing her bed, bedroom, clothes in closets etc. However, the Landlord did provide some photos showing she had moved a basic amount of living furniture, some kitchen appliances, and bathroom supplies into the rental unit. The photos appear to be taken at random times in the early part of 2020. I also note the Landlord went to the trouble of getting a soil delivery, and planting veggie greens in April 2020. I find the limited photographic record shows some occupation of the rental unit for residential purposes.

I do not find the Tenant has sufficiently demonstrated that the Landlord failed to occupy the rental unit for a minimum of 6 months. I find the Landlord has sufficiently rebutted the Tenant's allegations. On a balance of probabilities, I am satisfied that the Landlord occupied the home and used it as part of her living space from November through till at least early May. After early May, the Landlord had met the minimum requirements under

section 49 and 51 of the Act, and was entitled to change use (move, sell, etc) at that time.

Ultimately, I find it more likely than not that the Landlord has used the rental unit for the stated purpose (as laid out on the Notice) for at least 6 months. As such, I dismiss the Tenant's application on this matter. As the Tenant were not successful in their application, I decline to award them recovery of the filing fee they paid to make this application.

Conclusion

The Tenant's application is dismissed, in full, 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: September 25, 2020

Residential Tenancy Branch