Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, OLC, FFT

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") to cancel a Two Month Notice to End Tenancy for Landlord's Use dated October 28, 2020 ("Two Month Notice"); for an order for the Landlord to comply with the Act or tenancy agreement; and to recover the $100.00 cost of their Application filing fee.

The Tenants appeared at the teleconference hearing and gave affirmed testimony. No one attended on behalf of the Landlord. The teleconference phone line remained open for over 20 minutes and was monitored throughout this time. The only persons to call into the hearing were the Tenants, who indicated that they were ready to proceed. I confirmed that the teleconference codes provided to the Parties were correct and that the only persons on the call, besides me, were the Tenants.

I explained the hearing process to the Tenants and gave them an opportunity to ask questions about the hearing process. During the hearing the Tenants were given the opportunity to provide their evidence orally and to respond to my questions. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

As the Landlord did not attend the hearing, I considered service of the Notice of Dispute Resolution Hearing. Section 59 of the Act states that each respondent must be served with a copy of the Application for Dispute Resolution and Notice of Hearing. The Tenants testified that they served the Landlord with the Notice of Hearing documents by Canada Post registered mail, sent on December 19, 2020. The Tenants provided Canada Post tracking numbers as evidence of service. I find that the Landlord was served with the Notice of Hearing documents in accordance with the Act. I, therefore, admitted the Application and evidentiary documents, and I continued to hear from the Tenants in the absence of the Landlord.

Preliminary and Procedural Matters

The Tenants provided the Parties' email addresses in the Application and confirmed these in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Tenants that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing.

As I advised the Tenants in the hearing, Rule 2.3 authorizes me to dismiss unrelated disputes contained in a single application. The Tenants indicated different matters of dispute on the application, the most urgent of which is the application to set aside a Two Month Notice. I found that not all the claims on the Application are sufficiently related to be determined during this proceeding. I advised the Tenants that I would, therefore, only consider their request to set aside the Two Month Notice and the recovery of the $100.00 Application filing fee at this proceeding. Therefore, the Tenants' other claim is dismissed, with leave to re-apply.

Section 55 of the Act states that if a tenant's application to cancel a notice to end tenancy is dismissed, and I am satisfied that the notice to end tenancy complies with the requirements under section 52, I must grant the landlord an order of possession.

The Landlord submitted a letter to the RTB dated January 18, 2021 ("Letter"). The Tenants said they were not served with the Letter. To be administratively fair, I shared the contents of the Letter with the Tenants. In this letter, the Landlord states that she and her husband will not be attending the hearing, because she believes the Tenants have the burden of proof in this matter. She stated:

> January 18/21
>
> To the Residential Tenancy Branch,
>
> My husband and I will not be at attendance to the hearing re [file number] dispute.
>
> The tenant is responsible to defend the dispute and we are not, we asked for a postponement so we could attend and the tenant declined. Defense is not required in our case, we need to move into our home before the continued costs

of animal care, vehicle storage and renting accumulate. As our home has no mortgage associated with it, these costs to us are over and above, and we will be seeking compensation from these two tenants that we have grown to hate ever so much.

We have evidence that our lawyer, [M.L.] at [D.] Law, stated does not require admission and that defense is an act of war wherein we are not inclined.

[Landlord and her husband's printed names] .

[reproduced as written]

The onus to prove their case is on the person making the claim. In most cases, this is the person who applies for dispute resolution. However, a landlord must prove the reason they wish to end the tenancy when a tenant applies to cancel a Notice to End Tenancy.

Issue(s) to be Decided

- Should the Two Month Notice be cancelled or confirmed?
- Is the Landlord entitled to an Order of Possession?
- Are the Tenants entitled to recovery of the $100.00 Application filing fee?

Background and Evidence

The Tenants submitted a copy of the tenancy agreement and confirmed the following details in the hearing. They confirmed that the periodic tenancy began as a fixed term, starting on November 1, 2018, and running to November 1, 2019. The tenancy then operated on a month-to-month basis.

The Tenants said they pay the Landlord a monthly rent of $1,710.00, which includes a $60.00 payment of the repayment plan in place. They confirmed that rent is due on the first day of each month. They confirmed that they paid the Landlord a security deposit in two parts. The Tenants said that they first etransferred her $300.00, and then they paid the Landlord an additional $525.00 for a $825.00 security deposit. I note that this is consistent with half of the original rent the Tenants paid the Landlord. The Tenants said they did not pay the Landlord a pet damage deposit.

The Tenants submitted a copy of the Two Month Notice, which was signed and dated October 28, 2020, it has the rental unit address and it says it was served by registered

mail on October 28, 2020. The effective vacancy date on the Two Month Notice was January 1, 2021 at noon, with the grounds being that the rental unit will be occupied by the Landlord or the Landlord's close family member - the Landlord and her spouse, in this case.

In the hearing, the Tenants said:

> We've been in this tenancy for quite some time ,and the Landlord has raised on two separate occasions that she was going to be moving in. These came on the heels of repairs needed at the suite. Then she no longer needed the unit and was going to make repairs. She also said she was going to sell it, and this was in 2019.
>
> The timing of [the Two Month Notice] was a bit suspicious, which lends to her not acting in good faith. We received the repayment plan first, which wasn't signed by [the Landlord], our Landlord - it was by [her husband]. This was shortly after the repayment plan and her not getting a rent increase.
>
> We started to look for a new rental unit. It has been a very retaliatory relationship. We made arrangements for a repayment plan, but we told her it was null and void – it was not signed by the Landlord. We started looking and found the first ad. [for the rental unit] on [a common online advertising platform. The ad. was posted on the 20th, and we found that it was subsequently deleted by the author the very next day. Then we received the Two Month Notice of eviction. An update to the ad. was to move in on January 1 - that was updated. The very next day it was deleted, then we were served with the [eviction] notice.

The Tenants submitted copies of the online advertising listings, which included a photograph of the residential property and included:

> $975/2br – 1000ft^2 – Roommate in Beautiful 2 bedroom with large yard and lots of parking ([neighbourhood, city]).

This advertisement did not have a date on it, but the Tenants had noted beside the advertisement that it "didn't clearly capture on original print: 'Time: 2:06 PM, Date: 2019-10-29". They noted the same for a second advertisement, which was the same as the first, except that it also stated: "Available January 1".

The Tenants' went on to say:

> With that and our experience in all respects, we feel like this is not actually - she isn't acting in good faith. When we read section 49, our understanding is it's an arm's-length relationship, but the advertisement is for not an arm's-length relation.
>
> So, her putting up the ad. - it looked like the two rooms were going to be rented out. That's another indication that it doesn't seem like the interpretation of the Act itself; it never says that a roommate or a tenant can move in. These are not in the specific relationship outlined in the Act. Based on that and the timing, it seems curious about the service. It looks like she has an ulterior motive.
>
> Additionally, based on our rent split in two, it would be $825.00 each, but it was listed for $975.00 for the room, which is a little more than what would be evenly divided for the current rent.
>
> Lastly, the home is still listed for sale.

The Tenants submitted a copy of an advertisement with a photograph of the residential property, including the address, which offers it for sale. The Tenants added a note to the photographic evidence providing the names of the primary agent and brokerage firm, which they said were not clearly captured in the original print of the advertisement. In the hearing, they said that this advertisement is still active as of that date.

The Tenants continued their testimony:

> Going back to the basics in our interpretation of the Act itself, what transpired in the October time frame shows that the Landlord didn't have intent to move into the house.
>
> We have raised a threshold of evidence . . . . Even if there were no pattern of retaliation, and at best, opportunities of inconsistent behaviour, even if her credibility was not in question, her lack of appearance today or an agent for her, would lead any reasonable person to assume she's not acting in good faith. She has not met the threshold to meet that burden in this matter.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Rule 6.6 sets out the standard of proof and the onus of proof in dispute resolution proceedings, as follows:

> 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 most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.
>
> [emphasis added]

Accordingly, I find that the Landlord has the burden of proving the validity of the Two Month Notice on a balance of probabilities.

Section 49 (3) states that a landlord may end a tenancy for the landlord's use, specifically for the landlord or a close family member to move in. Section 49 (3) states:

> **49** (3) A landlord who is an individual 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.
>
> [emphasis added]

Policy Guideline #2A ("PG #2A") is intended to help parties to an application understand issues that are likely to be relevant. PG #2A addresses the good faith requirement of section 49 of the Act, as follows:

> **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.
>
> [emphases added]

Based on the testimony and documentary evidence before me, overall, I find that the Tenants have raised the possibility of the Landlord having an ulterior motive for eviction. The undisputed evidence before me is that the residential property was advertised for rent and for sale near the time the Two Month Notice was issued. I find this indicates that it is more likely than not that the Landlord did not intend to move into the rental unit after ending this tenancy.

Rather, I find it more likely than not that the Landlord is trying to evict the Tenants from the residential property, because she wants to re-rent it to someone else or sell it. Further, I find there is evidence before me of serious acrimony between the Parties, as evidenced by the Letter – the Landlord's only submission to the RTB on this matter. In the Letter, the Landlord said: "…we will be seeking compensation from these two tenants that we have grown to hate ever so much". I find this supports the conclusion that the Landlord has an ulterior motive for ending the tenancy.

After hearing the Tenants' testimony and reviewing the Parties' evidentiary submissions, I find that the Landlord's version of events does not ring true in this situation and is inconsistent with the requirements of section 49 of the Act and PG #2A. Accordingly, I

find that the Landlord has not provided sufficient evidence to meet her burden of proof in this matter and I cancel the Two Month Notice and find that it is void and of no effect.

The Tenants are successful in their Application, and as such, I also award them with recovery of their $100.00 Application filing fee. The Tenants are authorized to deduct $100.00 from one upcoming rent payment in satisfaction of this award.

Conclusion

The Tenants are successful in their Application to cancel the Two Month Notice, because the Landlord provided insufficient evidence to meet her burden of proof in this matter. The Two Month Notice is cancelled and is of no force or effect. The tenancy continues until ended in compliance with the Act.

Given their success in this proceeding, the Tenants are awarded recovery of the $100.00 Application filing fee, which they are authorized to deduct from one upcoming rent payment in satisfaction of this award.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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: January 26, 2021

Residential Tenancy Branch