Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDCT FFT

Introduction

The tenants applied for compensation pursuant to section 51(2) of the *Residential Tenancy Act* ("Act"). In addition, they apply for the cost of the filing fee under section 72(1) of the Act.

One of the tenants, an advocate for the tenants, an agent for the landlord, and a witness for the landlord attended the hearing on January 29, 2021. No issues of service were raised by the parties, and all parties were affirmed.

Issues

1. Are the tenants entitled to compensation?
2. Are the tenants entitled to recover the cost of the filing fee?

Background and Evidence

I have only reviewed and considered oral and documentary evidence meeting the requirements of the *Rules of Procedure,* to which I was referred, and which was relevant to determining the issues in the application. Only relevant evidence needed to explain my decision is reproduced below.

The tenancy began many years ago and ended on October 15, 2018. There was no written tenancy agreement; the tenancy agreement was oral. Monthly rent was $2,000.00.

On August 10, 2018, the landlord served the tenants with a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"). A copy of the Notice was submitted into evidence. The Notice indicated that the tenancy would end on January 31, 2019, and that the tenancy was ending so that the landlord or a close family member of the landlord could occupy the rental unit.

The parties discussed the fact that the landlord, at some point after issuing the Notice, changed his mind and told the tenants that they could stay in the rental unit for at least another year. On or about August 17, 2018, the landlord telephoned the tenants to let them know that they could stay another year. In an email dated August 17, 2018 (and submitted into evidence) the tenant O. emailed the landlord's son and states as follows:

> Hi [M] and [J],
> I called [landlord], saying that landlords asking his reference. He said we can stay another year. Is this Right, with the note he gave us?

On September 21, 2018, the tenants provided ten days' notice to end the tenancy on September 30, 2018 (ostensibly under section 50(1) of the Act). On September 30, the landlord's son emailed the tenant (O.) to say that he was not doing particularly well and that it would be good if the tenants cleaned the house and porch as soon as possible. He then adds, "I would then instruct the girls to offer the property on a short-term rental so that we can begin renovations after the new year." The tenant responded later that day and said that they needed a few more days to move out.

The tenants' advocate argued that the landlord did not actually reside in the rental unit and that the rental unit was rented out 7 months after the tenants moved out. While the landlord's granddaughters did not fully move in, the advocate argued that grandchildren are not considered a close family member for the purposes of the Act. Further, while the landlord may have been delayed in moving in, the tenants argue that that there were not extenuating circumstances (as will be addressed in a moment) that prevented the landlord from occupying the rental unit.

The landlord's agent testified that the landlord revoked the Notice because the landlord had changed his mind. He argued that it was fully understood between all the parties that the landlord had cancelled the Notice, and that it would no longer be in effect. He further gave evidence that the landlord was unable to live in the rental unit due to his physical fitness and that he was stuck in Croatia.

Finally, he argued that the extenuating circumstances that prevented the landlord from occupying the rental unit were (1) the number of hospital visits, and (2) the loss of the landlord's wife. The landlord returned to Croatia in order to bury his wife.

It should be noted that the parties, particularly the tenants' advocate, gave lengthy testimony and submissions regarding the good faith and motivations behind the Notice. However, I find these theories speculative and irrelevant to the issues before me.

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.

I must first turn, however, to the issue of whether the Notice was withdrawn, as this will determine whether the claim may proceed.

The landlord's agent argued that there was a clear understanding between the parties that the tenancy would continue for at least another year. He argued that this revocation, which occurred by phone call and an email, ended the Notice. Conversely, the tenants' advocate argued that it was not a revocation, but rather, an extension of the Notice. She further argued that the landlord cannot unilaterally revoke a notice to end tenancy and that neither express nor implied waiver occurred in the circumstances.

Residential Tenancy Policy Guideline 11 – Amendment and Withdrawal of a Notice to End Tenancy addresses the amending, withdrawal and waiver of a notice to end tenancy. Under section C, the guideline states that

> A landlord or tenant cannot unilaterally withdraw a notice to end tenancy. A notice to end tenancy may be withdrawn prior to its effective date only with the consent of the landlord or tenant to whom it is given. A notice to end tenancy can be waived only with the express or implied consent of the landlord or tenant (see section D below). It is recommended that withdrawal of a notice to end tenancy be documented in writing and signed by both the landlord and the tenant.

In this dispute, the landlord spoke to the tenant on the phone and said that the tenants could stay another year. The tenant appeared to understand this, as evidenced by her email to the landlord's son. Further, I find that the landlord's conduct in speaking with the tenant, along with the tenant's response email to the landlord's son, is evidence that there occurred an express waiver of the Notice. In other words, the tenants clearly understood that the Notice no longer applied to them. As per the policy guideline, the landlord was not required to document this withdrawal. For these reasons, based on the evidence before me, I find that there occurred a withdrawal of the Notice. That the tenants then decided to vacate the rental unit a little more than a month later does not quash this withdrawn Notice. (That there was no specific date other than "another year" mentioned in the discussions leads me to also find that there was no "extension" or amendment to the Notice.")

Given my above finding that the landlord withdrew the Notice, the tenants are not entitled to compensation based on what occurred after the tenancy ended in respect of the Notice. Accordingly, I dismiss the tenants' claim for compensation without leave to reapply. Further, I dismiss the tenants' claim for recovery of the application filing fee.

Conclusion

I hereby dismiss the tenants' application, without leave to reapply.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: February 2, 2021

Residential Tenancy Branch