



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL

Introduction

This hearing dealt with the tenant's application pursuant to section 49 of the *Residential Tenancy Act* (the "**Act**") to cancel the landlord's Two Month Notice to End Tenancy for Landlord's Use of Property (the "**Notice**").

The tenant attended the hearing. The landlord did not attend the hearing. However, an agent of the purchaser of the rental unit ("**JD**") attended the hearing on behalf of the purchasers (listed on the cover of this decision), JD advised me that the purchasers now owned the rental unit and that the Notice was issued at their request, pursuant to the contract of purchase and sale between members of the landlord's family and the purchasers. The tenant consented to JD appearing on behalf of the purchasers and making submissions as to the validity of the Notice. Both attendees were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified, and JD confirmed, that the tenant served the landlord with the notice of dispute resolution form and supporting evidence package. I find the landlord has been served in accordance with the Act.

JD submitted documents to the RTB online evidence portal the day before the hearing. These documents were either procedural in nature (JD's authority to Act on behalf of the purchasers and a schedule of parties) or included in the tenant's evidence (an addendum to the contract of purchase and sale). The Rules of Procedure require that all evidence of a respondent be served on the applicant no later than seven days prior to the hearing. This was not done. As such, I exclude the evidence submitted by JD from this hearing.

Issues to be Decided

Is the tenant entitled to an order cancelling the Notice?

If not, is the landlord entitled to an order of possession?

Background and Evidence

While I have considered the documentary evidence and the testimony of the attendees, 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 landlord and the tenant entered into a written, fixed-term tenancy agreement starting June 1, 2020 and ending December 1, 2020. The tenant requested of the landlord that the term be extended by an additional year, but the landlord did not respond to this request. As such, the tenancy now continues on a periodic basis (that is, month-to-month). The rental unit is a laneway house located on a residential property (the "**property**") which also include a single-detached house (the "**main house**"). Monthly rent is \$1,000 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$500. The sellers transferred this deposit to the purchaser when as part of the sale of the property. The purchasers retain this deposit.

On July 29, 2020, the members of the landlord's family (who own the property) and the purchasers (MD, SD, and HD) entered into a contract of purchase and sale. The completion date was February 16, 2021. A copy of the contract of purchase and sale was not entered into evidence, although an addendum, dated September 22, 2020, was. The addendum listed the dated of the initial contract, and the completion date.

JD testified that the sale was subject to three conditions:

- 1) that the purchasers secure financing;
- 2) that the sellers remove all junk and debris from the garage of the main hosue;
and
- 3) that the seller provide vacant possession of the "whole house including both suite", which JD testified indicated the rental unit, and another rental suite located in the main house.

JD testified that the contract of purchase and sale contained a holdback provision, in the event that the sellers could not provide vacant possession as required by the contract. As such, the inability of the sellers to provide vacant possession would not have had the effect of halting the sale.

JD called the sellers' realtor ("**HB**") to give evidence. He confirmed that the above-mentioned subjects were included in the contract of purchase and sale. He testified that the financing subject was removed on December 7, 2020 and that the "junk removal" subject was removed on January 20, 2021.

On December 7, 2020, the landlord issued the Notice to the tenant. It listed the reason for ending the tenancy as "all of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this notice because the purchaser or close family member intends in good faith to occupy the rental unit."

The Notice indicated that a copy of the contract of purchase and sale was attached as was a copy of the purchaser's written request for the seller to issue an eviction notice attached. The tenant testified that a copy of the addendum to the contract of purchase and sale was attached, as well as an email dated December 6, 2020, from the purchaser's realtor which reads:

Hi [HB], as per my client [MD], pls have the property vacated with no tenants as agreed closing date. Thx.

On December 23, 2020, MD wrote an email, which was provided to the tenant shortly thereafter, that stated:

Hello we would like to inform that we will need the coach house and the bedroom with the separate entrance to be vacant before we take possession of the [property] due to the fact we would like to do renovations, we would need it vacant as per our contract as my daughter and her fiance are moving in.

Sadly, JD testified that MD passed away shortly before this hearing. She testified that the other purchasers (SD, MD's son, and HD, MD's daughter-in-law) shared MD's reason for wanting vacant possession of the rental unit. She testified that several other of the purchaser's family members would be moving into the property. Among these would be SD's mother.

JD testified that the purchasers intended to repaint the rental unit and the main house prior to moving in, and to do some small touch up. She testified that they did not intend to do any renovations in the rental unit whatsoever. She testified that SD's mother would be moving into the rental unit.

Analysis

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

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.

So, despite the fact that this is the tenant's application, the landlord (or the purchasers) bear the evidentiary burden to prove that it is more likely than not that the Notice is valid.

Section 49 of the Act sets out the basis upon which the Notice was issued. It, in part, states:

Landlord's notice: landlord's use of property

49(1) In this section:

"close family member" means, in relation to an individual,

(a) the individual's parent, spouse or child, or

(b) the parent or child of that individual's spouse;

[...]

"purchaser", for the purposes of subsection (5), means a purchaser that has agreed to purchase at least 1/2 of the full reversionary interest in the rental unit.

[...]

(5)A landlord may end a tenancy in respect of a rental unit if

(a) the landlord enters into an agreement in good faith to sell the rental unit,

(b) all the conditions on which the sale depends have been satisfied, and

(c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:

(i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;

(ii) the purchaser 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.

[emphasis added]

Based on the testimony of JD, I am satisfied that the SD's mother is a close family member of one of the purchasers (as SD is a purchaser listed on the contract of purchase and sale).

Based on the testimony of JD and HB, I am not satisfied that the requirement set out at section 49(5)(b) has been met. When the Notice was issued on December 7, 2020, not all of the conditions of the contract of purchase and sale were satisfied. The subject clause that the junk and debris be removed from the garage had not yet been discharged. It was not until almost six weeks later that this condition was met.

As I do not have a copy of the contract of purchase and sale, I cannot say for certain whether the sale would not have completed had the garage not been cleaned. However,

both HB and JD referenced a holdback provision if the sellers could not provide vacant possession of the rental unit but did not reference any such provision regarding the garage cleaning condition. Additionally, both HB and JD are realtors, and used the term “subject” to describe the condition that the junk be removed from the garage. This term has a specific meaning in the context of real estate transactions and creates a mandatory requirement that must be fulfilled before the sale can be completed. As such, I understand that the sellers’ removal of the junk from the garage was a “condition on which the sale depend[ed]”. Based on these two pieces of information, I find it more likely than not that the sellers had to discharge the condition that they removal the junk from the garage in order for the sale to be completed.

As this condition had not been satisfied at the time the Notice was issued, the Notice is invalid. The Notice could have been issued after *all* the conditions on which the sale depended had been satisfied. Therefore, the earliest the Notice could have been issued was on January 20, 2021, after the garage was cleaned.

On this basis, I order that the Notice is cancelled.

As the Notice is cancelled, there is no need for me to consider the “good faith” requirement of section 49(5)(c)(i). I explicitly make no findings of fact on that subject.

Conclusion

The tenant is successful in her application. The Notice is cancelled and of no force or effect. The tenancy shall continue.

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: March 19, 2021

Residential Tenancy Branch