Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL, PSF, OLC, RR, FFT**

Introduction

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

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) pursuant to section 49;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The parties were each assisted by family members. The landlord was represented by counsel.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the participants each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Should the 2 Month Notice be cancelled? If not are the landlords entitled to an Order of Possession?
Are the tenants entitled to any of the other relief sought?
Are the tenants entitled to recover the filing fee from the landlords?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

This tenancy began in October 2017. The current monthly rent is $1,255.65 payable on the middle day of each month. A security deposit of $625.00 was collected and is still held by the landlords.

There was a previous hearing under the file number on the first page of this decision dealing with the tenants application to cancel a 2 Month Notice to End Tenancy for Landlord's Use dated October 16, 2020. The reason provided on that notice for the tenancy to end was that the landlord or a close family member intended in good faith to occupy the rental unit.

In the earlier hearing, the previous arbitrator found that the landlords had not met their onus of proving the ground on which they issued the notice and cancelled that 2 Month Notice. In making their determination the arbitrator wrote in part:

> While I have no doubt that the landlords are issuing the Notice in good faith, I am not persuaded that the daughter intends to occupy the rental unit in a manner consistent with section 49(3) of the Act. There are no photographs of boxes with the daughter's belongings (that the tenants argued would be proof that the daughter intends to move into the rental unit) because, on the evidence before me, the daughter does not appear to be intending to move into and occupy the rental unit as living accommodation.

A decision cancelling the earlier 2 Month Notice was issued on January 11, 2021. The landlords issued the present 2 Month Notice dated January 13, 2021 providing identical reasons for the tenancy to end as the earlier notice, that the landlord or close family member intend to occupy the rental unit. The landlords' evidence submitted for the present hearing include photographs of boxes with household items they say belong to

the landlords' daughter. The landlord and their witness testified that they intend for the rental unit to be occupied for residential purposes, as the permanent residence of the landlords' adult daughter.

Counsel for the landlords takes the position that, despite the fact that the present 2 Month Notice is issued for reasons identical to the earlier notice, this is a distinct and new matter because a new Notice to End Tenancy was issued and not barred by the principles of *res judicata*.

The tenants take the position that the present 2 Month Notice is issued for the same reasons as the earlier notice of October 2020. The tenants submit that a final and binding decision was made regarding that notice and the landlords ought to be barred from issuing further notices on the same basis.

The tenants submit that prior to the 2 Month Notice of October 2020 there was an earlier 2 Month Notice issued in February 2018 which provided the same reason for the tenancy to end, that the rental unit would be occupied by the landlord or a close family member, their adult daughter. That notice was disputed by the tenants and the subject of a dispute resolution hearing and decision dated May 24, 2018. In that decision the presiding arbitrator found on a balance of probabilities that the landlord failed to meet their evidentiary burden to demonstrate their good faith intention and cancelled that notice.

The tenants characterize the landlords' repeated issuance of notices to end tenancy as harassment and a violation of their right to quiet enjoyment. The tenants gave some evidence regarding the ongoing antagonistic relationship between the parties including some documentary evidence of text message correspondence.

The tenants submit that the landlord's behaviour and repeated issuance of identical Notices to End Tenancy are a breach of the Act and regulations requiring an order of compliance and constitutes withholding of services and facilities, specifically their right to quiet enjoyment of the rental unit. The tenants seek a retroactive rent reduction and monetary award in the amount of $7,530.00, the equivalent of approximately 6 months' rent, for their loss of quiet enjoyment.

Analysis

Res judicata is the legal doctrine preventing, among others, the rehearing of an issue on which a previous binding decision has been made involving the same parties.

A clear and succinct overview of the doctrine was provided in *Erschbamer v. Wallster*, 2013 BCCA 76 where the Court of Appeal wrote:

> [12] ...The [*res judicata*] doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

The parties agree that the present 2 Month Notice dated January 13, 2021 was issued on identical grounds to the earlier 2 Month Notice of October 2020. The landlords submit that their position as regards this tenancy has not changed from the time the earlier 2 Month Notice was issued. The landlords submitted evidence for this hearing and provided testimony directly referencing the earlier decision and the reasons why the earlier 2 Month Notice was cancelled.

I do not find the landlord's submission that this is a new matter to be decided upon based on new facts to be convincing or supported in the evidence. I find that the matter before me is substantially identical to the matter considered and determined in the January 11, 2021 decision.

I find the issuance of the 2 Month Notice within days of receiving the earlier decision, for reasons identical to the initial 2 Month Notice to be an attempt by the landlord to reargue a matter that has been considered and conclusively determined. I do not find the landlords' position that the earlier decision was not final and binding to be reasonable, supported in the other decision or in line with the principles of procedural and judicial fairness.

I find that the subject matter of this application, specifically the grounds for issuing the 2 Month Notice to End Tenancy has been conclusively determined in the decision of January 11, 2021. I find that the decision of June 20, 2019 was final and binding. A decision is not an invitation for a party to issue a subsequent Notice with additional evidence or to make submissions in an attempt to strengthen their position and repeat

arguments that were considered and rejected at a hearing. I find that the present submissions of the landlords is an attempt to specifically address the findings of the earlier arbitrator in an attempt to obtain a different outcome.

For these reasons I find that this matter is *res judicata* as the matter has already been conclusively decided and cannot be decided again.

The 2 Month Notice of January 13, 2021 is cancelled and of no further force or effect. This tenancy continues until ended in accordance with the *Act*.

The tenants seek a retroactive rent reduction in the amount of $7,530.00, approximately the amount of monthly rent in the amount of $1,255.65 for 6 months. The tenants submit that the continued issuance of notices to end tenancy after conclusive decisions have been issued has breached their right to quiet enjoyment.

Residential Tenancy Policy Guideline 6 provides that a breach of quiet enjoyment occurs with frequent and ongoing interference. The repeated issuance of Notices to the tenants may be construed as such a breach which may give rise to an application by the tenants for a monetary award.

In the present circumstance, while I have found that the issuance of the present 2 Month Notice mere days after the earlier decision to be subject to the principles of res judicata, I find that three notices issued over the span of 2 years is insufficient to constitute a breach of the tenants' right to quiet enjoyment. I will note that further issuance of meritless notices to end tenancy by the landlords may give rise to a basis for a monetary award in the tenants' favour.

I find the tenants testimony regarding their complaints about the landlords to be insufficient to demonstrate on a balance of probabilities that the landlord's conduct breaches the tenants' right to quiet enjoyment. Consequently, I dismiss this portion of the tenants' application without leave to reapply.

As the tenants' application was partially successful I allow the tenants to recover their filing fee from the landlords. As this tenancy is continuing the tenants may satisfy this monetary award by making a one-time deduction of $100.00 from their next scheduled rent payment.

Conclusion

The 2 Month Notice of January 13, 2021 is cancelled and of no further force or effect. This tenancy continues until ended in accordance with the Act.

The tenants are authorized to make a one-time deduction of $100.00 from their next scheduled rent payment.

The balance of the tenants' application 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: April 14, 2021

Residential Tenancy Branch