Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL, RR, RP, OLC**

Introduction

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

- cancellation of the Two Month Notice to End Tenancy for Landlord's Use of Property, pursuant to section 49;
- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62;
- an Order for regular repairs, pursuant to section 32; and
- an Order to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65.

The landlord, the landlord's agent (the "agent") and the tenants attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties confirmed their email addresses for service of this decision.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing. During the hearing the agent testified that she was recording the landlord's reaction to this hearing. I again advised the agent that recording of this hearing is not permitted. The agent apologized and testified that she would delete the recording.

Preliminary Issue- Service

The tenants testified that they left their Application for Dispute Resolution (the "application") in the landlord's mailbox just before March 3, 2021. The agent testified that the tenants left their application in the landlord's mailbox on March 1, 2021. The agent testified that the tenants served the landlord with the application late, and that the method of service was improper. The agent testified that the landlord had an opportunity to review and respond to the tenants' application.

The Notice of Hearing documents were emailed to the tenants for service on the landlord on February 18, 2021.

Rule 3.1 of the Residential Tenancy Branch Rules of Procedure (the "Rules") states:

> The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch, serve each respondent with copies of all of the following: a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution; b) the Respondent Instructions for Dispute Resolution; c) the dispute resolution process fact sheet (RTB-114) or direct request process fact sheet (RTB-130) provided by the Residential Tenancy Branch; and d) any other evidence submitted to the Residential Tenancy Branch directly or through a Service BC Office with the Application for Dispute Resolution, in accordance with Rule 2.5 [Documents that must be submitted with an Application for Dispute Resolution].

I accept the agent's testimony that the application was received by the landlord on March 1, 2021. Based on the testimony of both parties, I find that the tenants did not serve the landlord with this application within three days of receiving the Notice of Dispute Resolution Proceeding Package from the Residential Tenancy Branch.

In determining whether the delay of a party serving their dispute resolution application on the other party should result in the application being dismissed, I must determine if allowing the hearing to proceed would unreasonably prejudice a party or result in a breach of the principles of natural justice and the right to a fair hearing. The principals of natural justice as it applies to the service of the notice of dispute resolution are based on two factors:

1. a party has the right to be informed of the case against them; and
2. a party has the right to reply to the claims being made against them.

In this case, the agent testified that she and the lanldord had time to review and respond to the tenants' application. I find that the landlord was informed of the case against her and was able to review and respond to the application. I find that the landlord is not prejudiced by the continuation of this hearing and that this hearing will proceed on its merits. While leaving a copy of the application in the landlord's mailbox is not an approved method of service under section 89 of the *Act*, I find that the landlord was sufficiently served for the purposes of this *Act* with the tenants' application for dispute resolution, pursuant to section 71 of the *Act* on March 1, 2021 as the agent testified that the application was received on that day.

Both parties agree that the tenants did not serve the landlord with their evidence.

Section 3.14 of the Rules states that evidence not submitted at the time of Application for Dispute Resolution that are intended to be relied on at the hearing must be received by the respondent not less than 14 days before the hearing. I find that since the landlord did not receive the tenants' evidence package, all evidence submitted by the tenants, except the Two Month Notice and the Tenancy Agreement are not admitted into evidence. I am allowing the Two Month Notice and the Tenancy Agreement to be considered because both parties agreed that they each have a copy of the above documents. I find that allowing the above documents to be considered is not prejudicial to the landlord because the landlord's agent referred to both documents in the hearing, confirmed the contents of those documents and is the author of both documents.

Section 3.15 of the *Rules* states that the Respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

The agent testified that the landlord's evidence was left in the tenant's mailbox on April 30, 2021 and was received by the tenants on May 1, 2021. The tenants testified that the landlord's evidence was left in their mailbox on May 1, 2021 and received by them on May 1, 2021. I find that the landlord's evidence was served on the tenants in accordance with section 88 of the *Act* and section 3.15 of the Rules and will be considered in this decision.

Preliminary Issue- Sever

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the Two Month Notice to End for Landlord's Use (the "Two Month Notice") and the continuation of this tenancy is not sufficiently related to any of the tenants' other claims to warrant that they be heard together. The parties were given a priority hearing date in order to address the question of the validity of the Two Month Notice.

The tenants' other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the Two Month Notice. I exercise my discretion to dismiss all of the tenants' claims with leave to reapply except cancellation of the Two Month Notice.

I note that section 55 of the *Act* requires that when a tenant submits an application for dispute resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the application is dismissed or the landlord's notice to end tenancy is upheld and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issues to be Decided

1. Are the tenants entitled to cancellation of the Two Month Notice to End Tenancy for Landlord's Use of Property, pursuant to section 49 of the *Act*?
2. If the tenants' application is dismissed or the landlord's Notice to End Tenancy is upheld, and the Notice to End Tenancy complies with the *Act*, is the landlord entitled to an Order of Possession, pursuant to section 55 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced

here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. The subject rental property is a laneway house and the landlord resides in the main house on the same property. In early January 2021 the tenants expressed interest in renting the subject rental property. In mid January the tenants paid the landlord a security deposit for the subject rental property in the amount of $500.00 and the parties agreed that rent was to be $1,600.00 per month due on the first day of each month. The parties agreed that the term of the tenancy agreement was to be one year. The tenancy agreement states that the end of the fixed term tenancy is February 1, 2022 and that at that point in time the tenancy reverts to a month to month tenancy.

The parties met on January 22, 2021 to sign the tenancy agreement. The landlord provided the tenants with RTB form #1 with an attached addendum. The tenant's copy did not have the last page, page six of the tenancy agreement. The addendum was signed by the landlord. The tenants refused to sign the tenancy agreement because the they did not agree with the terms in the addendum. The tenants moved into the subject rental property on February 1, 2021 without signing the tenancy agreement. A video of the tenancy agreement (missing page six) and addendum was entered into evidence. The landlord entered into evidence emails between the parties in which the tenants state that they do not agree to the terms stated in the addendum.

Both parties agree to the following facts. Prior to the tenants moving in the relationship between the parties soured, the landlord accused the tenants of misrepresenting their marital and financial status. The landlord attempted to end the tenancy before the tenants moved in, but the tenants refused to accept the end of the tenancy and moved in on February 1, 2021.

Both parties agree that the landlord personally served the tenants with the Two Month Notice on February 1, 2021, the day the tenants moved in. The Two Month Notice is dated February 1, 2021 and states that the tenants must move out of the rental unit by April 30, 2021. The Two Month Notice states that the rental unit will be occupied by the landlord or the landlord's spouse.

The agent testified that the landlord wants to move into the subject rental property because she is currently sharing the master bedroom of the main house with her two children. The rest of the house is occupied by other members of the landlord's family.

The agent testified that the landlord needs more space for her and her children and the laneway house has two bedrooms.

The tenants testified that they believe they were served with the Two Month Notice as revenge for refusing to sign the addendum.

Analysis

All tenancy agreements between a landlord and a tenant with respect to a rental unit and residential property are subject to the *Act,* unless specifically exempted. The definition of "tenancy agreement" in section 1 of the *Act* includes tenancy agreements entered into orally, in writing, and by way of implied or express terms. The parties are bound by the terms of their oral agreement including any implied or express terms.

Both parties testified that they agreed that the tenancy agreement was to be a one-year fixed term tenancy agreement. This evidence is supported by the unsigned tenancy agreement drafted by the landlord which states that the end of the fixed term is February 1, 2022. Both parties agreed that the only portion of the written tenancy agreement the tenants did not agree with was the addendum. This is supported by the emails between the parties entered into evidence. I find that while the tenancy agreement was not signed by the parties, the parties entered into a binding verbal one-year fixed term tenancy agreement ending on February 1, 2022. I find that the term of the tenancy agreement was an express term.

Residential Tenancy Branch Policy Guideline (P.G.) #30 states:

> A landlord cannot give notice for landlord's use of property that will end a fixed term tenancy before the end of the fixed term. If a landlord wishes to end the tenancy for landlord's use of property, which may include use by the purchaser of the property, the landlord must serve a proper Two Month Notice to End Tenancy for Landlord's Use of Property (form RTB-32) on the tenant. Before a landlord can serve notice for the purchaser's use of the property, the landlord must have an agreement in good faith to sell the property, all conditions of the sale must have been satisfied and the purchaser must ask the landlord, in writing, to give notice to end the tenancy. The effective date of that Notice will be two months from the end of the month in which the Notice was served but in any case not before the end of the fixed term.

I find that the Two Month Notice is cancelled and of no force or effect because the Two Month Notice sought to end the tenancy prior to the end of the fixed term, contrary to P.G. #30.

Section 49(3) of the *Act* states that 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.

P.G. #2A states:

> 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.
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> 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….

I find that the landlord has not proved on a balance of probabilities that the Two Month Notice was issued in good faith. Based on the testimony of both parties, I find that the primary reason the landlord served the tenants with the Two Month Notice was because the relationship between the parties soured.

I find that while the landlord may have some desire and honest intention to move into the subject rental property, the landlord has an ulterior motive in evicting the tenants which is to avoid a difficult landlord tenant relationship. This finding is supported by the timing of the Two Month Notice being served on the tenants on the day they moved in. Had the landlord had an honest intent to move into the subject rental property for extra space for her family, she would not have advertised the property for rent in January 2021 but would have moved in herself. For these additional reasons, I find that the Two Month Notice is cancelled and of no force or effect.

Conclusion

The Two Month Notice is cancelled and of no force or effect. This tenancy will continue in accordance with the *Act.*

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: May 11, 2021

Residential Tenancy Branch