



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, 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; and
- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62.

The tenants, the landlord, the landlord's husband, the landlord's daughter, and counsel for the landlord attended the hearing. The tenants and the landlord were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord's daughter provided affirmed testimony. Counsel for the landlord made submissions on behalf of the landlord.

Both parties agree that the landlord was personally served with this application for dispute resolution in March 2021; however, neither party could recall on what date. I find that the landlord was served with this application for dispute resolution in accordance with section 89 of the *Act*.

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.

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

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*.

Preliminary Issue- Amendment

Both parties agree that the subject rental property is a house with a basement suite. The landlords live in the main portion of the house and the tenants lived in the basement.

The tenants' application for dispute resolution does not state that the tenant's rental property is the basement, and not the main portion of the house. Pursuant to section 64 of the *Act*. I amend the tenants' application for dispute resolution to add the word "basement" to the address of the subject rental property.

Neither party objected to this amendment.

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 tenant's 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. This tenancy began on November 1, 2015 and is currently ongoing. Monthly rent in the amount of \$1,300.00 is payable on the first day of each month. A security deposit of \$650.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The tenancy agreement states that the following services are included in the rent:

- Water,
- Electricity, and
- Heat.

Both parties agree that the landlord served the tenants with a Notice of Rent Increase on September 30, 2020 seeking to increase the rent to \$1,350.00 per month starting January 1, 2021.

Tenant C.S. testified that he informed the landlord that he would not pay the rent increase because there is a rent freeze in place.

Counsel for the landlord submitted that the landlord did not know about the rent freeze and cancelled the rent increase when she learned of it.

Both parties agree that the landlord asked the tenant to sign a new tenancy agreement starting January 1, 2021 in which the following services are not included in the rent:

- utilities,
- hydro, and
- gas

The proposed addendum stating the above was entered into evidence by both parties. The tenants did not sign a new tenancy agreement or addendum.

Both parties agree that the landlord asked the tenants to pay 1/3 of utilities for the subject rental house from January 1, 2021 on. The tenant testified that he paid 1/3 of the January 2021 and February 2021 Fortis bills but planned on disputing this because it was an illegal rent increase.

The tenant testified that he emailed the landlord on February 8, 2021 to dispute the change in utilities. This was not disputed by the landlord. The February 8, 2021 email was entered into evidence and states in part:

The information I collected from the Tenancy Board was that, the utility fees I was paying that were included on the \$1,300 needs to be deducted from it otherwise it will be considered as an illegal rent increase. This fee needs to be offset from the 1/3 of the utility cost you suddenly imposed (started January 1st, 2021 and paid two moths [sic] share for Fortis already) which I then need to pay the difference. I understand your need to charge me for my fair share of the

power/water/heat consumption and rent increase being frozen has prevented you from issuing me one. This past global events has brought uncertainties to many for more than a year and I truly am aware that both parties doesn't always meet eye to eye on certain matters. I wish we can both have a common ground when approaching this issue and discuss it on good faith. This means, I will have to wait for your response and therefore I won't sign a contract today.

Both parties agree that after the above email was sent to the landlord, the landlord returned the money the tenants paid towards utilities for January and February 2021.

The landlord testified that a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") was posted on the tenants' door on February 25, 2021. The tenants testified that they received the Two Month Notice on or around February 25, 2021. The Two Month Notice was entered into evidence and states:

- the tenants must move out of the subject rental property by April 30, 2021, and
- the rental unit will be occupied by the child of the landlord or landlord's spouse.

Tenant C.S. testified that the landlords served the tenants with the Two Month Notice because they refused to sign a new contract and pay 1/3 of utilities which were previously included in rent.

Counsel for the landlord submitted that the landlord wishes to use the subject rental property for additional living space and to give her daughter a home office. Counsel for the landlord referred to the landlord's daughter's signed statement which states at paragraph 3:

We have a rental suite in the basement of our house which is currently occupied by [the tenants]. It is my intention to occupy the basement suite and my plan is as follows:

- a. To convert one bedroom into a home office for my use;
- b. To convert the second bedroom to an exercise room and to purchase equipment for the exercise room such as a treadmill or stationary bicycle;
- c. The living room of the basement suite will become my private personal space to be used as a recreational space separate from the home that I share with my parents.

The landlord's daughter testified that she has bought office supplies in preparation for setting up a home office in the basement. Receipts for same were entered into evidence.

Counsel for the landlord submitted that the landlord's daughter is a 38 year old woman living with her parents and is looking for more privacy and the ability to work from home without her parents interruptions. Counsel for the landlord pointed to the landlord's daughter's signed statement which states at paragraph 5-7:

5. My manager works mostly from home and I work from home too. I only venture into the office when he is there. I must move around our house frequently with my laptop computer to find a quiet workspace to be free from interruption, making it extremely difficult as I am very often on Skype or Zoon calls. There are not plans to change the arrangement of working from home for the foreseeable future even after the Covid-19 restrictions have ended.
6. It is my intention to take some courses that are offered by [University] which are available online and I will require a quiet space to attend theses courses and to do my school work. Upgrading my education will assist me in advancing my career and in particular advancing with the organization for whom I currently work.
7. I would like to pursue opportunities to take on contracts for freelance work in addition to my current job. This type of work will require me to have a home office where I can work without interruption.

Counsel for the landlord submitted that the landlord does not have a mortgage and does not need the rental income. Counsel for the landlord submitted that the freeze on rent increases combined with increasing utility costs has decreased the economic benefit of renting out the basement of the subject rental property. Counsel for the landlord submitted that when the landlord learned that rent increases and utility increases were not permitted, the landlord decided that the economic benefit would be greater with what the landlord's daughter could do with the space, rather than renting it to the tenants.

Analysis

Based on the Two Month Notice entered into evidence and the testimony of both parties, I find that service of the Two Month Notice was effected on the tenants on February 25, 2021, in accordance with section 88 of the *Act*. Upon review of the Two Month Notice I find that it meets the form and content requirements of section 52 of the *Act*.

Section 49(3) of the *Act* allows a landlord to end a tenancy if the landlord intends in good faith to move in themselves, or allow a close family member to move into the unit. Section 49(1) of the *Act* defines a close family member as: (a) the individual's parent, spouse or child, or (b) the parent or child of that individual's spouse.

The concept of good faith is explained in Residential Tenancy Policy Guideline #2A which 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.

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.

Ministerial Order No. M195 made pursuant to section 10 of the *Emergency Program Act* states at section 5:

- 5(1) Subject to subsection (2), if a landlord
- (a) gave a notice of rent increase under the Residential Tenancy Act before the date of this order and the effective date of the rent increase is after March 30, 2020, or
 - (b) gives a notice of rent increase under the Residential Tenancy Act during the period this order is in effect,
- the rent increase does not take effect during the period this order is in effect despite the Residential Tenancy Act, the Residential Tenancy Regulation or any term of a tenancy agreement.
- (2) Subsection (1) of this section does not apply to a rent increase that is
- (a) for one or more additional occupants, and
 - (b) is authorized under the tenancy agreement by a term referred to in section 13 (2) (f) (iv) [requirements for tenancy agreements] of the Residential Tenancy Act.

(3) If a landlord collects a rent increase that does not comply with this section, the tenant may deduct the increase from rent or otherwise recover the increase.

I find the timing of the service of the Two Month Notice, shortly after the landlord's failed attempts to increase rent and utilities, contrary to Ministerial Order M195, supports the tenants' submissions that the landlord did not serve the Two Month Notice in good faith.

I find that one of the landlord's motivations in serving the tenants with the Two Month Notice is that the tenants refused to pay a rent increase greater than that allowed by Ministerial Order M195. This finding is supported by the submissions of counsel for the landlord. Counsel submitted that the combination of the rent freeze and increased utility costs decreased the economic benefit of renting the subject rental property to the tenants and was a motivation in serving the tenants with the Two Month Notice.

I find that serving the tenants with a Two Month Notice because the tenants did not comply with an illegal rent increase constitutes an ulterior motive in ending this tenancy. I accept that the landlord may now want her daughter to use the basement space; however, I find that this was not the only reason the Two Month Notice was served on the tenants. The landlord had an ulterior motive in serving the tenants with the Two Month Notice, which was because they wished to avoid their obligation under the *Act* and Ministerial Order No. 195 not to raise the rent.

Pursuant to Residential Tenancy Policy Guideline #2A, I cancel the Two Month Notice because the landlord did not serve the Two Month Notice in good faith.

Pursuant to section 62 of the *Act* I order the landlord to comply with Ministerial Order M195 and not raise the rent while Ministerial Order M195 is in force.

Conclusion

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

The landlord is ordered to comply with Ministerial Order M195.

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: June 17, 2021

Residential Tenancy Branch