Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

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 (the "**Notice**") pursuant to section 49; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Tenant JD attended the hearing on behalf of both tenants. The landlord attended this hearing and was assisted by two agents from her property management company ("**NH**" and "**SL**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

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

The landlord did not submit any documentary evidence in response to the tenants' application. SL stated that the landlord did not know what documentary evidence she could provide which would prove that she has acted in good faith. I advised the landlord that she is not required to provide documentary evidence in support of her position, and that I would consider her oral testimony given at the hearing.

Issues to be Decided

Are the tenants entitled to:

1) an order cancelling the Notice; and
2) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, 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 parties entered into a written tenancy agreement starting February 1, 2018. Monthly rent currently $4.029. The tenants paid the landlord a security deposit of $1,925 and a pet damage deposit of $1,925. The landlord still retains these deposits.

On April 17, 2021, the landlord served the tenants with the Notice via registered mail. The Notice specified an effective date of June 30, 2021. It listed the reason for ending the tenancy as: “The rental unit will be occupied by the landlord or the landlord's close family member.” It indicated that the child of the landlord or the landlord spouse would be occupying the rental unit.

The tenants filed their application to dispute this notice on April 26, 2021.

JD testified that the landlord's agent (“**SH**”, who was the tenants’ main point of contact at the property management company) advised them in February 2021 that the rental unit would be sold. JD said that the tenants would be agreeable to assisting the landlord in selling the rental unit. In March 2021, SH advised them that a photographer would come to the rental unit at some point to take staging photos.

On March 17, 2021 SH sent an email to tenant SD:

> Per our conversation, the owner tried to sell the property, and their realtor will contact you for the details.
>
> As you are month to month tenant, you are welcome to serve one month notice to the owner, and we vote of the property, or if the new buyer tried to move in, and then we serve you two month notice to end tenancy you get one month free.
>
> We appreciate your understanding and all you have done.

JD testified that, on April 14, 2021, SH called the tenants and told them that, if the tenants moved out of the rental unit by June 30, 2021, the landlord (the owner of the property) would pay them $5,000. JD testified that he asked SH if this was so the property would be easier to sell, and that SH confirmed this was the reason.

JD testified that he declined the offer and told SH that he wanted to stay in the rental unit.

Three days later, JD testified he was surprised to find that the landlord had served the tenants with the Notice, and that it indicated that the reason for its issuing unrelated to the property being sold.

JD emailed the NH on April 20, 2021, stating he was confused as to why the tenancy was being ended to allow the landlord’s child or spouse to move into the rental unit, when the tenants had previously been told the landlord intended to sell the rental unit. In

the email, he recounted what SH told him about the landlord's offer for them to move out.

JD testified that the landlord emailed him directly on April 26, 2021, to advise him that her sons was going to move into the rental unit. The tenants did not enter this email into evidence. However, the landlord confirmed that she sent this email.

The landlord testified that she intended to move into the rental unit with her family. She testified that she lives near a refinery which emits smoke and strong odors. She testified that her family and her parents-in-law all lived in this house until five years ago, when the odors from the refinery became too much for her parents-in-law. She testified that they moved to a neighboring municipality. She testified that, prior to the COVID-19 pandemic, her family visited her parents-in-law roughly once a week. During the pandemic, they dd not see each other. She testified that her family is now fully vaccinated, and that they want to resume seeing her parents-in-law.

The landlord testified that she wants to move into the rental unit to be closer to her parents-in-law and so that they can come visit her family.

SL testified that the rental unit was never put on the market. He testified that selling the rental unit was "just a thought" of the landlord, but that it was never acted upon. The landlord agreed that she did have a thought that she would sell the rental unit in February, but now intends to live in the rental unit with her family. She testified that the rental unit is "too big" for her needs, and that she had thought that she might sell it, and then use the proceeds to buy a smaller house for her family to live in.

I asked why the landlord didn't sell the house she was currently living in and use the proceeds from that sale to buy a smaller house away from the refinery. She testified that she wanted to keep her current house "for convenience", as her daughter still goes to school nearby, and the family would sleep there. While uncertain of her exact plans, the landlord testified that she and her daughter might sleep in their current house on school nights and the rental unit on other nights. She was unclear whether her son and husband would be moving between houses.

SL argued that the tenants simply misunderstood the landlord's intentions for issuing the Notice. He testified that the landlord intends in good faith to occupy the rental unit, and that she has no intention of selling it nor did she serve the Notice in response to the tenants refusing to agree to vacate the rental unit. He testified that SH now works with the property management company in a different capacity and was unable to attend the hearing as a result.

Analysis

Section 49 sets out how a tenancy may be ended so that a landlord may use the rental unit. In part, it states:

> 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;
>
> (3) 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.

The landlord's husband, son, and daughter are all "close family members" for the purposes of the Act.

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 this being the tenants' application, the landlord bears the onus to prove it is more likely than not that she and her family intend in good faith to occupy the rental unit.

RTB Policy Guideline 2A contains a discussion on "good faith":

> In *Gichuru v Palmar Properties Ltd*., 2011 BCSC 827 the BC Supreme Court found that good faith requires an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy. When the issue of a dishonest motive or purpose for ending the tenancy is raised, the onus is on the landlord to establish they are acting in good faith: *Aarti Investments Ltd. v. Baumann*, 2019 BCCA 165.
>
> 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 purpose for ending the tenancy, and they are not trying to avoid obligations under the RTA or the tenancy agreement. This includes an obligation to maintain the rental unit in a state of decoration and

repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant (section 32(1)).

If a landlord gives a notice to end tenancy to occupy the rental unit, but their intention is to re-rent the unit for higher rent without living there for a duration of at least 6 months, the landlord would not be acting in good faith.

If evidence shows the landlord has ended tenancies in the past to occupy a rental unit without occupying it for at least 6 months, this may demonstrate the landlord is not acting in good faith in a present case.

If there are comparable vacant rental units in the property that the landlord could occupy, this may suggest the landlord is not acting in good faith.

The onus is on the landlord to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no dishonest motive.

I am satisfied that, at one point in time, the landlord considered selling the rental unit. I find that the landlord had given the sale of the rental unit more than "just a thought", based on the fact that SH reached out to the tenants in February and again in March 2021 regarding the sale and went so far as to advise them that a photograph would attend the rental unit to take staging photos. These are not actions of someone who has had a mere thought, but rather those taken in serious preparation to sell the property. I find that the sale of the rental unit was, at minimum, a serious consideration. I accept SL's testimony that the rental unit has never been listed for sale.

The proximately of SH's communication with the tenants regarding to possible sale of the rental unit to the timing of issuing the Notice raises the question as to whether the two are linked.

I accept JD's undisputed testimony that, on April 14, 2021, the landlord, through her agent SH, offered the tenants $5,000 to vacate the rental unit by June 30, 2021. I accept JD's undisputed testimony that SH confirmed with him that the reason for this offer was so the rental unit would sell better.

I note that this claim of JD's should not have been a surprise to the landlord. It was contained in the tenants' April 20, 2021 email to RN. The landlord had ample notice of this allegation prepare a rebuttable to the tenants' claim and elected not to. As such, I accept it as true.

Three days after the tenants rejected the landlord's offer, the landlord served the Notice. Due to their proximity in time, I find that it is more likely than not that these two events are related. As I have already found that the landlord's offer was made for the purposes of expediting the sale of the property, I find it is more likely than not that the Notice was given with a similar aim in mind. I do not find it likely than within three days of the

tenants' rejection of her offer, the landlord would have come to an entirely different plan as what she wanted to do with the rental unit. I do not think it reasonable that, within a three-day period of time, the landlord would have decided to move her family into the rental unit.

Additionally, the landlord's story for who was going to live in the rental unit changed over time. As of April 26, 2021, it was just going to be her son. At the start of the hearing, she gave the impressions that her entire family was going to move into the rental unit. As the hearing progressed, she resiled from this position, testifying that her and her daughter would spend the majority of nights at their current home.

There is nothing inherently improper with any of these arrangements. As stated above, a child or a spouse is a "close family member" for the purposes of the Act, so a tenancy could be ended to allow a single child, a child and a spouse, or the landlord and her entire family to move into the rental unit. However, the fact that the stated reason for issuing the Notice has not been consistent over time gives me pause to doubt the veracity of any of the reasons given.

For the foregoing reasons, I find that the landlord has failed to prove on a balance of probabilities that she or a close family member intends in good faith to move into the rental unit. I find that the proximity in time of the issuing of the Notice to the tenants' rejection of her offer requiring the tenants to move so the property would be easier to sell, coupled with the landlord's inconsistent explanation of who would be moving into the rental unit, causes me to find that it is more likely than not that the Notice was issued for reasons other than the reason stated thereon.

As such, I find the Notice is invalid and if no force or effect. The tenancy shall continue.

Pursuant to section 72 of the Act, as the tenant has been successful in the application, they may recover their filing fee ($100) from the landlord. The tenant may withhold $100 from one subsequent month's rent in satisfaction of this amount.

Conclusion

The Notice is cancelled and of no force or effect.

The tenants may withhold $100 from one future months' rent in lieu of recovering their filing fee from the landlord.

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: August 31, 2021