Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL, FFT**

Introduction
The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act, (the "Act")* and the singular of these words includes the plural.

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

- An order to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property pursuant to section 49; and
- Authorization to recover the filing fee for this application from the opposing party pursuant to section 72.

Both the landlord and the tenant attended the hearing. As both parties were present, service of documents was confirmed. The landlord acknowledged service of the tenant's Application for Dispute Resolution and evidence; the tenant acknowledged service of the landlord's evidence. Neither party advised they took issue with timely service of documents.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Residential Tenancy Branch (RTB) Rules of Procedure (Rules) Rule 6.11. The parties were also informed that if any recording devices were being used, they were directed to immediately cease the recording of the hearing. In addition, the parties were informed that if any recording was surreptitiously made and used for any purpose, they will be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation under the *Act*.

Issue(s) to be Decided
Should the landlord's Two Month's Notice to End Tenancy for Landlord's Use be upheld or cancelled?
Can the tenant recover the filing fee?

Background and Evidence

The landlord gave the following testimony. The rental unit is the lower unit in the landlord's single-family house. The landlord lives in the upper unit. On the lower unit, there is a level entry walk in, however on the landlord's own level, he must drive alongside the house and enter through the back entrance. To get into his house, the landlord walks up a stairway of 4 steps. There is also a separate property with a separate address owned by the landlord's son adjacent to the landlord's property. The landlord and his son share a common driveway.

There is no signed tenancy agreement with the tenant. The tenancy began on November 1, 2020 and rent was set at $1,450.00 per month payable on the first day of each month. A security deposit of $725.00 was collected which the landlord continues to hold.

The landlord served the tenant with a Two Month's Notice to End Tenancy for Landlord's Use on April 26th by serving a person who apparently resides with the tenant. The tenant acknowledges being served on that day. A copy of the Notice was provided as evidence. The notice states the rental unit will be occupied by the landlord or the landlord's close family member. It provides an effective (move-out) date of July 1, 2021.

The landlord testified that he intends on moving into the lower unit, himself. The main reason is because he has bad knees and has problems going down the stairs to wash his clothes. He also has difficulty in going down steps and taking his garbage down to the garbage receptacles. It's a 10 foot walk down a slope that the landlord finds painful. He takes the garbage cans up and down the driveway once a week and doing this is difficult living on the upper level.

To support the argument that he intends on occupying the unit after the tenant vacates it, the landlord provided a letter from his doctor which confirms the landlord has moderate to severe osteoarthritis of the knees causing pain to his knees particularly when the landlord goes downstairs.

The lower unit, occupied by the tenant, has a level entry and there are no steps involved in leaving the house. After the landlord moves into that unit, he has not made any plans for what to do with the upper unit. It is possible his son may move into the upper unit, or potentially his sister but his only goal is to occupy the lower unit for his own comfort due to his knees. The landlord testified he may leave the upper unit vacant after he reclaims the lower unit.

The tenant gave the following testimony. The landlord served him with a notice to end tenancy in June or sometime earlier, however the tenant gave it back to the landlord since it wasn't done correctly, according to the tenant. This is the second one given to the tenant. (the tenant did not elaborate on the status of the June notice to end tenancy).

The tenant argues that the landlord seeks to end the tenancy for his family member to move in, however one of the landlord's sons lives only a few blocks away and the other one lives in Northern BC doing a pipeline job. When the tenancy began, the tenant told the landlord that he spends the winters down south and spends months at a time on his boat in the summer. The landlord proposed the tenant moves his items into a locker under the stairs and leave the furnishings there so the landlord could rent the tenant's unit on AirBNB during vacant periods. There was no further discussion regarding that subsequently. The tenant suspects the landlord wants to use the rental unit as a short term vacation rental.

The tenant also suspects the landlord's knees aren't such a problem since the landlord was seen weed-whacking tall grass and blackberries on his ¼ acre on June 8 or 9. The landlord has no problem stomping up and down the stairs to the utility room. The landlord responded to these arguments saying that the city did the majority of the weed removal using a rotating blade and that he only finished the areas around the telephone poles and fire hydrant. There is no way a person could weed whack ¼ acre. Second, it may have been his son who ran up and down the stairs.

Analysis

Section 49(8) states that a tenant may dispute a Two Month's Notice to End Tenancy for Landlord's Use by making an Application for Dispute Resolution within 15 days after the tenant receives the notice. The parties agree the tenant received the notice on April 26th and filed to dispute it the same day, in accordance with section 49(8).

If the tenant files the application, the landlord bears the burden to prove on a balance of probabilities, the validity of the grounds for issuing the 2 Month Notice and that the Notice is on the approved form; pursuant to 52 of the *Act* and Rule 6.6 of the Residential Tenancy Branch Rules of Procedure.

Section 49(3) of the *Act* states:

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.

Residential Tenancy Policy Guideline PG-2A [Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member] provides guidance to landlords and tenants to understand the relevant issues around section 49.

B. 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.

…

Reclaiming a rental unit as living space

If a landlord has rented out a rental unit in their house under a tenancy agreement, the landlord can end the tenancy to reclaim the rental unit as part of their living accommodation. For example, if a landlord owns a house, lives on the upper floor and rents out the basement under a tenancy agreement, the landlord can end the tenancy if the landlord plans to use the basement as part of their existing living accommodation. Examples of using the rental unit as part of a living accommodation may include using a basement as a second living room, or using a carriage home or secondary suite on the residential property as a recreation room.

A landlord cannot reclaim the rental unit and then reconfigure the space to rent out a separate, private portion of it. In general, the entirety of the reclaimed rental unit is to be occupied by the landlord or close family member for at least 6 months. (See for example: Blouin v. Stamp, 2021 BCSC 411)

In this case, the tenant has raised the issue of good faith, indicating the landlord's real intent in ending the tenancy was to rent it out as a short-term rental. On this point, I do

not find the argument presented by the tenant is justified. The only evidence of this potential use of the space is the tenant's testimony that the landlord once suggested that usage during periods when the tenants were not occupying the unit for months at a time. It was never brought up again. Ending the tenancy to use the rental unit for short term rental was never suggested to the tenant at any point. I do not find sufficient evidence from the tenant to satisfy me there is an ulterior motive of ending the tenancy to use the space for the purpose of renting it out as a short-term rental.

The tenant also raised the issue of the landlord's close family member not moving into the unit. On this point, the landlord made it clear that the intent was for the landlord himself to occupy the rental unit, not his close family members. I found the landlord to be forthright and honest when he stated he does not know what will happen with the upper unit once he reclaims the lower unit for himself. As long the landlord occupies the lower rental unit after the tenancy ends, there are no restrictions on what happens to the upper unit he once occupied.

Based on the evidence provided by the landlord, I find it reasonable to believe the landlord suffers from moderate to severe osteoarthritis of the knees. I also find it reasonable that the landlord would find the lower level of his house more accessible to the laundry room and garbage bins and therefore less painful on his knees. I find, based on the evidence provided, that the landlord has proven that the reasons for ending the tenancy, to reclaim it as the landlord's personal living space, is valid. For this reason, I uphold the landlord's notice to end tenancy for landlord's use.

Section 55 of the *Act* states that if a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if: (a)the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and (b)the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice. I have reviewed the landlord's notice to end tenancy and find it fully complies with the form and content provisions of section 52. As the effective date stated on the notice to end tenancy has passed, the landlord is entitled to an order of possession effective 2 days after service upon the tenant. During the hearing, however, the landlord stated that if the notice to end tenancy were upheld, he sought the order of possession be effective on September 30, 2021. The tenant testified he paid rent until the end of September, as well.
In light of this, I grant the landlord an order of possession effective 1:00 p.m. on September 30, 2021.

As the tenant's application was not successful, the tenant is not entitled to recovery of the $100.00 filing fee for the cost of this application.

Conclusion

I grant the landlord an Order of Possession effective at 1:00 p.m. on September 30, 2021.

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: September 05, 2021

Residential Tenancy Branch