



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL, FFT**

Introduction

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.

The tenant attended the hearing and was assisted by an advocate, JA ("tenant"). The landlord attended the hearing and as represented by his agent/daughter, PS. For ease of reference, the daughter will be referred to as PS throughout this decision whereas the landlord is the person named on the Application for Dispute Resolution as the landlord.

As both parties were present, service of documents was confirmed. The landlord confirmed receipt of the tenant's Application for Dispute Resolution and evidence; the tenant confirmed receipt of the landlord's evidence package. Neither party stated they had any concerns 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

Has the landlord provided sufficient evidence to prove the landlord and his spouse intend on moving into the rental unit?

Can the tenant recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The parties agree on the following facts. The rental unit is an unauthorized lower unit in a single detached house containing an upper unit, a lower unit and the tenant's unauthorized unit. The other lower unit is currently tenanted to a different tenant not a party to this proceeding. The tenant's unit has its own bathroom and kitchen however there is no stove in the unit.

A copy of the tenancy agreement was provided as evidence. The tenancy began on November 1, 2003 with rent set at \$500.00 per month payable on the first day of each month. The landlord collected as security deposit of \$250.00 which he continues to hold. Rent is currently set at \$600.00 per month.

The landlord's agent called the landlord's spouse's family doctor as the first witness. The witness gave the following testimony. The landlord's spouse has mobility and health conditions. She has significant osteoarthritis in both knees. She has poor range of motion and must use a walker for mobility. There are issues with her using the stairs from both the arthritis issue and hypoxia.

Hypoxia is the lack of incoming oxygen. The landlords spouse has a heavy right diaphragm causing her to have shortness of breath. She has a limited range of motion and she is significantly deconditioned, requiring physiotherapy. She also requires help with daily living.

The landlord's wife also has elevated troponins leading to increased heart work. Any physical activity creates a strain on her heart that worsens the longer she performs the activity.

Most recently, the landlord's spouse was seen at the doctor's office for an emergency visit due to swelling in her legs and physical deconditioning.

On cross examination, the witness testified that the landlord's spouse was intubated at the hospital from June 2 to June 7th. This was done following a "tummy tuck" operation done on her on May 29th. The witness testified the landlord's spouse suffered from mixed respiratory failure and overlying pneumonia complications from the operation. Lastly, the witness testified that prior to the tummy tuck operation, the landlord's spouse came to him for a pre-operation consultation on May 25th. At the time, he found the landlord's spouse to be stable. He wouldn't have signed off on the pre-op form if he thought it would be detrimental to her health. The witness testified that he felt the tummy tuck would assist the landlord's spouse in alleviating her back pain.

The landlord's daughter/agent PS gave the following testimony. When the notice to end tenancy was served on April 28th, the mother's surgery was pending. Even before the surgery, there were long term care aids coming in daily to assist her mother. Her mother is unable to open the doors for anyone because she cannot get down the stairs alone. Her mother is not confined to a wheelchair however she must use a walker or a cane to walk. Physiotherapists come in twice weekly to assist her mother since her last trip to the intensive care unit where she was hospitalized for 17-18 days. That will end next week, however the family wants to keep her mobile now that she can move around a bit. A care nurse comes to the home daily to wash her mother and get her ready for the day.

The daughter also wants to ensure her mother isn't isolated in the house. In the tenant's unit, there are laminate floors instead of carpets which is easier for the mother to use her walker on. There is also access to put her mother out in the sun in a recliner in the summer months. She wants her mother to be able to get out and walk around the yard, access the laundry room and garage. Her mother cannot do these things without going down the stairs, causing her mother's CO² saturation levels from destabilizing.

Lastly, the landlord's daughter testified that she has her own home but comes to her parents' house daily to take care of her mother while working from home. Her teenage daughter has expressed a desire to move in with the grandparents/landlords however this decision is irrelevant to the notice to end tenancy. The granddaughter wants to have more freedom living with her grandparents rather than her own parents.

The tenant's advocate gave the following submissions. This is the second of three attempts at evicting the tenant. The first attempt, a Two Month Notice to End Tenancy for Landlord's Use, was successfully disputed by the tenant at a hearing on April 23, 2021. The reason for ending this tenancy was for the landlord's daughter to occupy the unit to care for her mother while recovering from an impending tummy tuck surgery. The arbitrator found the landlord did not provide sufficient evidence to show a valid reason for issuing the notice.

Following the first attempt, the landlord served the tenant with another Two Month Notice to End Tenancy for Landlord's Use, the one before me today, on April 28th. On this notice, the landlord states the rental unit will be occupied by the landlord and the landlord's spouse.

The third attempt was an application for an early end to tenancy based on the claim that the tenant was a hoarder. That application was dismissed on July 27th because the arbitrator was not satisfied the tenant posed a fire risk to the landlord or that it would be unreasonable to wait for a notice to end tenancy issued under section 47 to take effect. The file numbers for all the disputes are recorded on the cover page of this decision.

The tenant acknowledges receiving the Two Month Notice to End Tenancy for Landlord's Use on April 28, 2021. The advocate submits that the landlord's spouse's medical issues arose due to her tummy tuck surgery. If not for the surgery, the issues would not have arisen. The advocate points out that the landlord's spouse's doctor testified that he found her condition stable when he saw her pre-operation.

The advocate submits that the landlord's spouse has always been able to function in her home. The landlord himself once broke his neck years ago and he continued to go up and down stairs.

The advocate submits that the reason the landlord served the tenant with the notice to end tenancy is to raise her rent and to stop her from parking in the landlord's driveway. The advocate notes in the tenancy agreement that parking for one vehicle is included in the rent. The advocate finds it suspicious that the landlord's daughter sent a text message indicating there would be a rent increase following the restrictions on rent increases due to the Covid-19 pandemic. This contemplates the tenant would remain in the unit until September at least, according to the tenant's advocate.

Lastly, the landlord has accepted rent from the tenant subsequent to serving the notice to end tenancy. No receipts were issued to indicate the acceptance of rent for “use and occupancy”. This reinstates the tenancy, argues the advocate.

Analysis

Section 49 of the *Act* provides that upon receipt of a Notice to End Tenancy for Landlord's Use, the tenant may, within fifteen days, dispute it by filing an application for dispute resolution with the Residential Tenancy Branch. The parties agree that the tenant received the notice to end tenancy on April 28th and filed an application to dispute it the following day, on April 29th in accordance with section 49.

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 on ending the tenancy was to regain the parking space and/or to increase the tenant's rent. On these points, I do not find the argument presented by the tenant is justified. I do not find sufficient evidence from the tenant to satisfy me there is an ulterior motive of raising the rent or removing the tenant to acquire her parking spot. Based on the evidence provided by the landlord's daughter and the landlord's witness, I find the landlord genuinely wants to reclaim the tenant's living space for his spouse and his family to use as part of their existing living accommodation.

I find the testimony of the landlord's spouse's family doctor to be compelling and forthright. He acknowledged that he felt the landlord's spouse's health was stable enough to undergo a tummy tuck surgery and I find it would be impossible for him to anticipate the complications that arose afterwards. Based on the doctor's testimony, I find the landlord's spouse suffers from debilitating mobility issue from arthritis, poor respiration and heart ailments preventing her from going up and down the stairs. I am satisfied that the landlord and his spouse would occupy the tenant's unit as part of their living space once the tenant vacates it, due to it's easy access to the back yard, laundry room and reception area. I find, based on the evidence provided, that the landlord has clearly established a need to reclaim the lower level of his house to accommodate the needs of his spouse.

The tenant's agent raised the issue of the landlord accepting rent money and not providing a "use and occupancy" note on a receipt for the tenant, thereby reinstating the

tenancy. In order for me to conclude that the tenancy has been reinstated, I require clear evidence that the landlord led the tenant to believe that by paying the amount that she owed, tenant landlord was not planning on continuing to seek an order of possession based on the notice to end tenancy. I find that no clear evidence of that was presented and that the tenancy has not been reinstated.

Based on my findings, I uphold the landlord's Two Month'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.

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 an Order of Possession to the landlord effective **2 days after service on the tenant**.

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