Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL / OPL FFL

Introduction

This hearing dealt with two applications pursuant to the *Residential Tenancy Act* (the "**Act**"). The landlord's application for:

- an order of possession for the landlord's use of the residential property pursuant to section 55;
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

And the tenant's application for the cancellation of the Two Month Notice to End Tenancy for Landlord's Use of Property (the "**Notice**") pursuant to section 49.

The tenant attended the hearing. The landlord was represented at the hearing by its president ("**FB**"). Both were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified, and FB confirmed, that the tenant served the landlord with the notice of dispute resolution package and supporting evidence. FB testified, and the tenant confirmed, that the landlord served the tenant with the notice of dispute resolution package and supporting documentary evidence. I find that all parties have been served with the required documents in accordance with the Act.

During the hearing, the stated that he provided the Service BC office where he made his application with copies of two different tenancy agreements. For reasons unknown to me, these documents did not get uploaded to the Residential Tenancy Branch (the "**RTB**") online dispute management system. As such, I only had the benefit of the copy of the tenancy agreement that the landlord provided. The tenant gave undisputed oral testimony as to the contents of the second tenancy agreement.

Issues to be Decided

Is the landlord entitled to:

1) an order of possession; and
2) recover its filing fee?

Is the tenant entitled to an order cancelling the Notice?

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 tenant and the prior owner of the residential property in which the rental unit is located (the "**building**") entered into a tenancy agreement on January 5, 2015. Monthly rent was $600, excluding cable and internet. The tenant paid the prior owner a $300 security deposit, which the landlord now holds in trust for the tenant.

In August 2017, the landlord purchased the building from the prior owner. The landlord is a corporate entity, whose shares are owned by two other corporate entities ("**IMJB**" and "**CE**"; full names on the cover of this decision), each of whom owns 50% of the shares of the landlord. All of IMBJ's shares are owned by FB (who is also the president of the landlord). All of CE's shares are owned by MB (full name on the cover of this decision), who is the common law spouse of FB.

On March 1, 2020, the landlord and the tenant entered into a written, fixed term tenancy agreement starting March 1, 2020 and ending June 31, 2020. After the end of the fixed term, the tenancy converted to a month to month tenancy per section 44(3) of the Act. Monthly rent is $680, which includes cable and internet.

The rental unit is an end unit on the ground floor of the building. There is a parking spot directly adjacent to it.

On September 30, 2021, the landlord's agent BB (who is the son of FB and the caretaker of the building) served the tenant with the Notice in person. It listed the reasons for ending the tenancy "The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse)." The tenant disputed the Notice on October 14, 2021.

FB testified that BB would move into the rental unit. He testified that BB currently lives in the building, but the area where lives does not have cooking facilities or a bathroom. Rather, he described it as a "common area" where the water heaters are located. It is equipped with a small refrigerator and a coffee maker. He testified that he wants his son to live in a unit that has its own bathroom.

FB testified that BB currently uses the bathroom of an unfinished, unoccupied unit in the building (the "**unfinished unit**"). He stated that BB cannot move into this unit because its walls are bare and uninsulated, there is no electrical at all, and only the bathroom is plumbed. He testified that the landlord needs to obtain permits to run electrical and plumbing in the unfinished unit but has not yet been able to obtain them (he did not say why, but only said that he had been trying to complete the renovation since the landlord bought the building).

FB testified that the rental unit is an ideal unit for BB to move into as it is located at the end of the building on the ground floor and has a parking spot directly outside. He testified that there is also room for a shed directly outside the rental unit which the landlord could use to store groundskeeping supplies that BB could use in the course of his duties as building caretaker.

The tenant does not deny that BB is a caretaker at the building, or that he lives in a unit which does not have a bathroom. Rather, the tenant argued that the reason the landlord selected the rental unit as the destination for BB to move to was due to past conflicts he has had with FB, and not due to any special characteristics of the rental unit. He also speculated that the landlord intended to renovate the rental unit and re-rent it at a higher rate.

Additionally, on his application, the tenant wrote that there are two other suites available in the rental unit that BB could move into. However, at the hearing, FB stated that the only vacant suite in the building is unfinished unit. The tenant did not disagree.

The tenant gave details regarding several conflicts he had with FB. He testified that the reason he signed the new tenancy agreement in 2020 was because the landlord would not allow him to change cable and internet providers. He testified that FB told him that he would need to stay with his existing provider, but that FB would arrange for the tenant to receive a competitive cable and internet package from that provider, so long as the cost of cable and internet was included in the monthly rent. The tenant agreed, signed a new agreement, and received the cable and internet package he wanted. He testified that some time thereafter the number of available channels were reduced, and when he asked the landlord about it, FB told him that he had to scale back the channels because it was costing too much. The tenant and the landlord ultimately resolved this dispute, with the tenant receiving a cable package which contains most of the channels he wants at no cost to him.

The tenant testified that after purchasing the building, the landlord did not shovel or salt the exterior of the building. He testified he raised this with FB, and the next day he (and all other occupants of the building) found bags or rock salt outside their doors. The tenant testified he understood this to mean that he was responsible for shoveling and salting.

The tenant testified that the landlord would not allow him to keep an uninsured vehicle on the building’s packing lot, which required him to sell the vehicle for less than it was worth.

The tenant testified that in August 2021, he acquired a new (insured) vehicle and parked it in the parking spot beside the rental unit. He testified that FB instructed him not to park there. He then stated that the landlord told him that parking was an additional $50 per month. The tenant testified that he never had to pay for parking when

the prior owner was a landlord. He continues to dispute that he is required to pay for parking. He testified that no other tenant in the building is required to pay for parking. He did not offer any evidence to corroborate such a claim.

The tenant alluded to a monetary claim he intends to make against the landlord. I advised him that I would not be able to make a monetary order against the landlord as part of this application, as the tenant had not amended his application to include such a claim and had not given the landlord any notice of his intention to make such a claim.

FB did not deny that the conflicts described by the tenant occurred. Indeed, he testified that "99% of the complaints [he] receives are from [the tenant] and the other 1% are *about* the tenant". Despite this, he testified that such history is not the basis for issuing the Notice. He was adamant that the sole reason for doing so was so that his son could move into a rental unit and that the rental unit was chosen as the destination for his son due to its suitability as a unit for the building's caretaker.

Analysis

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, in both applications, the landlord bears the onus to prove it is more likely than not that the Notice is valid and was issued for valid reasons.

Based on the testimony of the parties, I find that the tenant was served with the Notice on September 30, 2021 and disputed it within 15 days of being served.

Section 49 of the Act sets out how a tenancy may be ended for landlord's use. In part, it states:

> **Landlord's notice: landlord's use of property**
>
> 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;
>
> "family corporation" means a corporation in which all the voting shares are owned by
>
> > (a) one individual, or
> > (b) one individual plus one or more of that individual's brother, sister or close family members;
>
> […]
>
> (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.
>
> (4) A landlord that is a family corporation may end a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

As the landlord is a corporate entity, section 49(3) does not apply. Additionally, the landlord's shares are owned by two separate corporate entities: IMJB, which owns half the shares, and CE, which owns the other half. IMJB's shares are all owned by FB. CE's shares are all owned by MB, FB's common-law spouse.

As such, the landlord does not meet the definition of "family corporation" set out in the Act. None of the landlord's shares are not owned by an "individual"; they are owned entirely by corporate entities that, in turn, meet the definition of a "family corporation".

I do not understand the term "individual" used in the definition of "family corporation" to encompass corporate entities, given that sections 49(3) and (4) of the Act differentiate between "individuals" and "family corporations". I do not find it appropriate to interpret "individual" differently for the purposes of the definition of "family corporation" and allow it to include corporate entities.

As such, I find that the Notice is not valid, as there is no basis under the Act for a corporate entity that is not a family corporation to end a tenancy so that a rental unit may be occupied by a landlord or close family member of the landlord.

However, if I am incorrect, and the definition of "family corporation" does include corporate entities which are wholly owned by two family corporations, the shareholders of which are close family members, I would still not find that the Notice is valid.

As stated above, the landlord bears the onus to prove that BB intends, in good faith, to occupy the rental unit. The landlord provided no evidence whatsoever which would allow me to assess whether BB. He son did not testify at the hearing and did not provide any written statement. Accordingly, I find that the landlord has failed to discharge its evidentiary burden.

Additionally, RTB Policy Guideline 2A states:

> 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. <u>It means they do not intend to defraud or deceive the tenant, they do not have an ulterior purpose for ending the tenancy,</u> 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.
>
> [emphasis added]

It is not disputed that the tenant has come into frequent conflict with the landlord. FB stated (perhaps hyperbolically) that 99% of the complaints about the building he receives are from the tenant and that the other 1% are about the tenant. The tenant described four conflicts between the parties.

Furthermore, the unfinished unit is vacant and has been since 2017. The landlord has not diligently pursued renovating this unit. I cannot say why this is. I do not accept that it takes over four years to acquire permits to complete the required renovations.

I find that the conflicts between the parties were a factor in the decision that BB should move into the rental unit rather than into the unfinished unit. It makes little economic sense to deprive the building of an income generating unit, when a potential income generating unit sits vacant. While I accept that the rental unit may have advantages for a caretaker over the unfinished unit, I cannot say that this is the sole reason why the landlord elected to issue the Notice.

Accordingly, I find that the landlord had an ulterior motive when issuing the Notice, and this causes the Notice to be invalid. I order that it is cancelled and of no force or effect.

As the landlord has not been successful in this application, I decline to order that the tenant reimburse it the filing fee.

Conclusion

I dismiss the landlord's application, without leave to reapply.

I grant the tenant's application. The Notice is cancelled. The tenancy shall continue.

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: January 14, 2022

Residential Tenancy Branch