Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) filed by the Tenant on August 31, 2021, under the *Residential Tenancy Act* (the *Act*), seeking:

- Cancellation of a One Month Notice to End Tenancy for Cause; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call at 11:00 A.M. (Pacific Time) on January 11, 2022, and was attended by the Tenant E.K. (the Tenant), the Landlord, and the Landlord's agent A.G. (the Agent); all of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. As the Landlord acknowledged service of the Notice of Dispute Resolution Proceeding Package, and raised no concerns regarding the service method or date of service, I find that the Landlord was therefore sufficiently served for the purposes of the *Act* and the Rules of Procedure. The parties agreed that they had exchanged the documentary evidence before me in accordance with the *Act* and the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), except for documents from the Tenants pertaining to the payment of January 2022 rent, which the Tenant stated was not served on the Landlord. As neither party raised concerns regarding the service date or method of service for the documentary evidence served upon them by the other party, I therefore find that it was sufficiently served for the purposes of the *Act* and the Rules of Procedure, except for the evidence relating to January 2022 rent, which I have excluded from consideration. In any event, the parties agreed that rent for January 2022 had been paid.

The parties were advised that pursuant to rule 6.10 of the Rules of Procedure, interruptions and inappropriate behavior would not be permitted and could result in

limitations on participation, such as being muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over myself and one another and to hold their questions and responses until it was their opportunity to speak. The Parties were also advised that pursuant to rule 6.11 of the Rules of Procedure, recordings of the proceedings are prohibited, except as allowable under rule 6.12, and confirmed that they were not recording the proceedings.

I have reviewed all evidence and testimony before me that met the requirements of the Rules of Procedure; however, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses confirmed in the hearing.

Preliminary Matters

Preliminary Matter #1

Despite the parties having been advised at the outset of the hearing of the rules for behaviour during the hearing, the Landlord and their Agent had to be reminded several times during the hearing not to be speaking while the Tenant was providing their evidence and testimony and not to interrupt, as it was disruptive to the proceedings.

Preliminary Matters #2

At the conclusion of the proceedings, the Agent made a comment that “if 3 is not less than 5”, they will seek to end the tenancy by way of a different notice. The Agent had made similar comments throughout the hearing. I reminded the Landlord and their Agent for not less than the third time, that the legal test to be met is not whether 3 is less than 5, or even whether the number of occupants in the rental unit had increased since the start of the tenancy, which the parties all agreed they had, but rather whether the number of occupants in the rental unit was unreasonable, and therefore whether the Landlord had the right to serve and enforce the One Month Notice pursuant to section 47(1)(c) of the *Act*.

The Agent stated that until that moment, they had not been aware of the legal test to be met. I reminded the Agent and the Landlord that I had, on not less than 3 occasions throughout the hearing, including before accepting any evidence and testimony from the parties in relation to the validity of the One Month Notice, set out the legal test to be met

under section 47(1)(c) of the *Act* in order for the Landlord to obtain an Order of Possession. I note that near the start of the proceedings, and in addition to setting out the legal test to be met under section 47(1)(c) of the *Act*, I also set out the requirements for service of the One Month Notice and advised the parties that the One Month Notice would need to meet the form and content requirements set out under section 52 of the *Act* in order to be considered valid and enforceable.

Further to the above, I find that it was also the responsibility of the parties to be aware of the requirements of the *Act*, and I find that ignorance of the *Act*, and or a parties rights and obligations under it, does not alter or diminish in any way the legal requirements incumbent upon them under the *Act*.

Based on the above, I advised the Agent and the Landlord that I was satisfied that they had been provided with ample opportunity during the 86 minute hearing to ask questions about section 47(1)(c) of the *Act*, had they wished to do so, and to provide evidence and testimony in support of the One Month Notice served on the Tenants by the Landlord or their agents pursuant to section 47(1)(c) of the *Act*. I advised the parties that I was therefore concluding the proceedings and that I would accept no further evidence or testimony from the parties.

Preliminary Matter #3

Although the parties briefly engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the Branch) under Section 9.1(1) of the *Act*.

Issue(s) to be Decided

Are the Tenants entitled to cancellation of the One Month Notice?

If not, is the Landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Are the Tenants entitled to recovery of the $100.00 filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the periodic (month to month) tenancy began on July 1, 2015, and that rent in the amount of $1,200.00 is due on the first day of each month, which includes water, electricity, heat, cable, free laundry, storage, and garbage collection. Although the tenancy agreement lists only the Tenants and no additional occupants, the parties agreed that a minor occupant also resided in the rental unit at the start of the tenancy. The tenancy agreement also indicates that a $600.00 security deposit was required, and that there are no addendums to the tenancy agreement.

While the parties provided a significant amount of testimony during the 86 minute hearing, only the relevant parts of their arguments and testimony have been summarized below. The parties agreed that a One Month Notice was served on the Tenants by the Landlord by placing it in the mailbox for the rental unit on either August 30, 2021, or August 31, 2021. The Tenants stated that they filed their Application the day after it was received, and Branch records show that it was filed on August 31, 2021.

The One Month Notice in the documentary evidence before me is signed and dated, albeit the signature is in the incorrect location, and has an effective date of October 31, 2021. It appears to be on the current version of the form; however, a portion of the form appears to have been cut off and the missing portions of words written in by hand. The One Month Notice states that the Landlord is seeking to end the tenancy as the Tenants have allowed an unreasonable number of occupants in the rental unit. In the details of cause section of the form, it states that there are five people living in a one bedroom basement suite.

The Agent stated that the Landlord, who lives with their spouse above the Tenants in the upper portion of the home, is terminally ill and that the amount of noise caused by the number of occupants in the rental unit, three of whom are children, is no longer bearable to the Landlord, who is entitled to the peaceful enjoyment of their property. The Agent argued that the suite, which has one bedroom and one den, is unsuitable for a family of five, and that the den cannot be used as a bedroom by the Tenants or their children as it has no closet or window. When discussing why the One Month Notice was served by the Landlord on the Tenants, the Agent stated the following, which I have quoted directly “the real issue is the health problem”, by which the Agent meant the Landlord’s terminal illness. The Agent stated that the Landlord simply wishes to use the property for themselves so that they can enjoy the remainder of their life in peace and

that if the Landlord were to choose to re-rent the unit in the future, they would permit a maximum of two occupants.

The Agent repeatedly mentioned that the rental unit was originally rented to only the two Tenants, and one child, and that there were now two additional children in the rental unit. It was agreed that the Tenants' second child was born in 2016 and that their third child was born in 2018. When asked why the Landlord did not take issue with the number of occupants in the rental unit when the additional children were born and began occupying the rental unit, the Agent stated that as the children were infants, it was not an issue, but now they are older and create more noise.

The Tenant argued that the One Month Notice was not served in good faith by the Landlord and is the result of the souring of the tenancy relationship as the Tenants refused to pay an unlawful additional rent increase sought by the Landlord for August 2022, the Tenants sought repairs to the rental unit but refused to pay the Landlord the amounts sought by them for these repairs as they believed the repairs were the Landlord's responsibility, and as a result of an assault on the Tenant by the Landlord on October 3, 2021. The Tenant stated that if the Landlord truly wants to leave the rental unit vacant and reclaim it as their own space, as alleged by the Agent at the hearing, they could have served a Two Month Notice for Landlord's Use of Property, which they did not do. The Tenant stated that they advised the Landlord of this, but that the Landlord did not want to serve them with a Two Month Notice because the Tenants would then have been entitled to one month's free rent or compensation equivalent to one months rent and the Landlord would not have been able to re-rent the unit for at least 6 months.

The Tenant also argued that they suspect the Landlord will re-rent the unit after they vacate, as they have been told by the Landlord previously that they rely on the rental income to pay the mortgage. The Agent denied that this is the case, stating that the Landlord does not require the rental income for financial reasons. With regards to noise, the Tenant stated that they are unsure when exactly the Landlord is alleging that they are being disturbed from the noise of the 5 occupants of the rental unit, but that their children are generally in bed by 7:45 P.M. – 8:00 P.M. each night, leave for school by 8:00 A.M. on weekdays, and generally do not arrive home until 4:00-5:00 P.M. on weekdays as their mother, who is the Tenant P.K., is a teacher at the same school and they often come home together when she is done work. The Tenant questioned the legitimacy of the Landlord's assertion that it is noise caused by the number of occupants in the rental unit that is the issue, as they received only one communication ever with regards to noise, and that was in 2020 and was in relation to their child playing the

trumpet. The Tenant pointed to a text message in the documentary evidence before me in support of this argument.

Finally, the Tenant denied that the rental unit is unsuitable for their family of 5, stating that it is approximately 1,300 square feet and makes up the entire lower portion of the home. The Tenant stated that it is actually a two bedroom suite with a den, and that although the size it not ideal, it works for their family. The Tenant pointed to email communications with the Tenant P.K. regarding the size of the rental unit prior to signing the tenancy agreement, photographs of the rental unit, and MLS listings for the rental unit (one of which predates the tenancy agreement and two of which were posted during the tenancy) regarding the size of the suite and its layout.

The Tenants provided a significant amount of documentary evidence for my review and consideration in relation to their arguments including but not limited to:

- Birth certificates for two of their children;
- An email dated June 11, 2021, regarding the size of the rental unit according to P.K.;
- Copies of MLS listings for the property in 2013, 2016, and 2017;
- A copy of a text message exchange with the Landlord's son on August 27, 2018, regarding a $50.00 rent increase;
- Copies of various text messages with the Landlord's son regarding repairs needed to the rental unit;
- A text message exchange on October 25, 2020, regarding the hours during which one of the Tenant's children can play the trumpet;
- A video with audio of a heated discussion between the Tenant E.K., the Landlord, and the Landlord's spouse, wherein a physical altercation between the Landlord and the Tenant can be seen;
- A photo of an RCMP card related to a 911 call allegedly placed by the Tenant for the above noted incident;
- Copies of rent cheques;
- Copies of the tenancy agreement;
- A copy of the One Month Notice; and
- Photographs of the interior of the rental unit.

The Landlord also provided documentary evidence for my review and consideration in relation to their arguments including but not limited to:

- A two page written statement;
- Medical records;
- A one page advertisement of the home for sale;

- Photographs of the rental unit prior to the tenancy;
- An RCMP police card in the name of their adult child; and
- A letter from a family friend.

Analysis

Section 47(1)(c) of the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if there are an unreasonable number of occupants in the rental unit. Based on the documentary evidence and the affirmed testimony of the parties, I am satisfied that a One Month Notice which complies with section 52 of the Act, was served on the Tenants by the Landlord on or about August 30, 2021, or August 31, 2021, by placing a copy in the mailbox for the rental unit, which I find is a valid method of service under the *Act*.

As Branch records indicate that the Tenants filed the Application seeking cancellation of the One Month Notice on August 31, 2021, I find that they disputed it within the legislative time period set out under section 47(4) of the *Act* and therefore conclusive presumption does not apply.

During the hearing the Agent repeatedly focused on the fact that the number of occupants in the rental unit had increased since the start of the tenancy in 2015, a fact agreed to by the parties, rather than why the number of occupants in the rental unit is unreasonable. As there is no clause in the tenancy agreement prohibiting an increase in the number of occupants allowed in the rental unit, or setting restrictions or conditions around how and when the number of occupants may be increased, I find that the Tenants were not prohibited by the tenancy agreement or the *Act* from increasing the number of occupants residing in the rental unit, unless the number of occupants was unreasonable.

Having made that finding, I will now turn my mind to whether the number of occupants in the rental unit, which is agreed to be two adults and three children, is unreasonable. Although the parties disputed the size of the rental unit and the number of bedrooms and dens within it, it is clear to me from the photographs submitted by the Tenants and the Landlords, as well as the MLS listings for the property in 2013, 2016, and 2017 submitted by the Tenants, that there are at least two bedrooms in the rental unit, plus an area described by the Landlords in their photographs as “LIVING ROOM/NOW kids bedroom”. Although the Landlord referred to this area as part of the living room, they also indicated that it was the kids’ bedroom and in the photographs submitted by the Tenants showing a bunk bed, a door to this area can clearly be seen. As a result, I am

satisfied that this area is not in fact merely a portion of the living room as alleged by the Landlord and the Agent but either a bedroom or a den as stated by the Tenants.

Further to this, all three MLS listing state that there are two bedrooms and a den on the lower level, where I am satisfied that the rental unit is located, and that the lower level is 1,200 square feet. The photographs from the Landlord also state that there is a master bedroom, a second bedroom, and the area I have determined above is the den, within the rental unit. Based on the above, I am satisfied that the rental unit is at least 1,200 square feet and contains not less than two bedrooms and a den. Finally, I am satisfied that both the Landlord and their Agent intentionally misrepresented the size of the rental unit in both the One Month Notice and the hearing, when they repeatedly referred to it as a one bedroom den suite, in an effort to bolster their argument that the number of occupants in the rental unit was unreasonable.

Although the Landlord and Agent argued that the number of occupants in the rental unit is unreasonable, given my findings above regarding the size and composition of the rental unit, I am not satisfied that this is the case. I do not find it unreasonable for two adults and three children to be residing in a 1,200 square foot rental unit, comprised of two bedrooms and a den. Further to this, I am not satisfied that the actual issue for which the Landlord is seeking to end the tenancy is the number of occupants in the rental unit, as they did not take issue with the number of occupants in either 2016 or 2018 when the additional children were born and began occupying the rental unit. While the Agent and Landlord argued that the Landlord's health has declined, which I accept as fact, and that the Landlord can now no longer tolerate the noise from the rental unit, I am not satisfied that this is the case either. The Landlord submitted no documentary or other evidence to establish that they have ever raised the issue of noise with the Tenants and the Tenants submitted only one text message exchange from 2020 with the Landlord's son with regards to noise. As a result, I find that the Landlords have failed to satisfy me, on a balance of probabilities, that either the shear number of occupants in the rental unit is unreasonable given its size, or that the number of occupants in the rental unit is unreasonable, given the level of noise created by that number of occupants. As a result, I find that the Landlord and their Agent have failed to satisfy me, on a balance of probabilities, that they have grounds to end the tenancy for an unreasonable number of occupants, as set out under section 47(1)(c) of the *Act*.

Based on the above, I therefore grant the Tenants' application seeking cancellation of the One Month Notice, and I order that the tenancy continue in full force and affect unless or until it is ended by one or more of the parties in accordance with the *Act*.

As the Tenants were successful in their Application, I grant them recovery of the $100.00 filing fee pursuant to section 72(1)(a) of the *Act*. Pursuant to section 72(2)(a) of the *Act*, and in accordance with the Tenant's request at the hearing, I therefore grant the Tenants authorization to withhold $100.00 from the next months rent payable under the tenancy agreement, or to otherwise recover this amount from the Landlord.

Conclusion

The Tenants' Application seeking cancellation of the One Month Notice is granted, and I order that the tenancy continue in full force and affect unless or until it is ended by one or more of the parties in accordance with the *Act*.

The Tenants may deduct $100.00 from the next months rent or otherwise recover this amount 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: January 12, 2022

Residential Tenancy Branch