Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL, FFT, CNOP**

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution under the *Residential Tenancy Act* ("Act"). The Tenants applied for:

- cancellation of the Landlord's Two Month Notice for Landlord's Own Use dated October 27, 2021 ("2 Month Notice") pursuant to section 47;
- an Order of Possession in favour of the Tenant pursuant to section 54(2); and
- authorization to recover the filing fee pursuant to section 72 of the Act.

The two Tenants ("RB" and "EC") and the Landlord attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

RB testified the Tenants served the Notice of Dispute Resolution Proceeding and the Tenants' evidence ("NDRP Package") by registered mail November 18, 2021. RB submitted a registered receipt and stub that disclosed the tracking number of the NDRP Package. I find the NDRP Package was served on the Landlord in accordance with section 88 and 89 of the Act.

The Landlord testified that she served a package evidence on the Tenants by registered mail on December 28, 2021. The Landlord provided the registered mail tracking number to corroborate her testimony and the RB acknowledged receipt of the Landlord's evidence. I find the Landlord's evidence was served on the Tenants in accordance with section 88 of the Act.

Preliminary Matter – Exclusion of Witness

At the outset of the hearing, I identified the parties attending the hearing. One person ("JM") stated that he was the son of the Landlord. I asked if he would be providing any testimony during the hearing. The Landlord then submitted an authorization in which she stated she was authorizing JM to participate in the dispute resolution process as an agent. I clearly articulated that, if JM was going to give testimony, he would be required to leave the room and wait until the Landlord called him to provide his testimony. I told the Landlord that I did not want JM to listen to the evidence provided by the Landlord and the other witnessed before JM testified. The Landlord and JM stated that JM was attending the hearing only to provide support to his mother and that JM would not be providing testimony during the hearing. Based on the statements of the Landlord and JM, I permitted JM to remain on the conference line with the Landlord during the hearing. As a result, JM heard the testimony of the Landlord and RB. Later during the hearing, the Landlord stated she wanted to call JM to give testimony.

Rule 7.20 of the *Residential Tenancy Branch Rules of Procedure* states:

> **7.20 Exclusion of witnesses and others**
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> The arbitrator may exclude witnesses from the dispute resolution hearing until called to give evidence. The arbitrator may, when they consider it appropriate to do so, exclude any other person from the dispute resolution hearing.

The purpose of excluding witnesses from hearing the evidence of the parties to, and witnesses called for, a proceeding is intended to prevent witnesses from tailoring their testimony based on what other witnesses have said during the proceedings prior to that witness giving their testimony. In this case, I clearly asked whether JM would be giving testimony at the hearing and the Landlord and JM stated JM's presence at the hearing was for support of the Landlord and not as a witness. I find that it would be prejudicial to the Tenants if JM was permitted to testify at the hearing. Based on the above, I excluded JM from giving evidence at the hearing.

Preliminary Matter – Tenant's Claim for an Order of Possession

The Tenants' application included a claim for an Order of Possession in favour of the Tenants. SB admitted, at the commencement of the hearing, that the Tenants were still living the rental unit. As the Tenants are still in possession of the rental unit, the Act

does not authorize me to issue an Order of Possession for the Tenants. Accordingly, I dismiss the Tenants' claim for an Order of Possession without leave to reapply.

Issues to be Decided

Are the Tenants entitled to:

- cancellation of the 2 Month Notice?
- authorization to recover the Tenants' filing fee for this application from the Landlord?
- If the 2 Month Notice is not cancelled, is the Landlord entitled to an Order of Possession pursuant to section 55(1) of the Act?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Tenant's application and my findings are set out below.

The Landlord testified the tenancy commenced on October 1, 2019, on a month-to-month basis, with rent of $2,700.00 payable on the 1st day of each month. The Tenants were to pay a security deposit of $1,350.00 on October 1, 2019. The Landlord confirmed the Tenants paid the security deposit and that she was holding the security deposit in trust for the Tenants. SB confirmed the details regarding the tenancy agreement provided by the Landlord were correct. The Landlord stated that, if an Order of Possession was granted to her, she was willing to give the Tenants until February 14, 2022 to vacate the rental unit.

The Landlord stated 2 Month Notice was served on SB in-person on October 27, 2021. The Landlord submitted a Proof of Service on Form RTB-34 to corroborate her testimony. SB acknowledged the Tenants had been served with the 2 Month Notice in-person on October 27, 2021. I find the Tenants were served with the 2 Month Notice in accordance with section 88 of the Act.

The Landlord testified she served the 2 Month Notice on the Tenants so that her son, JM and his girlfriend, could move in the rental unit. The Landlord stated that JM and his girlfriend were unable to find suitable accommodation. The Landlord stated JM moved in the basement of the Landlord's home on July 31, 2021, after JM sold his apartment.

The Landlord stated that the rental unit that JM's girlfriend was living in was too small for JM and his girlfriend to live in together.

RB testified her family consisted of 7 people and a pet. She stated that, at the time of renting the rental unit, she understood from the Landlord that it would be a long-term tenancy. RB stated that the rental unit was a house with four bedrooms, 2 living rooms, family room, double garage and a lot of property around the house. RB stated the roof required repairs and that there was mold in the house. RB stated her children were attending school in the area, one of which is a special needs child, and that it would be difficult to find affordable housing in the area. RB stated the rental unit was too large for just JM and his girlfriend and would require significant maintenance. RB submitted that, as the rental unit was so large for only two people to live in, it was evidence that the Landlord was not acting in good faith when she served the 2 Month Notice on the Tenants. RB also stated that there was a dispute between the Landlord and the Tenants because the Landlord was holding the Tenants responsible for premature wearing of the flooring in the house. RB stated that the premature wearing of the flooring was a result of a defect in the flooring and was not the result of anything the Tenants had to the flooring done during their tenancy. RB stated the dispute with the Landlord over the flooring was evidence the Landlord was not acting in good faith.

The Landlord testified that, when the rental unit was purchased, it was for use by only herself and her husband. The Landlord stated that she previously rented the rental unit to a couple. The Landlord testified her priority was to look after the welfare of her own family and not SM's family. The Landlord stated that the issues with the premature aging of the flooring in the house was not a factor in serving the Tenants with the 2 Month Notice. The Landlord stated the existing flooring would be used by JM and his girlfriend when they moved into the rental unit. The Landlord stated that, notwithstanding the allegations of RB, she was acting in good faith when she served the 2 Month Notice.

Analysis

The Landlord testified she served the 2 Month Notice on SB in-person on October 27, 2021. RB acknowledged receipt of the 1 Month Notice. I find the Landlord served the 2 Month Notice in-person and the Tenants were deemed to have received the 2 Month Notice on October 27, 2021. Pursuant to section 49(8)(a) of the Act, the Tenants had 15 days to dispute the 2 Month Notice, or November 12, 2021, being the next business day after the 15-day dispute period expired. The records of the Residential Tenancy Branch disclose the Tenants filed their

application for dispute resolution to dispute the 2 Month Notice on November 9, 2021. I find the Tenants made their application to dispute the 2 Month Notice within the 15-day dispute period required by section 49(8)(a) of the Act.

Residential Tenancy Policy Guideline# 2A Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member addresses the requirements for ending a tenancy for Landlord's use of property and the good faith requirement. The Guideline provides that the Act allows a Landlord to end a tenancy under section 49, if the Landlord intends, in good faith, to move into the rental unit, or allow a close family member to move into the unit. The Guideline explains the concept of good faith as follows:

> 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.
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> *"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 motive for ending the tenancy, and they are not trying to avoid obligations under the RTA and MHPTA or the tenancy agreement.*

Section 52 of the Act states:

> **52** In order to be effective, a notice to end a tenancy must be in writing and must
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> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,
> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
> (d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
> (e) when given by a landlord, be in the approved form.

The Landlord testified she served the 2 Month Notice on the Tenants so that the

rental unit could be used by JM and his girlfriend. The Landlord testified that JM had sold his apartment and he was living in her basement. The Landlord stated that JM were living separately because the apartment that JM's girlfriend was too small for JM and his girlfriend. JM testified that, when she and her husband purchased the rental unit, it was just for the use of the two of them. JM stated that she didn't see the relevance of SB's submission that the rental unit was too large for JM and his girlfriend. The Landlord stated that the issues with the premature wearing of the flooring in the house would be used by JM and his girlfriend. The Landlord testified that she was acting in good faith when she served the Tenants with the 2 Month Notice and denied the allegations of RB that the Landlord was not acting in good faith.

RB testified that the rental unit was far too large for just two people to live in. RB stated that her children, one of which has special need, were attending school in the area in which the rental unit was located. RB stated that it would be a severe hardship for her family to move at this time as it was difficult to find affordable accommodation in the area in which the rental unit is located. RB stated that the Landlord was attempting to evict the Tenants because there were issues with the flooring in the house that the Landlord believed was the result of the Tenants. RB did not deny that the Landlord and her husband purchased the rental unit when there were just two of them or that the Landlord had previously rented the rental unit to a couple. The Landlord stated

RB submitted that the 1 Month Notice should be cancelled on the basis of three arguments. The first reason given was that the rental unit was too large for the use of just JM and his girlfriend. RB did not deny the Landlord and her husband purchased the home originally for their own use as a couple. I find that the use of the rental unit by two people does not in itself lead to the conclusion that the Landlord is not acting in good faith the Landlord gave the Tenants to vacate the rental unit.

The second reason given by RB for cancellation of the 2 Month Notice was it would be a severe hardship for the Tenants to move because her children were located in schools nearby to the rental unit and it would be very difficult finding affordable housing in the area. The Act does not contain any "hardship" provisions that allow an arbitrator to consider whether a notice to end tenancy should be cancelled on the basis of the hardship the tenant(s) would suffer if they are required to move out of the rental unit pursuant to a notice to end tenancy such as where it will be very difficult to find affordable accommodations. I find that, as there is no statutory authority to allow me to consider any hardship of the Tenants, I am unable to consider the Tenant's submission that the 2 Month Notice should be cancelled on the basis of any hardship the Tenants may suffer if they are required to

vacate the rental unit.

The third argument submitted by RB was the Landlord was not acting in good faith because of a dispute between the Tenants and Landlord over the premature wearing of the flooring in the rental unit. SB did not submit any evidence of communications between the Landlord and Tenants regarding the purported dispute over responsibility for the premature aging of the floor or call any witnesses to corroborate her testimony regarding this purported dispute. The Landlord stated that the issue regarding the flooring in the rental unit had nothing to do with her serving the 2 Month Notice on the Tenants. The Landlord stated JM and his girlfriend would be using the rental unit with the existing flooring. As SB did not submitt any evidence or called any witnesses to corroborate her assertion that the Landlord was attempting to end the tenancy on the basis of a dispute over the flooring in the rental unit, I find the Tenants have not provided sufficient evidence that the Landlord's motive to end the tenancy was because of a dispute over the flooring in the rental unit.

I find that, on a balance of probabilities, the Landlord was acting in good faith when she served the Tenants with the 2 Month Notice. I find the Landlord has provided sufficient testimony and evidence to establish grounds to end the tenancy pursuant to section 49(3) of the Act on the basis that a child intends in good faith to occupy the rental unit pursuant to section 49(3) of the Act. I dismiss the Tenants' application to cancel the 2 Month Notice.

I must now consider whether the Landlord is entitled to an Order of Possession. Section 55 of the Act states:

> **55** (1) 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
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> (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.

Under section 55 of the Act, when a tenant's application to cancel a notice to end tenancy is dismissed, and I am satisfied that the notice to end tenancy complies with the requirements under section 52 regarding form and content, I must grant the landlord an Order of Possession. I find the 2 Month Notice complies with the form and content requirements of section 52.

Section 53 of the Act states:

> **53** (1) If a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) or (3), as applicable.
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> (2) If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.
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> (3) In the case of a notice to end a tenancy, other than a notice under section 45 (3) *[tenant's notice: landlord breach of material term]*, 46 *[landlord's notice: non-payment of rent]* or 50 *[tenant may end tenancy early]*, if the effective date stated in the notice is any day other than the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, the effective date is deemed to be the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement
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> (a) that complies with the required notice period, or
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> (b) if the landlord gives a longer notice period, that complies with that longer notice period.

Based on the above, I grant the Landlord an Order of Possession effective at 1:00 pm on February 14, 2022. The Landlord is provided with this Order in the above terms and the Tenant must be served with this Order as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

As the Tenants were not successful in their application, I dismiss their claim for reimbursement of the $100.00 filing fee they paid for their application.

Conclusion

The Tenants' application is dismissed without leave to reapply.

I grant an Order of Possession to the Landlord effective at 1:00 pm on February 14, 2022. The Landlord is provided with this Order in the above terms and the Tenant must be served with this Order as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

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 31, 2022

Residential Tenancy Branch