



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL**

Introduction

This hearing dealt with the Tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for cancellation of the Landlord's Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") pursuant to Sections 49 and 62 of the Act.

The hearing was conducted via teleconference. The Landlord, JM, and Agent, AM, attended the hearing at the appointed date and time. The Tenant, MD, and Legal Advocate, HS, also attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

The Landlord served the Tenant with the Two Month Notice on October 29, 2021 by posting the notice on the Tenant's door. The Tenant confirmed receipt of the Two Month Notice, but did not provide a date when it was received. I find the Tenant is deemed served with the Two Month Notice on November 1, 2021 pursuant to Sections 88(g) and 90(c) of the Act.

The Tenant confirmed he served the Landlord with the Notice of Dispute Resolution Proceeding for this hearing on December 2, 2021 by Canada Post registered mail (the "NoDRP package"). The Tenant also confirmed that he served the Landlord with his evidence package on December 21, 2021 by Canada Post registered mail. The Tenant

referred me to the Canada Post registered mail receipts with tracking numbers as proof of service. I have noted the registered mail tracking numbers on the cover sheet of this decision. The Landlord confirmed receipt of the NoDRP package and evidence on December 22, 2021. I find that the Landlord was served with the documents for this hearing on December 22, 2021, in accordance with Sections 88(c) and 89(1)(c) of the Act.

Issues to be Decided

1. Is the Tenant entitled to a cancellation of the Landlord's Two Month Notice?
2. If the Tenant is unsuccessful, is the Landlord entitled to an Order of Possession?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties testified that this oral periodic tenancy began in February 2002. Monthly rent at the start of the tenancy was \$600.00 per month, but now the rent is \$800.00 payable on the first day of each month. The Tenant stated a \$360.00 security deposit was collected at the start of the tenancy, while the Landlord stated a \$300.00 security deposit was collected at the start of the tenancy. The Landlord confirms he still holds the \$300.00 security deposit.

The reason noted on the Landlord's Two Month Notice was that the child of the landlord or landlord's spouse will occupy the rental unit. The effective date of the Two Month Notice is December 31, 2021.

The Landlord provided in his documentary evidence authorization for his son:

to speak on my behalf during the dispute resolution hearing. [Landlord's Agent] is co owner of our house with me and has been responsible for tending to the needs of our tenants in both rental units for a number of years and will be in a better position to provide the necessary information. I will also be in attendance during the hearing to provide any information I can for the

past years when I acted as landlord for the tenant. I have also authorized [Landlord's Agent] to prepare the evidence we are submitting on our behalf.

The Landlord's Agent, who is also the Landlord's son, testified that his wife started a home-based business in March 2021 and their current house set up cannot sustain her business and all the family members who now live in the home. He said the house has a total of eight bedrooms. Two bedrooms in each of the two basement suites and four bedrooms in the main living area of the home. At present in the main living area, the Landlord's Agent and his wife have a bedroom, their two children who are 13 and 16 years old have a bedroom each, and a niece from their home country is sleeping in the last bedroom. The Landlord is sleeping on the sofa in the living room beside one of the Landlord's Agent's wife's business machines that runs late into the night.

The Landlord's Agent said there are loads of inventory and stock placed in various areas in their home from his wife's business. They have no more space, and need more room. Their plan for the two bedroom basement rental unit is that one room will be used as a business office, and the second bedroom will be used by the Landlord's Agent and his wife.

The Tenant testified that there was a previous RTB file where the Landlord's Agent was raising the same issues. The previous file number is reported on the cover sheet of this decision. That file was initiated as the Tenant's application against the Landlord's Agent to cancel a notice to end tenancy for landlord's use. The Landlord's Agent signed the two month notice for that file. The main issue in that hearing dealt with who was the Tenant's Landlord. The Tenant argued that JM is his Landlord, not the Landlord's Agent, and that the Landlord's Agent had no authority to act on behalf of the Landlord. The Arbitrator agreed with the Tenant and the notice to end was cancelled.

The Tenant wants confirmation who is the Landlord in his tenancy and does the Landlord's Agent have authority to act as the Landlord in this tenancy.

The Landlord's Two Month Notice is for Landlord's Use, and he has specified that a child of the Landlord will be occupying the rental unit. The Tenant asserts that the niece of the Landlord is not a qualified close family member who the Landlord can use as the person who will be occupying the rental unit.

The Tenant testifies that he has done so much renovation work in the rental unit in the last six years. In the Tenant's affidavit, facts pointing to bad faith, he deposes at paragraph 11, the work completed has been installation of a:

- a. *New bathroom floor, new tub, toiled [sic], cabinets, sink, tiling, painting;*
- b. *New plank vinyl flooring throughout living/dining/kitchen;*
- c. *Installation of new washer and dryer;*
- d. *Purchase and installation of new range and range hood, and construction of vent;*
- e. *Installation of new lighting;*
- f. *Repainting and installing new carpeting in main bedroom;*
- g. *Finishing repairs and repainting in second bedroom*

The Tenant believes the Landlord does not have the honest intention to use the rental unit as living space, and *recalls that [the Landlord's son] indicated the Tenant could stay if he paid double the rent, or \$1600* (Tenant's affidavit, paragraph 12). The Tenant maintains that the Landlord wants to re-rent the newly renovated unit for more rent. The Landlord's Agent denied claiming the Tenant could stay if he paid \$1,600.00 per month for rent. The Landlord's Agent says it is a fact that the other basement suite is rented for \$1,600.00 per month, it is also a bigger unit.

The Tenant's advocate states that issue estoppel, a species of res judicata, applies in this matter based on the decision issued after the first notice to end tenancy for landlord's use was heard.

Analysis

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. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 53 of the Act allows effective dates on notices to automatically change. The Two Month Notice was deemed served on November 1, 2021. I find that the effective date of the Two Month Notice will automatically change, pursuant to Section 53(3)(a), to January 31, 2022.

The term Landlord is defined in the Act as,

"landlord", in relation to a rental unit, includes any of the following:

- (a) *the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,*
 - (i) *permits occupation of the rental unit under a tenancy agreement, or*
 - (ii) *exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;*
- (b) *the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);*
- (c) *a person, other than a tenant occupying the rental unit, who*
 - (i) *is entitled to possession of the rental unit, and*
 - (ii) *exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;*
- (d) *a former landlord, when the context requires this;*

This particular tenancy is based on an oral agreement. In this hearing, the Landlord authorized his son to speak on his behalf during the hearing. The Landlord confirmed that his son is a co-owner of the residential property and he has been responsible for tending to the needs of both basement tenants for a number of years. The Landlord's Agent testified that the Tenant would call the Landlord's Agent if there were issues with the rental unit. I find that the Landlord's Agent has acted in the capacity as an agent on behalf of the Landlord and the Tenant did consider him as that.

In *R. v. Van Rassel*, [1990] 1 S.C.R. 225, Justice McLaughlin as she then was opined that issue estoppel *applies only in circumstances where it is clear from the facts that the question has already been decided*. The previous decision where the Tenant claims issue estoppel is in play in this matter did not consider the facts of the first two month notice issued at that time. The claim at the outset of that matter was who was the Tenant's Landlord. He argued that the Landlord's Agent, in this matter, and the Respondent in the first case, was not his Landlord and did not have the authority to issue the first two month notice. The Arbitrator agreed with him, cancelled the notice and the tenancy continued. The Arbitrator did not consider the merits of the first two month notice.

The issues in front of me at this hearing are different. The Landlord has served the current Two Month Notice on the Tenant, and I found that the Landlord has authorized his son to be his Agent. The issues in front of me are:

1. Does the Landlord or close family member intend, in good faith, to occupy the rental unit?
2. Does the Landlord or Landlord's Agent have an ulterior motive behind his actions to end this tenancy?
3. Does the proposed intention to occupy the rental unit conform with its use as living accommodation or as part of their living space?

I find that issue estoppel does not apply in this case. My reasons for these issues follow below.

Section 49 is the relevant part of the legislation in this matter. 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;*

...

"landlord" means

- (a) for the purposes of subsection (3), an individual who*
 - (i) at the time of giving the notice, has a reversionary interest in the rental unit exceeding 3 years, and*
 - (ii) holds not less than 1/2 of the full reversionary interest, and*

...

(2) *Subject to section 51 [tenant's compensation: section 49 notice], a landlord may end a tenancy*

- (a) for a purpose referred to in subsection (3), (4) or (5) by giving notice to end the tenancy effective on a date that must be*

- (i) *not earlier than 2 months after the date the tenant receives the notice,*
 - (ii) *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, and*
 - (iii) *if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy, or*
- ...
- (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.*
- ...
- (7) *A notice under this section must comply with section 52 [form and content of notice to end tenancy] ...*
- (8) *A tenant may dispute*
 - (a) *a notice given under subsection (3), (4) or (5) by making an application for dispute resolution within 15 days after the date the tenant receives the notice, or*
- ...

The Landlord's Two Month Notice was deemed served on the Tenant on November 1, 2021. The Tenant applied for dispute resolution on November 9, 2021 which, I find, was within 15 days after the date the Tenant received the Two Month Notice. I also find that the Two Month Notice complied with the form and content requirements of Section 52 of the Act.

This tenancy began in 2002. For 20 years, the Tenant has resided in the Landlord's residential property. In this time as well, the Landlord's family has grown. The Landlord's Agent, his son, who lives in the family home has gotten married and has two teenage children. The Landlord's Agent's wife has a home business which the Landlord's Agent says, "has taken over many parts of our house". A niece from their home country has relocated to BC to study, she also lives in the home. The Landlord's Agent maintains they need more living space for their family. The Landlord's Agent testified that he and his wife will move into one bedroom in the basement unit, and the second bedroom will be used for his wife's home business. The niece will not be moving

into the basement rental unit. These circumstances support the good faith intention that they plan to occupy the rental unit. I find that the Landlord and the Landlord's Agent have satisfied the first issue above.

The Tenant claims that the Landlord wants to benefit from the extensive renovations of the rental unit that the Tenant has completed. Either that or the Tenant must pay double his existing rental amount. The Landlord's Agent denies making this statement. I find that the Landlord and the Landlord's Agent are diligently trying to secure the Tenant's basement unit for their own use. I believe that their family size has increased and they need the extra space. I do not find any malice in the Landlord's conduct in trying to take back some of his residential property for his family's use. I do caution the Landlord to regard Section 51 of the Act regarding: **Tenant's compensation** after a Section 49 notice, which comes into play when the Landlord does not fulfil the stated purpose in their notice.

The Tenant made a claim that he did not believe the Landlord, or a close family member of the Landlord, intends, in good faith, to occupy the rental unit. RTB Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member, assists parties to understand issues that are likely to be relevant in this regard.

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. ...

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. ...

The onus is on the landlord to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no dishonest motive.

C. OCCUPYING THE RENTAL UNIT

Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that “occupy” means “to occupy for a residential purpose.” (See for example: *Schuld v. Niu*, 2019 BCSC 949) The result is that a landlord can end a tenancy sections 49(3), (4) or (5) if they or their close family member, or a purchaser or their close family member, intend in good faith to use the rental unit as living accommodation or as part of their living space.

Further to *Schuld*, the more recent decision of *Koyanagi v. Lewis*, 2021 BCSC 2062 paras. 30, 31 found that a:

narrow interpretation of “occupy as part of the residence” so as to exclude a home office is patently unreasonable. So too is his narrow interpretation of “living space” or “living accommodation.” Using a space within a residence for a home office is using it as part of the living space. Home offices are a common feature of a residence, especially, though certainly not exclusively, since the COVID-19 pandemic. Simply because a space in the home is being used as a home office does not mean the space is not being used as part of a living accommodation or living space.

...

This is a home office for the use by one of the family members who must work at home. To conclude that using the space in the house for this purpose does not constitute a living space or living accommodation, or, to use Verhoeven J.’s language, “as part of a residence” for a family member, is, in my respectful view, “clearly irrational” or “evidently not in accordance with reason.” The term “home office” itself encapsulates the fact that it is an office that exists within a person’s living space.

The Landlord’s Agent testified that his family needs more space because of additional family members in their home and also to provide space for his wife’s home business. He stated the Landlord is sleeping on the living room sofa and that this is not an appropriate space for his father to be sleeping at night. The Landlord’s Agent states that he and his wife will be sleeping in one of the bedrooms in the rental unit, and the second bedroom will be used as his wife’s home office space. I find based on the totality of the evidence, documentary as well as oral, offered by both parties that the Landlord

does have the good faith intention to use the basement suite as living space for a close family member. I do not find that the Landlord has an ulterior motive in this claim and I uphold his Two Month Notice.

As the Tenant was unsuccessful in his application, I must consider if the Landlord is entitled to an Order of Possession. Section 55(1) of the Act reads as follows:

- 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*
- (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 previously found that the Landlord's Two Month Notice complied with Section 52 of the Act. As I have dismissed the Tenant's application to cancel the Two Month Notice without leave to re-apply, the Landlord is granted an Order of Possession effective on February 28, 2022 at 1:00 p.m.

Conclusion

The Landlord's Two Month Notice is upheld and I grant an Order of Possession to the Landlord, which will be effective on February 28, 2022 at 1:00 p.m. The Order of Possession may be filed in and enforced as an Order of the British Columbia Supreme 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 Act.

Dated: February 03, 2022

Residential Tenancy Branch