Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

Introduction

On October 28, 2021, the Tenants applied for a Dispute Resolution proceeding seeking to cancel the Landlord's Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") pursuant to Section 49 of the *Residential Tenancy Act* (the "*Act*") and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

Both Tenants and the Landlord attended the hearing. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, all parties in attendance provided a solemn affirmation.

Tenant C.D. advised that the Landlord was served with the Notice of Hearing package by email on October 29, 2021. The Landlord confirmed that he received this package, and he did not have any position with respect to the manner with which this package was served. Based on this undisputed testimony, I am satisfied that the Landlord was duly served the Tenants' Notice of Hearing package.

She then stated that she emailed the Landlord their evidence on October 29, 2021 and January 27, 2022 and the Landlord confirmed that he received both of these emails. As this evidence has been received in accordance with the timeframe requirements of Rule

3.14 of the Rules of Procedure, I have accepted this evidence and will consider it when rendering this Decision.

The Landlord advised that he served his evidence to the Tenants by email on February 9 and 10, 2022. He did not have an explanation for why he served this evidence so late other than he was "busy". Although, he stated that he served this to the Tenants at least seven days before the hearing. C.D. advised that she only received this evidence yesterday and did not have adequate time to respond to this evidence.

When reviewing these submissions, I note that Section 44 of the *Residential Tenancy Regulations* indicates that any document served by email is deemed received three days after it is sent. Given that the Landlord had a significant amount of time to serve this evidence and that he was clearly aware of the timeframe requirements to serve his evidence, it appears as if this service was intentionally done, by design, at the last possible moment in an effort to prejudice the Tenants. As such, I have excluded this evidence and will not consider it when rendering this Decision.

All parties acknowledged the evidence submitted and were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that complies with the *Act*.

Issue(s) to be Decided

- Are the Tenants entitled to have the Landlord's Two Month Notice to End Tenancy for Landlord's Use of Property dismissed?
- If the Tenants are unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?
- Are the Tenants entitled to recover the filing fee?

Background, Evidence, and Analysis

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the most current tenancy agreement was signed on November 29 and/or November 30, 2020, that it started on December 1, 2020, and that the tenancy was currently a month-to-month tenancy. Rent was presently established at $1,120.00 per month and was due on the first day of each month. A security deposit of $550.00 and a pet damage deposit of $550.00 were also paid. A copy of the signed tenancy agreement was submitted as documentary evidence.

All parties also agreed that the Notice was posted to the Tenants' door on or around October 28, 2021. The reason the Landlord served the Notice is because "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)." As well, the Landlord checked off the box that the rental unit will be occupied by "The landlord or the landlord's spouse." The effective end date of the tenancy was noted as December 31, 2021.

The Landlord advised that he lives above the Tenants, that the rental unit is more suitable for his growing family, and that he can have access to the yard for his children. He stated that the vacate clause in the tenancy agreement, effective for July 31, 2021, was included as it was his intention to have his sister move into his unit, and then he would move into the rental unit. She was to assist him with childcare. However, he provided contradictory dates for when this plan was initially formulated and when this plan changed. He also stated that in February 2022, he agreed to allow other residents of his building to occupy his unit as of March 1, 2022, so he must be able to move into the rental unit otherwise he will be without a home.

He referenced past Decisions of the Residential Tenancy Branch that he believes follow the same fact pattern as this circumstance. He acknowledged that he signed multiple tenancy agreements over the years with the Tenants and that each tenancy agreement contained a vacate clause. He confirmed that a recent Decision involving himself and the Tenants determined that his use of these vacate clauses was improper and that he was not aware that the legislation changed prohibiting the manner with which he was

using them (the relevant file number is noted on the first page of this Decision). Immediately after he received this Decision, he then served the Notice to the Tenants.

C.D. advised that when she initially moved into the rental unit on October 1, 2016, she questioned the Landlord's use of the vacate clause; however, he informed her that the clause was "in her best interest." She stated that the Landlord told her at that time that he would be renovating all four of the units, and then renting them out. She testified that on December 1, 2020 when the new tenancy agreement was proposed, the Landlord wanted to increase the rent. However, due to the pandemic, he could not so he changed the date on the vacate clause to re-assess the rent amount at that point as the rent freeze should have been lifted by then. She read from a Facebook message that the Landlord sent her on November 12, 2020 which advised her that she would have to sign the current tenancy agreement until June 30, 2021 and that they could then proceed for another year after that.

She submitted that the Landlord's unit is identical to the rental unit and that his child plays in the yard already. As well, she indicated that the Landlord purchased a new home on or around November 2021, as verified by a Land Title document that she obtained in January 2022, where it was listed as his primary residence. She observed him move a considerable amount of his belongings from his unit over the last few months.

Finally, she stated that she received a text message from the Landlord on July 8, 2021 stating that his sister would be the one occupying the rental unit, and that this was the first time that she was aware of this. However, he quickly deleted that text message and sent a new message indicating that he would be the person occupying the rental unit.

The Landlord confirmed that he sent the Tenants a Facebook message on November 12, 2020 because his sister had moved in with him and they planned on December 1, 2020 for her to stay there, which was actually after the most current tenancy agreement was signed. He then gave contradictory dates for when he cemented his plans with his sister to move in, and he claimed that he was "confused" by all of the dates. He stated that the July 8, 2021 text about his sister moving into the rental unit was a "casual" text and that it was a mistake to indicate that his sister would move into the rental unit. He confirmed that he subsequently deleted the text and did not provide the Tenants with a reason for this as "the less said, the better."

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 49 of the *Act* outlines the Landlord's right to end a tenancy in respect of a rental unit where the Landlord or a close family member of the Landlord intends in good faith to occupy the rental unit.

Section 52 of the *Act* requires that any notice to end tenancy issued by a Landlord must be signed and dated by the Landlord; give the address of the rental unit; state the effective date of the notice, state the grounds for ending the tenancy; and be in the approved form. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

With respect to the Notice, in considering the Landlord's reason for ending the tenancy, I find it important to note that the burden of proof lies on the Landlord, who issued the Notice, to substantiate that the rental unit will be used for the stated purpose on the Notice. Furthermore, Section 49 of the *Act* states that the Landlord is permitted to end a tenancy under this Section if they intend in **good faith** to occupy the rental unit.

Policy Guideline # 2A discusses good faith and states that:

> "The BC Supreme Court found that a claim of good faith requires honest intention with no ulterior motive. When the issue of an ulterior motive for an eviction notice is raised, the onus is on the landlord to establish they are acting in good faith… 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... 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."

When reviewing the totality of the evidence and submissions before me, I note that the undisputed evidence is that the Landlord had been using vacate clauses in all his tenancy agreements with the Tenants over the years, and not once did he follow through with the reason indicated in those clauses. Furthermore, when the Landlord was questioned about the date that his plans for his sister to move in with him were

formalized, he could not provide a consistent date as he was “confused” by the timeline of events. I also find it important to note that his inconsistent submissions mirror the previous Decision where it was determined that his testimony was “illogical, contradictory and unreliable.” Even if I did not have this previous Decision before me, I have come to the same conclusion.

It is clear that the Landlord had been continuing to utilize the vacate clauses, despite the use of them being restricted in December 2017. Given that he had used this same clause so frequently, and then not occupied the rental unit after the date they were supposed to take effect, there can be no other conclusion other than he had been using these in a manner to put the Tenants in a compromising position. Clearly this places his intention to use the rental unit in good faith into serious doubt.

Furthermore, after he received this prior Decision where his good faith intention was determined to be duplicitous, he then immediately served the Notice. Considering the contradictory and inconsistent submissions of the Landlord during the hearing, I have no doubt that the Landlord had been fabricating an ever-changing narrative in an attempt to portray that it had been his intention to use the rental unit in good faith, prior to signing the latest tenancy agreement. I do not find the Landlord’s testimony to be credible, reliable, or compelling. When weighing the totality of the evidence and submissions before me, I am doubtful that the Notice was served in good faith. I find it more likely than not that the Landlord’s reasons above were created to disguise an ulterior motive for serving the Notice.

Ultimately, based on the doubts raised, I am not satisfied that the Landlord has established persuasive grounds to justify service of the Notice. Therefore, I find that the Notice of October 28, 2021 is cancelled and of no force and effect.

As an aside, the Landlord is cautioned from continuing the fraudulent use of the vacate clause in his tenancy agreements and his repeated attempts to end this tenancy claiming good faith. The Compliance and Enforcement Unit of the Residential Tenancy Branch is responsible for administrative penalties that may be levied under the Act. They have the sole authority to determine whether to proceed with a further investigation into repeated matters of contraventions of the *Act*, and the sole authority to determine whether administrative penalties are warranted in certain circumstances. The Tenants can contact the Residential Tenancy Branch to inquire about initiating an investigation by the Compliance and Enforcement Unit should they believe that the Landlord is continuing to attempt to circumvent the *Act*.

As the Tenants were successful in this Application, I find that the Tenants are entitled to recover the $100.00 filing fee. Under the offsetting provisions of Section 72 of the *Act*, I allow the Tenants to withhold this amount from the next month's rent in satisfaction of this claim.

Conclusion

Based on the above, I hereby Order that the Two Month Notice to End Tenancy for Landlord's Use of Property of October 28, 2021 to be cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act.*

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: February 21, 2022

Residential Tenancy Branch