Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

Parties		File No.	Codes:
(T)	A.K. and C.S.	910050564	CNC, CNL, FFT
(L)	M.D.	110056467	OPC, OPL, MNDL-S, FFL

Introduction

This hearing dealt with cross applications for Dispute Resolution under the *Residential Tenancy Act* ("Act") by the Parties.

The Tenants filed claims to:

- cancel a Two Month Notice to End the Tenancy for Landlord's Use, dated September 27, 2021 ("Two Month Notice");
- cancel a One Month Notice to End Tenancy for Cause dated November 21, 2021 ("One Month Notice"); and
- recovery of their $100.00 application filing fee;

The Landlord filed claims for:

- an Order of Possession, further to having served the Two Month Notice;
- an Order of Possession for Cause, based on the One Month Notice;
- a Monetary Order of $2,928.42 for damages for the Landlord, retaining the security deposit to apply to the claim; and
- recovery of her $100.00 application filing fee.

The Tenants, C.S. and A.K., and the Landlord, M.D., appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process. During the hearing the Tenants and the Landlord were given the opportunity to provide their evidence orally and respond to the testimony of the other Party. I reviewed all oral and

written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Early in the hearing, I advised the Parties that pursuant to Rule 2.3, I am authorized to dismiss unrelated disputes contained in a single application. In this circumstance, the Landlord indicated different matters of dispute on her application, the most urgent of which is the application for an order of possession for the Landlord's use of property and for cause. I find that not all the claims on the Landlord's Application are sufficiently related to be determined during this proceeding. I will, therefore, only consider the Landlord's request for an order of possession, pursuant to the eviction notices, and the recovery of the filing fee at this proceeding. Therefore, the Landlord's other claim is dismissed, with leave to re-apply.

When a tenant applies to cancel a notice to end tenancy issued by a landlord, section 55 of the Act requires me to consider whether the landlord is entitled to an order of possession. This is the case if I dismiss the application and if the notice to end tenancy is compliant with section 52 of the Act, as to form and content.

Issue(s) to be Decided

- Should the Two Month Notice be cancelled or confirmed?
- Should the One Month Notice be cancelled or confirmed?
- Is the Landlord entitled to an order of possession?
- Is either Party entitled to recovery of their $100.00 Application filing fee?

Background and Evidence

The Parties agreed that the fixed-term tenancy began on November 1, 2019, and ran to October 31, 2020, and then operated on a periodic or month-to-month basis. They agreed that the Tenants are required by the tenancy agreement to pay the Landlord a monthly rent of $1,500.00, due on the first day of each month. The Parties agreed that the Tenants paid the Landlord a security deposit of $750.00, and no pet damage deposit. The Landlord confirmed that she still holds the security deposit in full.

The Landlord submitted a copy of the One Month Notice that was signed and dated November 21, 2021, and has the rental unit address. The One Month Notice was served in person by a process server on November 21, 2021, and it has an effective vacancy date of December 31, 2021. It was served on the grounds that the Tenants or a person permitted on the property by the Tenants has caused extraordinary damage to the unit or property; and the Tenants have not done repairs of damage to the unit or property; and that the Tenants have breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Two Month Notice was signed and dated September 27, 2021, and it has the rental unit address. It was served in person by a process server on September 27, 2021, with an effective vacancy date of November 30, 2021. The Two Month Notice was served on the grounds that the Landlord will occupy the rental unit. The Landlord provided proof of service document evidencing service of the Two Month Notice on each of the Tenants.

I had advised the Parties that the burden of proof in this matter in on the Landlord, therefore, I asked the Landlord why I should confirm the Two Month Notice, rather than cancelling it, as requested by the Tenants. The Landlord said:

> At this point, can I direct you to a document of evidence with statements of fact and photos. On July 28, 2021, I was rear-ended, and I suffered a concussion and whiplash. I have post concussion syndrome. I have had multiple falls down the stairs, and I have been told that if I fall and hit head again, I might suffer permanent brain damage…. I need to move into the lower unit of the house to recuperate.

The Landlord referred to a doctor's note that she submitted, which states:

> To Whom It May Concern October 20, 2021
>
> Re: [Landlord…]
>
> [The Landlord] was involved in a motor vehicle accident on 28 July 2021 resulting in a concussion and whiplash injury. She has since developed post-concussion syndrome with ongoing vertigo/dizziness symptoms and PTSD. She has had several falls due to the vertigo and cannot use the stairs inside and outside as a result. She would like to move into her downstairs suite so she can recover and go back to her full time duties at work and I feel this is appropriate.

> Regards,
> [Signature]
> Dr. [A.G.]

I asked the Tenants for their response, and they said: “We just believe that there are still stairs and still possible falling hazard in this unit, and it’s just meant to displace the Tenants. It was not given in good faith.”

I asked the Tenants why they thought that the Two Month Notice was not served in good faith, and they said:

> We were given an option to sign a mutual end to end the tenancy. And there are still several stairs to get to our unit. The upstairs is entirely on one floor except for one bedroom downstairs. Also, the most recent doctor’s note says her condition is just PTSD. And we’ve said we would be willing to exchange units, but that is not an option for the Landlord.

The Landlord responded:

> In an effort to resolve the matter, on September 22nd, I offered the Tenants $1,500.00 in cash, a favourable reference, and a flexible move-out date. . .. They initially agreed, if I agreed that they are not responsible for the patio damage. But instead of following through on this, they filed a dispute.
>
> I can also address the stairs. There are multiple stairs – 47 steps in the main unit, versus 7 stairs to access the lower unit.
>
> In that evidence document, I’ve also included photos of the stairs. Photos 2 to 4 show stair cases to my home, and photo 5 is to the lower suite, which is much more sheltered and protected; so not as much weather as access to the upper unit has.

The Tenants said: “We have also submitted photos showing actual stairs, and there is a sheltered garage entry to the upstairs unit.”
I gave the Parties an opportunity to make any last statements they had, and as the Landlord has the burden of proof, she went first, saying:

> I realize that it may be difficult for them to understand my challenges as a woman who is decades older, and with my health issues; however, it is very real and it is

essential that I move into the lower unit without further delay.

The Tenants said: “We would like to re-say that we are perfectly willing to move upstairs until the Landlord’s health improves. But that was not possible for the Landlord. We find that it is not made in good faith.”

The Landlord said: “This is included in my evidence - the main unit is more than twice the size – it is not comparable in amenities or physical characteristics or market value. The tenancy agreement with the Tenants applies to the lower unit.”

The Landlord said that she does not intent on renting out the main suite, as she wants to focus on restoring her health first.

The Landlord submitted photographs of the stairs leading to and from the main unit. In her descriptions on the photographs, the Landlord said: “exposed front entrance steps”. I note there are three steps up to the door in this photograph.

The Landlord’s second photograph was described as: “16 steps to backyard”. In a third photograph inside the residential property, the Landlord illustrates that there are 14 steps from the main unit to the lower level, which has a bedroom, the storage room, and the furnace, according to the Landlord.

The Tenants submitted a photograph of the stairs leading to their rental unit, which consist of a sidewalk, with three steps, then more sidewalk, and one stair down, more sidewalk, and then three steps down. The Landlord also submitted a photograph of these stairs, and she described them as “sheltered”, although they are not covered by a roof.

The Tenants also submitted a photograph of the front of the residential property from the street. They have described the photograph as: “covered front entrance and fully sheltered garage entrance” in the upper suite.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Section 49 of the Act states that 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. Section 49 also defines a close family member as the individual's parent, spouse or child, or the parent or child of that individual's spouse.

Rule 6.6 sets out the standard of proof and the onus of proof in dispute resolution proceedings, as follows:

> 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.
>
> [emphasis added]

Accordingly, I find that the Landlord has the burden of proving the validity of the Two Month Notice on a balance of probabilities.

I considered the Parties' photographs of the stairs leading to and from the two suites, and within the suites. Based on common sense and ordinary human experience, I find that the Tenants' photograph of the stairs to the lower unit are spread out and therefore, that a fall on these stairs is likely to be less serious than a fall on the stairs leading to the backyard, or to the lower storage area and furnace from upstairs.

Further, I find it reasonable that the Landlord would need to have regular access to her storage and furnace room, which I find would be safer to access from the downstairs unit than from the main unit upstairs.

In addition, the Tenants offered to trade units with the Landlord, which was not acceptable to her, as she said she wants to focus on her recovery. A landlord is not required to switch units with a tenant in this type of scenario; therefore, I find that this is not a realistic option.

Based on the documentary evidence and testimony before me, and keeping in mind that the burden of proof in this matter is on a balance of probabilities, I find that the Landlord has satisfied me that she intends in good faith to reside in the rental unit in order to facilitate her recovery. I find that this is supported by her doctor's note dated October

20, 2021. As a result, I am satisfied that the Landlord has cause pursuant to section 49 of the Act to serve the Two Month Notice on the Tenants and to end the tenancy. As a result, I dismiss the Tenants' application wholly, without leave to reapply, and pursuant to section 62 of the Act.

I also find that the Two Month Notice issued by the Landlord complies with section 52 of the Act, as to form and content. Given the above, and pursuant to section 55 of the Act, I, therefore, award the Landlord with an Order of Possession of the rental unit. Since the effective vacancy date of the Two Month Notice has passed, I find that the **effective date of the Order of Possession will be two days** after the Tenants are deemed served with this Order.

In order to provide clarity for both Parties, and in the hopes of preventing future disputes, the Parties should be aware that pursuant to section 51 of the Act, **a tenant** who receives a notice to end a tenancy under section 49 **is entitled to receive** from the landlord, on or before the effective date of the landlord's notice, an amount that is the equivalent of **one month's rent payable under the tenancy agreement.** The Tenants may withhold this amount from the last month's rent or otherwise recover this amount from the Landlord, if rent for the last month has already been paid.

Further to this, in addition to the one month's compensation due to the Tenants under section 51 (1), **if steps have not been taken to accomplish the stated purpose for ending the tenancy** under section 49 **within a reasonable period** after the effective date of the notice, or if the rental unit is not used for that stated purpose for at least six months beginning within a reasonable period after the effective date, **the Landlord must pay the Tenants** an amount that is the equivalent of **12 times the monthly rent payable** under the tenancy agreement.

As the Two Month Notice has ended the tenancy, I find it irrelevant to consider the validity of the One Month Notice. I dismiss the Landlord's claim for an Order of Possession for Cause, based on the One Month Notice, without leave to reapply.

Given her success in this matter, I also award the Landlord recovery of her **$100.00** Application filing fee from the Tenants, pursuant to section 72 of the Act. The Landlord is authorized to deduct $100.00 from the Tenants' $750.00 security deposit in complete satisfaction of this award.

The Landlord's claim for a monetary order for damage or compensation for damage is dismissed with leave to reapply. However, please note that time limits that must be

considered in re-applying for this remedy. Please do not hesitate to call our office for assistance or explanation of any tenancy matter.

Conclusion

The Tenants are unsuccessful in their application, as the Landlord provided sufficient evidence to establish the validity of the Two Month Notice on a balance of probabilities. The Tenants' application is dismissed wholly without leave to reapply.

Pursuant to section 55 of the Act, I grant an **Order of Possession** for the rental unit to the Landlord **effective two days** after the Order is deemed served to the Tenants. The Landlord is provided with this Order in the above terms and the Tenants must be served with **this Order** as soon as possible. Should the Tenants 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 final and binding on the Parties, unless otherwise provided under the Act, and 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 10, 2022

Residential Tenancy Branch