Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC

Introduction

On August 5, 2021, the Tenants applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Sections 51 and 67 of the *Residential Tenancy Act* (the "*Act*").

Tenant K.A. attended the hearing with J.V. attending as an advocate for the Tenants. Later on in the hearing, Tenant L.A. and F.C. attended the hearing to provide witness testimony for the Tenants. The Landlord attended the hearing as well, with M.C. attending as a co-owner, Mar.C. attending as an agent for the Landlord, and Z.P. attending as counsel for the Landlord. 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, with the exception of Z.P., provided a solemn affirmation.

K.A. advised that he served the Notice of Hearing and evidence package to the Landlord by registered mail on or around August 23, 2021 and the Landlord confirmed receiving this package. Based on this undisputed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was duly served the Tenants' Notice of Hearing and evidence package. As such, this evidence was accepted and will be considered when rendering this Decision.
Z.P. advised that he served the Tenants with the Landlord's evidence package 13 days before the hearing by email. K.A. confirmed that they received the Landlord's evidence on February 8, 2022. As this evidence was received by the Tenants in accordance with the timeframe requirements of Rule 3.15 of the Rules of Procedure (the "Rules"), this evidence was accepted and will be considered when rendering this Decision.

All parties 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.

Issue(s) to be Decided

- Are the Tenants entitled to a Monetary Order for compensation based on the Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice")?

Background and Evidence

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 tenancy started on June 1, 2019 and that the tenancy ended when the Tenants gave up vacant possession of the rental unit on February 28, 2021 after being served the Notice. Rent was established at $2,025.40 per month and was due on the first day of each month. There was a dispute over whether a security deposit of $800.00 or $875.00 was also paid. A signed copy of the tenancy agreement was submitted as documentary evidence; however, it was of poor quality and difficult to read.

As well, all parties also agreed that the Landlord posted the Notice on the Tenants' door on November 28, 2020. Given that three days were required for this Notice to be deemed received, the effective end date of the tenancy of January 31, 2021 was corrected to February 28, 2021. The reason for service of the Notice was that "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)" and that more specifically, "The child of the landlord or landlord's spouse" would be occupying the rental unit.

The Landlord advised that the plan was for his son ("D.C.") to move into the rental unit, and he did so in the second week of March 2021 while repairs were being completed.

Z.P. asked Mar.C questions, and Mar.C. advised that D.C. moved into the rental unit on March 10, 2021 so that he could live on his own, away from his parents. Mar.C. stated that some repairs to damaged flooring and plumbing fixtures were completed in the rental unit. As well, the dishwasher was replaced. He submitted that D.C. had furniture in the rental unit and that he could still live there during these repairs. He referenced letters of tradespeople and neighbours, and utility bills, submitted as documentary

evidence, to support this position. He stated that D.C. would occasionally park at his parents' place, as it was nearby, if there was no available parking near the rental unit.

Z.P. read from D.C.'s affidavit, which outlined that D.C. moved into the rental unit on March 10, 2021 as his primary residence, despite some repairs being conducted at the same time. He submitted that D.C.'s hours of work, from 8:30 AM to 4:30 PM could account for why he was not seen around the property often. Moreover, D.C. would not always park in the same area near the rental unit, but he would spend "most nights" in the rental unit. He referenced utility bills and D.C.'s driver's licence address being changed to support the position that the Landlord's son had moved into the rental unit.

J.V. advised that it would be his expectation that the neighbours would have witnessed D.C. living in the rental unit. He objected to the Landlord's evidence and questioned the legitimacy of D.C.'s affidavit.

K.A. referenced letters from neighbours, submitted as documentary evidence, that had easily viewable vantage points of the rental unit. He advised that none of these neighbours observed D.C. living in the rental unit. He acknowledged that the Landlord provided evidence of the utility accounts being started; however, there was no evidence that D.C. lived in the rental unit day to day. He stated that there has been no evidence of any personal mail submitted by the Landlord to corroborate that D.C. lives there. As well, he indicated that he received a call from Stats Canada because a census form that was sent to the address of the rental unit was not completed and returned.

Witness L.A. advised that she would walk by the rental unit often, and the porch light would usually be on. She stated that two nights prior to the hearing, she knocked on the door and no one answered. She looked into the rental unit and observed a lawn chair, a single box spring without a mattress, and mail piled up in the front room.

Z.P. cross-examined L.A. She specified that she would walk past the rental unit once or twice a month, that she would always see the same porch light on, and that she only looked into the rental unit the one time. She stated that she witnessed the renovations and the work trucks being there and she testified that the downstairs was "gutted". She acknowledged that it was possible that D.C. stayed at other people's houses, but it appeared as if no one had been living there.

Z.P. clarified that D.C. would visit his girlfriend sometimes and would stop by his friends' places on occasion. As well, he may have spent some weekends with friends; however, he would primarily stay at the rental unit.

Witness F.C. advised that she lives two doors down from the rental unit and that she moved there in 2018. She testified that she has not seen anyone residing there, nor has she seen anyone matching the image on D.C.'s driver's licence on or around the rental unit during her dog walks past the property.

Z.P. cross-examined F.C. and she clarified that she would walk her dog once or twice per day, between 9:00 AM and 12:00 PM, and then sometimes in the afternoon or evening. She lived approximately 20 steps from the rental unit, and she did not walk up directly to the rental unit. She observed that the blinds were always closed and that she never saw anyone enter or leave the rental unit. She did observe, on one occasion, a person shovelling on the property; however, this person was much older than the picture of D.C. and she was confident that it was not the same person. She did not see any mail or papers on the property. She also walked the alley behind the rental unit, and she saw no activity or people.

Z.P. reiterated that D.C. provided a sworn affidavit confirming that he lived in the rental unit. He noted that L.A. only looked into the rental unit once in the past six months and that F.C. did not observe much as the blinds were closed and she only surmised that D.C. did not live there. As well, he noted that one of the neighbour's letters submitted as documentary evidence by the Tenants does not contain the name of that person. Furthermore, the phone number listed on the letter is that of the Tenants'.

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 the 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.

The first issue I must consider is the validity of the Notice. When reviewing the consistent and undisputed evidence before me, I am satisfied that the Landlord served the Notice because he wanted his son to occupy the rental unit. As such, I find that this was a valid Notice.

The second issue I must consider is the Tenants' claim for twelve-months' compensation owed to them as the Landlord did not use the property for the stated purpose on the Notice. I find it important to note that the Notice was dated November 28, 2020 and Section 51 of the *Act* changed on May 17, 2018, which incorporated the following changes to subsections (2) and (3) as follows:

> ***51*** *(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if*
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> > *(a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or*
> > *(b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.*

At the time the Notice was served, the Landlord advised that the intention was for his son to move into the rental unit and that the Notice was served in good faith. Regardless, the good faith requirement ended once the Notice was accepted by the Tenants and after they gave up vacant possession of the rental unit. What I have to consider now is whether the Landlord followed through and complied with the *Act* by using the rental unit for the stated purpose for at least six months after the effective date of the Notice. Furthermore, the burden for proving this is on the Landlord, as established in *Richardson v. Assn. of Professional Engineers (British Columbia)*, 1989 CanLII 7284 (B.C.S.C.).

With respect to this situation, Policy Guideline # 2A states that “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.” In addition, this policy guideline outlines that “The landlord, close family member or purchaser intending to live in the rental unit must live there for a duration of at least 6 months to meet the requirement under section 51(2).”

As well, Policy Guideline # 50 states the following:

> Sections 51(2) and 51.4(4) of the RTA are clear that a landlord must pay compensation to a tenant (except in extenuating circumstances) if they end a tenancy under section 49 or section 49.2 and do not accomplish the stated purpose for ending the tenancy within a reasonable period or use the rental unit for that stated purpose for at least 6 months.
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> Another purpose cannot be substituted for the purpose set out on the notice to end tenancy (or for obtaining the section 49.2 order) even if this other purpose would also have provided a valid reason for ending the tenancy. For instance, if a landlord gives a notice to end tenancy under section 49, and the stated reason on the notice is to occupy the rental unit or have a close family member occupy the rental unit, the landlord or their close family member must occupy the rental unit for at least 6 months. A landlord cannot convert the rental unit for non-residential use instead. Similarly, if a section 49.2 order is

> granted for renovations and repairs, a landlord cannot decide to forego doing the renovation and repair work and move into the unit instead.
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> A landlord cannot end a tenancy for the stated purpose of occupying the rental unit, and then re-rent the rental unit to a new tenant without occupying the rental unit for at least 6 months.

I find it important to note that when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Given the contradictory testimony and positions of the parties, I must also turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

When reviewing the totality of the evidence before me, I am satisfied that the reason on the Notice was for the rental unit to be occupied by the Landlord or close family member only. However, in considering the Landlord's submissions, I have some concerns. While D.C. claims to have moved into the rental unit on or around March 10, 2021, I accept that he set up Fortis and BC Hydro bills in his name. However, I note that according to his Fortis bills provided, no gas was consumed from April 15, 2021 to sometime in September or October 2021. While it is possible that this could have been due to potentially warmer weather during these months, I do find the complete lack of consumption to be particularly odd, and this causes me to become doubtful of the legitimacy of D.C.'s submissions.

In addition, when examining the BC Hydro bills for that corresponding time period, I note that these bills are calculated every two months and that the amounts of those bills are minimal, to say the least. While it is entirely possible that D.C. was energy conscious and that he consumed nominal amounts of electricity, in my view, I do not find it likely that had he been occupying the rental unit as alleged, that he would be spending less than $30.00 per month on average on electricity. Combined with the lack of use of any gas from this time period, I am increasingly suspicious of the reliability of the contents of D.C.'s affidavit.

Moreover, I note that the Landlord has provided letters from tradespeople attempting to confirm that they either saw D.C. at the rental unit or believed that he may have been living there. However, I note that D.C. indicated in his affidavit that he would work from the hours of 8:30 AM to 4:30 PM from Monday to Friday and that additional time would have to be factored into his commute as well. While it is possible that these tradespeople attended the rental unit outside of these times, given the timeframe provided by D.C., the available times would be limited to very early in the morning, late in the evening, or weekends. In conjunction with the aforementioned doubts created by the Landlord's submissions, I find that this further causes me to question the legitimacy of the circumstances being portrayed.

I acknowledge that a signed affidavit from D.C. was submitted for consideration; however, I find it curious why he did not attend the hearing as he was essentially the main subject of this dispute, and he could have answered to these issues directly.

While there were other, less significant inconsistencies that caused me additionally to doubt the reliability of the events as outlined, I am satisfied that it is possible that D.C. took possession of the rental unit on or around March 10, 2021. However, as noted above, burden is on the Landlord to prove that the rental unit was used for the stated purpose for at least six months after the effective date of the Notice. When weighing the totality of the evidence before me on a balance of probabilities, I find that there is insufficient persuasive and compelling evidence to support that D.C. occupied the rental unit and used it as his living accommodation for a duration of at least 6 months after the effective date of the Notice. While the Tenants have provided limited evidence to support their claims, I find that the doubts raised by the inconsistencies in the Landlord's evidence causes me to prefer the Tenants' evidence on the whole.

Given that I am satisfied that the rental unit was not used for the stated purpose for at least six months from the effective date of the Notice, I find that the Tenants are entitled to a monetary award of 12 months' rent pursuant to Section 51 of the *Act*, in the amount of **$24,304.80**.

Conclusion

I provide the Tenants with a Monetary Order in the amount of **$24,304.80** in the above terms, and the Landlord must be served with **this Order** as soon as possible. Should the Landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court 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: March 8, 2022

Residential Tenancy Branch