



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 2 Month Notice to End Tenancy for Landlord's Use of Property ("2 Month Notice"), pursuant to section 49.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

As the tenant confirmed receipt of the 2 Month Notice which was posted on the tenant's door on November 25, 2021, I find that this document deemed served 3 days after posting in accordance with sections 88 and 90 of the *Act*.

Issues(s) to be Decided

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began on December 1, 2017, with monthly rent currently set at \$649.00, payable on the first of the month. A security and pet damage deposit in the amount of \$312.50 was collected at the beginning of this tenancy.

The landlord purchased the property, and took possession in July 2021. The landlord served the tenant with a 2 Month Notice dated November 25, 2021, with an effective move-out date of January 31, 2022 for the following reason:

- The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse.

The landlord provided the following background for why they had decided to issue the 2 Month Notice. The landlord testified that they had previously attempted to serve the tenant with a 2 Month Notice, but the 2 Month Notice was cancelled as the Arbitrator was not satisfied that the landlord had provided adequate proof of ownership. The landlord provided documentary evidence for this hearing that they are the new owner of this property, and therefore the new landlord.

The landlord testified that their current commute to work is 60 to 90 minutes each way, and residing at the rental property would reduce the commute to only 20 to 25 minutes each way. The landlord also testified that they are the owner, caretaker, and manager of the property, and considering the large size of the 42 unit property, they needed to reside there to provide proper management for the property. The landlord testified that because of their age, and the fact that the building has no elevator, they cannot live on the third floor. The landlord also does not wish to live on the ground floor. The landlord testified that there is currently a vacant unit on the ground floor, and a vacant unit on the third floor that is currently undergoing renovations. The landlord testified that there are no vacancies on the tenant's floor, which is the second floor. When asked why the tenant's specific unit was chosen, the landlord testified that there was "no particular reason" other than the fact that the tenant's unit is the end unit, and they "had to pick one".

The landlord also provided detailed evidence of how the tenant has acted strangely, and has harassed the landlord since the issuance of the first Notice to End Tenancy on July 30, 2021. The landlord states that the tenant has stalked them, video taped them, and has engaged in other behaviour that has caused the landlord considerable concern.

The tenant disputes that the 2 Month Notice was issued in good faith, especially since there are other vacant units in the building. The tenant believes that the main reason for ending the tenancy is the fact that the tenant only pays \$649.00 per month in rent, while market rent is almost double that. The tenant provided a list of vacancies, as well as advertisements for other units that are advertised for \$1,200.00 per month. The tenant also provided receipts for the rent payments that they have made in the amount of \$640.00.

Analysis

Subsection 49(3) of the *Act* sets out that a landlord 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.

Residential Tenancy Policy Guideline 2: Good Faith Requirement When Ending a Tenancy states:

“If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.

If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate that they do not have an ulterior motive for ending the tenancy.”

Although the landlord stated that they had issued the 2 Month Notice in order to occupy the suite, I find that the tenant had raised considerable doubt as to the true intent of the landlord in issuing this notice. As the tenant raised doubt as to the landlord's true intentions, the burden shifts to the landlord to establish that they do not have any other purpose to ending this tenancy.

The landlord provided multiple reasons for why they plan to move into the building, which I accept. The landlord testified that they wished to reside on site in order to better manage the building, and be closer to work. I am not satisfied, however, with the landlord's explanation for why the tenant's specific unit was chosen. Although other

vacant rental units exist in the building, and although there are 13 other units on the same floor, the landlord did not provide a specific explanation for why they could not occupy the ground floor unit, or any of the other units on the second floor. Furthermore, in the landlord's own evidence and testimony, the landlord expressed considerable concern about the tenant's behaviour, and why they wished the tenancy to end. I find the landlord's own testimony raised considerable doubt as to why they would end this specific tenancy when other units were available. The tenant also clearly pays considerably less rent than some other rental units, as supported by the advertisements submitted by the tenant. Additionally, landlord has obvious concerns about the tenant which has not been addressed with the issuance of a 1 Month Notice to End Tenancy for Cause.

I find that the landlord has not met their burden of proof to show that they had served the tenant with this 2 Month Notice in good faith. Based on a balance of probabilities and for the reasons outlined above, I find that the landlord has not met their onus of proof to show that the landlord has no other motive for ending this tenancy.

Furthermore, it was undisputed by both parties that the tenant had paid rent after the effective date of the 2 Month Notice, which was accepted by the landlord. It was also undisputed that the landlord did not indicate to the tenant that these payments were for "use and occupancy" only. The landlord testified that the tenant's rent payments were paid through direct deposit and no rent receipts are therefore required or issued.

Residential Tenancy Policy Guideline #11 discusses the Amendment and Withdrawal of Notices, specifically what happens when payment is accepted after the effective date of a Notice is given.

"The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- *whether the receipt shows the money was received for use and occupation only.*
- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel....

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional.”

By accepting rent payment after the effective date of the Notice, and without indicating or communicating to the tenant that these payments were accepted for use and occupancy only, I find that the landlord had implied that that this tenancy was reinstated, and was to continue in accordance with the *Act* and tenancy agreement. Although the rent payments were paid electronically, and no rent receipts were issued, the landlord still could have informed the tenant through other means, but did not do so.

In addition to the fact that the landlord has not met their burden of proof to show that they do not have any other purpose in ending this tenancy, I find that the landlord had failed to clearly communicate to the tenant that the acceptance of rent payments were for use and occupancy only. For all these reasons listed, I allow the tenant's application to cancel the 2 Month Notice dated November 25, 2021. This tenancy is to continue until ended in accordance with the *Act*, regulation, and tenancy agreement.

Conclusion

The tenant's application to cancel the landlord's 2 Month Notice is allowed. The landlord's 2 Month Notice, dated November 25, 2021, is cancelled and is of no force or effect. This tenancy is to continue until it is ended in accordance with the *Act* and tenancy agreement.

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 24, 2022