Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, MNDCT, FFT

Introduction

This hearing was convened by way of conference call concerning an application made by the tenant seeking an order cancelling a notice to end the tenancy for landlord's use of property; a monetary order for money owed or compensation for damage or loss under the *Residential Tenancy Act,* regulation or tenancy agreement; and to recover the filing fee from the landlord for the cost of the application.

The tenant and 2 agents of the landlord attended the hearing and each gave affirmed testimony. The parties were given the opportunity to question each other and to give submissions. The parties agree that all evidence has been exchanged, all of which has been reviewed and is considered in this Decision.

During the course of the hearing I advised the parties that the Rules of Procedure require that multiple applications contained in a single application must be related, and I found that the primary application deals with a notice to end the tenancy, and the tenant's application for monetary compensation is dismissed with leave to reapply.

Issue(s) to be Decided

The issue remaining to be decided is:

- Has the landlord established that the Two Month Notice to End Tenancy for Landlord's Use of Property was issued in accordance with the *Residential Tenancy Act* and in good faith?

Background and Evidence

LANDLORD'S EVIDENCE:

The first agent of the landlord (JC) testified that this fixed-term tenancy began on September 1, 2018 and reverted to a month-to-month tenancy after August 31, 2020 and the tenant still resides in the rental unit. Rent in the amount of $1,085.00 was payable on the 1st day of each month, but is not certain of the current rental amount. On July 1, 2018 the landlord collected a security deposit from the tenant in the amount of $492.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a 1 bedroom suite in a carriage house, and a copy of the tenancy agreement has been provided for this hearing.

On January 27, 2022 the landlord posted a Two Month Notice to End Tenancy for Landlord's Use of Property to the door of the rental unit and sent a copy to the tenant by email. A copy has been provided by both parties for this hearing and it is dated January 27, 2022 and contains an effective date of vacancy of March 31, 2022. The reason for issuing it states: 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), specifying the child of the landlord or landlord's spouse.

The building is mixed use residential and commercial. There are 3 other units, 2 of which are single rooms with no kitchen and the other is a bachelor unit. This is the only 1 bedroom unit in the building, and there are no other units comparable to this one.

The landlord's 31 year old son currently lives in another community and shares the space with his mother and doesn't want to continue to live there and wants to be closer to his work in a neighbouring community. The landlord also wants his son to live there. Affidavits of the landlord and his son have been provided for this hearing.

The landlord had previously served a Two Month Notice to End Tenancy for Landlord's Use of Property, and the tenant disputed it. A copy of the resulting Decision dated December 07, 2021 has been provided for this hearing. The Arbitrator cancelled the Notice and the tenancy continued.

The landlord testified that he gave the tenant some information about comparable rents, as requested by the tenant, to give it some perspective, but made no suggestion about what the tenant should or would pay.

The landlord further testified that at the December 7, 2021 hearing the tenant's dispute involved misrepresentation leaving out some information, and said that the landlord's son could move into another unit, but the tenant knows there are no other comparable units. However, the tenant mislead the Arbitrator leaving out the word "comparable." The tenant also said that the landlord's son is "allegedly" the landlord's son. The

landlord has provided a copy of his son's birth certificate, and testified that the landlord's company owns the property, and proving that should be the end of the argument. There is no other evidence provided before or now that there is any other intent. The rental unit has not been advertised, and the landlord cannot prove a negative.

Also, at the previous hearing, the tenant had testified that the letter provided from the landlord's son was not sworn, but didn't specify what the issues were. The tenant also alleged that the landlord is trying to avoid legal arguments or obligations. That sounds impressive, but there are no facts to support that. The tenant is a lawyer, and the landlord discussed some elements of good faith and comparable units, of which there are none; there are no other available units in the building or any other building that are suitable. The Arbitrator at the December 7, 2021 hearing referenced that the letter provided by the landlord's son said something about comparable rental units, however the Decision also says something about the fact that the landlord's son made some reference of the tenant's ability to pay. He's not destitute, but a lawyer with a full-time job. The prior Arbitrator twisted that into a reason that perhaps the landlord's son lied in his letter, which made no sense to the landlord.

The tenant also said something about "wanting to" and not "needs to," which is not a requirement under the *Act.* Wanting is sufficient.

The tenant also said there are other units for the landlord's son, but they are smaller and 2 share a bathroom. The tenant knew that it wasn't comparable but implied at the hearing that there were others that the son could move into. That was fraudulent misrepresentation, and the tenant knew all that having lived in the rental unit for several years.

At some point in 2021 the landlord and son began discussions about moving a tenant who currently lives in a basement suite into this rental unit. In October, 2021 that tenant, who had an option to continue his tenancy, continued his current lease in the basement suite. The landlord also owns a residential property, a 3 bedroom home, which is rented under a single tenancy agreement to 4 students, and the landlord has no other 1 bedroom suites available.

The landlord filed a Judicial Review Procedure Petition in February, 2022 with respect to the December 7, 2021 Decision, but no date for hearing has been requested by the landlord.

The landlord's son testified that he is the son of the landlord, and there is no ulterior motive; the landlord's son intends to live in the rental unit long-term.

The landlord's son also testified that his sworn Affidavit is true.

The landlord's son and the landlord viewed the rental unit on June 13, 2021 because the landlord's son had not been there prior.

TENANT'S EVIDENCE:

The tenant submits that *Res Judicata* applies, in that the landlord is trying to have a *hearing de novo.* The same questions were asked previously and the parties are the same.

The tenant also submits that this hearing lacks jurisdiction, in that a Judicial Review Proceeding was filed and the tenant filed a Response. The tenant is currently waiting for a hearing date. The matter should be decided by the Supreme Court and either a new hearing be ordered or the Petition should be dismissed.

The tenant's position is the same; the landlord has not discharged his onus, and the notice to end the tenancy was not issued in good faith. If the landlord's son intends to move in, the landlord instead made a demand for additional rent during a rent freeze. The landlord's insistence to pay more rent, and his sole motivation is not a clear motive, ultimately is why it was found to be in bad faith.

The tenant also questions the credibility of the landlord. In July, 2021 the landlord did not issue a notice to end the tenancy for the landlord's use of the property, but tried to get the tenant to sign 2 mutual agreements to end the tenancy. Between July 28 and 31, the landlord still tried to get the tenant to sign one, purposely back-dating it. On July 31, 2021 when the first notice to end the tenancy was issued, the landlord put the date as July, however in an email on July 30, 2021 the landlord indicated that he sent a mutual agreement to end the tenancy and still wanted the tenant to sign it. The previous notice to end the tenancy was back-dated to July 28 so that it would have an effective date of vacancy of September 30. It was not dated July 31, 2021 when the landlord signed it. Further, there was no mention of the notice to end the tenancy in the emails exchanged by the parties, and the landlord still wanted the mutual agreement to end the tenancy.

The landlord made no reference to an email that he sent to the tenant dated June 28, 2021 stating that he MUST increase the rent, which was after the landlord and his son viewed the suite. The only thing to be interpreted from that is that he would attempt to evict without an increase in rent.

Analysis

Firstly, the tenant has raised 2 legal arguments: *Res Judicata* and that the matter is primarily before the Supreme Court.

Res Judicata is a doctrine which prevents the re-hearing of a matter that has already been adjudicated upon. The Supreme Court has dealt with *res judicata* in a number of cases. The Honourable Mr. Justice Macaulay stated that:

> *"… res judicata* ("the matter is judged") is an equitable principle that, when its criteria are met, precludes re-litigation of a matter. There are a number of preconditions that must be met before this principle will operate:
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> 1. the same question has been decided in earlier proceedings;
> 2. the earlier judicial decision was final; and
> 3. the parties to that decision (or their privies) are the same in both the proceedings.
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> However, if the moving party successfully establishes these preconditions, a decision-maker (i.e. the arbitrator) must still determine whether, as a matter of discretion, the principle should be applied. The Supreme Court of Canada (in 2001 in *Danyluk* and later in 2013 in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19) explained that "The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case." Further, this discretion exists to ensure that "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice.".
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> The Court then identified seven factors which could be considered in determining whether it would be fair and just in applying this principle, but noted that the list is open (i.e. non-exhaustive):
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> 1. the wording of the statute;
> 2. the purpose of the legislation;
> 3. the availability of an appeal;
> 4. safeguards within the administrative process;
> 5. the expertise of the administrative decision maker;
> 6. the circumstances giving rise to the prior decision;
> 7. any potential injustice that might result from the application or non-application of the principle (which the Court described as "a final and most important factor").

In this case, to apply the principle of *res judicata* would then mean that the landlord is barred from issuing another notice to end the tenancy for landlord's use of the property. The tenant is a lawyer and did not submit that there is any limitation or time period within which the landlord could re-issue. I do not believe that was an intention of the legislation. Further, Section 62 of the *Residential Tenancy Act* states:

> **62** (1) The director has authority to determine
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> (a) disputes in relation to which the director has accepted an application for dispute resolution, and
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> (b) any matters related to that dispute that arise under this Act or a tenancy agreement.

The landlord issued a new Two Month Notice to End Tenancy for Landlord's Use of Property and the tenant disputed it, and I find that both parties have acted as they are entitled to.

The second legal submission made by the tenant is that the matter of the first notice to end the tenancy is primarily before the Supreme Court. The record shows that the first notice to end the tenancy was cancelled on December 7, 2021. The landlord was unsuccessful in obtaining a review hearing because he applied later than the *Act* permits. There is no question that the landlord has also filed a Petition in the Supreme Court of British Columbia for Judicial Review, but has not set the matter for hearing. That matter seeks a review as to whether or not the December 7, 2021 Decision is patently unreasonable, not this matter, and in my opinion it is not primarily before the Supreme Court.

This is a new notice to end the tenancy and a new hearing was held that must be decided upon.

Where a tenant disputes a notice to end a tenancy given by a landlord the onus is on the landlord to establish that it was given in accordance with the *Residential Tenancy Act,* and in the case of a Two Month Notice to End Tenancy for Landlord's Use of Property, the landlord must establish good faith intent to use the rental unit for the purpose contained in the Notice.

I have reviewed the Two Month Notice to End Tenancy for Landlord's Use of Property (the Notice) and I find that it is in the approved form and contains information required by the *Act.* Good faith intent is in dispute.

I refer to Residential Tenancy Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member, which states, in part: "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."

The tenant relies on evidence of an email from the landlord dated June 28, 2021 indicating that rent must be increased, during a rent freeze, which could give rise to an ulterior motive. However, the tenant replied to the landlord that an increase may be in order considering a 2nd occupant.

The tenant also questions the credibility of the landlord by attempting to mutually agree in writing to end the tenancy with the tenant, and allegedly back-dating the Notice to July 28, 2021 so that there would be an effective date of vacancy of September 30, 2021. However, the tenant also agreed in his testimony that since the service of the Notice didn't meet the 3-day window, the effective date of vacancy would be extended to end of the following month. The landlord testified that he gave the tenant some information about comparable rents, as requested by the tenant, to give it some perspective, but made no suggestion about what the tenant should or would pay.

The exchanges of emails between the parties dating back to July 27, 2021 or earlier clearly indicate the landlord's intent to allow his son to move into the rental unit. The tenant was fully aware of that. The tenant also agreed, albeit not by signature, to end the tenancy for that purpose, but not before October 31, 2021. The tenant did not sign a Mutual Agreement to End Tenancy, but the landlord did nothing unlawful by attempting to have it signed. If the tenant had signed it, that would negate any necessity for the landlord to issue a Two Month Notice to End Tenancy for Landlord's use of property. That does not give rise to an ulterior motive.

The tenant also testified that there was no legal basis to increase rent or evict. I agree that there was no legal basis to increase rent, however requesting that the tenant agree to an increase of rent is not unlawful, and I disagree with the tenant that the landlord had no right to evict.

I have reviewed all of the evidentiary material, and having heard the testimony of the parties and the landlord's son, I find that there is a clear intention for the landlord's son to occupy the rental unit, and no ulterior motive for ending the tenancy.

I dismiss the tenant's application to cancel the Two Month Notice to End Tenancy for Landlord's Use of Property.

The *Act* also specifies that where I dismiss a tenant's application to cancel a notice to end a tenancy, I must grant an Order of Possession in favour of the landlord, so long as the notice given is in the approved form. Having found that it is in the approved form, I grant an Order of Possession in favour of the landlord. Since the effective date of vacancy has passed, I grant the Order of Possession effective on 2 days notice to the tenant.

Conclusion

For the reasons set out above, the tenant's application for a monetary order for money owed or compensation for damage or loss under the *Residential Tenancy Act,* regulation or tenancy agreement is hereby dismissed with leave to reapply.

The tenant's application for an order cancelling a Two Month Notice to End Tenancy for Landlord's Use of Property is hereby dismissed without leave to reapply.

I hereby grant an Order of Possession in favour of the landlord effective on 2 days notice to the tenant.

This order is final and binding and may be enforced.

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: May 19, 2022

Residential Tenancy Branch