Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, CNL, FFT

Introduction

The Tenant applies for the following relief under the *Residential Tenancy Act* (the "*Act*"):

- An order pursuant to s. 49 to cancel a Two-Month Notice to End Tenancy signed February 15, 2022 (the "Two-Month Notice");
- An order pursuant to s. 62 that the Landlord comply with the *Act*, regulations, and/or the tenancy agreement; and
- Return of the his filing fee pursuant to s. 72.

A.F. appeared as the Tenant. S.G. appeared as the Landlord. A.G., S.G.'s wife, appeared at the hearing. The Landlord advised that A.G. would be making submissions on his behalf.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

A.G. advised that the Landlord served the Tenant with the Two-Month Notice by posting it to his door on February 15, 2022. The Tenant acknowledges receiving the Two-Month Notice, though says he received it on February 18, 2022. I find that the Landlord served the Two-Month Notice in accordance with s. 88 of the *Act*. I further find that it was received by the Tenant on February 18, 2022 as acknowledged by the Tenant.

The Tenant advises that the Notice of Dispute Resolution and his evidence was served on the Landlord by way of registered mail sent on March 10, 2022. A.G. acknowledges

receiving the Tenant's application materials. I find that the Tenant served the Notice of Dispute Resolution and a portion of his evidence on the Landlord by way of registered mail sent on March 10, 2022 in accordance with s. 89 of the *Act*.

The Tenant further advised that three additional documents provided recently to the Residential Tenancy Branch were not served on the Landlord, a point that was confirmed by A.G.. Rule 3.1 of the Rules of Procedure requires an applicant to serve its evidence on respondents. Rule 3.5 of the Rules of Procedure requires an applicant to demonstrate service of their materials at the hearing. The additional evidence was not served, as admitted by the Tenant. As the documents was not served, it is not included into evidence and I will not consider it when determining this matter.

A.G. advised that the Landlord's response evidence was served on the Tenant by way of registered mail sent in late March 2022. The Tenant acknowledges receiving the Landlord's responding evidence, though says he received it in mid-April due to the registered mail package being sent to another rental unit at the subject residential property. The Tenant raised no objections with respect to service of the Landlord's evidence. I find that pursuant to s. 71(2) of the *Act* that the Tenant was sufficiently served with the Landlords responding evidence and make this finding based on the Tenant's acknowledged receipt of the same.

Issue(s) to be Decided

1) Should the Two-Month Notice be cancelled?
2) Is the Landlord entitled to an order for possession?
3) Is the Tenant entitled to the return of his filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant took occupancy of the rental unit on March 15, 2012.
- Rent is currently payable in the amount of $822.15 on the 15th of each month.
- The Landlord holds a security deposit of $375.00 in trust for the Tenant.

A copy of the written tenancy agreement was put into evidence. A.G. is not listed as a Landlord under the tenancy agreement. No evidence was provided on whether A.G. is a co-owner of the residential property with the Landlord.

A.G. advised that there are three rental units at the subject residential property: one basement suite, one on the main floor, and a third in a coach house. The Tenant is renting the coach house, which was described as a 1-bedroom rental unit by the parties.

A.G. advised that she and her husband are in the process of separating. She indicated that she is set to take over ownership of the subject residential property as part of their separation and that it is her intention to move into the Tenant's rental unit. A copy of a separation agreement signed by the Landlord and A.G. was put into evidence. The separation agreement was signed on February 10, 2022 and confirms A.G. is to take ownership of the property as part of the property settlement and will be responsible for the property's mortgage.

The Two-Month Notice was issued on the basis that the Landlord or the Landlord's spouse was to occupy the rental unit. A.G. says that she is choosing to occupy the rental unit due to financial reasons. She says that she is able to generate more rental income from the other two rental units and that she needs this to pay for the property's mortgage.

The Tenant argues that he is being targeted by the Landlord and questions why his rental unit is the one subject to eviction. He says that A.G. will have a child residing with her and that the 1-bedroom coach house is less appropriate than the other rental units. The Tenant argued that the basement suite was unoccupied and would better meet A.G.'s needs.

A.G. denied that the basement suite was unoccupied and says that it has been rented by the same tenants since 2020. She says the basement tenants were away for two months and this explains why it appeared to be vacant. She further emphasized that she is choosing to reside within the coach house for financial reasons as mentioned above, that her child would not be living with her full-time, and that the rental unit would suit her needs. The separation agreement notes that there is one child of the marriage, who is 8 years-old

The Tenant also argues that the Landlord is targeting him as he had been subject to a rent increase demand which he says exceeded the amount permitted under the *Act*.

The Tenant advises that the excess rent increase was attempted in January 2022 and that a mere month afterwards, the Landlord issued the Two-Month Notice.

A.G. indicated that she and her husband are frequently fighting. She admits that the excess rent increase demand was made, though it was made in the context of an argument she was having with her husband and was sent by her husband while she was arguing with him.

A.G. advised that she has not divorced her husband yet and that this would not be done until February 2023 as they have only recently separated. The two continue to reside within the former family home post-separation.

The Tenant advised that he has attempted to pay rent for March 15, 2022 onwards but that the Landlord has refused receipt of rent. A.G. confirmed that the Landlord has not accepted rent from the Tenant from March 15, 2022 onwards.

The Tenant argued that A.G. may not be a "spouse" as contemplated by the *Act* now that the parties are separating. Arguments were raised with respect to the urgency of A.G. taking occupancy of the rental unit given that several months have passed since the parties have separated and that she has yet to find alternate accommodation. He further argued that the dates are incorrect in the Two-Month Notice and that an improper notice to end tenancy was issued prior to the current version that is subject to his application.

At the end of the hearing, the Tenant confirmed that his claim under s. 62 of the *Act* pertained to his claim that the Two-Month Notice was not properly issued, a point that is made clear on the description provided by the Tenant in his application.

Analysis

The Tenant applies to cancel a Two-Month Notice. The Tenant's claim under s. 62 of the *Act* is not relevant to the extent that it replicates the same points in the Tenant's claim to cancel the Two-Month Notice under s. 49. I dismiss his claim under s. 62 as it does not advance a separate claim from the claim advanced under s. 49.

Pursuant to s. 49(3) of the *Act*, a landlord may end a tenancy with two months notice where the landlord or a close family member intends, in good faith, to occupy the rental unit. Pursuant to s. 51(1) of the *Act*, a tenant who receives a notice under s. 49 is

entitled to compensation equivalent to one month's rent payable under the tenancy agreement on or before the effective date of the notice. Though this is the Tenant's application, the burden of proving on a balance of probabilities that the Two-Month Notice was properly issued rests with the Landlord.

Policy Guideline #2A provides the following guidance with respect to the good faith requirement imposed by s. 49:

> In *Gichuru v Palmar Properties Ltd.*, 2011 BCSC 827 the BC Supreme Court found that good faith requires an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy. When the issue of a dishonest motive or purpose for ending the tenancy is raised, the onus is on the landlord to establish they are acting in good faith: *Aarti Investments Ltd. v. Baumann,* 2019 BCCA 165*.*
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> 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. 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 (section 32(1)).
>
> If a landlord gives a notice to end tenancy to occupy the rental unit, but their intention is to re-rent the unit for higher rent without living there for a duration of at least 6 months, the landlord would not be acting in good faith.
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> If evidence shows the landlord has ended tenancies in the past to occupy a rental unit without occupying it for at least 6 months, this may demonstrate the landlord is not acting in good faith in a present case.
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> If there are comparable vacant rental units in the property that the landlord could occupy, this may suggest the landlord is not acting in good faith.
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> The onus is on the landlord to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no dishonest motive.

I place significant weight in the separation agreement provided by the Landlord, which was signed on February 10, 2022. It clearly sets out that the Landlord and A.G. separated and that A.G. will be taking over ownership of the subject residential property, including the mortgage.

I find that the Landlord has demonstrated the good faith intention of A.G. to occupy the rental unit. It is entirely reasonable for A.G. to move to the residential property now that she and the Landlord have separated and that she will be taking over ownership of the property. It is further reasonable that she is concerned about her personal finances, particularly in the context of a separation, and is willing to live in less spacious accommodations so that she can maximize her rental income to pay the property's mortgage.

The Tenant argued that his rental unit is not as well suited for a small child and his mother. I put no weight into the Tenant's argument. A.G. indicated, and I accept, that financial concerns are pre-eminent in her mind. The Tenant further argued that A.G. has shown no rush to find alternate accommodation despite the months since the separation and the Two-Month Notice being issued. With respect, it is quite common for spouses to reside within the same house but live separate and apart from one another. Further, the Two-Month Notice was issued shortly after the separation agreement was signed. The only reason there has been a delay is due to the length of time for the Tenant's application to be heard.

Dealing finally with whether A.G. is a "spouse", I note that s. 49(1) of the *Act* defines a "close family member" as a parent, spouse, child. As stated by A.G. at the hearing, she is still married to the Landlord and that she will not be applying for a divorce until February 2023. This time frame corresponds with s. 8(2)(a) of the *Divorce Act*. Further, s. 3(2) of the *Family Law Act* specifies that a "spouse" includes a former spouse. A.G. is still married to the Landlord and is still considered to be his spouse despite their separation, a point that is supported by s. 3 of the *Family Law Act*. I find that the fact that A.G. has separated from the Landlord is immaterial to whether she is still a spouse. I further find that A.G. is still a "spouse" as contemplated by s. 49 of the *Act*.

I find that the Landlord properly issued the Two-Month Notice and has demonstrated A.G.'s good faith intention to occupy the rental unit. Accordingly, I dismiss the Tenant's application to cancel the Two-Month Notice without leave to reapply.

Section 55(1) provides that where a tenant's application to cancel a notice to end tenancy is dismissed and the notice complies with s. 52, then I must grant the landlord an order for possession.

I have reviewed the Two-Month Notice and find that it complies with the formal requirements of s. 52 of the *Act*. It is signed and dated by the Landlord, states the address for the rental unit, sets out the grounds for ending the tenancy, and is in the approved form (RTB-32). The effective date is incorrect given that the Two-Month Notice was received on February 18, 2022, meaning the effective date should be May 15, 2022. However, this error is corrected automatically by s. 53 of the *Act*. The error, such as it is, is not material to the validity of the Two-Month Notice.

I find that the Landlord is entitled to an order for possession. As the effective date of the Two-Month Notice has passed, I order that he provide vacant possession of the rental unit within two days of receiving the order for possession.

The Tenant further advised that he did not pay rent from March 15, 2022 onwards. I note that he is entitled to one month's free rent under s. 51(1) of the *Act*, which appears to have been satisfied based on the evidence provided by the parties.

I caution the parties that s. 51(2) of the *Act*, which permits compensation equivalent to 12 months rent, may be applicable should the stated purpose within the Two-Month Notice not be fulfilled within a reasonable period of time and that the rental unit is not used for the stated purpose for at least 6 months.

Conclusion

I find that the Landlord has demonstrated the good faith intention of his spouse, A.G., to occupy the subject rental unit. The Two-Month Notice was properly issued and the Tenant's claim to cancel the notice is dismissed.

The Two-Month Notice complies with s. 52 of the *Act*. Pursuant to s. 55(1) of the *Act*, I order that the Tenant give vacant possession of the rental unit to the Landlord within **two (2) days** of receiving the order for possession.

As the Tenant was unsuccessful in his application, I find that he is not entitled to the return of his filing fee. His claim for its return under s. 72 of the *Act* is dismissed without leave to reapply.

It is the Landlord's obligation to serve the order for possession on the Tenant. If the Tenant does not comply with the order for possession, it may be filed by the Landlord with the Supreme Court of British Columbia 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: June 07, 2022

Residential Tenancy Branch