



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- cancellation of the Two Month Notice to End Tenancy for Landlord's Use (the Notice), issued pursuant to section 49;
- an authorization to recover the filing fee for this application, under section 72.

The tenant and landlords CM and KM (the landlord) attended the hearing. Witness for the tenant KI also attended. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand the parties are not allowed to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5,000.00."

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with section 89 of the Act.

I note that section 55 of the Act requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the Act.

Issues to be Decided

Is the tenant entitled to:

1. cancellation of the Notice?
2. an authorization to recover the filing fee?

If the tenant's application is dismissed, are the landlords entitled to an order of possession?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending party; it is the landlord's obligation to present the evidence to substantiate the Notice.

Both parties agreed the tenancy started on October 01, 2020. Monthly rent is \$950.00, due on the first day of the month. At the outset of the tenancy a security deposit of \$475.00 was collected and the landlords hold it in trust.

Both parties agreed the landlord served the Notice in person on March 27, 2022.

A copy of the Notice was provided. The Notice is dated March 23, 2022 and the effective date is May 31, 2022. It states: "the rental unit will be occupied by the landlord or the landlord's spouse". The landlords testified that they will occupy the rental unit.

The tenant submitted this application on March 29, 2022 and continues to occupy the rental unit.

Both parties agreed the landlords occupy the main floor and the tenant occupies the self-contained basement rental unit. The landlord affirmed that the main floor and the rental unit have each approximately 1,200 square feet. The tenant affirmed the rental unit is $\frac{3}{4}$ of the size of the main unit.

The landlord affirmed he purchased the rental unit 22 years ago and that he planned to occupy the main floor and the basement rental unit after he retired. The landlord did not inform the tenant about his intention to occupy the rental unit prior to serving the Notice.

The landlord currently is 76 years old, and his wife KM is 79 years old. The landlords are both retired.

The landlord and KM do not sleep in the same bedroom because the landlord snores loud.

The landlord would like to occupy the main floor and basement rental unit because he no longer travels and he has a better financial situation, as he is not paying for his car anymore.

The landlord always had a good relationship with the current and the prior tenants. The landlord submitted into evidence letters signed by two former tenants indicating they had a good relationship with the landlord.

The landlord affirmed he has a lung infection and that his health condition worsened “in the last couple of years”. The landlord affirmed that he is sensitive to the air quality and if he is exposed to smoke and burning odour his lungs get congested and he begins to cough excessively.

The landlord submitted a doctor’s note dated March 23, 2022: “This letter is to confirm that [the landlord] has heart and lung disease. He is sensitive to smells and poor air quality which worsen these medical issues.

The landlord affirmed that he smells burning odours when the tenant cooks. The landlord replaced the tenant’s stove in June 2020 and the burning odours reduced. The landlord asked the tenant to replace his pans a few months ago in order to further reduce the burning odours.

The landlord affirmed he did not serve the Notice because of the burning odours.

The tenant’s application states:

It is my belief that the eviction notice was not served in good faith and that the landlords have an ulterior motive in giving me this notice. I do not believe the landlords intend to occupy the basement suite that I have been living in since October 2018. I intend to show that the landlords have been attempting to evict me for improper purposes and have been harassing me since approximately November 2019.

The tenant affirmed that on March 15, 2022 the landlord instructed him to cook at 350F or below and the tenant did not agree to cook at 350F or below. The tenant affirmed the landlord said he would serve a notice to end tenancy if the tenant cooks above 350F.

The landlord affirmed he asked the tenant to cook at 350F or below, but he did not say that he would serve a notice to end tenancy if the tenant cooks above 350F.

Witness KI affirmed she observed the landlord informing the tenant that he would serve a notice to end tenancy if he cooks above 350F.

At a later point, the landlord affirmed that he informed the tenant that he may ask him to move out if the landlord continued to smell burning odours on March 15, 2022.

The landlord affirmed that he decided it was time to live alone before the March 15, 2022 conversation.

Analysis

Section 49(8)(a) allows the tenant to dispute a 2 month Notice within 15 days after the date the tenant received it. As the tenant confirmed receipt of the Notice on March 27, 2022 and submitted this application on March 29, 2022, I find the tenant disputed the Notice within the timeframe of section 49(8)(a) of the Act.

Pursuant to Rule of Procedure 6.6, the landlord has the onus of proof to establish, on the balance of probabilities, that the Notice to end tenancy is valid.

RTB Policy Guideline 2A states that when issuing a notice under section 49 of the Act the landlord must demonstrate there is not an ulterior motive for ending the tenancy:

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 motive for ending the tenancy, and they are not trying to avoid obligations under the RTA and MHPTA or the tenancy agreement.

In *Gallupe v. Birch*, 1998 CanLII 1339, the British Columbia Supreme Court states:

[35] I conclude from the observations of Taylor J.A. and Melvin J. that a consideration of dishonest motive or purpose is a matter that should be undertaken in a consideration of the good faith of a landlord in serving an eviction notice under s. 38(3). When the

question of good faith is put in issue by a tenant, the arbitrator (or panel, if on a review) should consider whether there existed a fundamentally dishonest motive or purpose that could affect the honesty of the landlord's intention to occupy the premises. In such circumstances, the good faith of a landlord may be impugned by that dishonest motive or purpose.

I accept the undisputed testimony that the landlord has a lung infection, the landlord smells burning odours when the tenant cooks and that on March 15, 2022 the landlord asked the tenant to cook at 350F or below.

I find the landlord's testimony about his health condition worsening was vague and not convincing, as the landlord affirmed his health condition worsened "in the last couple of years". The landlord did not specify what was the health change, and when precisely his health condition worsened. The doctor's note does not provide details about the landlord's worsening health condition.

The landlord initially affirmed that he did not serve the Notice because of the burning odours and that he did not say on March 15, 2022 that he would serve a notice to end tenancy. Later the landlord admitted that he said that he may ask the tenant to move out on March 15, 2022 if the burning odours continue.

The tenant's application indicates the tenant does not believe the landlord served the Notice in good faith.

Based on the tenant's more convincing testimony and KI's testimony, I find the landlord said he would serve a notice to end tenancy on March 15, 2022 if the tenant does not cook at 350F or below.

The landlord dated the Notice March 23 and served the Notice on March 27, 2022.

Based on the above, I find that the landlord has not met the onus to prove that he intends, in good faith, to occupy the rental unit. I find the Notice was issued with ulterior motives.

Accordingly, I cancel the Notice. This tenancy will continue until it is lawfully ended in accordance with the Act.

As the tenant was successful in this application, pursuant to section 72 of the Act, I authorize the tenant to recover the \$100.00 filing fee.

Conclusion

The March 23, 2022 Notice is cancelled and of no force or effect. This tenancy will continue in accordance with the Act.

Pursuant to section 72(2)(a) the tenant is authorized to deduct \$100.00 from a future rent payment to recover the filing fee.

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: July 20, 2022

Residential Tenancy Branch