Dispute Resolution Services

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 tenants applied for:

- cancellation of the Two Month Notice to End Tenancy for Landlord's Use (the 2 month Notice), issued pursuant to section 49; and
- an authorization to recover the filing fee for this application, under section 72.

Tenant YR (the tenant) and landlord AN (the landlord) attended the hearing. The tenant represented tenant VA. The tenant was assisted by lawyer KK. 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

Are the tenants entitled to:

1. Cancellation of the 2 month Notice?
2. An authorization to recover the filing fee?

If the tenants' application is dismissed, is the landlord entitled to an order of possession?

Background and Evidence

While I have turned my mind to the evidence 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 parties; it is the landlord's obligation to present the evidence to substantiate the 2 month Notice.

Both parties agreed the tenancy started on June 01, 2017. Monthly rent is $1,100.00, due on the first day of the month. At the outset of the tenancy a security deposit and a pet deposit were collected, and the landlord holds them in trust.

The parties signed a new tenancy agreement (the new tenancy agreement) on June 04, 2019. Clause 2 of the new tenancy agreement indicates the fixed-term tenancy will end on May 31, 2020 because the tenants will "buy own property". Both parties signed clause 2. The new tenancy agreement states:

> 6. Tenants must move out of the rental at the end of the lease, as mutually agreed. Tenant may move out early without penalty.
> 7. Landlord can rent out the rental after the tenant moves out without penalty / tenant seeking compensation.

Both parties agreed the landlord served the 2 month Notice in person on March 27, 2022.

A copy of the 2 month Notice was provided. The 2 month Notice is dated March 28, 2022 and the effective date is May 31, 2022. It states: "the rental unit will be occupied by the landlord or the landlord's close family – the landlord or landlord's spouse". The landlord testified that he will occupy the unit with his wife and his two children.

The tenant submitted this application on April 07, 2022 and continues to occupy the rental unit.

Both parties agreed the landlord occupies the main unit with his wife and two children ages 10 and 13. The tenants occupy the coach house on the same lot. The landlord affirmed the main unit is a 3-bedroom, 2,400 square feet house and that the rental unit is a 1-bedroom, with approximately 800 square feet suite plus the unfinished basement. The tenant affirmed the landlord's unit is a 3-bedroom, 2,600 square feet house and the rental unit is a small 1-bedroom suite with an unfinished basement.

One of the landlord's children suffers from autism, stress and anxiety. As a consequence of the landlord's son's health condition, he is afraid of noise and of being around other people. The tenant is not aware of the landlord's son's health condition.

The landlord intends to occupy the rental unit as a living space. The landlord affirmed that his son has gained weight and his anxiety worsened in the months before he served the 2 month Notice. The landlord affirmed that his son's doctor requested that his son exercise to address the weight gain and anxiety. The landlord's son will do his private therapy and exercise in the rental unit's space. The landlord will also use the rental unit for meditation, yoga and home office space.

The tenant affirmed the rental unit is not large enough for exercising or suitable for yoga. The landlord affirmed that he intends to renovate the 600 square feet basement to use that space for exercising and the rental unit's main floor is suitable for his home office and yoga space, as there are large windows.

The landlord affirmed that the closest fitness center is 10-20 kilometres from the rental unit, and his son needs to be supervised all the time because of his health situation. The tenant affirmed that there is a large community center about "5 minutes driving from the rental unit".

Both parties agreed the landlord served a two month notice to end tenancy in 2019 (the 2019 Notice), as the landlord planned to occupy the rental unit. The tenant disputed the 2019 Notice and the parties agreed to cancel the 2019 Notice. The parties signed the new tenancy agreement because of the settlement to cancel the 2019 Notice.

Both parties agreed they had an amicable relationship until May 2020.

The landlord served a one month notice to end tenancy in late 2020 (the 2020 Notice). The tenant submitted a Residential Tenancy Branch (RTB) decision dated February 03, 2021 (the February 2021 decision) cancelling the 2020 Notice:

> I acknowledge that the Tenants now have an infant and that the tenancy agreement addendum states that there are only to be two occupants. However, the Notice was

> issued for significant interference, unreasonable disturbance, seriously jeopardizing health, safety or a lawful right and putting the Landlord's property at significant risk. The evidence provided is not sufficient to show that the addition of an infant has caused any of these issues due to water usage or the septic system.
>
> I also note that the Landlord states that the septic system was only made for a single household, yet the Landlord allowed the two Tenants to live in the rental unit. Again, the Landlord allowed for a situation that, according to him, the septic system was not built for. The Landlord cannot now decide to end the tenancy over this issue.
>
> Given the above, I am not satisfied the Landlord has proven the grounds for the Notice. I therefore cancel the Notice. The tenancy will continue until ended in accordance with the Act.

The tenant submitted an application asking for several orders, including monetary compensation. The parties submitted a decision dated June 01, 2021 (the June 2021 decision) dismissing the tenant's application with leave to reapply because the tenant did not serve the notice of hearing.

The tenant submitted a new application asking for several orders, including monetary compensation. The landlord submitted a decision dated March 02, 2022 (the March 2022 decision) dismissing the tenant's claims:

> At the outset of the hearing, the parties were advised that as per Rule 2.3 of the Rules of Procedure, claims made in an Application must be related to each other, and I have the discretion to sever and dismiss unrelated claims. The Tenant was asked which issue was the most pressing and she elected to bring forward the issues with respect to a repair Order. As such, this hearing primarily addressed issues related to repairs, and the Tenant was advised that her other claims were dismissed. The Tenant is at liberty to apply for any other claims under a new and separate Application.
> […]
> When assessing the legitimacy of the Tenant's submissions on the whole, I find it important to note that a previous Decision of the Residential Tenancy Branch made specific notes about the conduct of the Tenant, which cast doubt on the credibility of her submissions.
> […]
> Apart from much of the information in the Tenant's email being inaccurate, more importantly for this file, I find that this demonstrates the true demeanour and intent of the Tenant. I find that this, in combination with the limited documentary evidence supporting the Tenant's allegations on this file, reveals that there is a consistent pattern being demonstrated by the Tenant that is skewed, misguided, and erroneous. Not only do I find the Tenant to be lacking in credibility, but I also find that the Tenant has submitted insufficient compelling evidence to support any of her allegations.

> […]
> Consequently, I dismiss the Tenant's request for a repair Order for a separate electrical panel to be installed, as I am not satisfied that the Tenant is paying for any of the Landlord's electrical use. Furthermore, I dismiss the Tenant's claims for any compensation related to this issue for recovery of hydro, as I am not satisfied that the Tenant is paying for any electricity apart from what benefits her solely.
> As noted above, all other claims made by the Tenant have been dismissed with leave to reapply.

The landlord affirmed that he did not serve the 2 month Notice sooner because of the multiple applications for dispute resolution submitted by the tenant and because he was generous. The landlord affirmed that the tenant informed him around February 2022 that she does not plan to move out of the rental unit.

The landlord confirmed that he has acted in good faith during the entire tenancy and that he only served the 2 month Notice because his son's health situation worsened and because the tenant informed him that she does not plan to move out.

The tenant's counsel affirmed the landlord wants the tenant to move out because of ulterior motives and did not provide evidence that he intends to occupy the rental unit.

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 2 month Notice on March 27, 2022 and submitted this application on April 07, 2022, I find the tenants disputed the 2 month 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 2 month 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.

RTB Policy Guideline 2A states:

> 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.

I find that using the rental unit adjacent to the main unit for exercising, practicing yoga and for home office is considered to be part of the living space.

I find the landlord's testimony about the size of the rental unit and the main unit more convincing and detailed than the tenant's testimony. I find the main unit has 3 bedrooms, 2,400 square feet and the adjacent rental unit has 1 bedroom, 800 square feet and a 600 square feet unfinished basement.

I find the landlord's testimony about his son's health condition was detailed and convincing. I find the landlord clearly explained the changes in his son's health condition and why he needs to exercise and do therapy at home.

I find that a 600 square feet basement is a large enough space for exercising.

Based on the landlord's testimony, I find the landlord sufficiently explained why the rental unit's main floor is suitable for yoga and home office.

I find the landlord sufficiently explained the prior disputes with the tenant. The parties submitted into evidence the February and June 2021 and the March 2022 decisions. I find the prior disputes between the parties are not the motive or purpose to affect the good faith of the landlord's intention to occupy the rental unit.

I accept the landlord's uncontested and convincing testimony that the tenant informed him around February 2022 that she does not intend to move out.

Considering the above, I find the landlord proved, on a balance of probabilities, that he intends to occupy in good faith the rental unit as a living space for him, his wife and his son. I dismiss the tenant's application.

I find the form and content of the 2 month Notice complies with section 52 of the Act, as the 2 month Notice is signed and dated by the landlord, gives the address of the rental unit, states the effective date and it is in the approved form.

Pursuant to section 55(1) of the Act, I find the landlord is entitled to an order of possession effective two days after service on the tenants.

I warn the tenants that they may be liable for any costs the landlord incurs to enforce the order of possession.

The tenants must bear the cost of the filing fee, as the tenants were not successful.

Conclusion

I dismiss the tenants' application without leave to reapply.

I grant an order of possession to the landlord effective two days after service of this order. Should the tenants fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

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: August 05, 2022

Residential Tenancy Branch