Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

Introduction

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

- an order pursuant to ss. 49 and 62(2) cancelling a Two-Month Notice to End Tenancy signed on May 30, 2022 (the "Two-Month Notice"); and
- return of her filing fee pursuant to s. 72.

K.M. appeared as the Tenant. B.M. and C.M. appeared as the Landlords.

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.

The Landlords advised having personally served the Tenant with the Two-Month Notice, which the Tenant acknowledges receiving on May 30, 2022. I find that the Two-Month Notice was served in accordance with s. 88 of the *Act* and was received by the Tenant on May 30, 2022 as acknowledged by her at the hearing.

The Tenant advised having served the Landlords with the Notice of Dispute Resolution and her evidence, which the Landlord's acknowledge receiving. Based on the acknowledged receipt of the Tenant's application materials by the Landlord, I find that pursuant to s. 71(2) of the *Act* that the Landlords were sufficiently served.

The Landlords advised having served the Tenant with their response evidence. At the outset of the hearing, the Tenant confirmed having received the Landlords' evidence though mid-way through had advised that she did not have the documents referred to by the Landlords in their submissions. The Landlords clarified that they served their response evidence on the Tenant by way of registered mail sent in two packages on

August 5, 2022. The Landlords have provided registered mail receipts as proof of service of the registered mail packages. The Tenant testified that it was an honest mistake and that she does not frequently check her mailbox.

When evidence has been served but has not been acknowledged received, s. 90 of the *Act* provides for the deemed receipt of documents. Section 90 is intended to ensure a timely and efficient process under the *Act*. Policy Guideline #12 provides guidance with respect to the service provisions of the *Act* and it makes clear, citing relevant case authorities, that the deeming provisions set out under s. 90 create an evidentiary presumption of service that can be rebutted when fairness allows it.

Under the present circumstances, I accept the Landlords' proof of service in the form of tracking information that their evidence was sent via registered mail to the rental unit on August 5, 2022. The Tenant indicates she failed to check her mailbox, which she says was an honest mistake. Policy Guideline #12 is clear that the deeming provisions are not rebutted when a party refuses to accept service of documents sent via registered mail.

I find that the Tenant's reasoning for not retrieving the registered mail packages is insufficient to rebut the deeming provision of s. 90 of the *Act*. The Tenants conduct amounts to a wilful omission to retrieve the documents, which the Tenant acknowledged as an honest mistake. I find that the Landlords served their response evidence in accordance with s. 89 of the *Act* by way of registered mail sent on August 5, 2022. Pursuant to s. 90 of the *Act*, I deem that the Tenant received the Landlords' evidence on August 10, 2022.

Issues to be Decided

1) Should the Two-Month Notice be cancelled?
2) If not, are the Landlords entitled to an order of possession?
3) Is the Tenant entitled to the return of her 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 moved into the rental unit on April 1, 2017.
- Rent of $900.00 is payable on the last day of each month.
- A security deposit of $450.00 was paid by the Tenant.

A copy of the tenancy agreement was put into evidence. I am advised that the rental unit in question is a basement suite and that the Landlords reside in the upper portion of the property.

The Landlords testified that they listed the property for sale in the spring of 2022 with an intention of moving to the interior. C.M. testified that the property was listed for 3 weeks, the realtor conducted an open house, but that they received no offers. I am advised by the Landlords that their realtor suggested that the market had slowed and that it may not be a good time to sell their property. I am advised by the Landlords that they pulled their house off the market on May 30, 2022.

I am directed by the Landlords to a letter dated July 28, 2022 in their evidence, which they indicate is from their former realtor. The letter indicates that the Landlords contacted the realtor on May 27, 2022 to pull the property from the market and were advised that they would have to wait until the following Monday as office hours had closed. There is also mention that the price was dropped on May 4, 2022 and the Landlords expressed to the realtor if the property did not sell by May 30, 2022, they would take it off the market. The letter includes attached exhibits comprising the agreement to list the property, an amendment to the listing to drop the price, and instruction from the Landlords to the realtor signed on May 30, 2022 to delist the property.

The Landlords testify that they wish to make personal use of the rental unit and issued the Two-Month Notice on this basis. A copy of the Two-Month Notice was put into evidence. C.M. indicates that he intends to remove the kitchen in the basement suite and convert the space into a workshop. I am advised that the upper portion has a den full of boxes and that C.M.’s items are in a storage locker elsewhere. The Landlords’ evidence includes receipts for the storage locker. It was submitted that the Landlords need the additional space. There was also mention that the Landlords cannot easily accommodate guests as there is insufficient space within the main portion of the house. The Landlords indicate they have owned and lived at the property in question for approximately 12 years.

The Tenant argues that the Landlords issued the Two-Month Notice in bad faith. I was advised that the Landlords had previously provided the Tenant with a letter purporting to give her notice of ending the tenancy, which the Landlords acknowledge was in the improper form. The Landlords' evidence includes a copy of the previous notice, which is in the form of a letter dated March 31, 2022 and indicates that notice was issued on the basis that the Landlords intended to sell the property to a new owner. It indicates that the Tenant was to move out by May 31, 2022.

The Tenant testified that she informed the Landlords the weekend before May 31, 2022 that the letter of March 31, 2022 was not in the proper form. The Landlord's evidence includes an email dated May 28, 2022 from the Tenant advising that the letter was in the improper form.

It was argued by the Tenant that no sooner having informed the Landlords of the improper notice, they removed the property from the market and issued the Two-Month Notice based on their personal use. It was argued that making use of the space for storage would not constitute occupation for personal use as per s. 49 of the *Act* and that the Landlord's only mentioned that they intended to have the space for guests in response to the Tenant's submissions that storage was insufficient.

The Tenant also argued that the Landlords drafted the tenancy agreement and should thus be held to a higher standard of conduct due to their being an unequal bargaining power in their relationship. The Tenant further argued that the Landlord issued the letter of March 31, 2022 by telling her that the intention was to sell the property, that they did not like what was happening in the neighbourhood, that they would rent an apartment for a year, after which point C.M. would retire and the Landlords would move north.

The Tenant also indicates that the listing was still active on June 1, 2022. The Landlords indicate that whether it is online is beyond their control.

The Landlords emphasized that their plans changed due to the interest rate increase and subsequent cooling in the real estate market, which they say was purely coincidental. It was emphasized their intention is to occupy the rental unit, which is accessible from the upper portion but is separated by way of a double-locked door.

The Tenant argued that if she is unsuccessful and an order of possession is granted, it would be unconscionable and unreasonable to make the order of possession effective two days after she receives it. She described it as double jeopardy.

The parties confirmed the Tenant continues to reside within the rental unit.

Analysis

The Tenant seeks an order cancelling the Two-Month Notice.

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. When a tenant receives a notice issued under s. 49(3) of the *Act*, they may either accept the end of the tenancy or may file an application disputing the notice within 15 days of receiving it as required under s. 49(8). If a tenant files to dispute a notice to end tenancy issued under s. 49, the landlord bears the burden of proving on a balance of probabilities their good faith intention to occupy the rental unit.

Based on the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Tenant filed her application disputing the Two-Month Notice on June 9, 2022. As the Two-Month Notice was acknowledged received on May 30, 2022, I find that the Tenant filed her application within the time permitted under s. 49(8) of the *Act*.

As per s. 49(7) of the *Act*, all notices issued under s. 49 must comply with the form and content requirements set by s. 52 of the *Act*. 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, states the correct effective date, sets out the grounds for ending the tenancy, and is in the approved form (RTB-32).

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.

> 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)).
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> 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.

The Landlords indicate that their intention is to occupy the rental unit as they require more space for themselves, storage for their belongings, and to convert the space into a workshop. The Tenant argues that the timing of the Two-Month Notice is suspicious given it shortly followed her notifying the Landlords that the previous notice was defective and that the property delisting followed shortly thereafter.

The Landlords' evidence clearly demonstrates that the house had been listed for sale, the listing price was dropped on May 4, 2022, and that it was delisted by way of instructions to their realtor signed on May 30, 2022. The Landlords testify that they provided instruction to their realtor to delist the property on May 27, 2022, which corresponds with the letter from the realtor confirming this and indicating that the paperwork had to be signed on the next business day being May 30, 2022. The Landlords testified that their intention was to move to the interior but that their plans changed when the property did not sell due to their being little interest. I find that the Landlords explanation is entirely plausible under the circumstances and corresponds with the documentary evidence they have provided.

The Tenant argues that the Landlords have acted in bad faith and points to the previous notice that was issued on the basis that the property was going to be sold and that it set its effective date for May 31, 2022. It was argued that the Two-Month Notice was only issued once the Landlords were advised that the letter of March 31, 2022 was defective.

I do not agree with the Tenant that this demonstrates bad faith at all. The letter of March 31, 2022 is defective on its face: it is in the improper form and does not list a proper cause for ending the tenancy under s. 49 as there was no purchaser requesting vacant possession. Its defectiveness is so apparent that the Landlords clearly had a misapprehension of s. 49 and the consequences that listing the property would have with respect to the tenancy.

Further, the Landlords asked their realtor to remove the listing on May 27, 2022, which is the day before the Tenant emailed on May 28, 2022 notifying the Landlords that the March 31, 2022 was not a proper notice to end tenancy. The chronology does not support the Tenant's asserted series of events that were purported to be suspicious. Finally, it does not follow that the Landlords delisting the property is proof of their bad faith as they did not need to list the property or delist it to issue a notice to end tenancy under s. 49(3) of the *Act*.

There was no dispute that the property was listed for sale, that the Landlords had communicated an intention to move to the interior with the Tenant, and that it has since been taken off the market. Plans change and the Landlords evidence clearly demonstrates that they changed their plans when the property did not sell. As mentioned in the Landlords submissions, they did not have sufficient space, which corresponds with their written submissions that the lack of space within their home precipitated the plan to sell and move elsewhere.

The Tenant argues that the Landlords' standard of conduct ought to be held to a higher standard as they drafted the tenancy agreement. As I explained at the hearing, the Tenant is citing the *contra proferentem* rule, which is a rule in contract law related to the interpretation of a disputed term within a contract. The rule posits that if a term in an agreement is ambiguous and is drafted by a party with greater bargaining power, it should be construed against the drafter. That is not applicable under the circumstances.

The Tenant argues that mere use of the space for storage is insufficient. With respect, the Landlords did not testify that they intend to make use of the space for storage alone.

Without considering the dispute on whether they would use the space for guests, the Landlords testified that they intend to turn the space into a workshop. Given that the Tenant's own evidence is that the Landlords are nearing retirement age, this seems entirely plausible.

Further, there is nothing in Policy Guideline #2A, or anywhere else in the Policy Guidelines, to suggest that storage of items does not satisfy occupancy requirement under s. 49. What Policy Guideline #2A does state is the following with respect to reclaiming the use of the rental unit as a living space:

> If a landlord has rented out a rental unit in their house under a tenancy agreement, the landlord can end the tenancy to reclaim the rental unit as part of their living accommodation. For example, if a landlord owns a house, lives on the upper floor and rents out the basement under a tenancy agreement, the landlord can end the tenancy if the landlord plans to use the basement as part of their existing living accommodation. Examples of using the rental unit as part of a living accommodation may include using a basement as a second living room, or using a carriage home or secondary suite on the residential property as a recreation room.
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> A landlord cannot reclaim the rental unit and then reconfigure the space to rent out a separate, private portion of it. In general, the entirety of the reclaimed rental unit is to be occupied by the landlord or close family member for at least 6 months. (See for example: *Blouin v. Stamp,* 2021 BCSC 411)

The Landlords evidence provides a rational and clear purpose for taking back the rental unit for their own personal use, including storage and turning it into a workshop. I find that the Landlords have demonstrated their good faith intention to occupy the rental unit for their own personal use. Accordingly, I dismiss the Tenant's application to cancel the Two-Month Notice.

Section 55(1) of the *Act* 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. As the Two-Month Notice complies with s. 52 and the Tenant's application was dismissed, I find that the Landlords are entitled to an order of possession.

The Tenant argues that the effective date for the order of possession for two days is unconscionable. Policy Guideline #54 provides guidance with respect to determining the effective date of an order of possession and states the following:

> An application for dispute resolution relating to a notice to end tenancy may be heard after the effective date set out on the notice to end tenancy. Effective dates for orders of possession in these circumstances have generally been set for two days after the order is received. However, an arbitrator may consider extending the effective date of an order of possession beyond the usual two days provided.
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> While there are many factors an arbitrator may consider when determining the effective date of an order of possession some examples are:
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> - The point up to which the rent has been paid.
> - The length of the tenancy.
>   - e.g., If a tenant has lived in the unit for a number of years, they may need more than two days to vacate the unit.
> - If the tenant provides evidence that it would be unreasonable to vacate the property in two days.
>   - e.g., If the tenant provides evidence of a disability or a chronic health condition.
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> An arbitrator may also canvas the parties at the hearing to determine whether the landlord and tenant can agree on an effective date for the order of possession. If there is a date both parties can agree to, then the arbitrator may issue an order of possession using the mutually agreed upon effective date.
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> Ultimately, the arbitrator has the discretion to set the effective date of the order of possession and may do so based on what they have determined is appropriate given the totality of the evidence and submissions of the parties.

The effective date in the Two-Month Notice was July 31, 2022, which has long since passed. There was no suggestion by the parties that the Tenant has not paid rent for October. Further, the Tenant has been a tenant within the rental unit for some time. Accordingly, I make the order of possession effective on October 31, 2022 prior to rent coming due for the following month.

Conclusion

I dismiss the Tenant's application to cancel the Two-Month Notice without leave to reapply.

The Landlords are entitled to an order of possession under s. 55(1) of the *Act*. The Tenant shall provide vacant possession of the rental unit to the Landlords by no later than **1:00 PM on October 31, 2022**.

The Tenant was unsuccessful in her application. I find she is not entitled to the return of her filing fee. The Tenant's claim under s. 72 for return of the filing fee is dismissed without leave to reapply.

It is the Landlords obligation to serve the order of possession on the Tenant. If the Tenant does not comply with the order of possession, it may be filed by the Landlords 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: October 25, 2022

Residential Tenancy Branch