Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, LRE, LAT, FFT

Introduction

The Tenant seeks 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 on June 29, 2022 (the "Two-Month Notice");
- an order pursuant to s. 70 restricting the Landlords right of entry into the rental unit;
- an order pursuant to s. 70 for authorization to change the locks; and
- return of his filing fee pursuant to s. 72.

J.L. appeared as the Tenant. R.G. an G.M. appeared as the Tenants.

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. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. The Tenant acknowledges receipt of the Landlords' evidence without objection. The Landlords acknowledge receipt of the Tenant's application and his evidence, though raise issue with the service of evidence they say they received on November 23, 2022. The Tenant says this last evidence package was left at the Landlords' door.

Rule 3.14 of the Rules of Procedure requires any additional evidence from an applicant to be received by the respondent at least 14 days prior to the hearing. In this instance, that did not take place. The Landlords' advised that they did not take serious issue with the late service of the documents, though there was digital evidence served in the late evidence package that they could not access on their computer when they attempted to

do so. The Tenant argued the Landlords could have updated their computer over that time.

I have no issue admitting the late documentary evidence from the Tenant, this despite the Tenant's breach of Rule 3.14. I do so as the Landlords raise no issue with its inclusion as they had received it and could review it prior to the hearing. I do not admit the digital evidence as the Landlords state, and I accept, that they could not access the digital evidence. In other words, they could not review it prior to the hearing. The issue could have been prevented had the Tenant served his evidence in a timely fashion and followed up with the Landlords whether they had received the digital evidence and whether there were any issues.

I find that it would be procedurally unfair to the Landlords to include evidence that was both served late and could not be accessed by them. Accordingly, I do not include or consider the Tenant's digital evidence. Based on the mutual acknowledgements of receipt without objections for the remainder of the application materials, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Preliminary Issue – Tenant's Application

Pursuant to Rule 2.3 of the Rules of Procedure, claims in an application must be related to one another. Where they are not sufficiently related, I may dismiss portions of the application that are unrelated. Hearings before the Residential Tenancy Branch are generally scheduled for one-hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

Presently, the primary issue is whether the Two-Month Notice is enforceable. The other relief claimed is secondary as authorization to change the locks or restricting the Landlords' right of entry would only be relevant should the tenancy be found to continue. If the Two-Month Notice is upheld and the tenancy come to an end, those other claims would be moot.

I find that the Tenant's claims under s. 70 to change the locks and to limit the Landlords' right of entry is not sufficiently related to the primary issue of the claim, being the enforceability of the Two-Month Notice. Accordingly, those two claims are severed from the application pursuant to Rule 2.3 of the Rules of Procedure. Should the tenancy

continue, those claims will be dismissed with leave to reapply. If the tenancy comes to an end, the claims will be dismissed without leave to reapply.

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 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 aspects of the tenancy:

- The Tenant took occupancy of the rental unit in September 2019.
- Rent of $1,250.00 is due on the first day of each month.
- A security deposit of $625.00 and a pet damage deposit of $400.00 was paid by the Tenant.

The Landlords advise that they served the Two-Month Notice on the Tenant by personally delivering it to him on June 30, 2022. The Tenant acknowledges receiving the Two-Month Notice on June 30, 2022.

I have been provided with a copy of the Two-Month Notice. In it, it lists that it was issued on the basis that the Landlords would be occupying the rental unit. I am advised by the parties that the rental unit in question is a one-bedroom basement suite.

In the Landlords' telling, their current home is undergoing renovations. I am told that they will be replacing the electrical within their home as well as building an addition for a kitchen renovation. I am further advised that prior to the start of their renovations, they discovered issues with their septic system, which required replacement prior to the commencement of the other renovations. I am told the septic system work is ongoing. The Landlords were unable to give a firm idea on how long the renovations to their home would take given the complication of needing to replace the septic system. I am advised by the Landlords that they have lost their contractor for the renovations due to the delay and that they have yet to find a new contractor.

The Landlords tell me they need to occupy the rental unit during the renovations to their home. I am told by the Landlords that while the septic system is being replaced, they cannot make excessive use of the current system. R.G. also testified that they have dogs that cannot be present at their home given the construction and that there is a noticeable odor from the septic system at this time.

The Landlords documentary evidence includes invoices for the septic contractor dated October 26, 2022 as well as an undated electrical quote for their current home. The Landlords have also provided photographs of trenching that appears to have been undertaken at their home.

I enquired with the Landlords whether the upper portion of the rental unit was occupied. The Landlords advised that it was not tenanted and that it was occupied by them. I note that the Two-Month Notice lists the Landlord's address as upper unit at the residential property. The Landlords testified that the upper rental unit has three bedrooms but that they require the additional one-bedroom basement suite as there is insufficient space for their needs in the upper rental unit. G.M. testified that he is a volunteer firefighter and works from an office in his home. R.G. testified that she is completing a master's degree and that she may need additional space in the new year to open a counselling practice. I am further advised by the Landlords that they have family from out of province that come to visit, such that they need the additional space. The Landlords testify that their home undergoing renovations has a den, two-bedrooms, and a master bedroom suite.

The Tenant argues that the Landlords evicted the upper tenants by way of another two-month notice to end tenancy for landlord's use, which I am told the current renovations were cited for the need for occupancy. The Tenant's evidence includes a reference to two file numbers, which are noted on the cover page of this decision. The Tenant argued that the Landlords have not lived in the rental unit since February 1, 2022 despite it being vacant since that time.

The Landlords deny that the other tenancy ended on the basis of a two-month notice to end tenancy, instead saying that it was issued on the basis of a 10-day notice to end tenancy for unpaid rent. I was provided with a file number by the Landlords, which is noted on the cover page of this decision.

Review of the file number provided by the Tenant indicates that the upper tenants had filed an application to cancel a two-month notice to end tenancy. The Landlords had filed their own application for certain relief, though the primary issue was whether they were entitled to an order of possession based on a fixed term tenancy. The decision in that matter dismissed the application to cancel the two-month notice on the basis that none had been served, such that there was no notice to end tenancy in play.

Review of the file number provided by the Landlords indicate that they had made an application for unpaid rent. No order of possession was sought in that application and the decision notes that the tenants for the upper rental unit moved out on February 1, 2022, though it does not explain why.

The second file number provided by the Tenant in his written submissions indicates that the upper tenants have claimed compensation under s. 51(2) of the *Act* after being served with a notice to end tenancy under s. 49. That matter is set for hearing on April 27, 2023. I note that on that matter there is a two-month notice to end tenancy signed on November 1, 2021, which indicates it was issued due to the assertion that landlords would occupy the rental unit, and has an effective date of January 31, 2022.

At the hearing, the Landlords' testified that the Tenant had failed to pay rent and review of their evidence includes a letter dated October 19, 2022 in which issues of unpaid utilities dating back to May 2021 are alleged by the Landlords.

The Tenant confirmed that he 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. Section 49(1) of the *Act* defines a close family member as an individual's parents, spouse, or child or the parent or child of that individual's spouse. 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).

I accept the undisputed evidence of the parties that the Two-Month Notice was personally served and received by the Tenant on June 30, 2022. I find that the Two-Month Notice was served in accordance with s. 88 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)).
>
> 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.
>
> 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.

> 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.
>
> 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 in the present instance provide a reasonably compelling rationale for why they need to occupy their rental unit: their home is being renovated and they need somewhere to live during that time. Their rationale, however, does not withstand scrutiny. Based on the Landlords' own evidence, they claim to have been occupying the three-bedroom upper rental unit, going so far as listing that rental unit as their address for service within the Two-Month Notice. It is unclear why they would need the additional space given their current home according to them has three-bedrooms. I am told that the upper rental unit is insufficient for their needs, though how that could be so is unclear to me given the upper rental unit and the Landlord's home have a comparable amount of bedrooms.

There is also the issue of why the previous tenants left the upper unit. The Landlords contend that they were evicted pursuant to a 10-day notice to end tenancy for unpaid rent. However, the file they provided does not indicate that a 10-day notice had ever been served. The Tenant's evidence refers to a file in which the upper tenants seek compensation under s. 51(2) of the *Act* after receiving a notice to end tenancy under s. 49. That file does contain a two-month notice, which indicates it was signed on November 1, 2021 and has an effective date of January 31, 2022, thereby directly contradicting the Landlords' testimony that the previous tenancy ended due to unpaid rent.

Now there is nothing preventing a landlord from serving multiple notices to end tenancy under s. 49 for use of different rental units. One could imagine a landlord needing occupancy of both rental units due to having a large family, for example. However, here the Landlords' home is largely comparable in size to the upper rental unit and, so far as I am aware, only the Landlords G.M. and R.G. (and their dogs) live in the home. In other words, the upper rental unit ought to meet their needs. Indeed, it appears they ended the previous tenancy on the basis that they would occupy it, such that there is no clear basis why they would need the one-bedroom basement suite as well.

There is the further issue of timing here as I would expect that the Landlords, if they needed both rental units, would have known that at the outset and served both notices

at approximately the same time. Instead, the Two-Month Notice was issued 8 months later. The effective date of the Two-Month Notice is August 31, 2022. Based on the Tenant's testimony as supported by the previous two-month notice to end tenancy, I accept the Landlords obtained occupancy of the upper rental unit on or about February 1, 2022. It is unclear why the Landlords would have served the Two-Month Notice looking for occupancy of the basement suite on August 31, 2022 after taking occupancy of the upper rental unit some 7 months prior.

I find that the Landlords were less than forthcoming on the previous two-month notice to end tenancy. I would expect that the Landlords would have been upfront about the previous notice had there been a rationale for why they needed both rental units. Instead, the Landlords' attempted to hide this fact. During the hearing, the Landlords referred to issues of unpaid rent and their evidence includes a letter regarding ongoing issues related to unpaid utilities. All this leaves me with the conclusion that there appears to also be ulterior purposes for issuing the Two-Month Notice.

Regardless of whether an ulterior motive is present or not, I find that the Landlords have failed to demonstrate their good faith intention to occupy the rental unit. They currently have access to the upper rental unit such that there is an insufficient rationale for why the basement suite is also needed. The Two-Month Notice is hereby cancelled.

Conclusion

I grant the Tenant the relief sought and cancel the Two-Month Notice, which is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

Those claims severed pursuant by me at the outset of the decision, being the Tenant's claims under s. 70 of the *Act* for authorization to change the locks and to restrict the Landlords' right of entry, are hereby dismissed with leave to reapply.

The Tenant was successful in his application. Accordingly, I find that he is entitled to the return of his filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlords pay the Tenants $100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenant withhold $100.00 from rent owing to the Landlords on **one occasion** in full satisfaction of his 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: December 07, 2022

Residential Tenancy Branch