Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

Introduction

The Tenant files two applications seeking the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order pursuant to s. 49 cancelling a Two-Month Notice to End Tenancy signed on July 20, 2022 (the "July Two-Month Notice");
- an order pursuant to s. 49 cancelling a Two-Month Notice to End Tenancy signed on October 7, 2022 (the "October Two-Month Notice"); and
- return of his filing fee pursuant to s. 72 for both applications.

J.C. appeared as the Tenant. The Tenant was assisted by C.D. as his advocate. The advocate was joined by P.R. and S.K., both whom work at the same organization as C.D.. P.R. and S.K. attended the hearing strictly as observers and did not participate.

P.C. appeared as the named Landlord. He was joined by his wife, B.C.. M.M. also attended as a witness with respect to service of documents.

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.

I am advised that the Tenant served his application disputing the October Two-Month Notice and all his evidence on the Landlord. The Landlord acknowledges receipt without objection. The Landlord's witness advises that the Landlord's response evidence was served on the Tenant, which was acknowledged received without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application

materials, excluding the Notice of Dispute Resolution disputing the July Two-Month Notice.

Preliminary Issue – Tenant's Application #310079607

As mentioned above, the Tenant filed two applications, the first of which is listed as the primary file number for this matter and pertains to the Tenant's dispute of the July Two-Month Notice. Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, the Tenant's first application was filed on July 21, 2022.

At the hearing, neither the Landlord nor the Tenant's advocate appeared to be aware of the first application filed by the Tenant. The Landlord denies receipt of the first Notice of Dispute Resolution. The Tenant explained that he had filed the first application but did not serve it as he had decided to accept the July Two-Month Notice and move out. The Tenant testified that he changed his mind after encountering difficulties in finding alternate accommodations. Review of the July Two-Month Notice provided by the parties indicates an effective date of October 1, 2022.

The Landlord testified to this understanding the Tenant would be leaving and explained that he was surprised when the Tenant did not move out. In the Landlord's telling, the October Two-Month Notice was issued after the Tenant failed to move out by the effective date of the notice.

I enquired with the Tenant's advocate what I should do with respect to the Tenant's first application and the Tenant's testimony respecting the July Two-Month Notice. I did not receive a substantive response. The Landlord confirmed he did not withdraw the July Two-Month Notice.

Policy Guideline #12 provides that when an application has not been served, the matter may proceed, be adjourned, or dismissed with or without leave to reapply. In this instance, the Tenant wilfully did not serve the first application. I find it would be inappropriate to proceed on the application as it was never served, despite the obligation for the applicant Tenant to do so both under the *Act* and the Rules of Procedure. I further find that adjourning the matter to permit service would be inappropriate due to the wilful failure of the Tenant to serve the application and the prejudice to the Landlord in delaying this matter. Given this, I find that the appropriate course is to dismiss the Tenant's first application.

The dismissal means the Tenant failed to file his application within the 10 days permitted for him to do so under s. 47(4) such that the conclusive presumption applies. As such, the Tenant's first application is dismissed without leave to reapply.

Given the dismissal and the Landlord not having withdrawn the July Two-Month Notice, the Landlord may be entitled to an order of possession pursuant to s. 55(1) of the *Act* provided the notice complies with the form and content requirements set under s. 52. Section 52 of the *Act* states the following:

> **Form and content of notice to end tenancy**
> **52** In order to be effective, a notice to end a tenancy must be in writing and must
> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,
> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
> (d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
> (e) when given by a landlord, be in the approved form.
>
> (Underline Added)

Review of the July Two-Month Notice shows that the Landlord did not sign the notice, rather marking "N/A" both for the Landlord's name and for the signature line. I find that the Landlord's failure to sign the July Two-Month Notice renders it ineffective as it does not comply with the form and content requirements set under s. 52 of the *Act*. Given this, the Landlord is not entitled to an order of possession pursuant to July Two-Month Notice.

The matter of the Tenant's second application disputing the October Two-Month Notice remains to be determined.

Issues to be Decided

1) Should the October Two-Month Notice be cancelled?
2) If not, is the Landlord entitled to an order of possession?
3) Is the Tenant entitled to the return of his filing fee on the second application?

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 December 1, 2015.
- Rent of $754.00 is due on the first day of each month.
- A security deposit of $350.00 was paid by the Tenant.

The parties provided a copy of the tenancy agreement, which shows that this is a monthly periodic tenancy.

I was advised that the October Two-Month Notice was served on the Tenant by way of registered mail sent on October 7, 2022. The Landlord provides tracking information confirming the registered mail was sent on that date. The Tenant confirmed receipt of the October Two-Month Notice on October 12, 2022. I have been provided with a copy of the October Two-Month Notice, which shows that it was issued on the basis that Landlord or the Landlord's spouse intends to occupy the rental unit.

The Landlord testified that his wife has allergies to mould, moss, and grass where they live. I enquired how long the Landlord and his wife have been living at their current home and was advised by the Landlord that they have been there for about 20 years.I was further advised that the house is approximately 1800 square feet. The Landlord further testified that they used to own that house but sold it a couple of years ago to the municipality and that they currently rent the house from the municipality. The Landlord says that the municipality has plans for the house but that they have not been issued a notice to end tenancy.

The Landlord further testified that the subject rental unit is in a house with 6 rental units. The Landlord tells me that the Tenant's rental unit is 350 square feet and is adjacent to a vacant rental unit that is approximately the same size. The Landlord says the plan is to do some renovations to make one unit out of the Tenant's unit and the vacant one adjacent to it, primarily connecting the two with a hole in the wall and replacing the flooring and repainting.

The Landlord emphasized that he and his wife wanted to downsize, that they both in their early 70s, and that the rental unit is in coastal municipality such that the air quality will assist his wife's allergies. I note that the location of the Landlord's current home is a municipality immediately adjacent to the rental unit's municipality.

The Landlord's documentary evidence includes insurance sought by the Landlord for the subject rental unit, the Landlord and his wife having changed their address with ICBC to the rental unit address, inquiries and estimates for movers between January 1 to 3, 2023, and a quote for flooring and paint.

The Tenant's advocate argued the October Two-Month Notice was issued in bad faith, this despite the Tenant acknowledging he was prepared to vacate pursuant to the July Two-Month Notice though decided not to after finding the rental market was difficult. The Tenant's advocate further argued that the Landlord provided no building permits for the work contemplated. The advocate finally argued that the effective date of the October Two-Month Notice ought to be January 31, 2023 due to when the Tenant received the Two-Month Notice.

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

Analysis

The Tenant seeks an order cancelling the October 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). If disputed, the respondent landlord bears the burden of proving the notice was issued in good faith.

In this instance, I find that the October Two-Month Notice was served in accordance with s. 88 of the *Act* by way of registered mail sent on October 7, 2022. I find that the October Two-Month Notice was received by the Tenant on October 12, 2022, as confirmed at the hearing and as confirmed by the tracking information provided by the Landlord.

Upon review of the information on file and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Tenant filed his second application on October 12, 2022. Accordingly, I find that the Tenant filed his application within the time permitted to him 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 October 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's agent, 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 of the October Two-Month Notice is listed as December 30, 2022. The Tenant's advocate argued that the effective date ought to be January 31, 2022 based on when the notice was received by the Tenant. The notice requirements under the circumstances are defined by s. 49(2)(a) of the *Act*, which states the following:

> 49(2) Subject to section 51 *[tenant's compensation: section 49 notice]*, a landlord may end a tenancy
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> (a) for a purpose referred to in subsection (3), (4) or (5) by giving notice to end the tenancy effective on a date that must be
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> (i) not earlier than 2 months after the date the tenant receives the notice,
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> (ii) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, and
>
> (iii) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy, or
>
> […]

Given that rent is due on the first, the tenancy is on a month-to-month term, and that the October Two-Month Notice was received on October 19, 2022, the correct effective date is December 31, 2022 as per s. 49(2)(a) of the *Act*. Though the effective date of the notice is incorrect, the error is corrected automatically to December 31, 2022 by s. 53 of the *Act*.

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.
>
> 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 Landlord explains that he and his wife are seeking to downsize from their current home into one that is more closely situated to the ocean. The Landlord's evidence includes some indication that the Landlord has put in motion steps to move into the rental unit in early January and purchase the materials necessary to undertake the cosmetic upgrades they wish to do to the rental unit. I accept the Landlord's characterization that the subject rental unit is smaller and that it, with the adjacent rental

unit that is empty, will be used by the Landlord and his spouse given the space for which they were accustomed to their current home.

The Tenant, through his advocate, argues the Landlord is acting in bad faith. However, it is entirely unclear on the basis for which that argument was advanced. This is a long-term tenancy. I have not been given any indication there are ulterior purposes here such as conflict between the parties or other issues related to avoiding repair issues at the property. Indeed, the Tenant himself was prepared to vacate based on the July Two-Month Notice, though seemed to change his mind after searching for another place to live. It is difficult for the Tenant to advance an argument of bad faith on a bare allegation while also having admitted that they had a change of heart after filing to dispute the July Two-Month Notice such that he decided not to serve the application.

I find that that Landlord has provided a rational plan for wanting to occupy the rental unit and has demonstrated good faith intention to do so. I further find that no ulterior motive is present.

I find that the October Two-Month Notice was properly issued. The Tenant's application to cancel that notice is dismissed 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. Given that this is the case here, I find that the Landlord is entitled to an order of possession, which is to take effect on December 31, 2022 as per the October Two-Month Notice.

The Landlord is cautioned that failure to fulfill the stated purpose of the October Two-Month Notice within a reasonable period after the effective date and for at least 6 months may result in a claim by the Tenant for compensation equivalent to 12 times the monthly rent payable under the tenancy agreement as per s. 51(2) of the *Act*.

Conclusion

The Tenant's application to cancel the October Two-Month Notice is dismissed without leave to reapply. As the Tenant was unsuccessful, I find he is not entitled to his filing fee and dismiss his claim under s. 72 of the *Act* without leave to reapply.

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

It is the Landlord's 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 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: December 15, 2022

Residential Tenancy Branch