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 Notice), issued pursuant to section 49; and
- an authorization to recover the filing fee for this application, under section 72.

Tenants AB (the tenant) and CB and landlord YL (the landlord) attended the hearing. Witness for the landlord GW 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 all the parties were clearly informed of the Rules of Procedure, including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11, which prohibits the recording of a dispute resolution hearing. All the parties confirmed they understood the Rules of Procedure.

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.”

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.

Preliminary Issue – Service

The landlord confirmed receipt of the notice of hearing and the evidence (the materials) via registered mail in late November 2022.

The tenants confirmed receipt of the response evidence on December 22, 2022 and that they had enough time to review it.

Based on the undisputed testimony, I find the tenants served the materials and the landlord served the response evidence in accordance with section 89 of the Act.

The tenant served new evidence via registered mail on December 31, 2022 and January 02, 2023. The landlord affirmed she did not receive the new evidence.

The new evidence contains emails sent on December 4, 5, 6, 14 and 16 2022, January 01, 2023 at 10:45PM (the 2023 email), written submissions and a handwritten letter dated January 04, 2023 containing information about the landlord's address.

The tenant affirmed she served the new evidence late because her husband had a health issue and the engine of their car broke.

Both parties agreed they have access to a copy of the 2023 email and that they had time to review it.

Rule of Procedure 3.17 states:

> Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5 [Documents that must be submitted with an Application for Dispute Resolution], 3.1, 3.2, 3.10.5, 3.14, 3.15, and 10 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.
>
> The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

Based on the undisputed testimony, I find there is no prejudice to accept the 2023 email into evidence, as both parties confirmed they have access to a copy of the 2023 email and that they had time to review it. I accept into evidence the 2023 email.

I find the January 04, 2023 letter is not relevant to the merits of this application, as it only contains information about the landlord's address.

Based on the tenant's vague testimony, I find the tenant failed to prove, on a balance of probabilities, that she could not send the emails dated December 4, 5, 6, 14 and 16, 2022 within the timeframe of Rule of Procedure 3.14.

Thus, I do not accept the January 04, 2023 letter, the emails dated December 4, 5, 6, 14 and 16, 2022 and the written submissions into evidence.

Issues to be Decided

Are the tenants entitled to:

1. Cancellation of the 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 accepted evidence of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenants' 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 Notice.

Both parties agreed the tenancy started on January 01, 2020. Monthly rent is $1,338.00, due on the first day of the month. At the outset of the tenancy a security deposit of $650.00 was collected and the landlord holds it in trust.

Both parties agreed the tenants received the Notice on October 23, 2022 via email. The tenant affirmed she did not authorize the landlord to email the Notice and the Notice only contained pages 1 and 2. On December 06, 2022 the tenant received a complete copy of the Notice containing pages 3 and 4.

The landlord affirmed she emailed only pages 1 and 2 because pages 3 and 4 only have legal information, but she remedied this by sending a complete copy of the Notice with pages 1 to 4 on December 06, 2022.

The landlord submitted a copy of the Notice into evidence. It is dated October 23, 2022 and the effective date is December 31, 2022. The reason to end the tenancy is: "The rental unit will be occupied by the landlord's child". The landlord affirmed that her son GW plans to move to the rental unit.

The tenants submitted this application on November 07, 2022.

The landlord affirmed she purchased the one bedroom, 750 square feet rental unit in 2005 for GW to live when he becomes an adult. GW is currently 22 years old, attends university and works part time. The landlord decided that GW is a responsible adult, and it is time for him to move to the rental unit.

The landlord affirmed that her son has furniture, changed the electricity bill for his name on December 08, 2022 and updated his driver's license with the rental unit address on December 20, 2022.

GW affirmed he plans to occupy the rental unit.

The tenants' application states:

> We believe that our landlord is not acting in good faith regarding the Two Month Notice to End Tenancy for Landlord's Use of Property. Based on her emails, behaviours, and actions during the tenancy, we do not believe that her son will be moving into the townhouse. We believe she is being dishonest and has an ulterior motive — to force us to move out so she can rent the townhouse to someone else at a much higher rent. We are not filing late.

The landlord learned about the tenants' application in late November 2022.

I inquired the landlord if there is any other reason why she decided that her son should move to the rental unit. The landlord answered: "Because I'm losing hundreds of Dollars with the increase in the mortgage payment. I'm losing money. It is not possible to pay the mortgage with the higher interest. It is good for my son to move to the rental unit instead of losing money every month".

The landlord affirmed that her son may pay rent for the rental unit.

The landlord affirmed the market rental for the rental unit is $1,900.00 and that she is losing almost $600.00 per month.

The landlord emailed the tenants on September 23, 2020:

> Because of exorbitant insurance premium increase on all strata property insurance and thus significant increase of strata fee as well as annual increase of property taxes, I am struggling to keep afloat with the high cost of keeping up residential properties.

I don't have a choice but to adjust your rent amount to $1,330/month starting January 1, 2021 and let you know more than three months in advance. See attached notice.

The landlord emailed the tenants on September 23, 2022:

For the last two years, I have been losing money and now I am behind on my mortgage payments on this rental property because of ever- increasing interest charge, strata fees and property tax. Right now the pandemic is almost over. **NDP Provincial Government's guideline of a 2% rent increase has become not only ridiculous but also unenforceable.** Similar one-bedroom condo units in the [redacted] area were rented for $1,800/month to $1,900/month in 2021 and are rented for $2,000/month to $2,100/month in 2022. It is WRONG and unrealistic to expect property owners and landlords to rent to any tenants at substantially lower than prevailing market rent and thus lose money on a monthly basis.

Therefore, the rent for this [rental unit] townhome is adjusted to $1,800/month starting January 1, 2023 until December 31, 2023. If this is way above your monthly housing budget and affordability, I totally understand and you are more than welcome to move out at the end of lease term on December 31, 2022. I have chosen NOT to rent to you both any more after losing money on a monthly basis for two years even with $30/month underground Parking Rental Income since August 2022, unless you pay me the adjusted rent $1,800/month that is closer to prevailing market rent of $2,100/month. **Please don't fight with me about this rent amount**. There is no way I would keep on losing money on this rental suite. If I were to sell this rental suite for $480,000 in 2022 and invest this money at 5% interest rate, I could have received $2,000/month interest income, that is more than $1,800/month rent, from which I have to pay monthly Strata fee and property taxes. Whatever way you look at this situation, it does not make any economic sense to me any more**. I am investing in residential rental property in an effort to make a modest living by making my assets work harder for me. This past pandemic and NDP Provincial government's insane rental housing policies had made me suffer huge financial loss for two years. This is NOT sustainable.** If it continues, hard working landlords like me will not have any desire or incentive to invest in residential rental properties any more. Available rental housing stock will decline gradually. It will be even more challenging for people who have the need to rent suites to find rental housing. This chain reaction ("Domino Effect") is not good for the economy, not even to tenants.

By the way, the interest charge on $441,000 [rental unit] Assessed Value in July 2021 - It is public information available on BC Assessment website at 5.65% interest rate is $24,916 a year, while strata fee is $3,400 and property tax is $1,900 in 2022. Average maintenance expenses for the last 3 years is $26/month for a total of $940. Special Levy by [redacted] Strata on August 1, 2022 is $280.

Therefore, the cost to live in this [rental unit] townhouse is $2,518/month in 2022. Since you both do not have any equity in this townhouse [rental unit], you are actually paying monthly interest charge, monthly Strata fee and yearly property taxes in order to live in it. I am losing $1,200/month for a total loss of almost $14,400 in 2022. Do you still want

to remain invested in residential rental properties if you lose $1,200 per month for a rental property?

Do not even try to use the Provincial NDP rental guideline of 2% rent increase for 2023 to argue with me this time. I believe that both of you are decent, competent and resourceful people who can find housing elsewhere and make necessary adjustments in terms of where you choose to work and live. This rental relationship (dealing /exchange /interaction) does not work for me for the last two years, because this substantially below market monthly rent $1,338 has caused me to fall behind my mortgage payments. I am not willing to rent [rental unit] to you both any more, unless you pay me $1,800/month starting January 1, 2023, which is still $300/month less than the prevailing market rent of $2,100/year. **It is time that you both and I move on. I believe that three months are sufficient time for you both to find yourselves a more suitable rental suite and a more agreeable landlord elsewhere. It honestly is not worth your time and mental distress to fight with me just to overhold my [rental unit] townhouse for its prior cheap rent.**

House viewings will start November 19, 2022 Saturday from 2:00 pm to 5:00 pm.

(emphasis added)

The parties emailed each other on October 14, 2022:

Tenant: The rent increase you want is NOT in compliance with the BC Residential Tenancy Act and Residential Tenancy Regulation of the 2% increase for 2023. As such, we do not agree to house viewings on November 19th, 2022 or any other time. Any attempt to show the home is trespassing under the law. **You are illegally trying to kick us out to rent to someone at a higher rate. Please do not continue to harass us with your illegal acts and demands. We know our rights as tenants.**

Landlord: I am in the process of listing my FOR SALE now. It is wise that you both start to look for your next residence elsewhere.

(emphasis added)

The parties emailed each other on October 23, 2022:

Landlord: My older son GW move into [rental unit] on January 1,2023. Your Move-out Inspection with me as the soon-to-be prior landlord is December 31, 2022 (Saturday afternoon) at 1:00 pm. **Your fobs will be disabled on January 1, 2023. The front and back door of [rental unit] townhouse will be replaced on January 3, 2023.**

Tenant: First, you inform us that you are illegally increasing our rent by $462, which is an approximate 34% increase and drastically more than the allowable 2% for 2023. Then, when we inform you that we won't pay the illegal increase, you tell us that you're in the process of listing the townhouse for sale. Finally, when we reply asking you to inform us when the townhouse is listed for sale and to send us a link to the listing, you

> tell us that your son George is now going to move in. It seems like you are coming up with every possible excuse to make us leave because we won't pay your illegal rent increase. How are we supposed to believe that your son is actually going to move in?
>
> (emphasis added)

I asked the landlord to address the emails above referenced. The landlord affirmed she would like the tenants to be reasonable, she is losing money every month and that it will be beneficial for her son to move to the rental unit. The landlord affirmed that many tenants accept to pay market rate rent.

The 2023 email states:

> As a property owner, l have the right to decide how to use my residential property, to live in there or rent to tenants on my terms. I also have the right to change the rental terms as l desire because l own this property while you don't. If you disagree with the rental terms that l set, you can move out anytime. I have never ever force you to rent from me since January 1, 2020.
>
> **On the other hand, you are acting pathetically to delay my son GW rightful move-in on December 31, 2022 by using the loopholes in the Residential Tenancy Act to file a dispute with Residential Tenancy Branch and claiming my ulterior motive without evidence. Shame on you! What make you think that you have the right to decide how l use my residential property and at what terms? Your sense of entitlement is disturbing!**
>
> If you want to make a residential property to suit your personal and family life circumstances and preferences, buy a residential property to become a homeowner so you have the right to decide these things.
>
> You do NOT have the right to force me to rent to you at last year's rent $1,338/month and terms.
>
> **The way that the current Residential Tenancy Act infringes the rights of landlords and property owners is ridiculous!**
>
> (emphasis added)

The tenant affirmed the landlord is not acting in good faith and has an ulterior motive to issue the Notice. The market rate for the rental unit is $1,700 or $1,800.00 per month and the landlord plans to rent the unit at a higher rate.

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 tenants confirmed receipt of the Notice on October 23, 2022 and submitted this application on November 07, 2022, I find the tenants disputed the Notice within the timeframe of section 49(8)(a) of the Act.

Per section 52(e) of the Act, the landlord must serve the Notice using the approved form, namely RTB 32, which contains four pages. As the tenants confirmed receipt of the complete Notice form with the four pages in December 2022, I find the landlord remedied the service of the incomplete Notice with only the two first pages.

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.

The landlord admitted that she served the Notice because she is “losing hundreds of Dollars with the increase in the mortgage payment. I’m losing money. It is not possible to pay the mortgage with the higher interest. It is good for my son to move to the rental unit instead of losing money every month”.

The landlord may not serve a Two Month Notice to End Tenancy for Landlord's use because the tenants are paying rent below the current market rate.

I find the landlord's testimony that her son plans to occupy the rental unit to have no credibility, as the landlord admitted that she is losing money with the current rent the tenants are paying. Furthermore, GW's testimony, and the fact that GW changed the electricity bill for his name and updated his driver's license address after the landlord received the materials do not outweigh the landlord's testimony about her intentions to end the tenancy because of the amount of rent paid by the tenants.

Based on the above, I find that the landlord has not met the onus to prove, on a balance of probabilities, that her son 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 tenants are successful with their application, pursuant to section 72 of the Act, I authorize them to recover the $100.00 filing fee. I order that this amount may be deducted from a future rent payment.

The landlord may protest against the Residential Tenancy laws of British Columbia. However, the landlord may not do so by harassing the tenants.

For educational purposes, per section 31(1) of the Act, the landlord may not change the locks of the rental unit. Per section 14(2) of the Act, a landlord may only change the terms of a tenancy agreement if the tenants agree, and the landlord may only terminate the tenancy in accordance with the Act.

Compliance Enforcement Unit Referral

Residential Tenancy Branch Policy Guideline 41 states:

> The Residential Tenancy Branch may decide that an administrative penalty should be applied when the evidence shows the respondent has:
> •Contravened a provision of the Legislation or regulations; or
> •Failed to comply with a decision or order of the RTB.

Even though the tenants strictly warned the landlord on October 14, 2022 to stop harassing them with an illegal rent increase, the landlord continued to email the tenants

on October 23, 2022 and January 01, 2023, threatening to change the rental units locks and insisting on an illegal rent increase.

Because I am concerned with the landlord's behaviour, I am sending a copy of this decision to my manager. My manager will review this decision and if they are of the opinion that these circumstances could reasonably lead to administrative penalties, then they will send a copy of this decision along with any other relevant materials from the dispute resolution file to the Compliance and Enforcement Unit. This separate unit of the Residential Tenancy Branch is responsible for administrative penalties that may be levied under the Act. They have the sole authority to determine whether to proceed with a further investigation into this matter and the sole authority to determine whether administrative penalties are warranted in these circumstances. After any dispute resolution materials are sent, neither I nor my manager play any role in their process and, if the Compliance and Enforcement Unit decides to pursue this matter, they do not provide me or my manager with any information they may obtain during their process.

Before any administrative penalties are imposed, a person will be given an opportunity to be heard. While the Compliance and Enforcement Unit can review the contents of the dispute resolution file, they can also consider additional evidence that was not before me. They are not bound by the findings of fact I have made in this decision.

Any further communications regarding an investigation or administrative penalties will come directly from the Compliance and Enforcement Unit.

Conclusion

The 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 tenants are authorized to deduct $100.00 from the next rent payment to recover their 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: January 06, 2023

Residential Tenancy Branch