



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the Act) for:

- a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord was represented by counsel. The tenant called witness P.N. who provided affirmed testimony. The landlord did not call any witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution 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."

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

The tenant testified that he served the landlord with his application for dispute resolution and evidence via registered mail on July 8, 2022. The tenant entered into evidence a

photograph of the registered mail package sent to the landlord. The package is date stamped by Canada Post, July 8, 2022, and the registered mail tracking sticker and tracking number is clearly visible. The landlord testified that she received the above package. I find that the landlord was served with the above documents in accordance with sections 88 and 89 of the *Act*.

The landlord did not submit any documentary evidence for consideration.

Issues to be Decided

1. Is the tenant entitled to a Monetary Order for compensation from the landlord related to a Notice to End Tenancy for Landlord's Use of Property, pursuant to section 51 of the *Act*?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence of the tenant and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on August 1, 2015 and ended February 3, 2022 by way of a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"). Monthly rent in the amount of \$1,050.00 was payable on the 31st day of each month. A written tenancy agreement was signed by both parties and a copy was submitted for this application. The subject rental property is a house with a main unit and a lower suite. During the tenancy the landlord resided in the main unit and the tenant in the lower unit (the "subject rental property")

Both parties agree that the landlord served the tenant with the Notice in person on December 28, 2021. The Notice was entered into evidence and states the following ground for ending the tenancy:

- The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse, or child; or the parent or child of that individual's spouse).

- Please indicate which close family member will occupy the unit.
 - The father or mother of the landlord or landlord's spouse.

The landlord testified that she resided in the main portion of the house with her husband, two children and parents and that they needed more space. The landlord testified that at the time the Notice was served she honestly intended for her parents to move into the subject rental property and to live in the subject rental property for the rest of their lives.

The landlord testified that after the tenants vacated the subject rental property her parents moved in within a couple of days. The landlord testified that due to a serious family conflict, her father moved out of the subject rental property on April 6, 2022 and moved to Edmonton. The landlord testified that her father moved out to resolve the conflict. The landlord testified that she could not provide testimony on the conflict because it is very personal and ongoing.

The landlord testified that a few days after her father moved out of the subject rental property her mother moved back upstairs to the main part of the house because she could not live alone due to health issues. The landlord testified that her mother moved to Edmonton a couple of months later because her father decided to stay in Edmonton.

The landlord testified that she listed the subject rental house for sale in April 2022 after her father moved out because the family wanted to move to Edmonton. The landlord testified that the subject rental house did not sell but they moved to Edmonton anyways in September of 2022. The landlord testified that at the time the Notice was served the family conflict was unknown to the landlord.

The landlord testified that the subject rental house was put up for rent in December of 2022 and the entire house including the subject rental property was rented out to one tenant. The landlord testified that at the time the Notice was served she did not know that her parents were considering moving to Edmonton. The landlord testified that her father's decision to move out of the subject rental property was out of her control.

The tenant testified that the landlord told him that they needed space for her parents but a few months after he moved out he saw the subject rental property up for sale. The tenant entered into evidence multiple sites that the subject rental house was listed for sale on.

The tenant called witness P.N. who testified that he is a direct neighbour of the subject rental house. The witness testified that he is retired and was off on compensation before that. The witness sits outside in his yard everyday for 15-20 minutes once per hour having a cup of tea and smoking a joint and never saw evidence of occupation of the subject rental property after the tenant moved out. The witness testified that he has a direct line of sight from his property to the entrance of the subject rental property which is located on the side of the house. The witness testified that he did not see anyone move items into the subject rental property or come and go.

The landlord testified that there is an internal stairway between the main unit and the subject rental property.

The witness testified that approximately two to three weeks, or maybe a month after the tenant moved out, it looked like the landlord was showing the property for rent. The witness testified that he saw people come by to look at the unit. The witness testified that he does not recall the specific dates he saw people come to look at the unit. On cross examination counsel asked the witness if it were possible that he saw people coming to look at the property in April of 2022. The witness testified that it was possible and that he saw people about one month after the tenant moved out but did not know the exact dates. The witness testified that he is retired and does not look at dates and days but recalls what he has seen and heard.

The witness testified that he is not monitoring the subject rental property and that he just sits outside all the time and never saw evidence of habitation. The witness testified that it is possible that people entered the property when he was not looking.

Counsel submitted that the landlord honestly intended for her parents to indefinitely reside in the subject rental property. Counsel submitted that extenuating circumstances, that being the family emergency, prevented the landlord's parents from residing in the subject rental property for the required time period, and so the tenant's claim should be dismissed.

Counsel referred to section F of Residential Tenancy Policy Guideline #50 (PG #50) which states:

The director may excuse a landlord from paying additional compensation if there were extenuating circumstances that prevented the landlord from accomplishing the stated purpose for ending a tenancy within a reasonable period after the

tenancy ended, from using the rental unit for the stated purpose for at least 6 months, or from complying with the right of first refusal requirement.

These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically because of matters that could not be anticipated or were outside a reasonable owner's control. Some examples are:

- A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies one month after moving in.
- A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
- A tenant exercised their right of first refusal, but did not notify the landlord of a further change of address after they moved out so they did not receive the notice and new tenancy agreement.
- A landlord entered into a fixed term tenancy agreement before section 51.1 and amendments to the Residential Tenancy Regulation came into force and, at the time they entered into the fixed term tenancy agreement, they had only intended to occupy the rental unit for 3 months and they do occupy it for this period of time.

Counsel referred to an RTB Decision that was not supplied into evidence. Counsel provided a decision number. I note that Residential Tenancy Branch Decisions are not searchable by the decision number provided by counsel. Counsel submitted that in that decision, the landlord issued a Notice to End Tenancy for Landlord's Use of Property for their mother to move in but the mother refused to move in because the unit smelled like cat.

Counsel submitted that the arbitrator in the above decision cites that the characteristics of the first two examples of extenuating circumstances provided in PG #50 are outside the landlord's control and the latter two are under the landlord's control. Counsel submitted that the arbitrator in the above decision found that the mother's choice not to move into the unit that smelled like cat was outside the landlord's control and extenuating circumstances were found to exist.

Counsel submitted that in this case, the landlord's family emergency and her father's decision to move to Edmonton were extenuating circumstances which were outside of the landlord's control and could not have been anticipated. Counsel submitted that given the extenuating circumstances, it would be unjust and unreasonable to order the landlord to pay the tenant 12 months' compensation.

Counsel submitted that the tenant's witness was not credible. Counsel submitted that the landlord's testimony was candid as the landlord stated that her parents did not live in the subject rental property for very long and that gives the landlord's subsequent testimony credibility.

The tenant testified that the landlord was provided with ample opportunity to provide documentary evidence regarding occupation of the property, but no documentary evidence was provided for this hearing.

Analysis

Based on the testimony of both parties, I find that that tenant was personally served with the Notice on December 28, 2021 in accordance with section 88 of the *Act*.

Section 51 of the *Act* states:

51 (1)A tenant who receives a notice to end a tenancy under section 49 [*landlord's use of property*] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1)A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

(1.2)If a tenant referred to in subsection (1) gives notice under section 50 before withholding the amount referred to in that subsection, the landlord must refund that amount.

(2)Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

(a)steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

(b)the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(3)The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from

(a)accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or

(b)using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Residential Tenancy Policy Guideline #50 states:

The onus is on the landlord to prove that they accomplished the purpose for ending the tenancy under sections 49 or 49.2 of the RTA or that they used the rental unit for its stated purpose under sections 49(6)(c) to (f) for at least six months. If this is not established, the amount of compensation is 12 times the monthly rent that the tenant was required to pay before the tenancy ended. Under sections 51(3) and 51.4(5) of the RTA, a landlord may only be excused from these requirements in extenuating circumstances.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party holding the onus has not met the burden on a balance of probabilities.

Section 64(2) of the *Act* states:

The director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part.

The decision cited by counsel was not properly before me and thus I was not able to review it. As noted above, I am not bound to follow other Residential Tenancy Branch Decisions and this decision is based on the merits of the case and not on any previous Residential Tenancy Branch Decision. As the decision cited by counsel is not properly before me and I am not bound by it, I decline to consider it.

The landlord entered no documentary evidence for consideration and did not call any witnesses. The testimony of the tenant's witness directly contradicts the testimony of the landlord. Counsel submitted that the tenant's witness was not credible; however, I found the tenant's witness and his candour regarding smoking a joint multiple time a day to be quite credible. While I acknowledge that it was possible for the landlord's parents to move into the subject rental property internally, I find it unlikely that they would use the main entrance to the subject rental property so infrequently that the witness would never see them in the short time they allegedly resided in the unit. I find that the landlord has not proved, on a balance of probabilities, that her parents ever moved into the subject rental property. The landlord bears the burden of proof and has done a poor job of evidencing her position.

The landlord testified that the alleged family emergency/conflict was too personal to disclose, leaving a position already lacking in documentary evidence further lacking in details. The landlord did not provide witness statements pertaining to the reason the landlord's father allegedly moved to Edmonton or when said move occurred, or documentary proof of the move whatsoever. I find that the landlord has not proved that her parents moved to Edmonton due to a family emergency/conflict or that this alleged emergency/conflict was unknown to the landlord and or her parents at the time the Notice was served. I find that the landlord has not proved, on a balance of probabilities, that her mother could not reside alone due to health issues as no medical records or doctors notes indicating same were entered into evidence.

Pursuant to section 51(2) of the *Act*, I find that the landlord has not proved, on a balance of probabilities, that steps were taken, within a reasonable period after the effective date of the Notice to accomplish the stated purpose for ending the tenancy or that the rental unit was used for the stated purpose for at least 6 months duration.

I find that the landlord has not proved, on a balance of probabilmism, that a family emergency/ conflict or any other reason prevented the landlord's parents from either moving into the subject rental property or residing in it for at least six months. I find that the landlord has not proved the existence of an extenuating circumstance. As I have determined that the landlord has not proved that the alleged extenuating circumstance existed, I find that the tenant is entitled to 12 months' rent in the amount of \$12,600.00, pursuant to section 51(2) of the *Act*.

As the tenant was successful in this application for dispute resolution, I find that the tenant is entitled to recover the \$100.00 filing fee, in accordance with section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the tenant in the amount of \$12,700.00.

The tenant is provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court 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: March 06, 2023

Residential Tenancy Branch