Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL, FFL, CNL

Introduction

This proceeding dealt with a landlord's application for an Order of Possession for landlords use of property and a tenant's application for cancellation of Two Month Notice to End Tenancy for Landlord's Use of Property ("Two Month Notice").

Both the landlord and the tenant appeared for the hearing and the parties were affirmed. The tenant was assisted by an Advocate. The landlord appeared with an agent at the first hearing session and was represented by legal counsel at the second hearing session.

The hearing process was explained to the parties and the parties were given the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

The hearing was held on two dates. Two Interim Decisions were issued in this case and both of the Interim Decisions should be read in conjunction with this decision.

At the reconvened hearing, further arguments were made orally with respect to issue of *res judicata* and the tenant was provided the opportunity to respond to the landlord's evidence that had been presented in support of ending the tenancy for landlord's use of property.

It should be noted that I was provided a considerable amount of submissions, arguments and evidence, both in writing and orally, all of which I have considered; however, with a view to brevity in writing this decision I have only summarized and referenced that which is most relevant and necessary to understand my decision.

Preliminary Issue(s) to be Decided

1. Was the landlord estopped from issuing the subject Two Month Notice under the doctrine of res judicata?

The landlord's former agent, a corporate property manager, previously issued a Two Month Notice to End Tenancy for Landlord's Use of Property ("the first Two Month Notice") to the tenant in March 2022. The stated reason for ending the tenancy was that the rental unit would be occupied by the landlord or landlord's spouse. The tenant filed to dispute the first Two Month Notice and a hearing was held on August 9, 2022. A decision was issued on that same day, granting the tenant's applicant for cancellation of the first Two Month Notice due to a lack of evidence (file number referenced on the cover page of this decision).

The landlord issued the subject Two Month Notice on August 12, 2022 and sent it to the tenant via registered mail. The stated reason for ending the tenancy is that the rental unit will be occupied by the landlord or landlord's spouse.

The tenant's Advocate raised the issue of res judicata and submitted the landlord was estopped from issuing the subject Two Month Notice during the first hearing session of January 24, 2023. I ordered written submission from both parties with respect to this position, as seen in the first Interim Decision I issued to the parties. Upon receiving the written submissions, I ordered the hearing to be reconvened. At the reconvened hearing, I heard further arguments with respect to res judicata. Below, I summarize the parties' respective submissions concerning res judicata.

In summary, the tenant's Advocate pointed to and relied upon the following preconditions for applying the doctrine of res judicata:

1) That the same question has been decided.
2) That the judicial decision which is said to create the estoppal was final; and
3) That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppal is raised or their privies.

The tenant's Advocate argues that the parties or their privies are the same, that the matter has already been heard and decided upon, with finality, on August 9, 2022. As

such, the landlord or the landlord's privies was estopped from issuing another Two Month Notice for the same reason only three days later on August 12, 2022 in an attempt to have the matter re-heard.

In summary, the landlord's lawyer submitted that a decision maker has discretion to apply res judicata and the doctrine is not to be applied mechanically. Further, the tenant has the onus to prove res judicata as a defence. The landlord's lawyer submits that this case is different than that held on August 9, 2022 for a number of reasons:

- The parties are different in that a corporate property manager issued the first Two Month Notice whereas the subject Two Month Notice was issued by the individual owner of the property and there has been no evidence submitted to suggest the former corporate property manager and the property owner are privies. The landlord's lawyer submitted that being a privy means more than being a representative.
- There is new evidence that was not available at the first hearing and five months have passed from the time the first Two Month Notice was issued and the subject Two Month Notice was issued. The lack of evidence at the first hearing afforded the decision maker little ability to analyse the merits of the matter which is a stark contrast to that which is before me.
- Issuing a notice to end tenancy with the same stated reason is not determinative in itself and if that were the case, then no landlord would ever be allowed to issue more than one notice to end tenancy to a tenant for the same stated reason more than once.

.Analysis – Res judicata

The tenant put forth three preconditions that must be met for res judicata to apply, one of which is that the parties to the proceedings, or their privies, are the same.

The landlord named on the first Two Month Notice is different than the landlord named on the subject Two Month Notice. The landlord named in the previous dispute resolution proceeding is different than the landlord named for this proceeding. The tenant's Advocate argued that the corporate property manager was working as the owner's agent so they are privies. However, the landlord's legal counsel submitted that a privy is more than a representative, and pointed to *XY, LLC v. Canadian Topsires Selection Inc., 2014 BCSC 2017* in support of that argument. There was no evidence provided to me to suggest the corporate property manager was anything more than a

representative for the property owner and that the two entities are privies. Therefore, I find I am unsatisfied this precondition has been met.

As I am unsatisfied that the parties, or their privies, are the same and this pre-condition has not been met, I find it unnecessary to further analyze the other two pre-conditions. Therefore, I find the landlord named in this proceeding was not estopped from issuing the subject Two Month Notice or filing for an Order of Possession.

In light of the above, I proceed to consider the remedies sought by both parties with respect to the subject Two month Notice.

Issue(s) to be Determined

1. Should the subject Two Month Notice be upheld or cancelled?
2. Is the landlord entitled to an Oder of Possession and if so, when should it take effect?
3. Award of the filing fee.

Background and Evidence

The tenancy started in June 2011 and the tenant paid a security deposit of $540.00. The monthly rent is currently $1300.46 payable on the first day of every month. The rental unit is described as being a one-bedroom condominium unit owned by the landlord.

The subject Two Month Notice was issued on August 12, 2022 and indicates the reason for ending the tenancy is that the landlord or landlord's spouse will occupy the rental unit.

As described in greater detail in the first Interim Decision I issued to the parties, the subject Two Month Notice was sent to the tenant via registered mail but the registered mail was returned as it was unclaimed. The landlord proceeded to file for an Order of Possession based on an undisputed notice to end tenancy and sent the proceeding documents to the tenant via registered mail on September 21, 2022 but that registered mail was also returned as being unclaimed. The tenant claims to have not received any notice cards from Canada Post and the landlord's agent served the tenant with another copy of the Two Month Notice and the landlord's proceeding package, in person, on November 20, 2022. The tenant proceeded to file to dispute the subject Two Month Notice after receiving the Two Month Notice in person from the landlord's agent.

Although section 90 of the Act deems a person to be served five days after mailing, the deeming provision is rebuttable and, in giving the tenant the benefit of the doubt, I consider the subject Two Month Notice to be a disputed notice to end tenancy.

Landlord's reasons to end the tenancy

The landlord had been living abroad for several years, approximately 10 years, and returned to Canada on March 9, 2022. The landlord has been a Canadian citizen since 2006 and has returned to live in Canada permanently. The landlord wants to reside in his own condominium, the only property that he owns, and his wife will join him when she is permitted to move to Canada.

The landlord is married and an application that would permit the landlord's wife to move to Canada was filed in November 2022. The landlord explained that the immigration application required several months of preparation before the application could be made because numerous documents had to be translated from Russian and the translators are currently in very high demand. The landlord's wife has undergone medical testing as part of the process and is awaiting approval. The landlord is optimistic his wife will be approved for immigration as there is a very high approval rating for spouses.

Since the landlord has been out of the country for several years, the landlord does not have many personal possessions. The landlord has been staying in rooms with different friends will awaiting to regain possession of the rental unit; however, he has now surpassed the amount of time his most recent friend has agreed to provide accommodation.

The landlord testified that he earns income from his software development business and that he transferred his business to Canada by registering it in British Columbia.

The landlord testified that it is long term plan to live in the rental unit, that he has no other property that he owns and there is no other reason for seeking to end the tenancy other than to reside in the unit himself, and with his wife when she arrives in Canada.

The landlord provided evidence that he arrived in Canada on March 9, 2022 and that he has been living in various rooms since then. To demonstrate his intention to move into the rental unit the landlord has opened his own BC Hydro account, changed his address for his cell phone to the rental unit address, ordered internet services for the rental unit, registered a change of address for his driver's licence, obtained a quote for car insurance using the rental unit address for the vehicle he purchased in October 2022,

obtained a quotation from a moving company, obtained a quote for new appliances for the rental unit, and obtained a quote to repaint the rental unit.

Tenant's position

The tenant's Advocate submitted that the landlord does not have a good faith intention to move into the rental unit. The tenant's Advocate argued the landlord has the burden to prove he is moving into the rental unit and evidence to support that. The landlord provided evidence generated after the landlord lost at the hearing of August 9, 2022 due to lack of evidence. Further, the evidence provided is insufficient to demonstrate the landlord intends to move in. The immigration application of the landlord's wife was filed after the landlord issued the subject Two Month Notice and there is a risk the immigration application may be rejected.

Although not stated by the tenant's Advocate, before the hearing ended, the tenant could be heard in the background saying the landlord will re-rent the unit for much more rent.

Closing arguments

The landlord's lawyer argued the landlord has been trying to regain possession of the rental unit since he returned to Canada in March 2022 and that he has no other motive for doing so other than he wants to live in his own unit and set up a home for him and his wife. There is a high likelihood the landlord's wife's immigration application will be approved but even if it is not approved, the landlord will still reside in the rental unit as the landlord owns no other property and the landlord has been moving from room to room while awaiting to move into his own property.

While the landlord has the burden to prove his intentions, the tenant has not presented any basis for alleging bad faith either.

The landlord obtained proof of his intention to move into the rental unit after issuance of the Two Month Notice until late November 2022, which was a number of months after it was sent to the tenant in August 2022 and the landlord had filed his application based on an undisputed Two Month Notice. Then when it became apparent the tenant was filing to dispute the Two Month Notice the landlord proceeded to get evidence to support his position.

The tenant's Advocate maintained the landlord does not have a good faith intention to occupy the rental unit given the landlord issued the subject Two Month Notice only days after the first proceeding; the lack of evidence at the time of its issuance, and the evidence the landlord did obtain is insufficient to prove his intention to move into the rental unit.

Before ending the hearing, I canvassed the parties with respect to the effective date for an Order of Possession in the event one was granted to the landlord with my decision. The landlord requested an Order of Possession effective at the end of March or April 2023. The tenant did not provide a specific date or month but indicated he needed more time than that to vacate and that he had not found other accommodation.

Analysis

Where a notice to end tenancy comes under dispute, the landlord bears the burden to prove the tenant was served with a valid notice to end tenancy and the tenancy should end for the reason indicated on the notice. The burden of proof is based on the balance of probabilities.

The reason for ending the tenancy, as indicated on the Two Month Notice, is consistent with section 49(3) of the Act which permits a landlord to end a tenancy where:

> (3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends **in good faith** to occupy the rental unit
>
> [My emphasis added]

The Act contemplates that an owner of a property will want to end a tenancy at some point in time so that the owner, owner's spouse or owner's close family member may occupy the rental unit. The landlord in this case has submitted that is exactly what he wants to do, occupy his own property as his residence, and have his wife join him there when she is approved to move to Canada.

The tenant called the landlord's good faith intention into question, pointing to a previous attempt to end the tenancy that was unsuccessful only three days before the subject Two Month Notice was issued.

Residential Tenancy Policy Guideline 2A provides information and policy statements with respect to ending a tenancy for landlord's use of property. Under the heading "Good Faith", the policy guideline provides:

> **B. GOOD FAITH**
> 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.
>
> [My emphasis underlined]

It is before me to determine whether the landlord has demonstrated that he had only a good faith intention to end the tenancy when the subject Two Month Notice was issued, on August 12, 2022 and still has a good faith intention.

The landlord has demonstrated with documentary evidence that he arrived in Canada from overseas on March 9, 2022. The landlord has provided some evidence that he has been living in different rooms of friends since then and the landlord submits that he wants to live in the only property he owns for the long term.

Considering the tenancy has been in effect for 11 years and the landlord has been living abroad for at least 10 years, now that the landlord has returned to Canada, and has been in Canada for a year now, I find the landlords desire to reside in his own property and the only property he owns rather than rent elsewhere to make sense.

The landlord has gone to lengths to set up accounts and obtain quotes using the rental unit address in an effort to demonstrate his intention. While the evidence was generated after the subject Two Month Notice was issued, the landlord provided a reasonable explanation for that. Evidence of the landlord's intention would not be required to issue a Two Month Notice or applying for the Order of Possession based on an undisputed Two Month Notice. Rather, proof of one's intention would only be relevant if the Two Month Notice was disputed and shortly after the tenant disputed the Two Month Notice the landlord obtained his evidence.

I appreciate the argument made by the tenant's Advocate that the evidence provided is not determinative; however, proving one's intention to move into one's own property does not necessarily generate evidence that is different than was provided for this dispute. Rather, I find the nature of the evidence is in keeping with a person's intention to move into their own property. Even the quotation for new appliances and repainting is not unusual considering the property has been tenanted for a very long time and these elements are likely nearing the end of their life expectancy.

While there is a risk the landlord's wife may not be approved for immigration, the rental unit is a one bedroom unit and I find it reasonable that a one-bedroom unit is suitable for the landlord to use as his residence for at least six months even if his wife's application is not approved.

Also of consideration in making this decision is that I did not hear any suggestion the landlord has attempted to end the tenancy for any other reason other than to occupy the rental unit himself. Nor is there any evidence before me to suggest the parties had a strained tenancy relationship and the landlord is motived to bring the tenancy to an end under false pretenses or for ulterior motives.

While the tenant stated at the hearing that he believes the landlord will re-rent the unit for higher rent, I find it more speculative than anything in the absence of any evidence or basis for making such a statement.

All things considered, I find I am satisfied, on a balance of probabilities, that the landlord has a good faith intention to occupy the rental unit so that he may use it for his residence for at least six months.

Upon review of the subject Two Month Notice, I find that it is in the approved form and it is duly completed. As such, I find I am satisfied it meets the form and content requirements of the Act.

In light of the above, I dismiss the tenant's application and I grant the landlord's application for an Order of Possession.

Given the date of this decision, and to afford the tenant at least one full month to vacate and obtain the compensation to be provided to the tenant under section 51(1), I order the tenancy ended effective April 30, 2023. The tenant is permitted to withhold rent for April 2023 and the landlord is provided an Order of Possession with an effective date of April 30, 2023.

The landlord was successful in his application and I award the landlord recovery of the $100.00 filing fee. The landlord is authorized to recover this award by deducting $100.00 from the tenant's security deposit.

Conclusion

The tenant's application is dismissed.

The landlord is provided an Order of Possession effective at 1:00 p.m. on April, 30 2023. The landlord is authorized to deduct $100.00 from the tenant's security deposit to recover the filing fee from the tenant.

The tenant may withhold rent for April 2023 as compensation payable under section 51(1) of the Act.

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 28, 2023

Residential Tenancy Branch