



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

A matter regarding SECURE SELF STORAGE 2013
INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL-4M, FFT

Introduction

This hearing dealt with the tenants' application pursuant to section 67 of the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 4 Month Notice to End Tenancy for Conversion of a Rental Unit ("4 Month Notice"), pursuant to section 49; and
- authorization to recover the filing fee for this application pursuant to section 72.

Both parties attended the hearing, and were given a full opportunity to be heard, to present evidence and to make submissions.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenants' application. In accordance with section 89 of the *Act*, I find the landlord duly served with the tenants' application.

The tenants confirmed receipt of the 4 Month Notice, dated October 27, 2022, which was posted on the tenants' door. In accordance with sections 88 and 90 of the *Act*, I find the tenants deemed served with the 4 Month Notice, 3 days after posting.

Preliminary Issue – Landlord's Evidence

The tenants confirmed receipt of the landlord's evidentiary materials, which was sent to the tenants by way of registered mail on March 21, 2023. In accordance with sections 88 and 90 of the *Act*, the evidence is deemed served 5 days after mailing. The tenants

argued that the landlord had waited to serve the tenants, which was “not fair” as the tenants felt that they did not have adequate time to respond.

The tenants also argued that the landlord did not serve the evidence in a digital format, which was the format the evidence was submitted to the RTB. The tenants argued that the pages were not numbered or marked.

Rule 3.15 of the RTB’s Rules of Procedure establishes that “the respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Subject to Rule 3.17, the respondent’s evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing”

The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as “at least” or “not less than” a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.15 and the definition of days, the last day for the landlord to file and serve evidence on the tenants was April 5, 2023. I note that the hearing was originally scheduled for April 3, 2023, and was re-scheduled on April 3, 2023 on due to Arbitrator availability at the RTB. Even if the original hearing date was applied, the landlord had until March 26, 2023 to serve and upload their evidentiary materials.

I find that the landlord’s evidence was served within the required timeline. Although the tenants claimed that it was unfair to admit the evidence, I find that the tenants had ample time to review the landlord’s evidentiary materials and respond. The purpose of a participatory hearing is to allow both parties to call witnesses, and make any additional submissions if they wish.

Rule 3.17 states the following about how evidence should be organized.

3.7 Evidence must be organized, clear and legible

All documents to be relied on as evidence must be clear and legible.

To ensure a fair, efficient, and effective process, identical documents and photographs, identified in the same manner, must be served on each respondent and uploaded to the Online Application for Dispute Resolution or submitted to the Residential Tenancy Branch directly or through a Service BC Office.

For example, photographs must be described in the same way, in the same order, such as: “Living room photo 1 and Living room photo 2”.

To ensure fairness and efficiency, the arbitrator has the discretion to not consider evidence if the arbitrator determines it is not readily identifiable, organized, clear and legible.

I note that there is no requirement for the parties to number their pages. Furthermore, although evidence is normally submitted to the RTB through an online portal, there is no requirement for the parties to serve their evidence to each other digitally. I am satisfied that the landlord had provided identical documents and photographs to both the tenants and RTB, and that the evidence was identifiable, organized, clear, and legible.

I find that the landlord had complied with the RTB Rules of Procedure, and that there is no undue prejudice by admitting the landlord’s evidentiary materials. Accordingly, the landlord’s evidence was considered for the purposes of this hearing.

Preliminary Issue – Tenants’ Evidence

The tenants submitted several evidence packages for their application. I note that the tenants had uploaded evidence to the online portal on March 28, 2022, November 30, 2022, March 10, 2023, March 31, 2023, April 2, 2023, and April 5, 2023.

Rule 3.13 of the RTB’s Rules of Procedure establishes that where possible, the applicant should submit and serve their evidence in a single package, and with their Application for Dispute Resolution.

Rule 3.14 of the RTB’s Rules of Procedure establishes that a respondent must receive evidence from the applicant not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as “at least” or “not less than” a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, the last day for the tenants to file and serve evidence as part of their application was March 29, 2023.

The tenants’ last three evidence packages were not served within the prescribed timelines. Where late evidence is submitted, I must apply rule 3.17 of the Rules.

Rule 3.17 states the following:

3.17 Consideration of new and relevant evidence

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.

In this case, I find that the tenants did not submit their evidence in a single package, or within the required timelines. I note that the tenants had ample time to prepare for the hearing since filing their application on November 25, 2022, and since that date uploaded and served the landlord with six evidence packages. I am not satisfied that the tenants had provided a reasonable explanation for why they had submitted three additional packages past the required timeline. As noted above, the purpose of the participatory hearing is to allow both parties with the opportunity to respond after submitting their initial materials. I find the admission of the last three evidence packages would be prejudicial to the respondent. The tenants failed to submit their evidence within the required timelines, and in furthermore, the tenants had decided to respond in multiple packages. On this basis I find that there is undue prejudice by admitting the tenants' late evidence. For these reasons, I exercise my discretion to exclude the tenants' late evidence that was uploaded on March 31, 2023, April 2, 2023, and April 5, 2023.

Issues(s) to be Decided

Should the landlord's 4 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or

arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This month-to-month tenancy began on September 1, 2015. Monthly rent is currently set at \$942.13, payable on the first of the month. As noted in an earlier decision, the landlord had originally collected a security deposit in the amount of \$800.00, \$400.00 of which has been returned to the tenants.

On October 27, 2022, the landlord had served the tenants with a 4 Month Notice to End Tenancy for conversion of the rental unit to non-residential use.

The landlord provided the following explanation for why they had decided to serve the tenants with this 4 Month Notice. The landlord wants to end the tenancy as they want to use the rental property for additional commercial storage for the landlord's storage facility business.

The landlord denies having any ulterior motives, and argues that they intend in good faith to use the rental property for the above reason. The landlord notes that they are a storage facility business, and not a residential landlord. The landlord testified that the tenants were actually clients of the landlord and had rented storage space there. The landlord testified that the tenants had approached the landlord about renting the property, which is located on the grounds of the industrial storage facility, and both parties entered into a tenancy as of September 1, 2015. The landlord testified that they were unaware of any zoning issues at the time.

The landlord submits that the rental property is located on grounds that zoned as "light residential", and that residential rentals are not permitted where the rental property is. The landlord notes that according to the local bylaw, only one residential security/operator unit is permitted on this type of property. The landlord notes that the tenants do not provide security services to the landlord, nor do the tenants assist the landlord with the operation of the storage facility business. The landlord argued that the rental property is not in compliance with municipal zoning bylaws, and is therefore illegal.

The landlord submitted a copy of a statement by a surveyor dated March 20, 2023. The surveyor states that they are a licenced land surveyor and that they had reviewed the title search for the subject property and the local bylaw and mapping. The surveyor confirms that the property is zoned light industrial, which does not include residential use in its allowable uses of the land. The surveyor stated that commercial storage is permitted.

The landlord argued that no permits or approvals are needed to use the property as commercial storage as the land is already zoned for that purpose.

The landlord does not deny that they had served the tenants with a 4 Month Notice to End Tenancy on two previous occasions before this one. The landlord testified that the intention was the same as before, and that was to end the tenancy in order to use the space for commercial purposes. The landlord testified that they did not have legal advice or knowledge, and had failed to check off the proper box for the 4 Month Notices that were previously served on the tenants. The landlord testified that they were not successful in ending the tenancy on those previous occasions, not because of bad faith, but because of an honest mistake.

The tenants filed this application disputing this latest 4 Month Notice because they strongly believe that the landlord did not issue the 4 Month Notice in good faith. The tenants noted that there is an undisputed history of the landlord serving them with Notices to End Tenancy. The first 4 Month Notice was served on the tenants on September 30, 2020 with an effective date of January 31, 2021. The reason provided for that 4 Month Notice was to "Convert the rental unit for use by a caretaker, manager, or superintendent of the residential property". In the decision dated January 19, 2021, the Arbitrator cancelled the 4 Month Notice as they were not satisfied that the landlord had provided sufficient evidence to demonstrate that the landlord's caretakers were retiring, and that new caretakers were hired and required the tenants' rental unit.

On October 13, 2021, the tenants received a new 4 Month Notice to End Tenancy. That 4 Month Notice to End Tenancy was issued for the same reason: that the landlord wanted to convert the rental unit for use by a caretaker, manager, or superintendent of the residential property. On October 27, 2021, an Arbitrator cancelled the 4 Month Notice as section 49(6) only allows for the landlord to convert the rental unit for use by a caretaker or manager of a residential property, and not a commercial one.

The tenants described what they consider to be a history of harassment and bullying by the landlord, as well as disputes between the parties. The tenants testified that despite the fact that utilities are included in the monthly rent as noted on the original tenancy agreement, the landlord sent the tenants a letter dated May 30, 2018 with a new tenancy agreement enclosed for the tenants to sign, noting that the electricity will now be the responsibility of the tenants effective September 1, 2018. The tenants testified that the landlord had deliberately terminated their electricity service on August 31, 2018, which resulted in a disconnection notice dated September 7, 2018. The tenants testified that since then they have been forced to pay for their electricity. The tenants note that

since this application was filed they have been served with a 10 Day Notice to End Tenancy for Unpaid Utilities on February 6, 2023.

The tenants testified that there were also threats of eviction when the tenants protesting the cutting of a hedge on the property. The tenants testified that a confrontation took place on October 6, 2022 about the tree cutting, and the police were called.

Counsel for the landlord responded that the relationship between the parties has been quite strained, and that the tenants called police even when the landlord was attempting to serve them with evidence for the hearing. Counsel also argued that the tenants have continued with this tenancy for a substantial amount of time despite the allegations of harassment.

Analysis

Subsection 49(6) of the *Act* sets out that a landlord may end a tenancy in respect of a rental unit where the landlord, in good faith intends to convert the rental unit to non-residential use.

The tenants questioned the landlord's true motive in serving them this 4 Month Notice, and described a history of what the tenants considered harassment and bullying, and meritless Notices to End Tenancy.

Residential Tenancy Policy Guideline 2: Good Faith Requirement When Ending a Tenancy states:

"If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.

If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate that they do not have an ulterior motive for ending the tenancy."

As the tenants raised doubt as to the landlord's true intentions, the burden shifts to the landlord to establish that they do not have any other purpose to ending this tenancy.

Although the landlord stated that they had issued the 4 Month Notice in order to convert the residential property for non-residential use, I find that the tenants have raised doubt as to the true intent of the landlord in issuing this notice. The tenant gave undisputed testimony that this is the third 4 Month Notice to End Tenancy served on the tenants, with the last two being cancelled after a hearing was held. Although the landlord claims that there were errors made during the issuance of the first two 4 Month Notices, and that these errors were due to lack of knowledge and legal advice rather than dishonest intentions, I am not satisfied that this third Notice to End Tenancy was issued simply because the landlord wanted to comply with zoning bylaws and use the property for commercial use. Although the landlord did obtain a statement from a licensed professional land surveyor confirming that the property is zoned for use as an industrial lot, and does not include residential use in its allowable uses, the landlord did not provide any evidence to support that they have received any warning letters or orders about any breaches, or for the landlord to comply, nor did the landlord provide sufficient evidence to support any negative consequences associated with the continuance of the residential tenancy.

Furthermore, I find that the testimony of both parties as well as the evidence submitted raised questions about the landlord's good faith. The landlord did not dispute the fact that the relationship between the parties is quite strained. Although the landlord claims that the landlord's intentions have remained the same, I am not convinced that this is the primary reason for why the landlord wants to end this tenancy.

Although the landlord does have the right to seek the end of this tenancy on the grounds provided under the *Act*, I find that the evidence supports the deterioration of the relationship between the two parties, and the landlord's determination to end this tenancy. Although the landlord notes that the rental property would be used for additional commercial storage for the landlord's storage business, the landlord did not provide sufficient evidence to support that this additional storage or space is needed. The onus is on the landlord and not the tenants to establish that they truly require the residential property for the reason provided on the 4 Month Notice.

Based on a balance of probabilities and for the reasons outlined above, I find that the landlord has not met their onus to show that they truly require the rental property for non-residential use, and that there is no ulterior motive for ending this tenancy.

I therefore allow the tenants' application to cancel the 4 Month Notice. The 4 Month Notice dated October 27, 2022 is cancelled, and is of no force or effect. The tenancy will continue until ended in accordance with the *Act*.

As the tenants' application has merit, I find the tenants are entitled to recover the filing fee for this application.

Conclusion

The tenants' application to cancel the landlord's 4 Month Notice is allowed. The 4 Month Notice, dated October 27, 2022 is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I allow the tenants to implement a monetary award of \$100.00 for the recovery of the filing fee, by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenants are provided with a Monetary Order in the amount of \$100.00, 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: May 10, 2023

Residential Tenancy Branch