



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNL, MNDCT, FFT

Introduction

On April 6, 2023, the Tenant made an Application for Dispute Resolution seeking to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") pursuant to Section 49 of the *Residential Tenancy Act* (the "Act") and seeking to recover the filing fee pursuant to Section 72 of the *Act*, seeking a Monetary Order for compensation pursuant to Section 67 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing, with H.L. attending as an advocate for the Tenant. The Landlord attended the hearing, with D.M. attending as a co-owner of the rental unit. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

During the hearing, I advised the parties that as per Rule 2.3 of the Rules of Procedure, claims made in an Application must be related to each other and that I have the discretion to sever and dismiss unrelated claims. As such, I advised the parties that this hearing would primarily address the Landlord's Notice, that the monetary claim would be dismissed, and that the Tenant is at liberty to apply for this under a new and separate Application.

At the outset of the hearing, H.L. requested an adjournment primarily due to a death of the Tenant's witness. There was no documentary evidence submitted to support this submission. The Landlord was asked for her position with respect to this request, and D.M. stated that they would like to avoid an adjournment.

When reviewing this request, while I have little doubt of the legitimacy of this claim that an acquaintance of the Tenant had recently passed away, I note that there was no documentary evidence submitted to support this statement. Regardless, while tragic, given that the matter under consideration pertained to a notice to end tenancy for Landlord's use, I find that adjourning this hearing to a later date would unfairly prejudice the Landlord. As such, the Tenant's request to adjourn the hearing was not granted.

Service of documents was discussed, and there were no issues pertaining to service. As such, all parties' evidence will be accepted and considered when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

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 complies with the *Act*.

Issue(s) to be Decided

- Is the Tenant entitled to have the Notice cancelled?
- If the Tenant is unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on July 15, 2016, that the rent was established at an amount of \$703.29 per month, and that it was due on the first day of each month. A security deposit of \$325.00 was also paid. A signed copy of the tenancy agreement was submitted as documentary evidence for consideration.

All parties also agreed that the Two Month Notice to End Tenancy for Landlord's Use of Property was served on March 25, 2023, by email. The reason the Landlord served the Notice is because "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)." As well, the Landlord indicated that it would be "The landlord or the landlord's spouse" that would be specifically occupying the rental unit. The effective end date of the tenancy was noted as May 31, 2023, on the Notice.

D.M. advised that they need vacant possession of the rental unit because they will live there only when they are in the area conducting work on the property.

The Landlord reiterated that they will use the rental unit as a "home base" when they come to work on the property. She advised that in the past they would ordinarily rent via Airbnb when they were in the area working on the property, and that this was becoming financially difficult. She confirmed that they have a primary residence elsewhere, and that the use of the rental unit would be as a secondary residence.

H.L. read from a prepared statement that only minimally related to the reason the Notice was served.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 49 of the *Act* outlines the Landlord's right to end a tenancy in respect of a rental unit where the Landlord or a close family member of the Landlord intends in good faith to occupy the rental unit.

Section 52 of the *Act* requires that any notice to end tenancy issued by the Landlord must be signed and dated by the Landlord; give the address of the rental unit; state the effective date of the notice, state the grounds for ending the tenancy; and be in the approved form.

With respect to the Notice, in considering the Landlord's reason for ending the tenancy, I find it important to note that the burden of proof lies on the Landlord, who issued the Notice, to substantiate that the rental unit will be used for the stated purpose on the Notice. Furthermore, Section 49 of the *Act* states that the Landlord is permitted to end a tenancy under this Section if they intend in **good faith** to occupy the rental unit. I also find it important to note that Policy Guideline # 2A discusses good faith and states that:

The BC Supreme Court found that a claim of good faith requires honest intention with no ulterior motive. When the issue of an ulterior motive for an eviction notice is raised, the onus is on the landlord to establish they are acting in good faith... 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... 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.

In addition, this policy guideline further clarifies occupation and the requirement to occupy the rental unit for at least six months after the effective date of the Notice.

C. OCCUPYING THE RENTAL UNIT

Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that "occupy" means "to occupy for a residential purpose." (See for example: *Schuld v. Niu*, 2019 BCSC 949) The result is that a landlord can end a tenancy sections 49(3), (4) or (5) if they or their close family member, or a purchaser or their close family member, intend in good faith to use the rental unit as

living accommodation or as part of their living space.

Vacant possession

Other definitions of “occupy” such as “to hold and keep for use” (for example, to hold in vacant possession) are inconsistent with the intent of section 49, and in the context of section 51(2) which – except in extenuating circumstances – requires a landlord who has ended a tenancy to occupy a rental unit to use it for that purpose (see Section E). Since vacant possession is the absence of any use at all, the landlord would fail to meet this obligation. The result is that section 49 does not allow a landlord to end a tenancy to occupy the rental unit and then leave it vacant and unused.

6-month occupancy requirement

The landlord, close family member or purchaser intending to live in the rental unit must live there for a duration of at least 6 months to meet the requirement under section 51(2).

When reviewing the totality of the evidence and testimony before me, I find it important to note that the Landlord confirmed that the rental unit will be used as their secondary residence, and will only be used when they happen to be in the area on occasion. Given that this is not their primary residence, it is evident that their intention for the rental unit is “to hold and keep for use” for when it is convenient for them. Clearly, when the Landlord served the Notice, she had no intention to live primarily in the rental unit for a duration of at least six months after the effective date of the Notice. Furthermore, the Landlord does not have that intention now, as the rental unit will admittedly be used as a part-time and irregular residence.

Based on my assessment of the evidence and testimony before me, I am not satisfied, on a balance of probabilities, that the Landlord served the Two Month Notice to End Tenancy for Landlord’s Use of Property in good faith. As such, I find that this Notice dated March 25, 2023, is cancelled and of no force and effect.

As the Tenant was successful in this Application, I find that the Tenant is entitled to recover the \$100.00 filing fee. Under the offsetting provisions of Section 72 of the *Act*, I allow the Tenant to withhold this amount from the next month’s rent.

Conclusion

Based on the above, I hereby Order that the Two Month Notice to End Tenancy for Landlord's Use of Property dated March 25, 2023, to be cancelled and of no force or effect as well.

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: July 24, 2023

Residential Tenancy Branch