



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNL – MT, FFT, OPC, FFL, MNDCL

Introduction

This hearing was scheduled to deal with cross applications. The tenants filed to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property and an extension of time to make the application. The landlord applied for an Order of Possession for landlord's use of property and a Monetary Order for damages or loss under the Act, regulations, or tenancy agreement.

Both parties appeared at the hearing and were affirmed. The landlord was also represented by legal counsel.

Preliminary and Procedural Matters

At the outset of the hearing, I confirmed the parties had sent their respective proceeding packages and evidence to the other party. The tenant did not however have the landlord's evidence package. I determined the landlord's evidence package was sent to the tenant on August 3, 2023 via registered mail; however, the tenant stated that she does not check for mail very often. I was satisfied the landlord met his obligation to serve the tenant with evidence within the time limit for doing so and the reason the tenant did not have it is because the tenant does not check their mail frequently enough. Section 90 of the Act deems a party to have received mail five days after mailing, even if the recipient does not pick up their mail. Accordingly, I found the tenant to be deemed served with the landlord's evidence and I admitted it for consideration in making this decision.

The tenancy agreement names only one tenant. The other adult residing with the tenant is identified as an authorized occupant on the tenancy agreement. In filing these applications, the parties named the adult occupant as a tenant. I amended the

applications to remove the name of the adult occupant from the style of cause, without any objection.

On March 30, 2023 the landlord's realtor personally served the tenant with the subject Two Month Notice to End Tenancy for Landlord's Use of Property. The tenant did not file to dispute the Two Month Notice within the 15 day time limit for doing so. Rather, the tenant did not file until April 28, 2023. Under section 66 of the Act, I may grant an extension in "exceptional circumstances" only. The tenant explained that she filed to dispute the Two Month Notice and after someone left a type-written note suggesting the landlord was not acting legitimately. A copy of the note was provided as evidence. It is devoid of any identifying information and no details are provided. I find the note to be too vague and lacks veracity. Therefore, I find there is insufficient evidence to support a basis for an extension and I dismiss the tenant's application.

Having declined to grant an extension of time to dispute the Two Month Notice, the remainder of the hearing focused on whether the landlord served a valid and enforceable Two Month Notice. During the hearing, I determined a material factor to determine is whether the tenancy has a fixed term since a landlord cannot end a tenancy during a fixed term with a Two Month Notice. I authorized and ordered both parties to provide me with additional evidence with respect to the term of the tenancy. I received evidence from both parties and considered it in making my decision.

I did not hear or make any finding with respect to the landlord's monetary claim. The landlord's monetary claim is severed from this application and dismissed with leave to reapply.

Issue(s) to be Decided

1. Did the landlord serve a valid and enforceable Two Month Notice to End Tenancy for Landlord's Use of Property?
2. Are the tenants in a fixed term tenancy or on a month to month status?
3. Is the landlord entitled to an Order of Possession or does the tenancy continue at this time?
4. Award of the filing fee.

Background and Evidence

The tenancy started on December 15, 2019 and was set for a 2.5 year fixed term that was to expire on June 30, 2022. The rent was set at \$2800.00 due on the first day of

every month. The tenant requested that the hot tub at the property be provided for their use and the parties agreed it would be provided for an additional fee of \$250.00 per month, making the tenant's total monthly obligation \$3050.00.

In January 2022, six months before the fixed term was set to expire, the tenant reached out to the landlord via text message and asked the landlord what his plans were for continuing to rent to the tenant. The landlord asked to meet the tenant in person. During that meeting, the landlord stated that he was agreeable to renting the rental unit to the tenant for another two year term but he also wanted to increase the rent. After the meeting, the tenant responded, via text message, agreeing to a rent increase but a lesser fee for the hot tub so that the total payment due to the landlord remained at \$3050.00 per month.

The landlord did not issue a Notice of Rent Increase. The landlord did not prepare an amendment or an addendum to the tenancy agreement to reflect an extension of the fixed term. Nor, did the landlord prepare an entirely new tenancy agreement.

In May 2022 the landlord decided that he no longer wanted to extend the tenancy for another two year fixed term and that he wanted to regain possession of the rental unit upon expiry of the original fixed term of June 30, 2022. Both parties provided evidence of the communication they had through text message (WhatsApp) and email and I have referenced those communications in greater detail in the following section.

It is undisputed that the parties met again, in person, in May 2022. During that meeting the landlord informed the tenant that he planned to move into the rental unit, renovate the unit, and then sell it. After that meeting, the tenant communicated via text message saying she would accept the landlord's "notice" and would vacate by the end of July 2022 with July 2022 being free of rent.

The tenant paid the rent for July 2022 and did not move out. The tenant continued to pay rent in the months that followed and the landlord did not move to regain possession of the unit.

The parties also submitted to me that they reached an agreement that the tenant would continue to occupy the rental unit while the property was listed for sale.

The landlord listed the property for sale on July 11, 2022 and a Contract of Purchase and Sale ("CPS") was accepted by the landlord on March 18, 2023. The buyer's conditions were to be removed by March 29, 2023. The landlord and the buyer agreed

in the CPS that vacant possession of the property, without any tenancy, was to transfer to the buyer on June 15, 2023. On March 29, 2023, the buyer signed a written request for the landlord to issue a notice to end tenancy to the tenant.

On March 30, 2023 the subject Two Month Notice was served upon the tenant. The Two Month Notice has a stated effective date of June 1, 2023 and provides the following reason for issuance of the Two Month Notice:



All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit.

The Two Month Notice was accompanied by the buyer's written request for the landlord to give the tenant the Two Month Notice because the buyer intends to occupy the rental unit.

The tenant initially believed she was entitled to see a copy of the CPS but subsequently learned that is not necessary if she was provided with a copy of the buyer's written request, which she was.

On April 28, 2023 the tenant filed to dispute the Two Month Notice and on May 30, 2023 the landlord and the buyer executed an Addendum to the CPS to extend the possession date from June 15, 2023 to October 14, 2023, or earlier if the tenant vacates earlier, and the reason for the extension, as described on the Addendum, is due to the tenant not vacating the rental unit within time.

Term of tenancy: fixed or month to month

The parties were in dispute as to whether the tenancy is in a fixed term set to expire in 2024 or in a month to month status when the Two Month Notice was issued.

It is undisputed that starting in January 2022 the parties began communicating with each other with respect to the term of tenancy, as seen below:

On January 11, 2022 the tenant wrote:

Hi [name of landlord]. I wanted to start discussing with you as to what your thoughts and plans are in continuing to rent to us. Please let me know as we'd like to continue our rental agreement. Thanks.

The parties arranged to meet and after the meeting, where the parties discussed another two year fixed term and a rent increase, on January 16, 2022, the tenant wrote:

Morning. I spoke to my husband and we don't want to rent the hot tub in addition to a rent increase. We think if you keep the rent the same you are still getting rent increase and plus hot tub rental but with a deflation as it would be considered used. We looked at hot tub rental cost and purchase cost and it's less than what we have paid you over the course of two years. Since the hot tub is now paid, we think that's fair. Rent with a 4% increase is \$2912 which would leave the hot tub rental at \$138. Hopefully this will work out.

The landlord responded to the tenant on January 18, 2022:

Morning, I understand your thoughts that you want to keep \$3050 for next two years. So I hope you can still take care of my house as usual and I confirm \$3050.00 with hot tub. But can we change payment date to 30th every as 1 day of every month is my mortgage due day, I want to have one day room, thx.

The tenant responded to the landlord later the same day:

Morning! Thank you! Yes, we will send payment on the 30th rather than the 1.

Nearly four months pass before the landlord sends an email to the tenants on May 11, 2022 stating, in part:

How are you ? I hope you stay safe and well .

Regarding next two year's further rental as I confirmed by Whatsapp on Jan. 18, 2022, I am so sorry to inform you that I have to change my mind as we need to move back to our unit. I know it will cause inconvenience for you and your family, I feel no good as well and really apologize for this changing but I think it is necessary and better to inform you as soon as possible, so you can start looking for new one immediately. Now it is 50 days away to our termination on June 30th , 2022, I hope you will find a good place for your family. Good luck and have a good afternoon,

On May 17, 2022 the tenant responded to the landlord's May 11, 2022 email, stating, in part:

My husband has just returned from his trip from Quebec and have had a chance a to talk to him about your notice.

After our discussion and consideration, he and I would like to express how frustrated and disappointed we are with you and this notice. We specifically asked you in January for the extension as we did not want to be in this position of having to look for new place and we've made plans and made commitments on the basis of knowing that we have an extension of our lease for an additional two years. We can't change or back away from the commitments we've already made.

We find it odd that you would give us notice effective at the end of our original lease when you did not once mentioned that you had a change of mind. This notice was out of the blue.

We have been excellent tenants and have always paid rent on time. We have taken care of your unit exceptionally.

In having discussions with the colleagues at my law firm and reviewing the Residential Tenancy Act, we are entitled to a two-four months notice with the last month being a compensation to us of free one month rent.

The landlord's legal counsel argued that the WhatsApp communications in January 2022 amount to a discussion only and that had the landlord been serious about extending the tenancy for another two year fixed term he would have drafted a new written tenancy agreement reflecting that. Since there was not a new tenancy agreement created, the tenancy went to a month to month status upon expiry of the original fixed term of June 30, 2022. In the alternative, the landlord's legal counsel argued that, even if the parties agreed to another two year fixed term, the tenant brought the tenancy to an end by giving a tenant's notice to end tenancy on May 22, 2022 to end the tenancy effective July 31, 2022 and when the tenant did not vacate at the end of July 2022 the tenancy became a month to month tenancy by default.

The tenant's notice, to which the landlord's legal counsel refers, is an email from the tenant dated May 22, 2022. It was undisputed that the landlord and tenant agreed to meet in person, on May 20, 2022. The tenant testified that the landlord told her that his plan was to move into the rental unit, renovate it and then sell it. The landlord testified that during that meeting he informed the tenant that he had to sell the unit and they agreed the tenant could occupy the rental unit while it was for sale. On May 22, 2022 the tenant wrote to the landlord an email stating:

We have discussed your situation as well as ours.

We have decided that we will accept your notice and will be moving out as of July 31.

We confirm our agreement, in accordance with the Residential Tenancy Act, with July being the last month of tenancy, is free rent.

The tenant explained during the hearing, that the “notice” to which she was referring to on May 22, 2022 was the landlord’s oral notification that he would move in, renovate the unit, and then sell the unit.

The landlord responded by thanking the tenant on May 23, 2023 and wrote:

There is an official Notice called " Two Month Notice to End Tenancy For Landlord's Use of Property" Do you need it ? or It is fine with emailed confirmation between us? please inform me.

The landlord testified that he did send the tenant a Two Month Notice via registered mail in May 2022 but it was returned as unclaimed. The landlord claimed that he also emailed it to the tenant in May 2022. Neither party provided a copy of a Two Month Notice issued in May 2022. Nor, did the landlord provide a registered mail receipt or the email he allegedly used to send a Two Month Notice in May 2022.

Despite this exchange of messages on May 22, 2022, the tenant did not move out at the end of July 2022 and continued to pay rent. The tenant stated that after sending the email of May 22, 2022 she learned the tenancy could not be ended by way of the landlord’s oral notice. As such, the tenant argued that the tenancy did not end as of July 31, 2022 and it continued on the fixed term basis, as they had previously agreed to.

The landlord’s legal counsel argued the tenant’s email of May 22, 2022 caused the tenancy to end as of July 31, 2022 and then continue on a month to month basis by default.

Analysis

Section 49 provides that a landlord may issue a Two Month Notice to End Tenancy for Landlord’s Use of Property (“Two Month Notice”) where:

- (5) A landlord may end a tenancy in respect of a rental unit if
- (a) the landlord enters into an agreement in good faith to sell the rental unit,
 - (b) all the conditions on which the sale depends have been satisfied, and
 - (c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
 - (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;
 - (ii) the purchaser is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

Although the tenant did not specifically raise the issue of the fixed term or the effective date of the Two Month Notice, I am bound to issue decisions and orders that do not conflict with the Act. Where a Two Month Notice is given for under section 49(5)(c), section 49(2) provides that the effective date of the Two Month Notice must be:

- (i) not earlier than 2 months after the date the tenant receives the notice,
- (ii) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, and
- (iii) **if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy,** or

[My emphasis added]

Although the tenant did not file to dispute the Two Month Notice within the time limit for doing so, and I did not grant the tenant an extension, in order to grant an order of

Possession to the landlord I must still be satisfied that the landlord has served the tenant with an otherwise valid and enforceable notice.

I find the term of the tenancy at the time the Two Month Notice was served is critical to determining whether the landlord served a valid and enforceable notice. In other words, if the tenancy is within a fixed term and the expiry date is after June 1, 2023 the landlord could not have required the tenant to vacate the unit by that date and the landlord was not in a position to promise vacant possession to the buyer as of June 15, 2023.

Section 14(2) of the Act permits a tenancy agreement to be amended, as seen below:

(2)A tenancy agreement may be amended to add, remove, or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment.

Where a term in a tenancy agreement is amended or extended, it should be done in writing by way of amending the existing tenancy agreement or executing another document such as an Addendum. Alternatively, an entirely new tenancy agreement could be prepared. The landlord did none of these things and the landlord's legal counsel argued the lack of a new tenancy agreement demonstrates the text messages in January 2022 were merely evidence of a discussion. However, I find the landlord's lack of written documentation to amend, extend or enter into a new tenancy agreement is not inconsistent with the landlord's other actions. To illustrate:

- The parties had agreed to increase the rent and decrease the hot tub fee but the landlord did not issue a Notice of Rent Increase despite the requirement to do so and the landlord collected the total amount of \$3050.00 in the absence of a Notice of Rent Increase.
- In the landlord's email of May 11, 2022, it appears the landlord believes, erroneously, that he can require the tenant to vacate the rental unit at the end of the original fixed term without serving her a notice to end tenancy. The Act would require the landlord to serve the tenant the appropriate notice to end tenancy in the absence of a vacate clause in the tenancy agreement.
- The "notice" to which the tenant referred in her email of May 17, 2022 was not a Two Month Notice and was most likely "oral" notice the landlord had given since the landlord sent the tenant an email on May 23, 2022 asking if he should prepare a Two Month Notice or if email confirmation was sufficient. If the landlord is one to always prepare written documentation, as submitted by the landlord's legal counsel, why would the landlord ask this question of the tenant.

- The landlord testified that he had given the tenant a Two Month Notice in May 2022 yet, there was no evidence corroborating such.

In light of the above, I reject the landlord's argument that if he truly agreed to another fixed term, he would have prepared the appropriate documentation.

The written communication in the WhatsApp messages in January 2022, and as confirmed in the landlord's email of May 11, 2022, I find, on a balance of probabilities that the parties agreed to extend the fixed term for another two years upon expiry of the original fixed term as submitted to me by the tenant. Also, the tenant had clearly relied upon the agreement, as demonstrated in the tenant's email of May 17, 2022.

Where parties reach an agreement, one party cannot unilaterally withdraw the agreement or disregard one of its terms, for their benefit solely, as the landlord attempted to do by way of the May 11, 2022 email. I find the landlord to be estopped from doing so.

I reject the landlord's argument that the tenant gave a notice to end tenancy on May 22, 2022, via email. Clearly, the tenant indicates she is responding to the landlord's "notice" even though there was no written notice given to the tenant and I do not see the tenant's statements in that email as being consistent with a tenant's notice to end tenancy.

Despite taking the position the tenant gave a notice to end tenancy effective July 31, 2022 the landlord did not pursue regaining possession of the rental unit and continued to accept rent from the tenant. In the landlord's affidavit, the describes the reason for doing this, as follows:

Given the difficulty I was having in selling the Property, I did not enforce the Tenants' notice to end the tenancy on July 31, 2022. As a result, between July of 2022 and March of 2023, the Tenants continued to pay the monthly rent and I continued to accept it.

I find the above statement peculiar, especially in regard to accepting rent for July 2022 and the few months that followed considering the first listing contract provided that the agents would list the property for sale between July 11, 2022 through October 2022. It does not make sense to me that the landlord claims to be having a difficult time selling the property when he accepted rent on July 1, 2022 since it was not yet listed for sale. And, as of August 1, 2022 the property had only been for sale for 20 days, which is hardly indicative of difficulty selling the property. Therefore, I reject the landlord's

position that he continued to accept rent from the tenant July 2022 onwards on a month to month basis solely because he was having difficulty selling the property.

Based on everything before me, and on a balance of probabilities, I find as follows:

- The parties agreed to extend the fixed term for another two year fixed term upon expiry of the original fixed term;
- The tenant did not give a notice to end tenancy to the landlord in May 2022.
- The landlord did not serve the tenant with a notice to end tenancy in May 2022.
- The parties remain in a fixed term until it expires on June 30, 2024.

Having found the parties are in a fixed term until June 30, 2024 the landlord cannot give a buyer vacant possession of the property until on or after that date unless the tenancy ends some other way before the fixed term expires.

While section 53 of the Act provides that an incorrect effective date on notice to end tenancy automatically changes to comply with the Act, I do not issue the landlord an Order of Possession effective for June 30, 2024 based on the Two Month Notice dated March 30, 2023 as the existing CPS may collapse as a result of this decision and to provide the landlord with an Order of Possession effective June 30, 2024 would be potentially prejudicial to the landlord. I note that in the landlord's affidavit, he wrote:

I am fearful that I will be in breach of contract if this matter is not resolved on August 18, 2023 and that I will lose the sale of the Property. Given how difficult it was to sell the Property in the first place, if the Buyer walks away from the Property due to the Tenants failure to vacate, I do not know what I will do about my financial situation.

This decision is being issued after August 18, 2023 and should the sale collapse due to the landlord's inability to provide the buyer with vacant possession in a timely manner and if the tenants vacate the property on June 30, 2024 pursuant to an Order of Possession I issue, the landlord could face significant financial consequences under section 51(2) of the Act. Therefore, I find it more appropriate and less prejudicial to deny the landlord's request for an Order of Possession at this time and enable the landlord to pursue other options including:

- selling the property, subject to the tenancy
- delaying the sale of the property until the fixed term nears its expiry date and seeking an Order of Possession at that time
- entering into a written mutual agreement to end tenancy with the tenant.

Conclusion

The tenant's application is dismissed.

The landlord's request for an Order of Possession based on a Two Month Notice dated March 30, 2023 is denied.

The landlord's monetary claim was severed and dismissed with leave to reapply.

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: September 13, 2023

Residential Tenancy Branch