



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes CNC, OPC

Introduction

This hearing dealt with cross applications. The tenant applied to cancel a Notice to End Tenancy for Cause. The landlord applied for an Order of Possession for cause. Both parties appeared at the hearing and were provided the opportunity to make submissions, in writing and orally, and to respond to the submissions of the other party in accordance with the Rules of Procedure and with respect to matters determined relevant to this dispute.

I heard that the tenant had submitted photographs to the Residential Tenancy Branch that were not before me during the hearing. I received the photographs after the teleconference call ended and I determined that the photographs were served late. Nor was I able to determine whether the photographs were served upon the landlord. Accordingly, I did not accept or consider the late evidence.

On a procedural note, the tenant was cautioned several times during the hearing to present evidence relevant to the Notice served upon him and the government order issued to the landlord by the city. After hearing from the parties approximately 45 minutes, with the majority of the time being used to hear the tenant's submissions, I informed the tenant I had heard enough to make a decision and that I would be upholding the Notice to End Tenancy. The tenant continued to speak out of turn and conducted himself inappropriately. I asked the tenant to leave the teleconference call. After the tenant hung up I continued to speak with the landlord for approximately five minutes before ending the call.

Issue(s) to be Decided

Should the Notice to End Tenancy be upheld or cancelled?

Background and Evidence

The residential property is zoned as a single family dwelling. The dwelling consists of a basement, a main floor, a second storey for a total of three floors. In the past, the residential property was divided into four separate living units consisting of two units in the basement, a unit on the main floor, and separate living accommodation on the second storey of the building. The rental unit occupied by the tenant is located on the second storey of the building.

On September 15, 2010 the city issued a letter to the landlord after an inspection took place by the city's property use inspector. The inspector instructed the landlord to apply for one additional dwelling unit or restore the building to a one-family dwelling in order to comply with the zoning by-laws and avoid further action. The landlord issued a 1 Month Notice to End Tenancy for Cause to the tenant with the reason for ending the tenancy was to comply with a government order. The tenant disputed that Notice and on November 2, 2010 a hearing was held. The tenant was successful and the Notice issued September 28, 2010 was cancelled on the basis the landlord issued the Notice prematurely.

On January 27, 2011 the landlord was served with a legal notice by the city. The legal notice states that the "second storey of this building remains occupied as a separate living quarter, without permit or approval, in contravention of the Zoning and Development and Building By-laws." The landlord was ordered by the city by way of this legal notice to restore the use of the building to its approved use as a one-family dwelling, including removal of cooking facilities and all associated wiring and plumbing. The landlord has removed the kitchens from the basement units and the second storey unit. The only kitchen remaining in the residential property is on the main floor which is occupied by another tenant.

The landlord issued a 1 Month Notice to End Tenancy for Cause on January 30, 2011 with an effective date of February 28, 2011. The Notice indicates the reason for ending the tenancy is "Rental unit/site must be vacated to comply with a government order".

The landlord is seeking an Order of Possession as the tenant occupying the second storey refuses to vacate despite the landlord's efforts to find alternative accommodation for the tenant.

The tenant submitted that the kitchen removed from the second storey may have been original to the construction of the house approximately 42 years ago and that the kitchen on the main floor could be described as a kitchenette. The tenant submitted that the city has issued the order without showing drawings of the original house plan or evidence that the kitchen on the second storey was built without permits. The tenant

appeared to be of the position that the city has erred in concluding that the second storey is being occupied as separate living accommodation without permit or approvals. The tenant submitted that the landlord was in a position to apply for permission for an additional dwelling unit as evidenced by the September 15, 2010 letter but the landlord did not apply for such permission. The tenant is of the position the landlord is trying to sell or has sold the house.

The landlord's agent was of the position that the original kitchen was on the main floor and not the second storey as submitted by the tenant. The agent submitted that the tenant must vacate the rental unit as the building must be restored to use by a single family pursuant to the order issued by the city.

In reaching this decision I have considered the letter issued by the city on September 15, 2010, the previous dispute resolution decision, the legal notice issued by the city January 27, 2011 and the Notice to End Tenancy dated January 30, 2011.

Analysis

I have review the Notice to End Tenancy issued to the tenant on January 30, 2011. I am satisfied the landlord has completed the Notice and sufficiently served it upon the tenant. Accordingly, the only issue for me to determine is whether the tenant must vacate the rental unit in order to comply with a government order.

Upon review of the letter and legal notice issued to the landlord by the city, I am satisfied that the city has issued an order to the landlord to restore the property for use as a one-family dwelling and that the city has identified the second storey living accommodation as being in violation of the city's by-laws.

As the tenant was informed numerous times during the hearing, I do not have the authority to overturn or change a decision or order issued to the landlord by the city. Accordingly, I do not give further consideration to the tenant's arguments that the kitchen located on the second floor was original to the construction of the building or that the city erred in determining the second storey was being used as living accommodation in violation of the city by-laws.

Although the landlord was provided the option of applying for permission for one additional dwelling unit in September 2010, I do not find the landlord was obligated to pursue that option under the Act. Rather, I find the landlord was within his right to choose to restore the property to a one-family dwelling without additional dwelling units.

Therefore, I do not the landlord's lawful choice to restore the building to a conforming use to be a basis for cancelling the Notice.

Finally, I find that the tenant's submission that the landlord intends to sell or is selling the property is not relevant to the issuance of the order to the landlord by the city. The fact remains the city has issued an order to the landlord and the second storey must not be used as separate living accommodation.

I am satisfied that the tenant's continued occupation of the second storey as separate living accommodation is in violation of the city's order and that to comply with the city's order the tenant must vacate the rental unit. I am further satisfied that an order from the city is a government order and that the landlord issued the Notice to End Tenancy on January 30, 2011 pursuant to receiving the government order.

In light of the above, I uphold the Notice to End Tenancy and I grant the landlord's request for an Order of Possession. The tenant's application is dismissed.

I provide to the landlord an Order of Possession effective at 1:00 p.m. on February 28, 2011. The Order of Possession must be served upon the tenant and may be enforced in The Supreme Court of British Columbia as an Order of that court.

Conclusion

The tenant's application is dismissed. The landlord's application for an Order of Possession is granted. The landlord is provided an Order of Possession effective February 28, 2011 to serve upon the tenant.

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: February 18, 2011.

Residential Tenancy Branch