Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNQ

Introduction
This hearing dealt with the tenant's application pursuant to section 49.1 of the *Residential Tenancy Act* (the *Act*) for cancellation of the landlord's 2 Month Notice to End Tenancy Because the Tenant Does not Qualify for Subsidized Rental Unit (the 2 Month Notice). The tenant confirmed that on September 29, 2011 she received the landlord's 2 Month Notice sent by the landlord by registered mail on September 28, 2011. The landlord confirmed that she received a copy of the tenant's dispute resolution hearing package sent by registered mail on November 4, 2011. Both parties also sent and received written evidence packages to one another. I am satisfied that all of the above documents were served to one another in accordance with the *Act*.

At the commencement of the hearing, the landlord made an oral request for an Order of Possession should the tenant's application to cancel the 2 Month Notice be dismissed.

Issues(s) to be Decided
Should the landlord's 2 Month Notice be cancelled. If not, should the tenancy end and should the landlord be granted an Order of Possession?

Background and Evidence
While I have turned my mind to all the documentary evidence, including applications, agreements, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

This month-to-month tenancy commenced on April 1, 2010. The tenant pays $529.00 in monthly rent for this three bedroom housing unit in a subsidized housing building. The landlord continues to hold a security deposit in excess of $700.00 for this tenancy paid when the tenancy began.

The landlord testified that the 2 Month Notice was issued to the tenant once the landlord confirmed that the tenant's two young children have not been living with her since at least October 2010. The landlord submitted written evidence from the tenant's mother, one of the tenant's neighbours, and the Executive Director of the housing society acting

as the tenant's landlord. This evidence supported the landlord's assertion that the tenant's two children cited on her tenancy application and tenancy agreement have not been residing in the rental unit for many months. The Executive Director's note stated that the tenant's mother told her on September 23, 2011 that the tenant's mother had "interim custody of M (the tenant's daughter) for 5 years & that M has never lived with (the tenant)." The Executive Director's note also stated that the tenant's mother will have had physical custody of the tenant's son for one year and that the Ministry of Children and Families is the son's actual guardian. In a November 2, 2011 email, the tenant's mother confirmed the information outlined in the Executive Director's note, stating that both of the tenant's children have their own rooms at the tenant's mother's residence and "sleep there each and every night".

The landlord noted that the tenant's October 14, 2008 tenancy application and the residential tenancy agreement she signed on April 1, 2010 listed her daughter born in 2006 and her son born in 2008 as additional residents for her tenancy.

The provisions for Additional Residents as set out in section 5 of this tenancy agreement reads as follows.

> *...Other than the tenants named above, list all other persons, including those under age 19, who will normally be residents of the rental unit. A resident is anyone who spends more than 14 days in the rental unit in any 3-month period...*

The landlord testified that eligibility to reside in this building is contingent on having children residing with tenants. She said that the tenant has breached the following provisions of section 17(d) of her tenancy agreement which reads in part as follows.

> *17.(d) The landlord has selected the tenant partly on the basis of the number of residents in the tenant's household. The tenant agrees that only the persons named at the beginning of this tenancy agreement have the right to live as residents in the rental unit during the term of this tenancy, unless the landlord otherwise consents in writing. The tenant agrees to notify the landlord promptly of any change in the residents in the rental unit. The number of residents is a material term of this tenancy agreement, and the landlord may end the tenancy if:*
>
> *(i) the tenant fails to report a change in the number of residents in the rental unit;...*
>
> (emphasis in original)

The landlord testified that action was taken to end this tenancy once it became apparent that the tenant is occupying a three bedroom rental unit but has no children living with her. She said that this situation has apparently existed for some time. She said that the

landlord has taken action to ensure that the rental unit can be made available to a family that qualifies for this three bedroom subsidized housing unit.

The tenant entered written and oral evidence that she is involved in a lengthy custody dispute with her mother through the courts. She testified that neither of her children presently reside with her. She said that her daughter has never lived with her at this rental unit as the tenant's mother refused to give up custody of the tenant's daughter. She testified that her son was apprehended by the Ministry of Children and Families in October 2010 and has not lived with the tenant since then. She said that it was her own fault that she did not alert the landlord that her son had been apprehended and was no longer in her custody. The tenant testified that she is currently expecting a third child.

The tenant's lawyer submitted written evidence confirming that the judicial process has taken far longer than anticipated. Related hearings are proceeding in November 2011 and others are scheduled for four days in January 2012. The tenant's lawyer reiterated the tenant's claim that the tenant's potential loss of her residence before she receives a court decision will seriously prejudice the tenant's attempts to obtain custody of her son.

The tenant also testified that the neighbour's written submission was obtained by the landlord because the landlord told the neighbour that the tenant was complaining about her. She said that the neighbour might be available at the hearing to comment on the accuracy of her written evidence. Based on the tenant's testimony and that of her witness, it was not necessary to call the neighbour as a witness.

The tenant also testified that she provided a copy of a mediated agreement signed in April 2009 and entered into the Court Registry on April 6, 2010 to the landlord's representative at this hearing when she moved into the rental unit. This agreement established that the tenant, the tenant's witness and the tenant's mother consented to place her daughter in the interim custody of her mother. Visitation rights were set out in that agreement. When the agreement was signed in April 2009, the parties to the agreement confirmed that the tenant's daughter would be returned to the tenant's full custody no later than December 1, 2010.

The tenant's witness, also named in the mediated agreement, testified that he witnessed the tenant hand a copy of this agreement to the landlord's representative when she moved into this rental unit.
The landlord's representative denied having received a copy of the mediated agreement and said that there was no record of receiving this agreement until the tenant entered this into written evidence for this hearing.

Analysis

I should first note that none of the people who wrote letters entered as written evidence by the parties participated in this hearing. While the landlord's Executive Director provided a note regarding her conversation with the tenant's mother, her written evidence would have been more convincing had she participated in the hearing. I also note that both of the people whose evidence the landlord has relied on are involved in or were involved in disputes with the tenant. At least one of these individuals, the tenant's mother, may have a definite interest in supplying information to the landlord that would impact the existing custody dispute.

I have given little weight to the landlord's assertion that housing in this subsidized rental property is only available to tenants who have children living with them on a full-time or permanent basis. The landlord was unable to identify anything in the residential tenancy agreement or in any other document entered into written evidence that confirmed that this building was restricted to tenants with children living with them on a full-time or permanent basis.

The alleged breach of a material term of the tenancy agreement and the landlord's claim that the tenant no longer qualifies for subsidized housing relies on the landlord's assertion that the tenant has not complied with the family composition as identified in the tenant's application for subsidized housing and her tenancy agreement. I find that the test to be applied to the landlord's 2 Month Notice is whether or not those listed on the tenancy agreement actually reside in the tenant's three bedroom rental unit.

Much of the tenant's written evidence was directed at demonstrating that the tenant has been actively attempting to obtain custody of her children and that this process has taken far longer than expected. While the tenant has provided details regarding visitations that her children make to her rental unit, these visitations do not qualify as residence in the rental unit. Similarly, an occasional sleepover by her children does not qualify a tenant in a subsidized rental unit for bedrooms for these children. Despite her earnest intentions to obtain custody of her children, the tenant and her witness both entered sworn testimony that the tenant's children do not reside with her and have not resided with her since October 2010 in the case of her son and since the commencement of this tenancy for her daughter.

Based on the sworn testimony of the parties and the written evidence before me, I find that the tenant's children have not resided in the rental unit since at least October 2010. Under these circumstances, I dismiss the tenant's application to cancel the landlord's 2 Month Notice.

Section 55(1) of the *Act* reads as follows:

> ***55*** *(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,*
>
> > *(a) the landlord makes an oral request for an order of possession, and*
> >
> > *(b) the director dismisses the tenant's application or upholds the landlord's notice.*

Since I have dismissed the tenant's application to cancel the 2 Month Notice, I find that this tenancy ends on the effective date of the landlord's notice, November 30, 2011. I grant an Order of Possession to the landlord to this effect.

Who should or should not obtain custody of the tenant's children and the timing of any such decision are clearly not matters that I can take into account in considering an application under the *Act*. The *Act* does not allow me to override a landlord's legal rights and obligations with respect to housing subsidized tenants on the basis of compassionate grounds. Although it would be unfortunate if the decision to end this tenancy impacts the tenant's ongoing legal issues with respect to custody of her children, the availability of this three bedroom rental unit may make a significant difference to the lives of another family in need of this subsidized accommodation.

Conclusion

I dismiss the tenant's application for dispute resolution without leave to reapply.

At the hearing, the landlord requested an Order of Possession if the tenant's application for cancellation of the Notice to End Tenancy were dismissed. I allow the landlord's oral request to end this tenancy and provide the landlord with a formal copy of an Order of Possession effective by 1:00 p.m. on November 30, 2011. Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: November 16, 2011

Residential Tenancy Branch