Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding R.T.C. Sales Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, CNL, FF

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) pursuant to section 49; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Preliminary Issues – Service of Documents

The landlord testified that the individual with the same last name as the landlord who had been acting on his behalf during this tenancy (BM) served the tenant with the 2 Month Notice on January 7, 2014. The landlord gave sworn testimony that BM handed the 2 Month Notice to the tenant who attended this hearing (the tenant) who signed for having received delivery of the 2 Month Notice. The tenant testified that BM never handed him the 2 Month Notice. He said that he found one page of the 2 Month Notice in his yard. In his original application for dispute resolution, the tenant requested additional time to dispute the 2 Month Notice. He did so because the only full copy of the 2 Month Notice he claimed to have received was by email on February 12, 2014, the same date that he submitted his original application for dispute resolution.

In this case, I find that the landlord has not provided adequate direct evidence as to the service of the 2 Month Notice to the tenant on February 12, 2014. He provided no written evidence from BM to confirm his service of the entire two page 2 Month Notice to the tenant on that date. He also provided no written evidence to confirm his allegation that the tenant had confirmed in writing his receipt of the 2 Month Notice. While service

of a 2 Month Notice by email is not an allowed way to serve notice to end tenancy, there is sworn testimony and written evidence from the tenant that he did receive the landlord's full 2 Month Notice on February 12, 2014. The landlord's legal counsel also noted correctly that the tenant has admitted receipt of the 2 Month Notice by February 12, 2014. Under these circumstances, I find that the tenant's admission that he received the full 2 Month Notice on February 12, 2014 constitutes valid evidence that the 2 Month Notice was served in full on that date. I find that the tenants have applied to cancel the 2 Month Notice within the 15 day period allowed under the *Act*.

As the tenant confirmed that BM handed him the 1 Month Notice on March 2, 2014, I find that the landlord served the 1 Month Notice in accordance with section 88 of the *Act* on that date. I find that the tenants filed the amended application for dispute resolution seeking the cancellation of the 1 Month Notice on March 5, 2014, and within the 10 day time period for doing so.

The landlord confirmed that he received copies of both the tenants' original dispute resolution hearing package and the amended hearing package by registered mail, sent by the tenant on February 14, 2014 and March 5, 2014, respectively. Both parties also confirmed that they had received and reviewed one another's written and photographic evidence packages. I am satisfied that the parties have served the above-noted documents to one another in accordance with sections 88, 89 and 90 of the *Act*.

At the commencement of the hearing, the landlord's counsel requested the issuance of an immediate Order of Possession if the tenants' application to cancel the notices to end tenancy were dismissed.

Preliminary Issue – Request for an Adjournment

During the course of the hearing, the landlord's counsel requested authorization to submit late evidence or, in the alternative, an adjournment of the proceedings to enable the landlord to submit written evidence that the landlord had not submitted prior to this hearing.

Rule 6 of the Residential Tenancy Branch (the RTB's) Rules of Procedure establishes how late requests for a rescheduling and adjournment of dispute resolution proceedings are handled. Since the landlord's counsel had not submitted a written request for an adjournment in sufficient time before this hearing, Rule 6.3 applies:

6.3 Adjournment after the dispute resolution proceeding commences

> *At any time after the dispute resolution proceeding commences, the arbitrator may adjourn the dispute resolution proceeding to a later time at the request of any party or on the arbitrator's own initiative.*

In considering this request for an adjournment, I have applied the criteria established in Rule 6.4 of the Rules of Procedure. I note that the first of the landlord's notices to end tenancy in dispute at this hearing was issued on January 7, 2014. The tenants' original application for dispute resolution was deemed served to the landlord on February 19, 2014, well in advance of this hearing. On March 26, 2014, the RTB received a 33 page written and photographic evidence package, delivered by the landlord's legal counsel. For these reasons, I found that the landlord had ample opportunity to submit whatever evidence he and his legal counsel wished to present well in advance of this hearing. The adjournment process is not designed to enable a party who only becomes aware during the proceedings of the deficiencies in their evidence to obtain an additional opportunity to submit information that the party could easily have produced in advance of the hearing. At the hearing, I decided that the landlord had not met the criteria established for granting an adjournment and proceeded with this hearing. I also denied the request to provide late evidence after the hearing for essentially the same reasons as outlined above.

At the hearing, the landlord provided the phone number for BM, the individual who had been acting for him throughout most of this tenancy. The landlord had not provided any written evidence from this individual. I agreed to contact the Telus operator to see if we could obtain sworn oral testimony from this person who had signed the original Residential Tenancy Agreement (the Agreement) on the landlord's behalf, as well as the alleged extension to that Agreement, and signed and served both notices to end tenancy disputed by the tenants. The TELUS operator was unsuccessful in connecting with this individual.

Issues(s) to be Decided

Should the landlord's 1 Month and 2 Month Notices 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

This tenancy for what the landlord's counsel described as a 4 bedroom plus executive house on a 10 acre property started by way of a two-year fixed term Agreement on July 1, 2010. The landlord's counsel noted that this house has a three care garage and an indoor swimming pool. Although neither party provided a copy of the original Agreement, there is written evidence and undisputed sworn testimony that the tenant

and BM acting on the landlord's behalf signed the original Agreement on June 7, 2010. Monthly rent was set at $3,400.00, payable in advance on the first of each month, plus hydro and heat. The Agreement noted that there was parking for seven cars.

The tenant entered into written evidence three pages of the Agreement, which he maintained was amended by initials the landlord's agent, BM, and the tenant added to the length of the term on page 2 of the 6-page Agreement. This written evidence showed the length of the fixed term as 5 years and the end date for the term as June 30, 2015, and was stamped as "APPROVED". The tenant gave sworn testimony that in 2012, he discussed the possibility of extending the term of the Agreement with BM who had signed as the landlord and who had been the tenant's sole contact until February 19, 2014. The tenant testified that he met with BM on August 24, 2012 in a Subway restaurant at which time both he and BM initialled the changes to the term of the Agreement. The tenant said that he was told at that time by BM that he would be allowed to remain in this house for many years.

The landlord and his counsel maintained that BM was not acting with the landlord's authorization if he did initial the changes to the original Agreement. The landlord's counsel also raised many objections to whether the amended Agreement had any legal validity for a number of reasons, which included his claim that:

- it is unclear whether the initials on page 2 of the Agreement entered into written evidence by the tenant were in fact those of BM;
- the tenant had not provided a full copy of the Agreement;
- the alleged extension occurred after the original Agreement had expired;
- the lack of any additional consideration by the tenant for extending the Agreement by three years negated the alleged new contract; and
- the failure of the parties to the original Agreement to date and sign the changes to the original Agreement negated the alleged new contract.

The landlord's counsel maintained that the original two year fixed term tenancy has expired and that no extension of this Agreement was entered into with the landlord's authorization. Although the landlord's counsel questioned the legality of the partial evidence supplied by the tenant, the landlord and his counsel did not enter into written evidence any copy of the Agreement.

The landlord's 2 Month Notice seeking an end to this tenancy by March 8, 2014, entered into written evidence by the tenant, identified the following reason for seeking an end to this tenancy:

- *All of the conditions for 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 landlord testified that he put a "For Sale" sign up on the property late in 2013 and the tenant was aware that there had been numerous showings of the property to prospective purchasers. He gave sworn testimony that the 2 Month Notice was issued on January 7, 2014, after he learned that the purchaser wanted to use the property. He said that the tenant's application to cancel the 2 Month Notice is causing problems for the completion of the sale of the property.

The tenant also entered into written evidence a copy of the 1 Month Notice, requiring the tenant to end this tenancy by April 2, 2014, for the following reasons:

Tenant or a person permitted on the property by the tenant has:

- *put the landlord's property at significant risk...*

Tenant has engaged in illegal activity that has, or is likely to:

- *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;*
- *jeopardize a lawful right or interest of another occupant or the landlord...*

The landlord's principal objection leading to the issuance of the 1 Month Notice involves the tenant's placement of seven containers and four heavy machines on the premises. The landlord and his counsel maintained that the tenant is carrying on his container rental/sales business from this property and that there is considerable danger and risk to the property as a result of this unauthorized use of the property.

In this regard, the tenant testified that BM was fully aware from the beginning of this tenancy that the tenant was intending to use part of the rental property for his container leasing and sales business. He noted that the Agreement showed both his personal name and his business as listed tenants. The tenant testified that he uses a 20 foot by 20 foot personal home office in this rental property. He said that he seldom if ever has clients/customers attend this property. He gave undisputed sworn testimony that he has two other 10 acre properties where he parks containers and operates his business. The tenant testified that the seven containers that he has parked on this property are for his personal storage for his hobby of collecting cars and car parts. He said that the machines that he keeps on the premises are primarily for work on this 10-acre property,

including snow ploughing and maintaining this 10 acre property, and for assistance with his car hobby.

Analysis

While I have turned my mind to all the documentary evidence, including photographs, 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 application and my findings around each are set out below.

Legal counsel for both sides presented many interesting arguments and cited elements of contract law that they maintained had a bearing on the issues before me. I have given their arguments due consideration. I also understand that they disagree as to the legal effect of the three pages of the Agreement entered into written evidence by the tenant and would like a determination as to whether or not the Agreement has been extended until 2015.

In a situation where a tenant has applied to cancel a notice to end tenancy, the landlord bears the burden of proving that the tenancy should be ended for the reasons cited in the notices. In this case, the issue before me is whether the landlord has submitted sufficient evidence to demonstrate that this tenancy should be ended for the landlord's use of the property (on the basis of the 2 Month Notice) or for cause (on the basis of the 1 Month Notice).

Much of the evidence and arguments presented by counsel for both parties involved whether or not the extension to the Agreement initialled by the tenant and BM constituted a legal extension of this fixed term tenancy. With all due respect to counsel representing both parties, I find that there is no need for me to make any determination regarding this aspect of the issues presented by the parties.

There is no dispute that some form of tenancy continues to exist between the parties. An undisputed and unaltered portion of page 2 of the Agreement noted that the tenancy may continue on a month-to-month basis or another fixed length of time. More importantly, neither party initialled the portion of that section of the Agreement, which would have required the tenant to vacate the rental unit at the end of the original fixed term, presumably by June 30, 2012. In the absence of any extension of the Agreement, this tenancy continued as a periodic tenancy initially and may or may not have been extended to an additional fixed term to last until June 30, 2015. Whether or not the tenancy currently in place is a periodic tenancy or a fixed term tenancy, the landlord still has to demonstrate that one of the notices issued to the tenant enables the landlord to end the tenancy for the purpose stated in those notices. The dispute regarding alleged

illegal alteration of the original Agreement has little effect on this principal question before me. In other words, even if I were to accept the position taken by the landlord's counsel with respect to the changes to the Agreement that occurred in 2012, the landlord will still be faced with the same test to show his entitlement to an Order of Possession based on either the 1 or 2 Month Notices.

A plain reading of the reason stated in the 2 Month Notice would require the landlord to demonstrate that conditions for sale of the rental unit have been satisfied and that the purchaser had asked the landlord, in writing, to give the 2 Month Notice to the tenant because the purchaser or a close family member intended in good faith to occupy the rental unit. This portion of the 2 Month Notice essentially parallels the following wording of section 49(5) of the *Act*, the portion of the *Act* which allows a landlord to obtain possession of a rental unit for these purposes:

> *49 (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...*

A landlord in this position has many documents that can be produced to demonstrate that he is entitled to end a tenancy under these circumstances. In this case, I find that the landlord provided only his sworn oral testimony, and that he was even unclear on the timing and specifics on that count. The tenant's counsel questioned whether the sale was actually still in place, as he noted that the tenant had heard three different accounts regarding the details of this prospective transaction.

In this case, the landlord failed to enter into written evidence anything to demonstrate that he had an agreement of sale for this property. Although section 49(5)(c) of the *Act* specifically states that the purchaser must ask the landlord, "in writing" to give the notice to end tenancy to the tenant, the landlord and his counsel did not supply this most basic piece of written evidence to support the landlord's application. The landlord provided no details, written or otherwise, as to the identity or circumstances of the prospective purchaser that would shed any light whatsoever on whether or not the prospective purchaser or his or her close family members were planning in good faith to occupy the rental unit. Although witnesses were no doubt available to discuss this portion of the landlord's request for an Order of Possession, I find that the landlord and his counsel presented surprisingly little in either written or oral testimony that would support the landlord's request to end this tenancy for landlord's use of the property. As I find the landlord has fallen very far short of demonstrating that he has justification to end this tenancy for the reason stated on the 2 Month Notice, I allow the tenant's application to cancel the landlord's 2 Month Notice. The 2 Month Notice is cancelled and of no force or effect.

Turning to the landlord's 1 Month Notice, I accept that the landlord and his counsel have submitted some written evidence that they believed had a bearing on the reasons cited in that Notice for ending this tenancy. For example, the landlord entered into written evidence a sworn statutory declaration that he observed the tenants carrying on what he believed to be illegal activities related to the storage, moving and hauling of large ocean freight containers around on the property and some photographs of the property. However, most of his written evidence consisted of copies of documents extracted from the municipal zoning bylaw and the business website of the tenants. Even by the time of this hearing, neither the landlord nor his counsel were able to say that anyone from the municipality had issued any type of document to either the landlord or the tenant with respect to the tenants' use of this property. In fact, the tenant gave undisputed sworn testimony that on the sole occasion when a municipal official did visit the site, he was told that there were no problems with the tenants' use of the property.

While the landlord and his counsel may earnestly believe that the activities the tenants are undertaking at the rental property are illegal, their belief that this is so is insufficient to end a tenancy for illegal activities. The landlord's counsel said that the landlord intends to contact the municipality shortly to have a determination made as to whether municipal bylaws are being contravened by the tenants' use of this property.

It is possible that the municipality may find that bylaws are being contravened. If this proves the case and the tenant does not address these issues, the landlord may then have cause to issue a 1 Month Notice. However, the test before me is whether the

landlord can show that as of the March 2, 2014 date of the issuance of the 1 Month Notice there was activity that was then considered illegal. At this stage, there is conflicting evidence as to whether any of the activities being undertaken at the rental property are illegal. As of this point, the landlord has obtained no determination by the municipal bylaw officials most knowledgeable on this subject as to whether bylaws have been contravened. Under these circumstances, I find that the landlord has failed to demonstrate that the tenant's activities on the site are illegal and hence deserving of his issuance of a 1 Month Notice for illegal activity.

The landlord's 1 Month Notice also maintained that the tenancy should be ended for cause because the tenant had placed "the landlord's property at significant risk." I find that the claims made by the landlord and his counsel on this count are based on what amounts to little more than speculation. The tenant testified that the containers on the rental property are used for his own personal hobby of collecting cars and car parts to assist him in the restoration of these cars. He gave undisputed sworn testimony that the containers he uses for his business are at two separate 10 acre locations rented for that exclusive purpose.

During the hearing, the landlord's counsel expressed concern that there was a "possibility" of the landlord's property being placed at significant risk by the presence of the containers and whatever is inside them. He also noted that the landlord is very concerned that he might be responsible for the leakage of fluids from the containers as he has no idea as to what is in the containers and whether their contents are legal. The tenant's counsel correctly noted that if the landlord has concerns about the contents of the containers or the status of equipment being used on the site, the landlord can issue a written request to inspect any portion of the property, including the containers on 24 hours notice. The tenant's counsel stated that no such inspection request has been made by the landlord or BM.

While I can understand why the landlord would be concerned as to his potential liability for the contents of items stored on his property, the test established by section 47(1)(d)(iii) of the *Act* is that a tenancy can be ended for cause if a landlord can demonstrate that his property is being put at "significant risk." This section does not state that a tenancy can be ended because there was the "possibility" of the property being placed at significant risk. In this case, the landlord's justifiable worries as to what is being stored in the tenant's seven containers on his property can be easily resolved through the issuance of a 24 hour written notice to inspect the property at which time the landlord can gain access to any containers on the landlord's property. Actual evidence, perhaps supported by photographs of the contents of the containers would

then become available, as opposed to the current situation where I find the landlord's evidence is speculative at best.

After considering the sworn testimony of the parties, the written and photographic evidence, and the oral representations of counsel for both parties, I find that the landlord has not provided sufficient evidence to demonstrate that his property has been placed at significant risk entitling him to end this tenancy on the basis of the 1 Month Notice. Without eyewitness evidence from anyone other than the landlord and the tenant, I find that the landlord's speculation and that of his legal counsel as to what may lurk within the containers on this property is insufficient reason to end this tenancy. As such, I allow the tenant's application to cancel the 1 Month Notice issued on March 2, 2014.

As the tenant has been successful in his application, I allow him to recover his $50.00 filing fee from the landlord.

Conclusion

I allow the tenant's application to cancel both the 2 Month Notice and the 1 Month Notice. As the tenant's application has been allowed, the 2 Month Notice and the 1 Month Notice are cancelled and are of no force or effect. This tenancy continues.

I order the tenant to recover his $50.00 filing fee by reducing his next scheduled monthly payment by $50.00. In the month following that one-time $50.00 reduction, the tenant's monthly rent reverts to $3,400.00.

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: April 07, 2014

Residential Tenancy Branch