Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNL FF

Introduction

Both parties were present at the hearing. The tenant confirmed they received on October 1, 2015 the Notice to End Tenancy, dated September 30, 2015 to be effective November 30, 2015, posted on their door. I find that service by posting is deemed to be received on the third day. Therefore, the effective date on the Notice is automatically corrected to December 31, 2015 pursuant to section 53 of the *Residential Tenancy Act* as a Notice to End Tenancy for landlord's use of the property must give a full two months' notice and end the tenancy on the day before the day in the month that rent is due under the tenancy agreement according to section 45 (1) (b). The tenants brought this Application to cancel the Notice to End Tenancy and to recover the filing fee.

The tenants said they served the Application/Notice of Hearing by posting it on the landlord's door. I pointed out that this had not been legally served according to section 89 of the Act but the landlord said he received it and was willing to accept this service. I find pursuant to my authority in section 71(c) that the Application/Notice of Hearing is sufficiently served for the purposes of this hearing.

Issue(s) to be Decided:

Has the landlord proved on the balance of probabilities that he is ending the tenancy in order to occupy the property himself or is the tenant entitled to any relief? Is the landlord entitled to an Order of Possession if the tenant is unsuccessful in the application?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to provide evidence and to make submissions. The parties have had 3 previous hearings in July, August and September 2015 and much of the evidence from previous hearings was filed for this hearing. I cautioned the parties to present evidence relevant to this hearing and this issue and not to record the hearing as it is contrary to section 6.11 of the Rules of Procedure of the Residential Tenancy Branch. Both parties stated they were aware of the provisions of section 51(2) of the Act where the tenant may claim twice the

monthly rent if the landlord does not use the unit for at least 6 months after the end of the tenancy for his stated purpose or has not taken reasonable steps to accomplish his stated purpose.

The undisputed evidence is that the tenancy commenced October 1, 2006, it is now a month to month tenancy, rent is $1100 a month and a security deposit of $550 was paid. The landlord served a Notice to End Tenancy pursuant to section 49 of the Act stating, “The rental unit will be occupied by the landlord or the landlord’s spouse or a close family member…”

The landlord currently lives in the upstairs unit where he shares a kitchen and bathroom with another tenant. He said he wants to move into the downstairs unit now to obtain his own privacy in his own apartment. He also will have his eighteen year old son live with him part time.

The tenants cross examined him on the issue of his good faith. He agreed he had served other notices to end tenancy. He said although he had formed the intent to occupy the tenants’ suite about a year ago, he served the other notices for he thought he had good reason to end their tenancy for cause and in his opinion, he had good evidence of cause. Also, he said it would be a faster process to end the tenancy with a one month Notice. He answered their question regarding utilities by stating he had not taken steps to transfer them yet for he was waiting to occupy the unit. He again answered their questions about an arrangement to re-rent the suite (if their tenancy had been ended through a previous hearing). He explained that a woman coming from another Province was a friend of the upstairs tenant. She needed some temporary housing and he told her she could live in the downstairs unit on a temporary basis until he got organized to move in. There was no tenancy agreement. A letter from her in evidence acknowledges that the landlord was unsuccessful in the prior hearing so she was getting alternate accommodation. She thanked him for agreeing to have her mail sent to his address until she was established.

The tenants submitted in evidence a proposal they had made for them to move upstairs and share the space with the upstairs tenant as the landlord presently does. A letter in evidence from the upstairs tenant states in very strong language that this arrangement would be totally unacceptable to him.

In the hearing, I found the tenants were very assertive while the landlord was mild in manner and response. The tenants asked him to repeat his evidence and attempted to introduce evidence pertaining to the other hearings on cause. When the hearing was to be concluded, they said they needed more time to state further evidence on bad faith.

When I asked them what evidence they intended to review, they said the past decisions, photos, past testimony and that related to his dog barking. I declined to hear this evidence as it is contained in the documents filed as evidence and it relates to their dispute on ending the tenancy for cause. It is not relevant to the present issue. I read the previous decisions also and considered the testimony of the parties at that time.

Included with the evidence is the Notice to End Tenancy, the previous Decisions and Orders, the tenancy agreement, a Police Report, many emails between the parties concerning noise and ending the tenancy for cause, medical evidence showing the landlord has attended medical clinics in Canada and Mexico and evidence from a sound engineer containing evidence of testing the tenant's CDs and finding they had been cut and altered in some ways.

On the basis of the documentary and solemnly sworn evidence presented for the hearing, a decision has been reached.

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Analysis:

As discussed with the parties in the hearing, the onus is on the landlord to prove on a balance of probabilities that the rental unit will be occupied by the landlord or the landlord's spouse or a close family member pursuant to section 49 of the Act.

I find the evidence of the landlord credible that he intends to occupy the unit himself with his 18 year old son living there part time. His evidence is supported by the fact that he has been sharing a unit with another tenant, including kitchen and bathroom, and I find it more likely than not that he wants at this time to have his own privacy and space. Although the tenants cross examined him closely, I found he answered in an honest and straightforward manner all of their questions. They raised a question about the other female being offered the unit if they had to vacate it for cause. Again, I find the landlord's answer reasonable and logical that it was a temporary arrangement to accommodate a friend from out of Province until she found other accommodation. I find her letter supports the landlord's testimony.

The tenants said they believe the landlord has served the Notice in malice and bad faith. Residential Policy Guideline 2 addresses the issue of a good faith requirement when the landlord serves a Notice to End Tenancy for landlord's use of the property. It defines Good Faith in part as 'an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage'. .. It goes on to say, 'If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that

they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy'.

I find the weight of the evidence is that the landlord does truly intend to occupy the unit himself with his son with no ulterior motive. I find insufficient evidence provided by the tenant of any malice or bad faith of the landlord. I carefully considered the previous decisions and statements that were referred by the tenant. I find the previous decisions indicated there were serious problems between the parties but I find nothing in that evidence or statements to indicate malice or bad faith of the landlord or to contradict the landlord's present intent to occupy the unit for his own use. Although the tenant alleges the past efforts to end their tenancy indicate the present Notice was issued in bad faith, I find the landlord on each occasion was merely exercising his legal right to serve a section 47 Notice to End Tenancy when he believed he had cause. I find the fact that an arbitrator decided his reasons were insufficient cause to end the tenancy at the time does not mean that he was exercising bad faith.

For all of the above reasons, I dismiss the application of the tenant to cancel the Notice to End Tenancy. I find the tenancy is terminated on December 31, 2015 as automatically corrected under section 53 of the Act.

Conclusion:

The Application of the Tenant to set aside the Notice to End Tenancy is dismissed without recovery of the filing fee due to lack of success. The tenancy is at an end on December 31, 2015(as corrected). Pursuant to my authority under section 55 of the Act and the oral request of the landlord in the hearing, an Order of Possession is issued to the landlord effective December 31, 2015.

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: December 10, 2015

Residential Tenancy Branch