Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Tenants on September 8, 2016. The Tenants filed seeking an order to cancel a 2 Month Notice to end tenancy for landlord's use of the property.

The hearing was conducted via teleconference and was attended by two agents for the corporate Landlord (the Landlords); both Tenants; the Tenants' Assistant (the Assistant); and the Tenants' witness (the Witness). Each person who submitted evidence gave affirmed testimony.

I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process; however, each declined and acknowledged that they understood how the conference would proceed.

The hearing began at 9:00 a.m. as scheduled and continued until 12:16 p.m. at which time the hearing time expired. The parties were in agreement to adjourn the hearing to 1:00 p.m. the same day. The hearing reconvened at 1:00 p.m. and continued until 1:44 p.m. The Landlord's agent H.P. and the Tenants' assistant C.R. were not in attendance at the reconvened hearing.

The Landlords testified they received documentary evidence from the Tenants as follows: 1 group of evidence received on October 25, 2016; 2 groups of evidence received on October 26, 2016; and 2 groups of evidence received on October 31, 2016.

The Landlords submitted that the Tenants' evidence included copies of the Landlords' evidence. Several copies of the Landlords' evidence had been duplicated and submitted in the Tenants' subsequent submissions. The Landlord A.R. confirmed the packages of evidence were served to their corporate office; the Landlord's service address as listed on the Notice to end tenancy. The Landlord asserted she had been out of town until the day before the hearing and had not had an opportunity to review all of the Tenants' late submissions. She later confirmed that she had her colleges deal only with emergencies during her absence and did not arrange for them to do any preparation for this hearing. That being said, she stated she was prepared to proceed with the hearing.

The Tenants confirmed they had served their evidence upon the Landlords in three shipments. The Residential Tenancy Branch (RTB) file contained several submissions received from the Tenants between September 12, 2016 and October 31, 2016. Many of the submissions on file from the Tenants were duplicate copies of previous submissions upon which the Tenants wrote statements.

The Tenants testified they received the Landlords' documentary evidence package on October 14, 2016. The Landlord's evidence was received at the RTB on October 14, 2016.

Residential Tenancy Branch Rule of Procedure 3.17 stipulates that evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC office in accordance with the Act or Rules 3.1, 3.2, 3.10, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence. The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

As is the case in this matter, a landlord bears the burden to prove the merits of a Notice to end tenancy when a Notice is disputed. Usually, at the time a tenant files an application to dispute a Notice to end tenancy the tenant is in receipt of the Notice and not the documentary evidence the landlord intends to rely upon to support that Notice. As such, a tenant must be provided an opportunity to provide documentary evidence in response to any evidence the landlord intends to rely upon in support of a Notice to end tenancy; as provided for in the Rules of Procedure.

After consideration that the Landlords' submissions were not served upon the Tenant until October 14, 2016 and that the Tenants' late evidence submissions primarily contained duplicate copies of previous evidence previous submissions, I have considered all relevant documentary evidence and oral submissions from both parties.

In moving forward, section 62(3) of the *Act* stipulates that the director may make any order necessary to give effect to the rights, obligations and prohibitions under this *Act*, including an order that a landlord or tenant comply with this *Act,* the regulations or a tenancy agreement and an order that this *Act* applies.

Accordingly, I Order that if these parties find themselves at dispute resolution in the future, all evidence submissions must be relevant, legible, and submitted in one package in accordance with the Rules of Procedure. Failure to do so may result in in the arbitrator refusing to consider evidence that does not meet those requirements. The Rules of Procedure can be accessed at http://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf.

Both parties were provided with a full and fair opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Although all relevant submissions were considered they may not all be listed in this Decision.

Issue(s) to be Decided

Has the Landlord proven the good faith requirement to uphold the 2 Month Notice to end tenancy issued August 25, 2016?

Background and Evidence

The Tenants entered into a month to month tenancy agreement which began on March 1, 2006. On February 14, 2006 the Tenants paid $325.00 as the security deposit. The current monthly rent of $836.00 is payable on or before the first of each month.

The rental unit was described as being a 1 bedroom apartment located on the third floor of a four floor building. The building was built in approximately 1978 and the current owner has owned the building for over twenty years. During the past five years the owner has kept a residence in this building on the third floor and the remaining units have primarily been occupied

by tenants. The owner is out of the country for approximately six months each year leaving around November 1st and returning sometime around April the following year.

The property management company (the corporate Landlord) has managed this building for the owner for over ten years. The Landlord's Agent, H.P., has been the building manager for approximately one year and the Agent, A.R., is the property manager who was assigned to this building April 25, 2016.

On August 26, 2016 the Tenants received a 2 Month Notice to end tenancy for landlord's use. That Notice was issued on the prescribed form dated August 25, 2016 listing an effective date of October 31, 2016, for the reason that the landlord intends to convert the rental unit for use by a caretaker, manager or superintendent of the residential property.

Landlords' Submissions

The Landlords' relevant oral submissions are summarized as follows:

- The Landlords have decided that the rental building requires a fulltime caretaker as the building has had numerous occurrences of vandalism, which included small pieces of glass being found around the door of the owner's residence and broken door closers.
- The Landlord manages numerous other buildings, all of which have fulltime caretakers and that process has worked well for the Landlord.
- A fulltime caretaker would oversee the owner's residential unit during the owner's absences. In years past, the building manager would check on the owner's residential unit and bring in the owner's mail during the owner's absence.
- The building manager currently has an office located in the sewage pump room. That office space will be lost as a new sewage pump, which will require more space, is scheduled to be installed in 2017.
- The Landlords are planning a full scale building remediation which will include replacement of the balconies so they need to have a manager living on site to oversee that construction work.
- The Landlords and owner have chosen the Tenants' third floor rental unit to be the caretaker's suite because the Tenants' rental unit is the only suite that gives the vantage point of the foreshore/ water area. The Landlords asserted the Tenants' suite has the best view of the foreshore area; the front of the building; the parking garage; and the street. The Landlords argued that there would be no purpose for them to choose a unit at the back of the building as that would prevent the caretaker from monitoring the front entrance.
- The Landlords argued they are concerned as there have been trespassers who use drugs on the foreshore and climb trees in the foreshore area during which emergency vehicles had to be called. As a result they need to have an onsite caretaker to oversee what is happening on the foreshore.
- The Landlords have not made any effort to advertise or hire a caretaker at this time as they are waiting for the Tenants' suite to be vacated so they can renovated/updated that unit before the caretaker would move in.

- The Landlords asserted they required an onsite caretaker now as the vandalism has started to escalate which is why they installed security cameras on September 2, 2016, as per the invoices submitted into evidence. The security cameras are not recording activities at this time as the Landlord does not have the required space to set up the recording equipment. The Landlords stated they intend to have the recording equipment set up in the new caretaker's suite.

The Landlords' documentary evidence included, in part, copies of: emails between the two Agents stating that pieces of glass was found on the 3rd floor; some torn carpet, and marks on the carpet were found on the 4th floor on May 19, 2016; burn type marks on the carpet were found September 3, 2016; and broken door closers were found on July 21, 2016. In addition there were two photographs submitted displaying the front exterior of the building.

Tenants' Submissions

The Tenants disputed all submissions made by the Landlords and argued that the tone of their eleven year tenancy changed in June 2011 after the owner saw the Tenants sun bathing on the foreshore. The Tenants asserted that since that time the Landlords have embarked on a systematic approach to evict them.

The Tenants presented several arguments in support of their application to cancel the 2 Month Notice, as summarized below:

- The foreshore area, which includes the beach area, is public property and not owned by the owner of the rental building. The trees which are being climbed, as referenced by the Landlord, are on the public foreshore area and not on the rental property.
- The owner's travels out of Canada have been "like clockwork" in previous years as the owner has always left November 1st and returned the following April 1st. During the owner's absences in the previous years the owner's granddaughter would attend to his suite, not the building manager as submitted by the Landlord.
- The Tenants asserted they were told by the current building manager in April 2016 that their file had been transferred to the new property manager who had a history of successfully evicting tenants.
- The Tenants asserted there have been no incidents of vandalism or ongoing vandalism because there is no evidence of property damage. The damages submitted by the Landlords are simply due to the natural deterioration and wear and tear of the old building materials which have not been regularly maintained. There was one small rip in the carpet they found in the second floor hallway and the door closers were not replaced, they only required adjustment and one machine screw. The questioned how the building manager could have found such minute pieces as of glass as she does not clean or vacuum the building.
- The Landlords have talked about repairing the balconies for several years and there is no evidence to prove they are embarking on major construction projects in 2017.

- The security camera recording equipment is currently located in the electrical room and not the room where the sewage pump is located.
- The owner's suite door is not visible from the Tenant's rental unit. There are two other rental units that are in closer proximity to the owner's suite as shown in the "T" diagram floor plan submitted by the Tenants. The third floor security camera does not face down the hallway towards the owner's suite; rather, that security camera faces directly towards the Tenants' door.
- The Tenants have seen the owner yell at people on the foreshore from his balcony and the owner's suite is the only suite that has a view of the foreshore/beach areas. The foreshore/beach areas cannot be seen from the Tenants' suite as per the photographs the Tenants submitted.
- The Tenants submitted that the occupants of suite 202 gave their notice to end tenancy on August 31, 2016 and vacated the rental property as of October 1, 2016. Suite 202 is a 1 bedroom suite with the exact same floor plan as the Tenants' rental unit. The Tenants argued that suite 202 was more suitable for a caretaker's suite as there are no balconies below that suite; therefore, that suite has an unobstructed view of the front door, as shown in the photographs submitted into evidence. The view of the front door area from the Tenants' suite is blocked by the side wall that connects the balconies above and below.
- The Tenants questioned the Landlords that if suite 202 was truly inappropriate for the caretaker then why not offer the Tenants the opportunity to occupy that suite?
- During their tenancy a two bedroom suite on the first floor had previously been occupied by the owner's son and wife who acted as caretaker during their occupancy. That first floor suite is more suitable as the caretaker's suite because one of the bedrooms could be used as an office and provides space for the camera recording equipment and the other bedroom could be for the caretaker to occupy. Rather than cramming the equipment and office into a caretaker's bedroom unit in a one bedroom unit. That lower suite also has a better view of the rental property.

From the Tenants' submissions there was evidence that these parties had been involved in numerous dispute resolution proceedings in the past. However, neither party submitted copies of the previous Decisions. The Tenants asserted that this current matter was yet another attempt by the Owner and Landlords to evict them in a long history of unsubstantiated notices to end their tenancy.

I informed each party that I would be reviewing the previous Decisions held in the RTB record in order to have a clear understanding of the chronological events which have occurred. Each party was given the opportunity to speak to my reviewing those decisions and no issues or concerns were raised. The file numbers for those previous Decisions are listed on the front page of this Decision. Those previous Decisions are summarized below.

1). Decision issued April 11, 2013: The Tenants' application regarding several issues including, in part, an Order to have the Landlord comply with the *Act,* Regulation, and/or tenancy

agreement; reduced rent; and monetary compensation of $1,500.00. That application was dismissed in its entirety.

2). Decision issued October 10, 2013: The Tenants' application to cancel a 1 Month Notice to end tenancy for cause issued August 19, 2013. The application was upheld; the 1 Month Notice was cancelled; and the tenancy continued.

3). Decision August 28, 2015: The Tenants' application to cancel a 1 Month Notice to end tenancy for cause issued June 18, 2015. The Tenant's application was dismissed.

Review Consideration Decision Sept 15, 2015: The Tenants' application for Review Consideration was dismissed and the August 28, 2015 Decision was upheld.

The Tenants filed for Judicial Review of the August 28, 2015 Decision which ordered this matter to be reconvened and joined with the following Decision.

4). Decision December 4, 2015: The Landlord's application for an Order of Possession for Cause based on the 1 Month Notice issued June 18, 2015. The Landlord's application was upheld and an Order of Possession was granted.

Rev Con Decision 16, 2015: The Tenants' application for Review Consideration was dismissed and the December 4, 2015 Decision was upheld.

The Tenants filed for Judicial Review of the December 4, 2015 Decision which ordered this matter to be reconvened at a new hearing and joined with the above August 28, 2015 Decision.

New Hearing Decision April 20, 2016: That decision found in favor of the Tenants; the 1 Month Notice issued June 18, 2015 was cancelled; and the tenancy was to continue in accordance with the *Act.*

Tenants' Witness

The Tenant initially stated that his witness was to testify that the damages referenced by the Landlords did not meet their interpretation of the meaning of vandalism. I initially refused to hear the witness's testimony as his opinion on the definition of vandalism was not relevant to the issues before me. When the hearing reconvened the Tenant explained that he would like his witness to testify what he saw in the building during the adjournment.

The witness testified that he had been employed as a maintenance employee for several years for an organization unrelated to the corporate Landlord. He said he was not a licensed contractor and was not a licensed property manager. He submitted that he looked at the security camera during the adjournment and saw through the lens cover that the camera lens was pointed in a direction where it would capture the elevator and the Tenants' door. If the Tenants' door was open that camera would be able to see inside the rental unit.

Landlord's Rebuttal

The Landlords confirmed the occupants of suite 202 gave their notice to end tenancy and vacated as of October 1, 2016. Shortly after those tenants vacated the unit the Landlords began renovations which involves the installation of new flooring, all new bathroom fixtures; new cupboards and new appliances.

The Landlords submitted that the owner's granddaughter moved into suite 202 on November 1, 2016. They asserted the granddaughter entered into a month to month tenancy for $850.00 per month which was a comparable rent to what all other tenants are paying in that building.

The Landlords testified that the Tenants were not given the opportunity to move into suite 202 because a fully renovated suite would command a higher rent than what the Tenants were currently paying. They asserted the owner's granddaughter was paying only $850.00 because she agreed to move into the suite prior to the completion of the renovations as the kitchen cupboards are still on order. Also, they did not offer suite 202 to the Tenants to prevent having to serve another 2 month notice for landlords use for a family member to move into the building as that would cost them compensation equal to another month's rent.

The Agent A.R. asserted the owner requested that she take over management of this building because she had experience with renovations and large remediation projects. Also, the previous property manager is scheduled to retire in 2017 so it made sense to transfer management in 2016 prior to the onset of those projects.

In closing A.R. argued that the Tenants are not privy to all of the owner's business. They have evidence that there have been damaged locks and the owner's car had been keyed. Their building manager had taken care of the owner's suite in the past and the owner has the right to have a caretaker suite in the building.

The Tenants asserted they were initially told the owner's granddaughter would be moving into the owner's suite.

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*. After careful consideration of the foregoing and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

When a tenant disputes a 2 Month Notice to end tenancy, the landlord bears the burden of proof that the Notice was given in good faith. Residential Tenancy Policy Guideline 2 provides that good faith is 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. I concur with the aforementioned and find this Policy is relevant to the issues before me.

Based on the aforementioned good faith requirement, the Landlords bear the burden to prove the following two part test:

1) The landlord must truly intend to use the premises for the purposes stated on the notice to end tenancy; and

2) The Landlord must not have an ulterior motive as the primary motive for seeking to have the tenant vacate the rental unit.

I accept the Landlords' submission that the owner has the right to choose to have an onsite caretaker. While I recognize that there are occasions in which, with the passage of time or a change in circumstances, an entirely new environment may be created. However, when determining the good faith requirement I cannot consider the 2 Month Notice issued August 25, 2016 in isolation. I must consider the events of this tenancy as a whole leading up to the issuance of this 2 Month Notice.

In this case I am not satisfied that the 2 Month Notice was issued August 25, 2016 due only to a change in circumstances. Rather, I find there to be sufficient evidence before me which proves the landlord had an ulterior motive for ending the tenancy as described below.

As noted above, these parties have been at dispute resolution since April 2013 when the Tenants first sought a resolution to disputes they were having with the owner; who moved into the building approximately five years after the start of their tenancy. Since then, the Landlords have attempted to end this tenancy. Their first notice to end tenancy was issued August 19, 2013 and was cancelled October 10, 2013. A second notice was issued June 18, 2015 and was successfully disputed through numerous hearings, review considerations, a Judicial Review, and a final new hearing after which the second notice was cancelled. The matters pertaining to the June 18, 2015 notice were held over a period of almost 8 months, between August 28, 2015 and April 20, 2016.

Secondly, I find it presumptuously suspicious that the current property manager was assigned to this building on April 25, 2016, five days after the previous notice was cancelled. Furthermore, there was insufficient evidence of any alleged vandalism dated prior to her start date. The alleged vandalism evidence consisted of only 3 emails issued from the building manager dated May 16, 2016; September 3, 2016; and October 12, 2016; all dated after the start date of the new property manager. Furthermore, I accept the Tenants' assertions that the items listed as vandalism in those emails could very well be normal wear and tear of items that were in excess of 30 years of age; such as carpet or door hinges/closer located in high traffic areas.

In addition, I find the Landlords submitted insufficient evidence that the Tenants' rental unit was the only unit that was suitable for a caretaker's unit. I favored the Tenants' submissions that the second floor unit, that had been vacated prior to this hearing, was a more suitable unit for a caretaker as that view was not blocked by lower balconies or the wall that was attached to the balconies. The photographic evidence supported the Tenants' submissions that the second floor unit had an unobstructed view of the front door and front yard. I further accept that the Tenants' rental unit does not have a clear view of the owner's suite's door from the interior hallway, as other units have on that floor.

Regarding the arguments that an onsite caretaker was required to manage the sewage pump installation and/or the building remediation project, I note there was no documentary evidence

before me that would prove such projects have been initiated. Rather, the Tenants' provided disputed verbal testimony that those projects had been talked about for several years and there had been no indication of a start date.

Also, I find the Landlords' submissions that the Tenants' unit is required for the caretaker to occupy and to have an office where they would store the camera equipment to be improbable given that the Tenants' unit is a one bedroom unit. The Tenants' submissions that the two bedroom unit on the first floor, which had previously been occupied by the owner's son who acted as live in caretaker, to be more plausible given the circumstances presented to me during the hearing.

From their own submissions the Landlords have made no efforts to advertise or hire an onsite caretaker pending the outcome of this hearing. If there truly was an issue of increased vandalism in the building that required an onsite management presence, it is reasonable to conclude the Landlords would have arranged for an onsite caretaker to move into the building as soon as possible. It is also reasonable to conclude the Landlords would have arranged for the caretaker to move into the second floor unit which was vacant; with the identical floor plan as the Tenants' unit; and has a better view of the front door area.

I do not accept the Landlords' submissions that the owner's granddaughter was provided the suite on the second floor simply because she agreed to occupy it prior to the completion of the renovations. Also, I do not accept the argument that she was provided that second floor unit to avoid issuing someone a 2 Month Notice for a family member to move into another occupied rental unit; as a granddaughter does not meet the definition of family member under section 49 of the *Act.*

From their own submissions, the Landlords argued that the Tenants were not offered the second floor suite because that unit had been renovated and would command a higher rent. In consideration that the Tenants' rental unit had not yet been renovated and their tenancy has been long term, over eleven years, I find the argument that a renovated unit commanded a higher rent, in and of itself supports the presence of an ulterior motive for the Landlords wanting to end this tenancy and gain access to renovate the Tenants' unit and charge a higher rent.

Accordingly, I conclude there to be insufficient evidence to prove the August 25, 2016 Notice was issued in good faith. Therefore, I find in favor of the Tenants' application and order that that the 2 Month Notice issued August 25, 2016 be cancelled.

I caution the landlord that further attempts to end the tenancy for unlawful reasons or in bad faith may constitute a form of harassment, in breach of section 28 of the *Act.* Such a breach may entitle the Tenants to seek monetary compensation for loss of quiet enjoyment.

Conclusion

The Landlords were found to have submitted insufficient evidence to prove the good faith requirement of the 2 Month Notice issued August 25, 2016. That 2 Month Notice was cancelled and is of no force or effect.

This decision is final, legally binding, and 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 08, 2016

Residential Tenancy Branch