Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNL, MNDC, OLC, OPL, OPC, FF

Introduction

This was a cross-application hearing.

On November 9, 2016 the tenant applied to cancel a two month Notice to end tenancy for landlords' use of the property issued on October 25, 2016; compensation for damage or loss under the Act in the sum of $8,000.00 and an order the landlord comply with the Act.

On November 10, 2016 the landlord applied requesting an order of possession based on cause and landlords' use of the property, compensation for damage or loss in the sum of $375.00 and to recover the filing fee cost from the landlord.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained reviewed. The parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the relevant evidence and testimony provided.

Preliminary Matters

The landlord has named two tenants as respondents.

One of the two tenants applied, naming the landlord.

The landlord confirmed receipt of the tenants' evidence of 36 pages and a USB on December 14, 2016. The landlord had no objections to the timing of that submission.

The landlord said the tenant was given 81 pages plus two CD's on November 15, 2016. Service occurred in person. The tenant said that evidence was given in relation to a hearing that was held on December 6, 2016. The tenant did not have that evidence before him.

The tenant confirmed receipt of a second 51 page evidence submission given on December 7, 2016.

As service of the 81 page evidence, plus CD submission of the landlord was in question I determined that evidence could be entered through oral submissions. The landlord did not object to this finding.

The landlord confirmed that a one month Notice to end tenancy for cause has not been issued. Only a two month Notice for landlords' use of the property is in dispute.

Section 2.3 of the Rules of Procedure provides:

> ***2.3 Related issues***
>
> *Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.*

At the start of the hearing the parties were informed that portions of the applications could be dismissed with leave to reapply. Pursuant to section 2.3 of the Rules of Procedure, toward the end of the hearing matters not related to the Notice ending tenancy were dismissed with leave to reapply.

Issue(s) to be Decided

Should the two month Notice for landlords' use of the property issued on October 25, 2016 be cancelled or is the landlord entitled to an order of possession?

Background and Evidence

The terms of the tenancy were set out in previous decisions submitted by the tenant (see cover page for file numbers.) The tenancy commenced in 2011. Two tenants reside in the lower level of the home; the landlords' family resides in the upper level. According to a July 29, 2016 decision issued, the tenants currently pay $975.00 rent per month. Rent is due on the first day of each month.

The landlord and the tenant agree that a two month Notice ending tenancy for landlords' use of the property issued on October 25, 2016 was served on the tenants indicating that the tenants are required to vacate the rental unit on December 31, 2016.

The reason given on the Notice is:

> *The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child; or the parent or child of that individual's spouse.)*

The landlord confirmed that the reason given on this two month Notice to end tenancy is the same reason that has been provided on two previous two month Notices to end tenancy for landlords' use of the property; issued on June 4, 2016 and July 31, 2016.

The tenant supplied a copy of a decision issued on July 19, 2016 as the result of a hearing held on that date. A two month Notice ending tenancy for landlords' use of the property and a 10 day Notice ending tenancy for unpaid rent, both issued on June 4, 2016, were cancelled.

On October 5, 2016 a hearing was held, resulting in a decision issued on October 6, 2016 cancelling the two month Notice to end tenancy for landlords' use of the property that had been issued on July 31, 2016.

Legal advocate for the tenant submitted that the actions of the landlord are an outrageous and egregious abuse of process. The Act is not intended to allow a landlord to issue repeated notices to end tenancy. The legal advocate stated that the landlord is causing the tenants to feel harassed. The landlord has had ample time in the past to respond to the tenants' applications to cancel the Notices and has shown an absence of good faith. On this basis the legal advocate said the current Notice should be cancelled. If the Notice is cancelled the legal advocate submits the landlord should be barred from issuing any Notice to end tenancy on any previous ground for the same cause for a period of at least one year. This would prevent further abuse by the landlord.

The legal advocate stated that the landlord has applied previously and has failed on both occasions to prove they issued the Notices to end tenancy in good faith. The landlord did not request review of those decisions or request judicial review, but instead has chosen to repeatedly issue eviction Notices in an attempt to evict the tenants. The landlord has submitted evidence regarding his mothers' health and cause to end the tenancy; which have no bearing on the reason given on the Notice to end tenancy that is in dispute.

After making submissions legal advocate A.B. exited the hearing due to a prior commitment.

In response to my question regarding the concept of res judicata counsel for the tenant stated that the reason given on the Notice now in dispute is the same as the previous two Notices; however, the landlord has additional submissions that were not considered at the previous two hearings; the landlord was not represented by counsel at those hearings and the landlord was not fully aware of his obligations at those hearings.

Counsel stated that the landlord has an honest intention to have his parents reside in the rental unit and that they had proof of good faith. If the landlord were to be barred from issuing a Notice for at least a one year period of time the landlord may be forced to sell the home.

Counsel for the landlord submitted the tenants have not shown good faith. It was pointed out that a tenant is not required to demonstrate good faith; the landlord must prove good faith, if good faith is called into question by the tenant when a Notice ending tenancy for the reason given has been issued.

It was explained to the parties that consideration of the previous two decisions would be reviewed and considered; however submissions on the merits of the Notice and the tenants' response proceeded.

Counsel for the landlord explained that the home has two floors; the upper level has three bedrooms and 1.5 bathrooms. Seven people share the upper level: the landlord, his spouse, two parents and children ages 14, 10 and 12 years. The 14 year old son wants his own room and the landlords' parents wish to move into the lower level. This will provide more space for the family in the upper level of the home and make access to the home easier for the landlords' mother, who has some health issues.

Counsel submits that the landlord does not want to be terrible; they just want the space in the home. In order to demonstrate a good faith intention the landlord is willing to return December rent paid, to the tenants. The landlord is willing to extend the possession date to January 31, 2017 and to waive rent for January.

The tenant responded that this whole issue began when the tenants refused to accept a $200.00 per month rent increase the landlord attempted to impose in January 2016. In 2015 the tenants had accepted a $40.00 rent increase that was not made in accordance with the Act. When asked to pay $200.00 more in 2016 the tenants told the landlord they could not afford that increase and refused to accept an increase.

The tenant said that the landlord has not been honest and is "making things up." The landlords' testimony changes form hearing to hearing. The tenant pointed to the previous decisions. At the first hearing the landlord agreed he had tried to raise the rent. That Notice to end tenancy was cancelled on July 19, 2016 as the landlord had not shown good faith and was motivated by the tenants' refusal to accept a rent increase. The decision issued on October 6, 2016 concluded the tenant was more credible and found the landlord had not acted in good faith by attempting to increase rent by $200.00; supporting an ulterior motive for issuing the Notice. As a result the Notice ending tenancy issued on July 31, 2016 was cancelled. At a hearing held on December 6, 2016 the landlord attempted to evict the tenants based on an early end of tenancy; without benefit of a Notice ending tenancy for cause. That application was dismissed.

The tenant said the landlord is using his family as a shield to evict the tenants so the rent can be increased. The space upstairs is ample for the family. The tenant said he had been very friendly with the family but that relationship has now deteriorated.

Counsel for the landlord responded that the decision issued on October 6, 2016 confirmed that use of the unit by the landlords' parents sounded reasonable. The landlord denies he ever wanted a $200.00 rent increase but an arbitrator has found the

landlord did seek out an increase. The landlord disagreed with that finding but did not request review, clarification or judicial review of any decision. Since the summer of 2016 the landlord has had an honest and good faith intent to use the unit for the reason given on the Notice. In one year the landlord would be back with the same Notice for the same reason. There is no solution for the landlord but to sell; the landlord feels handcuffed.

Analysis

The tenants have applied for the third time in 2016 to cancel a two month Notice to end tenancy for landlords' use of the property. Each of the three Notices have has provided the same reason for ending the tenancy; to allow the landlords' parents to occupy the rental unit. The parties also attended a December 6, 2016hearing where the landlord attempted to evict the tenants pursuant to section 56 of the Act.

On July 19, 2016 a decision was issued dismissing the landlords' application requesting an order of possession; the tenants' application to cancel the Notice ending tenancy succeeded. The arbitrator wrote:

> *"The landlord has not established that he or his family members intend in good faith to occupy the rental unit. The landlord requested an illegal rent increase that was refused and I find that the tenant's refusal to pay the increase rent forms part of the landlord's motivation to end the tenancy; as such I find that the landlord has an ulterior motive for seeking to end the tenancy and therefore has failed to show that he is acting in good faith in giving the Notice to End Tenancy."*

On October 6, 2016 an arbitrator accepted that the landlords submission the space currently occupied by seven family members had become too small, as a reasonable position. The arbitrator went on to find that the tenants' testimony was more credible than the landlords' in relation to the rent increase that had been sought in the sum of $200.00 per month. The arbitrator wrote:

> *"Given the tenants' refusal to pay such an increase, I accept the tenants' position that the landlord issued the 2 Month Notice with an ulterior motive. I note that the Arbitrator considering the previous 2 Month Notice made the same finding and I find that the 2 Month Notice issued shortly thereafter on July 31, 2016 was done so the landlord could gather more evidence since the previous arbitrator noted that there was no evidence from the landlords' parents."*

The landlord has submitted that this application would allow the landlord to make submissions that were not made in past hearings.

During this hearing the landlord was asked to respond to the concept of res judicata. Res judicata is a rule in law that a final decision has been made and cannot be heard again. There are three preconditions that must be met before the principle of res judicata can operate:

- The same question has been decided in an earlier proceeding;

- The earlier decision was final; and

- The parties to the earlier decision are the same in both the proceedings.

The decisions issued on July 19 and October 6, 2016 both considered the same reason and set of circumstances. Pursuant to section 77(3) of the Act the decisions were final and binding on the same parties.

An arbitrator may use discretion, in determining whether the principle of res judicata should be applied. The Supreme Court of Canada (2001 – Danyluk and 2013 – Penner v. Niagara (Regional Police Services Board), 2013 SCC 19) explained:

> *"The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring the justice is done on the facts of a particular case."*

The use of discretion allows an arbitrator to ensure that decision-making authority be applied in a manner that does not support an injustice.

The Court has identified seven factors that may be considered when determining whether it would be fair and just in applying the principle of res judicata. The factors include:

- The wording of the statute;
- The purpose of the legislation;
- The availability of an appeal;
- Safeguards within the administrative process;
- The expertise of the administrative decision-maker;
- The circumstances giving rise to the prior decision; and
- Any potential injustice that might result from the application or non-application of the principle.

The Residential Tenancy Act provides a landlord with the ability to issue Notices to end tenancy; the Act does not contain any limits on the number of Notices that may be issued. However, a landlord must balance their right to issue Notices against the tenants' right to quiet enjoyment, pursuant to section 28 of the Act, which provides:

Protection of tenant's right to quiet enjoyment

> ***28*** *A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
>
> *(a) reasonable privacy;*
>
> *(b) freedom from unreasonable disturbance;*

> *(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference.*

The landlord has now issued a third two month Notice to end tenancy for landlords' use of the property, for the same reason, within a five month period of time. The landlord has not taken advantage of the right to apply requesting clarification, correction, review consideration or judicial review on the previous findings made by arbitrators who are delegated authority pursuant to section 9.1(1) of the Act.

I have considered the circumstances that existed at the time the previous Notices to end tenancy were issued and the findings made in relation to the tenants' application to dispute those Notices. I find on the balance of probabilities that the circumstances that gave rise to those decisions are the same as those that existed when the third Notice to end tenancy was issued on October 25, 2016. It is not that any new conditions existed on October 25, 2016; I find the landlord is attempting to re-argue the same facts that have been previously considered.

I found the tenants' submission consistent with the submissions referenced in the previous decisions. I found the landlords' submission less so. The landlord denies having ever requested a rent increase, yet the decision issued on July 19, 2016 includes in the analysis:

> *"At the hearing the landlord acknowledged that he did ask for a rent increase from the tenant in January, but he denied that the Notice to End Tenancy had connection to the tenant's refusal to pay increased rent…."*

As this is third attempt by the landlord to evict the tenants for the same reasons that have been considered in the recent past, particularly the October 6, 2016 decision, I find that the principle of res judicata applies and that to allow the same matter to be considered in such short duration since the last Notice was issued would form an injustice. Issuing a new Notice to end tenancy is not meant as a method to re-argue the reason given on previous Notices. There are avenues available for review consideration and judicial review; neither of which the landlord pursued.

Therefore, pursuant to section 62(3) of the Act, I find that res judicata applies and that the two month Notice to end tenancy for landlords' use of the property issued on October 25, 2016 is cancelled. The tenancy will continue until it is ended in accordance with the Act.

I am not authorized to issue an order barring the landlord from utilizing the Act; however the landlord is warned that the tenants may proceed with a claim for loss of quiet enjoyment should the tenants believe the landlord is breaching their right to quiet enjoyment. It will be for the landlord to determine whether the issuing of any future Notice

to end tenancy will provide an adequate passage of time that allows the same reason to be considered.

The claims for compensation are dismissed with leave to reapply.

Conclusion

The matter has been previously decided.

The two month Notice to end tenancy for landlords' use of the property issued on October 25, 2016 is cancelled.

The parties each have leave to reapply in relation to the balance of their applications.

This decision is final and 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: December 23, 2016

Residential Tenancy Branch