Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, RR, AAT, FF

Introduction

The tenant's original application was for an order setting aside a 2 Month Notice to End Tenancy for Landlord's Use. His application was subsequently amended to include claims for a rent reduction and an order allowing the tenant access to the rental unit. Both parties appeared and gave affirmed evidence. No issues regarding the exchange of evidence were identified.

The hearing commenced November 24, 2016. The parties were not able to complete their testimony in the time set aside for the hearing and it was continued on December 5. The parties were able to complete all of their evidence on that date.

In addition to the parties two other witnesses were heard on December 5. I called each and joined them to the conference call. I made a mistake with the first witness and did not notice that I had not connected our conversation to the main conference until I had completed my questioning of her. At that point I did connect the witness and myself with the rest of the conference call participants. I read my notes of our conversation to all the parties and the tenant confirmed that they were an accurate reflection of what she had said. The tenant's lawyer asked her some questions and the landlords were given the opportunity to ask the witness questions before she disconnected from the call.

Issue(s) to be Decided

- Is the 2 Month Notice to End Tenancy for Landlord's Use dated September 26, 2016 valid?
- Should an order granting the tenant access to a portion of the rental unit be made and, if so, on what terms?
- Should the tenant be granted a monetary order and, if so, in what amount?

Background and Evidence

This month-to-month tenancy commenced December 1, 2000. The monthly rent, which is due on the first day of the month, has been $835.00 throughout the tenancy. The tenant paid a security deposit of $417.50.

The tenant filed a copy of his written tenancy agreement. It provides that there will be two persons occupying the rental unit and that except for casual guests, no other persons shall occupy the premises without written consent of the landlord.

The rental unit is one side of a side-by-side duplex. The main living area is on the main floor where there is a kitchen, living room, two bedrooms and a bathroom. According to the records of BC Assessment the upstairs is 856 square feet and the basement finish area is 770 square feet.

The basement is accessed only from the outside. There is a half-bath in the basement but no kitchen. The tenant described the basement as partially finished.

The tenant said that for the first year of his tenancy he lived in the lower level while his daughter lived upstairs.

For some years the tenant rented the finished portion of the basement to his friend K. The tenant said this arrangement last for five years and his friend moved out in 2013 or 2014. K testified that he lived there for about 2 ½ years and he moved out in October 2012. The tenant said he collected $350.00 per month; K said he paid $250.00.

Both agreed that K created a little kitchen area in the area plumbed and wired for a laundry. K installed a little cabinet with a sink. He also set up a refrigerator, a countertop over, and a small propane stove. K built a bedroom and closet. K did not use the kitchen or bathroom upstairs.

The evidence is that after K moved out the tenant used the space for his own storage.

The tenant testified that for the first half of this year he rented the unfinished portion of this basement to another friend as living space. This sub-tenant had a little hot plate and used the half-bath. He did not use the kitchen or bathroom upstairs. The tenant said he charged his sub-tenant $250.00 to $350.00 per month. This person moved out in May.

For many years the tenant would find the tenants for the other side of the duplex so he could be assured of compatible neighbours. The first three of these tenants had a direct contractual relationship with the landlord and paid their rent directly to the landlord.

That changed in 2015 when his friend T became the tenant of the adjoining unit. She and the landlord had some difficulties so the tenant took over the adjoining unit. He collected the rent from T and paid it to the landlord. T paid a monthly rent of $1175.00.

The adjoining unit also has two levels. Unlike the rental unit it had an interior staircase and no basement bathroom. While T was living in the adjoining unit the tenant closed off the stairway so the only access to that basement is from the outside.

Before T lived next door, C did. While C rented the adjoining unit he lived in the basement and rented out the upper level. At that time there was a fire door between the two basements. C wanted access to the half bathroom in the basement of the tenant's unit so he would not have to bother his tenants upstairs. The tenant removed the steel panel door between the door basements and hung an ordinary door. This door does not lock and provides free access between the two basements.

After C moved out the tenant rented the upstairs level of the adjoining unit to CF. CF's tenancy started March 1, 2016. She is a single mother with three children. Her middle child is disabled and uses a wheel chair. In addition to the upper level her rental unit includes a storage room on the lower lever. The tenant kept the balance of the basement for his own use. CF pays the tenant $1200.00 per month for rent and he pays her $100.00 per month for the use of the basement. The tenant pays the landlord $1175.00 for this side of the duplex.

The landlords are a young couple who bought the neighbouring house in August 2014. Over the next two years they completed a major renovation of that house. They also had a baby, who is now nine months old. Currently, they live in that house with two single men, one of whom is a family member.

Last spring they approached the owner of the duplex about purchasing it. The sale agreement was concluded just three weeks before the possession date of July 27, 2016. The vendor did not want to serve a notice to end tenancy so a clause requiring vacant possession was not included in the sale agreement.

Before purchasing the property the landlords had it inspected by a home inspector. A summary of the inspection report was submitted into evidence. The most important issues identified were:

- "We recommend that a certified electrician inspect this house and repair as needed."
- "This home will be difficult to insure with a 60 amp service and the 2 services may have to be changed to 100 amp."

- “There may be mold behind the basement walls due to sings of standing water in the basement.”
- “Due to all the contents piled up in various areas we could not inspect all of the walls and floors. We are willing to do this once the home is cleaned up.”

On the possession date the vendor sent the tenant an e-mail formally advising him of the sale and introducing him to the purchasers.

The tenants sent the new landlords an e-mail setting out the deficiencies in the property, That long list includes deficiencies with the electrical service which the tenant identified as legal hazard and contrary to the municipal code; rotten floors in both bathrooms; rotten window frames; and an assortment of pests.

The landlords also filed a statement from their electrician. He states that the: “basic requirements necessary for the safety of the home and its occupants would be a total replacement and upgrade. Performing upgrades to this extent would require clear and unobstructed access to the wiring in the walls, ceilings. Floors, attic and unfinished basement area.”

The statement goes on to say that on August 10 an electrical permit was issued “for the total replacement of existing electrical from a 60 AMP service in very poor condition with unsafe additional writing to a 400 Amp Breakered Combo meter base and new armoured SUB feeders.” A copy of the permit was filed.

The landlords testified that it has always been their intention to move into this unit and live there.

On July 28 the landlords issued and served a 2 Month Notice to End Tenancy for Landlord’s Use through an agent. The sole reason on the notice was that: “The landlord has all the necessary permits and approvals required by law to demolish the rental unit, or renovate and repair the rental unit in a manner that requires the rental unit to be vacant.”

The landlords say that their agent did not fill out the form properly; in particular, he did not also check the box that states: “the rental unit will be occupied by the landlord or the landlord’s close family member . . .”; and he did not post the notice properly. The agent filed a statement saying the same thing.

When they became aware of these deficiencies the landlords withdrew the notice. They confirmed this with the tenant by e-mail and tenant acknowledged this by e-mail.

Starting with an e-mail dated August 2 and continuing until September 26 the tenant told the landlord that he was making arrangements to move to a friend's farm (which has been a long standing dream for both sides) and he would be happy to sign a Mutual Agreement to End Tenancy. His August 2 e-mail stated:

> "I have been making plans to move for some time, since long before [the landlord] informed me he was planning to sell. An assumption on your part I am manoeuvring to extend my stay at [the rental unit] indefinitely would be an unfortunate misunderstanding.
>
> I've been here long enough, and I'm not attached to staying. Better places for me to live have already been arranged, however they will take some time to prepare as they are currently under construction, both my Plan A and my Plan B."

On August 17 the landlord asked the tenant:

> "Can you please email me a date and any conditions for a mutual agreement to end tenancy. We look forward to working with you on this matter."

The tenant responded the next day:

> "Yes Ma'am. I am meeting with the various parties dividing up the ownership of the farm I am moving to later today. It is my home (I cannot know for sure until it is complete) that I will be coming home later today with a written residency lease for my new home. As soon as I have this document I will be happy to commit to a departure which includes a facilitation for building upgrades required for the maintenance of [CF's] residency, which is my top priority."

In response to another inquiry from the landlord on August 29 the tenant advised:

> "This meeting should provide the brass tacks for my residential status and I expect to have a formal written agreement in place which will serve both our securities when I return . . later Thursday evening.
>
> As the cabin is currently unfinished, this meeting will also encumber the new owners with a specific date which I may take possession of my new home".

On September 26 the tenant contacted the female landlord by e-mail advising that the plan had run into difficulties and he was not going to be able to move anytime soon.

> "Consequently, limited resources dictate that I must return to discussions which include the alternative of my continued residence here at [the rental unit] for the immediate future."

In the same e-mail the tenant refers to various conversations he had with the male landlord “in the interests of keeping alternative scenarios open” during which he has offered to move out of the unit during the renovations and to pay a greater rent.

The landlord responded that the tenant was aware that when they bought the property ”it was our immediate intention to undergo a major renovation” and they had accommodated his request for a few more months to give him time to find alternative accommodation. The landlord goes on to say they want to create a family friendly space for their baby and any future additions to their family. She said that the amount of rent was not relevant because the unit was not for rent.

The next day the landlords issued a 2 Month Notice to End Tenancy for Landlord’s Use. The reasons on the notice are that the landlords are going to occupy the space and they have all the necessary approvals necessary to renovate or repair the unit in a manner that requires the unit to be vacant. This time there was no issue about service.

Regarding the personal use the landlords testified that the layout of their current home is not suitable for young children and that babies and single room mates are not a good fit. It is their intention to live on the main floor of the unit, after it has been renovated, and to renovate the lower level so it contains a family room, an office, a guest room, and a full bathroom; and to use that space themselves. They intend to keep their current home as a rental unit.

The landlords testified that they do not plan on installing a kitchen in the lower level; they have not received a permit for that work; and they are not installing the wiring necessary for an electric stove. They testified that they have bought the cabinets and appliances for the kitchen and those supplies are currently stored in one room in the basement of the adjoining unit.

The tenant argued that the landlords’ true plan is to create two separate suites out of the unit and to rent both.

The tenant called CF as a witness. She testified that she had a conversation with the male tenant some time after school started. He told her they were renovating the basement and asked if she would like to live there. He suggested that they could install a ramp and make it more wheelchair- accessible than her current unit.

She testified that she was not interested in the idea. Her handicapped child is five years old and very small for his age, thirty to thirty-five pounds. Because of his condition he

will always be small. His wheelchair is also very light. As a result accessibility is not an issue for her and will not be for many years. On the other hand her current space meets her needs and she is happy there. She would like to continue living in her unit. When the male landlord spoke to her she put him off. There has never been a second conversation on the topic. On cross examination she said that the male landlord did not attach any timeline to his inquiry.

The tenant's friend K testified about a conversation he had with the male landlord at the beginning of September. In that conversation the male landlord suggested that it might be a good suite for CF eventually. From the rest of the conversation he gathered that the landlords were going to live in the lower level until the remodel was completed upstairs and then move upstairs.

K testified that he usually stays with the tenant for a few days every month. On those visits he has looked at the basement and chatted with the male landlord. He testified that two bedrooms had been roughed in, as had a larger bathroom. The old sink and counter that he had installed had been ripped out. He noted new wiring everywhere in the basement including wiring for a new hot water tank but did not notice if wiring for an electric stove had been installed. After some prompting by the tenant he said he had seen a kitchen sink and countertop in the basement of the adjoining unit.

The tenant testified that the male tenant told him of a variety of plans for the building including having foreign students in four separate units; having a friend renovate the adjoining unit; renting the basement to his brother and brother's girlfriend; making the basement wheelchair accessible and having CF move into it. The male landlord also told him they would live in the lower level until the upstairs remodel was complete and then move upstairs. All of these conversations occurred before the tenant told the landlord that he wasn't moving after all and they served him with the notice to end tenancy.

The tenant testified the neither basement is zoned for residency; something the male landlord acknowledged to him.

With regard to the claim for the loss of use of the lower level, including the loss of rental income, the landlord testified that in mid-August they asked the tenant to move his belongings from the basement of the rental unit to the basement of the adjoining unit so they could start work. The tenant agreed and he and the male landlord worked on this project together over the course of the weekend of August 20 and 21. The e-mail correspondence and text message between the landlords and the tenant during this project are extremely cordial. For example, on August 20 the male landlord asks the

tenant: “Were you keeping the mattress and box spring? I just told the fellow outside he could have it he’s coming back tomorrow it its still there. Hope I didn’t make a mistake!” T0 which the tenant replies: “its up for free. Anyone can take it.”

The only concerns that the tenant expresses during this period is the disruption that will be caused to CF’s unit while it is being renovated.

The landlords testified that the lock for the exterior entrance from the rental unit was changed, with the tenant’s consent. They said that the tenant has the key to the exterior door on the adjoining unit and the door between the two basements does not lock, so the tenant has unfettered access to both sides.

The tenant says that at the beginning of August he gave the landlord a key to the basement. A few days later the landlord changed the lock and asked him to clear his belongings out of the basement of the rental unit. In his view everything he had in the basement of either unit was useful but when storage space was being reduced he had to prioritize which items he would keep and which items would be reduced to garbage status. The items that he said could be thrown away only became garbage because he had no place for them. He said that this sorting process occurred because he was under duress.

The tenant testified that he did not express any objection to moving his things from one basement to the other because although he was talking about moving to his friend’s farm, that was just one of the contingencies that he was keeping open at that time. Another was that he could move into the basement suite once it was completed. Because he was negotiating with the landlords about the second contingency he did not express any disagreement with their request that he move his belongings from one basement to another.

The tenant filed a photograph of the items that were moved outside and left there. The photograph shows an older mattress, a fishing net, some Rubbermaid lids, a full plastic garbage bag, and an assortment of smaller items. The tenants says about an equal amount was taken from the free pile left curbside. On questioning, he also said that he made no attempt to sell any of these items.

The tenant said that after Cmoved out he left furniture for storage; when K moved out he left boxes and other items for storage; and when T moved out, she left a roomful of her belongings for storage. He testified that he has not charged them anything for storage.

The landlords testified that they are under pressure to complete the electrical upgrades in order to maintain their insurance. They filed a letter dated November 14, 2016 from their insurance company to them stating"

> " . . they have agreed that we can extend the condition on the home insurance policy, and allow until December 31, 2016 to complete the electrical update to [the rental unit].
>
> Please be advised that if this update is not completed by this time, we may no longer be able to offer coverage under the current policy."

Analysis

Section 49(3) allows a landlord who is an individual to end a tenancy if the landlord or a close family member of the landlord (as defined by the Act) intends in good faith to occupy the rental unit.

Residential Tenancy Policy Guideline 2: Ending a Tenancy Agreement: Good Faith Requirement defines "good faith" 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.

The *Guideline* goes on to explain that if the evidence shows that , in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive then the questions as to whether the landlord had a dishonest purpose is raised.

When the good faith intent of the landlord is called into question, the burden rests with the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The *Guideline* requires the landlord to establish that they do not have another purpose that negates the honesty of intent or demonstrates they do not have an ulterior motive for end the tenancy.

The evidence shows that both the male landlord and the tenant like to think, and to talk about, the various scenarios that are possible. The tenant asks that we take the landlord's communications as concrete plans and to take his communications as just descriptions of possibilities, not concrete plans.

Although the tenant placed great emphasis on the suggestion that CF could move into the lower level the evidence does not show that this was any more serious than an idea that was floated and then discarded. Certainly CF is not making any plans to move. The fact that the landlord only spoke to her once and then, after she did not display any

particular interest dropped the matter, is consistent with the landlord trying out future contingencies; not a concrete plan to rent to her in the near future.

Much of the tenant's evidence established that the landlords said they were going to live in the lower unit until the upstairs was completed and then move upstairs. If they move a refrigerator, hot plate and other small cooking appliances into the space and set up a temporary kitchen while the upstairs kitchen was being renovated they would be following a procedure implemented by most homeowners living though a kitchen renovation. This only establishes that the landlords will be occupying the lower level.

Although the tenant argued that it the fact that kitchen cabinets and appliances were stored in the basement of the adjoining unit was only consistent with the landlord's intention to install a kitchen on the lower level, that is not necessarily so. They could not store these items in the basement of the rental unit because it is being renovated and they could not store them in the upstairs of the rental unit because the tenant is living there. If the tenant had been able to prove that there were duplicates of kitchen cabinets, appliances and fixtures that would have indicated that the landlords were intending to install two kitchens. However, although he has full access to both basements, the tenant did not submit any evidence of this nature.

Based on the evidence before me I am satisfied that the landlords do intend to use both levels of the rental unit for their own use. Accordingly, I find that the 2 Month Notice to End Tenancy for Landlord's Use dated September 26, 2016 is valid.

As I have found that one of the reasons stated for ending the tenancy is valid it is not necessary for me to make any determination about the validity of the second reason stated on the notice.

The tenant argued that the effective date on the notice was incorrect.

Section 25(4) of the *Interpretation Act* provides that in the calculation of time expressed as clear days, weeks, months or years, or as "at least' or "not less than" a number of days, weeks, months or years, the first and last days must be excluded. Subsection (5) provides that in the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

Section 49(2) provides that the effective date of the notice must be a date that is:

- not earlier than two months after the date the tenant receives the notice; and,
- the day before the day in the month that the rent is due.

This particular notice was served on September 27. The effective date of the notice was stated to be November 30, 2016, two months and three days after it was received by the tenant. Even after excluding the first day the notice was received by the tenant more than two months before the effective date of the notice. The effective date on the notice is correct.

The landlord did not deposit the cheque the tenant provided for the November rent. This represents the section 51(1) tenant compensation.

Section 55(1) of the *Residential Tenancy Act* provides that if a tenant makes an application to set aside a landlord's notice to end a tenancy and:

- the notice to end tenancy complies with section 52; and,
- the application is dismissed or the notice to end tenancy is upheld;

the arbitrator must grant an order of possession of the rental unit to the landlord.

In this case the tenant's application has been dismissed and the notice to end tenancy complies with section 52, therefore, I grant the landlord an order of possession effective two days after service.

With regard to the tenant's claim for compensation for loss of use of the basements I find that the tenant had the use of two basements and after mid-August he had the use of one. This is a reduction in the value of his tenancy. Section 65(1) allows an arbitrator who has found that a landlord has not complied with the Act, regulation or tenancy agreement to order that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of the tenancy agreement. This is subject to subsection 7(2) which requires any party who claims compensation from the other for damage or loss to do whatever is reasonable to minimize the damage or loss.

Although the tenant filed photographs to show the condition of the area his friend rented; the work the landlords have already done in the basement of the rental unit; and the personal belongings he discarded; he never submitted any photographs of the basement of the adjoining unit that would have shown that there was no room for the items he says he wanted to keep but was forced to discard, or the proportion or his belongings to those of his friends he has stored there.

The tenant argued for a reduction of rent equal to one half of the rent because the basement is one half of the square footage of the unit. That is not a valid calculation of the value of the basement because an unfinished basement represents a lesser percentage of the value of the tenancy than the area that is finished and contains the kitchen, bathroom, and principal living areas. The true value of storage was set by the tenant himself. He pays CF $100.00 per month for use of the most the space in the adjoining basement. I find that the value of this tenancy has been reduced by $100.00

per month since August 21 and I award the tenant the sum of $435.53 for this item. This is calculated as $35.53 for August ($3.23/day for 11 days), and $100.00 per month for September, October, November and December. I have awarded compensation for December because the tenant will be in occupation of the rental unit for at least a portion of the month.

The tenant also claimed compensation for loss of rental income from the basement. On any claim for damage or loss the party making the claim must prove, on a balance of probabilities:

- that the damage or loss exists;
- that the damage or loss is attributable solely to the actions or inaction of the other party; and,
- the genuine monetary costs associated with rectifying the damage.

The evidence is that except for a short period of time in 2016 the tenant has not derived any rental income from the basement since October 2012. There was no evidence, either receipts for rent received or some evidence from that sub-tenant, to confirm the monthly rent paid or the number of months for which it was paid. The tenant's own testimony only gave a range for the rent charged, not a specific amount.

Leaving aside that the tenant's own evidence that his tenancy agreement prohibits sub-tenants and that the basement is not zoned for habitation, the evidence does not show that the basement has been a significant source of revenue for the past fours years nor does it establish the actual loss suffered by the tenant. This claim is dismissed.

The tenant's claim for an order granting him access to the basement is dismissed. There are two exterior entrances to this basement. He used to have the keys to both doors, now he has the key to one. His access has not been impeded in any way as evidenced by the photographs he filed in evidence. He has already been awarded compensation for loss of use of the space.

Finally, as the tenant was partially successful on his application I find that he is entitled to partial compensation from the landlords of the fee he paid to file it. I award the tenant the sum of $50.00 for this item.

I grant the tenant a monetary order in the amount $485.53, as calculation above.

Conclusion

a. The 2 Month Notice to End Tenancy for Landlord's Use dated September 26, 2016 has been upheld.

b. An order of possession effective two days after service is granted to the landlord. If necessary, this order may be filed in the Supreme Court and enforced as an order of hat court.

c. A monetary order in the amount of $$485.53 is granted to the tenant. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that court. In the alternative, it may also be applied to any rent that may be due for December by the tenant.

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 12, 2016

Residential Tenancy Branch