



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, OLC, FFT

Introduction

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

- cancellation of the Two Month Notice to End Tenancy for Landlord's Use of Property, pursuant to section 49;
- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Tenant J.K. (the "tenant"), the landlord and the landlord's legal counsel attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that the landlord was served the notice of dispute resolution package in person at the end of September 2018. Counsel for the landlord confirmed that the landlord personally received the notice of dispute resolution around that time. I find that the landlord was served with this package in accordance with section 89 of the *Act*.

I note that Section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

1. Are the tenants entitled to cancellation of the Two Month Notice to End Tenancy for Landlord's Use of Property, pursuant to section 49 of the *Act*?
2. Are the tenants entitled to an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62 of the *Act*?
3. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
4. If the tenants' application to cancel the Notice to End Tenancy is dismissed and the landlord's Notice to End Tenancy is upheld, is the landlord entitled to an Order of Possession, pursuant to section 55 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began in April 2015 and is currently ongoing. This tenancy was a fixed term tenancy set to expire on September 30, 2018. Monthly rent in the amount of \$960.00 is payable on the first day of each month. A security deposit of \$350.00 was paid by the tenant to the landlord. A written tenancy agreement was signed by both parties but a copy was not entered into evidence. The rental property is a four plex, with two rental properties on the top floor and two rental properties on the bottom floor. The landlord resides in one of the units on the top floor and the tenant resides in the unit below the landlord.

Counsel stated that in June of 2018, before the landlord received legal counsel, he served a rent increase on the tenant which sought to increase the rent over the allowable limit as set out the *Residential Tenancy Regulation* (the "*Regulation*"). The tenant filed to dispute the rent increase at which point the landlord sought legal advice. Counsel stated that he advised the landlord that he was not permitted to raise the rent above 4% and the landlord withdrew the rent increase prior to the hearing. The decision for the aforementioned hearing was entered into evidence and states that prior to the hearing the rent increase was withdrawn.

Counsel stated that when the landlord entered into the lease agreement with the tenant it was his intention, pursuant to section 44(1)(b) of the *Act* and section 13.1(2) of the *Regulation*, that his daughter would move into the subject rental property at the end of the fixed term tenancy agreement. In furtherance of this intention, counsel sent the tenant a letter dated August 20, 2018 stating that the tenant was required to move out at the end of the fixed term. The letter dated August 20, 2018 from counsel to the tenant was entered into evidence.

Counsel stated that on September 26, 2018, the tenant was personally served with a Two Month Notice to End Tenancy for Landlord's Use with an effective date of November 30, 2018 (the "Two Month Notice"). The tenant confirmed receipt of the Two Month Notice on September 26, 2018.

The Two Month Notice stated the following reason for ending this tenancy:

- 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).

Counsel stated that the landlord's daughter, who is 33 years old, and his granddaughter currently live with the landlord. The landlord's daughter is seeking more autonomy and space and no longer wishes to live with her father.

The tenant testified that prior to receiving the Two Month Notice, he had not received notification that the landlord wanted the subject rental property for his daughter's use and does not believe same to be true. The tenant testified that another unit in the four-plex rental property was available in September 2018 and that the landlord rented it out just prior to him receiving the Two Month Notice. The tenant alleged that the landlord was only evicting him to get a higher rent for his unit as the landlord could have given the other unit which was available to his daughter.

Counsel submitted that the unit which was available in September 2018 was unsuitable for the landlord's daughter for the following reasons:

- It was approximately 200 square feet smaller;
- It has a less desirable view; and
- It is on the same floor as the landlord and the landlord's daughter is seeking a greater level of separation.

Counsel submitted that the landlord is fully aware that if he uses the property for a purpose not stated in the Two Month Notice, within the timeframe stated in section 51 of

the *Act*, that the tenant is owed an amount equivalent to 12 months rent. Counsel submitted that the landlord has an honest intention to use the subject rental property for his daughter and that the tenant has remedies under the *Act* should the landlord fail to do so. Counsel also recognized that the tenant was entitled to receive one month's free rent, pursuant to section 51 of the *Act* and the Two Month Notice.

The tenant did not specify what section of the *Act* he was seeking the landlord to comply with.

Analysis

Fixed Term Tenancy Agreement

Section 44(1)(b) of the *Act* states that a tenancy ends only if the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97(2)(a.1), requires the tenant to vacate the rental unit at the end of the term.

Section 97(2)(a.1) of the *Act* states that the Lieutenant Governor in Council may make regulations prescribing the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term.

Section 13.1(2) of the *Regulation* states that for the purposes of section 97(2)(a.1) of the *Act* [*prescribing circumstances when landlord may include term requiring tenant to vacate*], the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that

- (a) the landlord is an individual, and
- (b) that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

The onus or burden of proof is on the party making the claim. When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim has not met the burden on a balance of probabilities and the claim fails.

I find that the landlord has not proved that at the time he entered into the tenancy agreement with the tenant, that it was his intention for his daughter to move into the subject rental property at the end of the fixed term. I find that the tenant is not required to vacate the subject rental property pursuant to the fixed term tenancy agreement.

Two Month Notice

Policy Guideline 2 states that good faith is a legal concept, and means that a party is acting honestly when doing what they say they are going to do or are required to do under legislation or a tenancy agreement. It also means there is no intent to defraud, act dishonestly or avoid obligations under the legislation or the tenancy agreement. If the good faith intent of the landlord is called into question, the onus is on the landlord to establish that they truly intended to do what they said on the notice to end tenancy. The landlord must also establish that they do not have another purpose or an ulterior motive for ending the tenancy.

I find that there is sufficient evidence that the landlord honestly intends to use the rental unit for his daughter. In making this finding, I have taken into consideration all of the testimony of each party and all of the documentary evidence provided for this hearing.

While the tenant argues that the landlord could have offered him a different unit in the four plex, the landlord is not required to do so. I accept counsel's submission that the rent increase was made in error and that the landlord intends to use the subject rental property for his daughter.

Based on the foregoing, I find that the tenant is not entitled to a cancellation of the Two Month Notice.

When a tenant's application to dispute a landlord's notice to end tenancy is dismissed, section 55 of the *Act* requires me to grant an order of possession if the landlord's notice to end a tenancy complies with section 52 of the *Act*.

After reviewing the Two Month Notice submitted into evidence, I find that the Two Month Notice complies with section 52 of the *Act*. As a result, I find that the landlord is entitled to an Order of Possession. The Order of Possession will take effect on November 30, 2018, the effective date on the Two Month Notice.

As noted by the landlord's counsel, section 51 of the *Act* states that the landlord must pay the tenant, in addition to the one months' free rent, an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if:

- (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
- (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Order for landlord to comply with the *Act* and Filing Fee

I dismiss the tenant's application for an Order for the landlord to comply with the *Act* as the tenant did not specify what section of the *Act* he was seeking the landlord to comply with.

I find that since the tenant was not successful in his application, he is not entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

Conclusion

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the landlord effective at **1:00 p.m. on November 30, 2018**, which should be served on the tenants. Should the tenants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: November 08, 2018

Residential Tenancy Branch