Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

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

- a monetary order for compensation for damage or loss under the Act in the amount of $4,794.00 for failure to use the rental property as indicated in the Two Month Notice to End Tenant for Landlord's Use of the Property (the "**Notice**") pursuant to section 67; and
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

All parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

All parties testified that they had served their evidence on the opposing parties in accordance with the Act. All parties confirmed that the opposing parties had served them with their evidence in accordance with the Act. The landlords confirmed that the tenants served them with the notice of dispute resolution package in accordance with the Act.

Issue(s) to be Decided

Are the tenants entitled to:

- a monetary order against the landlords in the amount of $4,794.00; and
- recover their filing fees from the landlords?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties agree on most of the underlying facts of this case. Unless otherwise specified, the facts I recount are agreed to by all parties.

The parties entered into a written tenancy agreement starting March 1, 2013. Monthly rent was $2,150.00 plus 2/3 of utilities and was payable on the first of each month. The tenants paid the landlords a security deposit of $1,075.00. The landlords have returned this deposit to the tenants.

On their application, the tenants claimed that monthly rent was $2,397.00. However, at the hearing, they agreed that monthly rent was $2,150.00, and the balance represented utilities costs.

The unit the tenants rented is comprised of the upper floors of the rental property. The basement is a separate unit, and, during the tenancy, was occupied by the landlords' caretaker.

The tenants vacated the rental unit on or about June 15, 2017.

On April 4, 2017, the landlords personally served the tenants the Notice. The Notice had an effective date of June 30, 2017. The reason for issuing the Notice was listed as:

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

The landlords testified that, at the time the Notice was served, the landlords intended for their daughter to move into the rental unit. Their daughter needed a place to live, as she had recently listed her house for sale.

The landlords testified that the daughter's house sold on April 7, 2017. They testified that in the middle of May, 2017, their daughter purchased a new home to live in, and decided against moving into the rental unit.

The landlords testified that once they learned of this, they arranged for their caretaker to move into rental unit (from the basement suite). They testified that he is "like family",

and that the he could maintain the rental unit while the landlords were away. The testified that when they were in Victoria, they would stay in the rental unit. They testified that the rental property was their home, and that they had no other in the city it was located.

The landlords testified that, at the end of May or in early June (after arranging for their caretaker to move into the rental unit), they became aware that their nephew needed a place to live, as he had been evicted from his prior rental unit. They offered that he move into the basement suite. He accepted, and moved in on July 1, 2017.

The tenants did not give any evidence to contradict the landlords' evidence. They testified that they had a great deal of difficulty locating alternate accommodations following the end of the tenancy, and that, at one point, they considered moving out of province to find accommodation.

The tenants argue that the landlords failed to use the rental unit in the manner specified on the Notice, and as such they are entitled to a monetary order in the amount of double the monthly rent, pursuant to section 51(2) of the Act, as it was at the time the tenant's claim originated, which states:

> **Tenant's compensation: section 49 notice**
>
> **51** (2) In addition to the amount payable under subsection (1), if
>
> (a) steps have not been taken to accomplish the stated purpose for ending the tenancy under section 49 within a reasonable period after the effective date of the notice, or
>
> (b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,
>
> the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

(I note that the tenant's claim originates in a time prior to when section 51(2) was amended to allow for a monetary order equivalent to 12 times the monthly rent.)

The tenants argue that the landlords did not act in good faith when executing the Notice. They argue that the landlords ought to have cancelled the Notice when they learned their daughter was not going to move into the rental unit.

The landlords argue that they acted in good faith when issuing the Notice. They argue that at the time the Notice was issued, they had a good faith intention for their daughter to occupy the rental unit.

The landlords advanced two other arguments, each in the alternative of the other (meaning one or other could be true, but not both):

- They argued that the moving the caretaker from the basement suite into the rental unit would have been an acceptable ground for issuing the Notice, and as such the Notice should not be considered invalid or did not require cancelling.
- By moving the caretaker into the rental unit they were, in fact, retaining the rental unit for their own use (that is, complying with the box that was selected on the Notice), as the caretaker would maintain the rental unit while they were away, and they would occupy it when they were in town.

Analysis

The landlords issued the Notice pursuant to section 49 of the Act, which, in part, states:

> **Landlord's notice: landlord's use of property**
>
> 49 (1) In this section:
>
> "close family member" means, in relation to an individual,
>
> (a) the individual's parent, spouse or child, or
>
> (b) the parent or child of that individual's spouse;
>
> […]
>
> (3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.
>
> […]
>
> (6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:
>
> […]
>
> (e) convert the rental unit for use by a caretaker, manager or superintendent of the residential property;

In cases involving the issuance of a notice to end tenancy, the onus to prove the notice is validly issued rests with the landlord, per Rule of Procedure 6.6, which states

6.6 The standard of proof and onus of proof

> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

As such, based on the above, the landlords bear the burden to prove on a balance of probabilities that:

1) when ending the tenancy, the landlord intended in good faith to allow a close family member to occupy it; or
2) when ending the tenancy, the landlord:
    a. intended, in good faith, to convert the rental unit for use by a caretaker, manager or superintendent of the residential property; and
    b. had all the necessary permits and approvals required by law.

Good faith is discussed in Policy Guideline 2, which refers to the case of *Gichuru v Palmar Properties Ltd.,* 2011 BCSC 827, in which the BC Supreme Court, relying on prior case law, found, at paragraph 56, that "good faith applies to both the intention to occupy and the purposes for which the intention is held" and, at paragraph 57, that good faith is equated "with honesty, and with the absence of dishonesty, malice, deception, or pretence."

Section 46(3) and (6) both require that the landlords act in good faith when the tenancy ends. A notice to end a tenancy does not itself function to end a tenancy; rather it gives notice of when the landlords *intended* to end it. In this case, the Notice stated that the landlords intended to end the tenancy on June 30, 2018. As such, I find that the Act requires the landlords to be acting in good faith on this date.

While they may have acted in good faith when the Notice was issued, I find that, by the end of the tenancy, the landlords were not acting in good faith. At the time the tenancy ended, the landlords knew that their daughter would not be moving into the rental unit. Indeed, this was known to them well in advance of the end of the tenancy. Once this

became known to the landlords, I find that their motives for ending the tenancy changed and were not what they were when the Notice was issued.

I do not find persuasive the landlords' argument that, by moving the caretaker from the basement suite into the rental unit, the landlords intended to use the rental suite for their own use. On its face, this is not the case. The caretaker moved into the rental unit. If the landlords wanted to keep the rental unit for their own use, the caretaker could have remained in the basement suite. Accordingly, I find that the landlords have failed to satisfy the requirements of section 46(3) of the Act.

I find more persuasive the landlords' argument that, once it was known their daughter was not going to move into the rental unit, that they changed their mind with regards to its use, and decided that they wanted to convert the rental unit for use by the caretaker. While a more likely explanation, this argument is not in compliance with the Act as the landlords did not reissue the Notice citing the revised reason. Good faith requires an absence of "pretence". By not reissuing the Notice, the landlords maintained the pretence unit the end of the tenancy that that the reason the tenancy ended was because the landlords wanted the rental unit for their own (or a close family member's) use. I find that this was not the case (the caretaker is not a close family member, as defined by the Act, even if he is "like family").

Accordingly, I find that the landlords have failed to comply with section 46(6) of the Act.

Tenant's Compensation

Section 51(2)(b) of the Act states:

> **Tenant's compensation: section 49 notice**
>
> 51(2) In addition to the amount payable under subsection (1), if
>
> […]
>
> (b) the rental unit is not used for that stated purpose for at least 6 months beginning within a reasonable period after the effective date of the notice,
>
> the landlord, or the purchaser, as applicable under section 49, must pay the tenant an amount that is the equivalent of double the monthly rent payable under the tenancy agreement.

Based on the foregoing, I find that the landlords failed to use the rental unit for the purpose stated on the Notice for at least six months following the end of the tenancy. As such, the Act requires that I order the landlords to pay the tenants the equivalent of twice the monthly rent. Accordingly, I order that the landlords pay $4,300.00 to the tenants.

As the tenants have been successful in their application, I order that the landlords pay them their filing fee for this application in the amount of $100.00.

Conclusion

Pursuant to section 51(2), 67, and 72 of the Act, I order that the landlords pay the tenants $4,400.00, comprised of damages owed for breach of the Act and for the tenants' filing fee.

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: March 26, 2019

Residential Tenancy Branch