Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT FFT**

Introduction

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

- a monetary order for $12,000 representing 12 times the amount of monthly rent, pursuant to section 38 and 62 of the Act; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing. The landlord was assisted by her son ("**TG**"). Each party was given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord called one witness ("**PW**")

The tenant testified, and the landlord confirmed, that the tenant served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenant confirmed, that the landlord served the tenants with her evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Preliminary Issue – Joinder

At the outset of the hearing, the landlord asked that her application against the tenant scheduled to be heard in January 2020 be during this hearing. This future application is for the recovery of damages the landlord alleges she suffered due to the condition of the rental unit at the end of the tenancy. Arbitrators have the authority to bring forward a hearing so that it may be heard at the same time as another hearing. However, in order to do this, all parties must consent.

The tenant did not consent. He testified that he was not prepared to address the landlord's application at this hearing, and that he had not yet submitted any evidence in response to it.

Accordingly, I declined to hear the landlord's application at this hearing.

Issue(s) to be Decided

Is the tenant entitled to:

1) a monetary order equal to 12 times the amount of the monthly rent; and
2) recover the filing fee from the landlord?

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 entered into a tenancy agreement starting October 1, 2017. Monthly rent was $1,000. The tenant did not provide the landlord with any deposit.

The rental unit is the upper floor of a carriage house. The carriage house also includes a rental suite on the lower floor (the "**Lower Unit**"). The rental unit is located on a residential property which also include a single detached house (the "**Main House**"). The carriage house is roughly 300 yards uphill from the Main House and is accessible by a "dark forest path".

The landlord operates a bed and breakfast in the Main House (the "**B&B**") and resided in a room in the Main House during the tenancy.

On March 3, 2019, the landlord served the tenant with a two month notice to end tenancy for landlord's use of the property (the "**Notice**"). It specified a move-out date on May 31, 2019. The Notice stated that the reason for ending the tenancy was "the rental unit will be occupied by the landlord or the landlord's close family member".

The tenant vacated the rental unit on May 31, 2019.

The tenant testified that he did not believe that the landlord moved into the rental unit once he left. He based this belief on the fact that the landlord is “legally blind” and would have difficulty walking along the path from the Main House to the rental unit, and up the stairs of the rental unit.

He also testified that, after the tenancy ended, he attended the Main House, knocked on the door, and the landlord answered it. He argued that this indicates she continues to reside in the Main House.

Finally, the tenant testified that, on two sperate occasions, he contacted the B&B through its reservation system on booking.com (using pseudonyms) and inquired about renting out the entire carriage house (both the rental unit and the Lower Unit). He testified that on both occasions the landlord confirmed that the entire carriage house was available for rent. He entered computer screenshots of one such exchange into evidence.

The tenant testified that he is entitled to an award equal to 12 times the monthly rent, pursuant to section 51 of the Act, as the landlord failed to use the rental unit as indicated on the Notice.

The landlord denied that she does not occupy the rental unit. She testified that her vision impairment does not prevent her from walking from the Main House to the rental unit or from climbing the rental unit stairs.

She also testified that after the tenant vacated the rental unit, she spent three weeks cleaning it. However, as this is the subject of her application set for January 2020, I will not discuss the details of the state of the rental unit further.

The landlord submitted 10 witness statements into evidence, all of which confirm that the landlord lives in the rental unit. PW testified that he is the nephew of the landlord and that the landlord resides in the rental unit. He testified that on two separate occasions he spent the night in the second bedroom of the rental unit while the landlord stayed in the main bedroom.

The landlord testified that the reason she was at the Main House when the tenant knocked was because it is her place of work (she operates the B&B).

The landlord testified that she sleeps in the rental unit and has moved her belongings into it. She testified that she prepares her meals in Main House because, due to her eye sight, she needs to use appliances with physical knobs, and not digital readouts (the rental unit has digital appliances).

However, the landlord confirmed that she does rent out the rental unit on booking.com, as part of the B&B business. She testified that between the end of the tenancy and the date of the hearing (approximately five months) she rented out the rental unit on eight occasions for 16 nights total (including the night immediately following the first night she stayed in the rental unit). She testified that when she rents out the rental unit, she sleeps in her trailer that is located on the residential property.

The landlord testified that her practice is to include the rental unit as part of her B&B rental stock on booking.com and allow people to book it. However, she testified that when people who have booked the rental unit arrive, and there is vacancy in either the Lower Unit or in the Main House, she tells the visitors that the rental unit is unavailable, and places them where there is vacancy. She testified that it is only when there is no other vacancy at the B&B that guests stay in the rental unit.

The landlord testified that she does not herself respond to inquiries on booking.com made by prospective clients, but rather she hires someone to do this. The person responds to inquires using standard language approved by the landlord.

The landlord argued that she moved into the rental unit within a reasonable time after the tenant vacated, and that she has used the rental unit as her primary residence. As such, she argued that she has complied with the Act and an award equal to 12 month's rent is not appropriate.

Analysis

The basis for the tenant's claim lies at section 51(2) of the Act, which states:

> **Tenant's compensation: section 49 notice**
>
> 51(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), 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.

I find that the purpose stated on the Notice for ending the tenancy was "the rental unit will be occupied by the landlord or the landlord's close family member."

Based on the testimony of the parties, the testimony of PW, and the witness statements, I find that the landlord moved into the rental unit within three weeks of the effective date of the Notice and continues to spend most of her nights there. I find the amount of time it took for her to move into the rental unit after the effective date of the Notice to be reasonable.

I am not persuaded by the tenant's arguments that she did not move into the rental unit because she answered the door at the Main House on one occasion, or because her vision is impaired. I find the landlord's explanation as to why she answered the door to the Main House to be reasonable (the Main House is her place of work), and I accept the landlord's evidence that her vision impairment does not prevent her from walking to the rental unit or from climbing the stairs.

However, just because the landlord moved into the rental unit, it does not mean that she has used the rental unit for the purpose stated on the Notice.

Policy Guideline 2A considers the meaning of the word "occupy":

> Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see also: Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that <u>"occupy" means "to occupy for a residential purpose."</u> (See for example: *Schuld v Niu*, 2019 BCSC 949)
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> [emphasis added]

Based on the testimony of the landlord, and the documentary evidence submitted by the tenant, I find that even though the landlord moved into the rental unit, she has

continuously used the rental unit for a non-residential purpose since the tenant vacated the rental unit.

I find that the landlord has rented out the rental unit as part of the B&B business on eight separate occasions for a total of 16 nights since the end of the tenancy. Additionally, I find that she has offered to rent it out on at least two other occasions (when the tenant posed as a prospective renter). Finally, I find that, based on the landlord's own testimony, at all times following the end of the tenancy, the rental unit formed part of the B&B's "rental stock", and was available to be rented out on a short-term basis.

The fact that the landlord would rent rooms in the Main House or the Lower Suite in priority to the rental unit, or re-direct renters who rented the rental suite to other accommodations, if they were available, does not change the fact that the nature of the rental unit is that of "rental stock" for the B&B.

In *Schuld* (referenced in Policy Guideline 2A) the BC Supreme Court considered a judicial review of an arbitrator's decision in which a landlord ended a tenancy on the basis that the landlord would occupy the rental unit, then proceeded to leave it vacant with the intention to later demolish the rental unit. In that case, the court wrote:

> [17] In my view, the word "occupy" as used in s. 49(3) must be read in the context of the statute and, bearing in mind statutory objectives, it is clear to me that the specific purpose of these sections is to limit the circumstances in which a landlord may give a Notice to End Tenancy [citation omitted]. There are two separate circumstances. One scenario is where the landlord intends to occupy the rental unit as a residence for his own purposes; the other scenario is where the landlord intends to demolish the rental unit to construct something different. The arbitrator has chosen to expand the definition of the word "occupy" in s. 49(3) so that it encompasses and takes within it, therefore, ss. (6), which is the subsection relating to demolishing the rental unit. In my respectful view, that deprives ss. (6) of practically all meaning. The result would be that landlords could give notice under s. 49(3) even if s. 49(3) is not applicable, but s. 49(6) is applicable.
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> [18] The key difference, of course, is that a notice under s. 49(6) cannot be given until the landlord has all the necessary permits and

> approvals required by law and, of course, also intends to demolish the unit. Those circumstances that would underlie the ending of a tenancy under s. 49(6) were not in place even by the time the Residential Tenancy Branch hearing took place before the arbitrator, and, as far as I have been given to understand, on the hearing of this petition, still not taken place. So the petitioner's complaint that he could have remained in the premises for quite a bit longer than he did seems on the surface, at least, to be valid. However, it is not my place to express an opinion on the underlying merits of the issue before the arbitrator.
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> [emphasis added]

I accept that the circumstances in *Schuld* are distinguishable from those in this case, as in *Schuld* the landlord did not move into the rental unit, whereas in this case I have found that the landlord did. However, in this case, the landlord also used the rental unit for as part of her business' rental stock. I find that such use is a "non-residential purpose".

I make this finding despite the fact that she moved her possessions into the rental unit and despite the fact she sleeps in it. This does not does necessarily mean that the rental unit was occupied for residential purposes. I find that the predominate purpose of the rental unit was that of "rental stock" for the B&B, as when that purpose and the purpose of using the rental unit for the landlord to sleep in came into conflict (that is, when the rental unit was rented out, and there were no vacancies in other rooms for the renters), that the non-residential purpose prevailed, as can be seen by the landlord's evidence that she would vacate the rental unit and sleep in her trailer. If the landlord's evidence was that she only listed the rental unit on booking.com when she was not using it (by being on vacation, for example), I might have made a different finding.

If a landlord wants to end a tenancy to use a rental unit for a non-residential purpose, she must do so in accordance with section 46(6)(f), which states:

> (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:
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> […]
>
> (f) convert the rental unit to a non-residential use.

Ending a tenancy on this basis requires that a landlord obtain all necessary permits, or, if permits are not required, proof by way of confirmation from the municipality or

equivalent governing body, that no such permits are required (Policy Guideline 2B). Additionally, a tenant is entitled to four months' notice of the tenancy ending, as per section 49(2)(b) as opposed to the two months' notice the tenant received.

In the present case, as the landlord used the rental unit as part of the rental stock for her B&B, she is required to have issued a notice for conversion of the rental unit for non-residential use. She would then have had to give the tenant four months to vacate (as opposed to two) and obtained any necessary permits, or, if permits are not necessary for the expansion of the operation of the B&B, then confirmation from the appropriate regulatory agency confirming as much. She did not do these things.

As such, I find that *Schuld* remains applicable to this case, as in both scenarios the landlord used a form of notice to end tenancy which circumvented the permitting and amount of notice requirements of the Act.

Based on the foregoing, I find that the landlord did not occupy the rental unit for a residential purpose (as required by Policy Guideline 2A) after the tenant vacated. I find that while she did move into the rental unit, the predominant use of the rental unit has been as rental stock for the B&B, which is a non-residential use. The fact that it has only been rented out for 16 nights since the tenancy ended does not alter this fact. It has been *marketed* and *been available* for rent for the entirety of the time between the end of the tenancy and the date of the hearing (with the exception of the time the landlord spent cleaning it immediately after the tenant vacated).

As such, I find that the landlord failed to use the rental unit for the purposed stated on the Notice for a period of six months after the effective date of the Notice, or at all.

Accordingly, I order that the landlord pay the tenant an amount equal to 12 times the monthly rent ($12,000).

As the tenant has been successful in his application, I order that the landlord reimburse him his filing fee ($100).

Conclusion

Pursuant to sections 38, 62, and 72 of the Act, I order that the landlord pay the tenant $12,100.

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 6, 2019

Residential Tenancy Branch