Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNL, OLC, FFT

Introduction

In this dispute, the tenants sought the following:

1. to cancel a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") pursuant to section 49 of the *Residential Tenancy Act* (the "Act");
2. an order that the landlords comply with the Act, *Residential Tenancy Regulation* (the "Regulation"), or the tenancy agreement pursuant to section 62 of the Act; and,
3. recovery of the filing fee pursuant to section 72 of the Act.

The tenants applied for dispute resolution on October 1, 2019 and a dispute resolution hearing was held on December 11, 2019. The tenants, the landlords, legal counsel for the landlords, and a legal assistant-interpreter attended the hearing, and they were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses. No issues of service were raised by the parties.

I have reviewed evidence submitted that met the *Rules of Procedure,* under the Act, and to which I was referred but have only considered evidence relevant to the issues of this application.

It should be noted that section 55 of the Act requires that, when a tenant applies for dispute resolution seeking to cancel a notice to end tenancy, I must consider whether the landlord is entitled to an order of possession if the application is dismissed and the notice to end tenancy complies with the Act.

Issues

1. Are the tenants entitled to cancel the Notice?
2. If not, are the landlords entitled to an order of possession?
3. Are the tenants entitled to an order that the landlords comply with the Act, the Regulation, or the tenancy agreement?
4. Are the tenants entitled to recovery of the filing fee?

Background and Evidence

At the outset, I note that while landlords' counsel provided oral and written submissions in respect of the landlords' involvement in the events leading up to the dispute and the issuing of the Notice, the landlords themselves did not testify.

By way of brief background, the tenancy started on August 10, 2018 and continues to the present day. A written tenancy agreement, a copy of which was submitted into evidence, confirms that the monthly rent is $4,300.00 (due on the first of the month). The tenants paid a security deposit of $2,150.00; there is no pet damage deposit. The tenancy was a fixed term tenancy which was to end on July 31, 2019. As per the Act, it has now become a periodic, or month-to-month tenancy.

Landlords' counsel submitted that the landlords mistakenly believed that the tenancy would end, and automatically terminate on July 31, 2019 unless a new tenancy was entered into by the parties.

The tenants are working professionals and made it clear to the landlords before, and at the start of, the tenancy that they were seeking a long-term tenancy.

Between the start of the tenancy and the present day, the parties have had a rather difficult relationship, with the landlords attempting to raise the rent and have the tenants sign a new tenancy agreement. The parties have been to arbitration before. I will shortly delve into the difficulties of this relationship as it pertains to the present dispute.

On September 12, 2019, the landlords (or a representative of the landlords) attempted to serve the Notice on the tenants, but they were not home. The landlords posted the Notice on the door of the rental unit. The Notice, a copy of which was tendered into evidence, indicated that the landlords or a close family member of the landlords would be moving into the rental unit and that the tenancy would end on November 30, 2019.

Landlords' counsel submitted that there is full intention for the landlords to move into the rental unit, and that there is "zero question as to the landlords' bona fides."

Next, landlords' counsel provided some background history about the rental unit – a nice family home in a desirable neighbourhood – and how it originally belonged to the landlords' parents, who passed away, and how the home was bequeathed to the parents' three children (one of whom is the present landlord, along with his wife, the other landlord).

There were internal family discussions about which child would take full ownership of the rental unit, and it was decided that the landlord would buy out his siblings' interests in the property. During those family discussions, however, it was intimated to the tenants that the landlord's brother (one of the siblings who was originally in the parents' will) might be moving into the rental unit. This led to confusion, as the tenants did not fully understand the various sibling relationships.

In any event, landlords' counsel argued that the landlords currently reside in property next door to the rental unit property, and that they intend to put that house (the one in which they currently live) on the market. Once sold, they intend to move into the rental unit; this would benefit them in terms of not having to pay property gains taxes and other taxes related to the disposition of real property. The house in which the landlords live is also more marketable and sellable, whereas the rental unit home is more customized and is, according to counsel, likely harder to sell. Thus, it makes more sense for the landlords to move into the rental unit and sell the other house.

The tenant ("P.K.") testified that now that the landlords have hired themselves a lawyer, the lawyer puts landlords' entire story into a polished presentation that "sounds good" and is "all put together after-the-fact." However, he argued that the parties have been fighting over rent since 2018, and that the entire dispute has always been about money.

He pointed out that the landlords repeatedly tried to have the tenants sign another 2-year fixed-term agreement with a higher rent but questioned why the landlords only now (as in, September 2019) issued the Notice. The landlords have, according to the tenant, tried on five or six occasions (through attempted illegal rent increases) to "get us out."

The tenants submitted a copy of a text message dated June 11, 2019, in which one of the landlords writes, "We will take over the house next month. [. . .] We need to have the rent increase to $4,800.00 monthly."

Further discussions about the landlords' desire to raise the rent ensued; the tenant testified that the landlords had no intention of complying with the law, at least not until after the tenants agreed to a rent increase. He tendered the following text messages sent to him by both landlords, dated July 2, 2019:

> Landlord [A.L.]: As per [landlord K.L.] talked to me which is after starting the new agreement, we will follow it. Not this time. Thanks!
>
> Landlord [K.L.]: Hi, [tenant] , I think we both misunderstanding, we were saying that after new agreement, will follow BC laws.

On July 6, 2019, the landlords sent a letter to the tenants in which they landlords state "this is a formal reminder to you that the Tenancy between the Landlord and you as tenant for the Leased Premises as described above will terminate on July 31, 2019 according to the Leases dated Aug 5, 2018 between Landlord & yourself."

A little over a month later, the landlord ("K.L.") sent a text message on August 22, 2019 to the tenants in which the landlord indicates "I have friend interest to view my house , we will have a showing tomorrow 5pm I want pass the notive to you now."

The tenant questioned why there was no mention made of the estate issues until now. On the matter, he pointed out that, despite what the sibling relationship might be in terms of who was named in the deceased parents' will, the landlords said that their brother would be moving in. This occurred on August 27, 2019. Two weeks later the Notice was served. The landlords are "now changing [their story] again" in explaining – through the submissions of their counsel – that *they* intend to move into the rental unit.

It should be noted, and this was testified to by the tenant and referenced by landlords' counsel, that after the landlords tried to illegally (or "mistakenly," as characterized by counsel) impose a rent increase in July 2019, the tenants filed for dispute resolution on July 24. An arbitration hearing occurred on September 27, 2019, from which a decision resulted ordering that the rent would continue as per the tenancy agreement.

I suggested to counsel that the timing of the Notice and the impending hearing was rather peculiar, to which counsel explained that the timing was simply "coincidental and unfortunate." And, that the issuing of the Notice was simply the result of further family discussions about the disposition of the property and after proper legal advice had been provided. (Counsel remarked that the landlords' previous attempts to have the tenants

sign new fixed-term tenancy agreements were made by mistake after their previous lawyer possibly provided poor advice. I do not know, and did not hear, what the previous lawyer told the landlords.)

Analysis

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.

Issues 1 and 2: Are tenants entitled to cancel Notice? If no, are landlords entitled to an order of possession?

Where a tenant applies to dispute a notice to end a tenancy, the onus is on the landlord to prove, on a balance of probabilities, the ground on which the Notice was issued.

Section 49(3) of the Act allows a landlord to end a tenancy when

> 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.

This is the section under which the Notice was issued by the landlords to the tenants.

In this dispute, the landlords' counsel argued that the Notice was issued with every intention of the landlords moving into the rental unit, and that the Notice was therefore issued in good faith.

The tenants dispute this and drew my attention to the every-changing stories about who is or who is not going to move in, and raise the issue of the long-standing rent dispute as being the motivating factor behind the issuing of the Notice. In other words, the tenants call into question the good faith intention behind the landlords' issuing of the Notice.

In *Gichuru v. Palmar Properties Ltd.* (2011 BCSC 827) the court found that a claim of good faith requires honest intention with no ulterior motive. When the issue of an ulterior motive for an eviction notice is raised, the onus is on the landlord to establish they are acting in good faith (see *Baumann v. Aarti Investments Ltd.,* 2018 BCSC 636).

“Good faith” means a landlord is acting honestly, and they intend to do what they say they are going to do. It means they do not intend to defraud or deceive the tenant, they do not have an ulterior motive for ending the tenancy, and they are not trying to avoid obligations under the legislation or the tenancy agreement. In some cases, past conduct of a landlord is indicative of, or may call into serious question, whether a landlord is acting in good faith in a present case.

The onus is on the landlord to demonstrate that they plan to occupy the rental unit for at least 6 months and that they have no other ulterior motive.

When two parties to a dispute provide equally reasonable accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In this case, the onus was on the landlords to prove that they had no other ulterior motive when they issued the Notice.

While counsel provided well-articulated oral and written submissions as to his clients’ possible motivations or reasons, I heard no evidence from the landlords themselves. As counsel is no doubt aware, evidence does not include the submissions of parties or their counsel (see *Mwanri v. Mwanri,* 2015 ONCA 843, “Submissions by counsel are not evidence. They are simply submissions and nothing more.”).

I heard no explanation from the landlords’ themselves as to why their stories changed, no meaningful explanation as to why the Notice was issued just before a scheduled arbitration hearing, and no account of their previous comments about flouting the law.

When viewed in entirety, the landlords’ explanation lacks an air of reality. What is more likely, I find, is that the landlords have been unable to raise the rent to their desired amount and have resorted to using a notice to end tenancy to achieve their desired result.

In the alternative, and not to suggest any overt nefariousness on the landlords’ part, the landlords have acted in ignorance of the law (perhaps after receiving bad advice from their previous lawyer). But, ongoing decision-making based on an ignorance or misapplication of the law does not support what is necessary to issue a notice to end the tenancy in good faith. In other words, while I recognize that the shifting estate situation may point to the landlords’ eventual desire to move into the rental unit or to sell the property, I am not satisfied on a balance of probabilities that the landlords issued the

Notice in good faith. The overall conduct of the landlords dismantles any claim that their intention in issuing the Notice was done in good faith.

Given the above, I find that the landlords have not established that the Notice was issued in good faith and that they intent to occupy the rental unit in the manner described.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlords have not met the onus of proving the validity of the Notice.

As such, I hereby order that the Notice dated September 12, 2019 is cancelled and of no force or effect. The tenancy shall continue until it is ended in accordance with the Act; the landlords are not entitled to an order of possession.

Issue 3: Are tenants entitled to an order that landlords comply with Act, Regulation, or tenancy agreement?

Under section 62(3) of the Act, an arbitrator may "make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies."

Having found that the landlords issued the Notice for reasons that I hold not to have been in good faith, I order that the landlords must comply with the Act, the Regulation, and the tenancy agreement.

Issue 4: Are tenants entitled to recovery of filing fee?

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee.

As the tenants were successful, I grant their claim for reimbursement of the filing fee in the amount of $100.00. In full satisfaction of this award the tenants may make a one-time deduction in rent for January 2020 in the amount of $100.00.

Conclusion

I order that the Notice dated September 12, 2019 is hereby cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the Act.

I order that the landlords comply with the Act, the Regulation, and the tenancy agreement.

I grant the tenants recovery of the filing fee; they may deduct $100.00 from the rent for January 2020 in full satisfaction of this award.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: December 12, 2019

Residential Tenancy Branch