Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, FFT

Introduction

The tenant seeks compensation pursuant to section 51(2) of the *Residential Tenancy Act* ("Act"). In addition, they seek recovery of the filing fee under section 72 of the Act.

This matter was first heard on May 18, 2021 and adjourned to October 15, 2021 to continue the proceedings. Attending the October 15th hearing was the tenant, her legal advocate, the landlords (husband and wife), and their interpreter.

No service issues were raised at either hearing, the tenant and the landlords were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

Issue

Is the tenant entitled to compensation?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issue of this dispute, and to explain the decision, is reproduced below.

The tenancy began September 15, 2013 and ended August 5, 2019. Monthly rent for the last couple of months of the tenancy was $2,050.00. The tenant paid a security deposit which was returned to her. In evidence was a copy of the written tenancy agreement.

On July 1, 2019, the landlord served the tenant with a handwritten "notice" to end the tenancy. The tenant referred to this as an "illegal notice to end tenancy," because it was not the proper method for ending the tenancy. The landlord was made aware of this.

Shortly after, on July 3, the landlord served a proper Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"). A copy of this Notice is in evidence. The Notice, which was signed by the landlord on July 3, 2019, states that the tenancy was to end on September 1, 2019. (This, of course, was an error: the earliest possible end date would have had to be September 30, 2019. See section 49(2)(a) of the Act.)

Page two of the Notice states that the reason for the tenancy being ended is that "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)." The Notice indicates that it was served in person on July 4, 2019, though the parties appeared to agree that it was served on July 3.

The tenant's legal advocate presented evidence, much of it in fact being that of the landlord's evidence, that the landlord's son was supposed to take possession on August 4. However, the parties found the rental unit to be in a state of disrepair and decided to do some renovations. On September 19, the son gave his father the "go ahead" for renovations. The son, however, ended up changing his mind and decided not to move in at all. This was explained in the son's affidavit. The advocate argued that the very act of commencing renovations – as opposed to taking occupancy – ought to be sufficient to trigger a claim for compensation under section 51(2) of the Act.

Further, it was argued by the advocate that a reasonable period would be about fifteen days. Thus, by September 15, the task of completing renovations should have been completed. The advocate argued that there are no extenuating circumstances in this matter. Quite simply, the landlord and son made a choice not to occupy the rental unit or accomplish the reason for ending the tenancy as stated in the Notice. The landlord had more than six months from September 1 in which they could have accomplished the purpose for ending the tenancy. He argued that a reasonable period for taking occupancy would be "almost immediately."

COVID-19 was referenced as an additional factor in the landlord's arguments, the advocate noted. However, the tenant's advocate argued that the pandemic was and is not an extenuating circumstance. The Canadian border has never been closed to Canadian citizens, of which the landlord's son is one.

On a final note, almost as an aside, the legal advocate explained that an occupant who had resided downstairs in the residential property had been evicted at some point during the tenant's tenancy. The rental unit of that former tenant was then converted by the landlord into an Airbnb rental accomodation.

It is therefore possible (though the advocate recognized the evidence supporting this is circumstantial) that the landlord intended to do the same – that is, turn it into an Airbnb property – with the rental unit.

The landlord testified (through the interpreter) that in June 2019 the landlord's husband told the tenant that the landlord's son would be coming back to Canada and would need to live in the rental unit. They subsequently issued the incorrect, and then the correct, notice to end the tenancy. In short, the landlord explained that the family needed to use the space for living in. After receiving the Notice, the tenant informed the landlord that they would be moving out on August 4, 2019. Even before this occurred, the landlord took over the utility bills in July of 2019.

The landlord explained that she "was very, very nice to the tenant." In six years of the tenancy the landlord did not raise the rent at all. She only raised the rent by $50 in the last two months of the tenancy. And she returned the tenant's security deposit.

Reiterating her position, the landlord testified that the reason for wanting the rental unit back was for the son. The son is a dentist who had been practising under contract with a clinic in Washington state. That contract was not extended, so the son wanted to return to Canada and look for work here. The landlord added that on August 5 her husband returned to the rental unit and lived in the rental unit for five days while doing renovation work. The landlord's husband is, in his own words, "a good renovator," and he wanted to do as much as the renovations and repairs himself as possible.

The landlord's husband then testified (through the interpreter). He explained that he "moved in himself" into the rental unit and had a bed there and living necessities. He testified that he was "eating and having fun there." Moreover, this is contrary, the landlord's husband remarked, to the tenant's claim that they were not occupying the rental unit. He moved the lawn in the summer, collected leaves in the fall, and removed snow in the winter.

The husband added that the renovations were all done for the purpose of owner occupancy. He then testified that the renovations were done for his son, who is (or was) presumably coming home because of the dental clinic contract not being extended. The son is married with child, and he needs more space.

Photographs of the rental unit being worked on were submitted into evidence by the landlord.

Both parties provided testimony about damages (or lack thereof) to the rental unit caused by the tenant. The landlord testified that he needed to make repairs to the rental unit, even though the condition inspection report indicated that everything was marked as in a “satisfactory” condition at the end of the tenancy. The landlord also testified that they returned the tenant’s security deposit because the tenant had begged and pleaded with them to return it. The tenant denied she ever pleaded or begged for the deposit.

During the second hearing on October 15, 2021 the landlord provided additional testimony about the fact that he “did all the repair work” himself and that he was living in the rental unit over the winter. He engaged in snow removal, yard work, and so forth. He undertook the renovations “little by little” and during the six months after the tenancy ended, he “didn’t rent that place to anyone.” Moreover, he engaged in no commercial activities in relation to the rental unit and he did not hire anyone to do the repairs and renovations. As owner, “I did everything myself.”

Under cross examination, the tenant’s advocate asked the landlord several questions, a few of which are reproduced below (though slightly paraphrased in some cases):

> Q: The purpose of the Notice was for the son to move in?
> A: Yes.
> Q: Still no one who lives there?
> A: Yes.
> Q: You were working on the rental unit everyday?
> A: Basically, yes.

And the advocate asked the landlord how long it was from the landlord’s house to the rental unit. The landlord replied that it was about a fifteen-minute drive.

The tenant provided additional testimony during the second hearing, primarily in relation to the condition of the rental unit at the end of the tenancy, details surrounding the return of the security deposit, and reiterating that the landlord “never had any complaints about damage” to the rental unit at the end of the tenancy.

In final submissions the advocate argued that it makes no logical sense why the condition inspection report would record the condition as “satisfactory” when the landlord in his own affidavit then provided an extensive list of damages. Moreover, even if repairs were needed (which the advocate argues they were not in order for the rental unit to be habitable), such repairs would take no longer than two weeks.

The rental unit could have been occupied and it did not need to be empty. “The point is,” the advocate submitted, “it’s now been two years and the son is still not in the rental unit.”

The advocate referred to, and cited, *Residential Tenancy Policy Guideline 50* (“Compensation for Ending a Tenancy”) in which the guideline states

> [. . .] if a landlord ends a tenancy on the 31st of the month because the landlord’s close family member intends to move in, a reasonable period to start using the rental unit may be about 15 days.

He submitted that “we’re clearly over a reasonable time for anyone to live there.” Further, any reasonable period of time was well over long before the pandemic started; indeed, the rental unit sat empty for seven months before the pandemic. Last, the advocate reiterated that it is the tenant’s position that COVID is not an extenuating circumstance.

In respect of the landlord’s claim that he was staying, or living, in the rental unit, it is the tenant’s position that the landlord was not staying there. Why would anyone stay in an unfurnished suite? the advocate submitted. There were no pictures on the wall, there was no furniture or furnishings, and, “it doesn’t make sense why [the landlord] would live there when his house is ten to fifteen minutes [drive] away.”

The advocate referred to two notarized letters from neighbours who attested to the house being unoccupied with no furniture or paintings on the walls. To this day, the house apparently remains unoccupied.

The son’s and landlord’s wife’s affidavits refer to the son giving his father the “go ahead” on renovations to the rental unit, and in which the wife mentions the son’s desire to have a second bathroom installed. It was at this point that the advocate argued that the renovations were clearly a choice of the landlord and not in any way necessary for a tenant to occupy the rental unit.

In summary, the advocate argued that (1) the landlord did not live there in the residential occupancy sense, and (2) even if the landlord did live in the rental unit for six months, he did not fulfill the purpose of the Notice being issued (namely, that the son was to occupy the rental unit). It is for these reasons, he submitted, that the tenant is entitled to compensation under section 51(2) of the Act.

In their final submissions the landlord clarified that the Notice indicated that *a* family member would occupy the rental unit. The Notice did not specify *which* family member would occupy the rental unit. The landlord reiterated that he lived there and that the photograph “G” is evidence that the landlord was living there.

In respect of the two neighbour letters, the landlord questioned as to how they would truly know if someone was living there, and to that end, did the neighbours even know what the landlord looked like?

The fact is, the landlord reiterated, the landlord was living in the rental unit over the winter. And he testified that “I am the owner, and I am one of the family.” He is 64 years old and he took as long as necessary to make the repairs and renovations. There is no law, the landlord added, that should or ought to say how long one must take to complete a renovation. As the owner, he should be allowed to take “as long as I feel necessary.” In conclusion, as owner, he was living there in the rental unit that the son was supposed to have moved into.

In a brief rebuttal, the tenant’s advocate argued that, although the Notice indicated a blanket “all kind of family member” reason for ending the tenancy, the actual (or real) purpose of the Notice was to end the tenancy so that the landlord’s son could move in. Last, the advocate pointed out that the landlord’s own affidavit has the landlord saying that he worked on the rental unit when he could, and that he only slept there at night when renovating, and that this is not “occupancy” as contemplated by the Act.

In his brief rebuttal, the landlord remarked that some people have different requirements for living. While some may require lots of furniture and furnishings, others do not, he added.

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.

In this dispute, the tenant seeks compensation pursuant to section 51(2) of the Act. This section of the Act, as it was in force at the time the Notice was issued and at the time the tenant’s application for dispute resolution was made, reads as follows:

(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.

The notice to which this section refers is a notice to end tenancy made under section 49 of the Act. In this case, the Notice was issued under section 49(3) of the Act which states that "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."

As a starting point, it should be noted that the correct, legal effective date of the Notice ought to have been September 30, 2019. However, despite this error, the parties all appeared to operate under the incorrect assumption that the tenancy ended, or would end, on September 1, 2019. As such, I will make as a finding of fact that the "effective date of the notice" (as per subsections 51(2) and (3) of the Act) was September 1, 2019. That is the date from which any reasonable period commenced.

Turning first to the stated reason for the Notice being issued, page two of the Notice is clear: "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)." This reflected a valid reason for ending a tenancy under section 49(3) of the Act.

It is worth noting that the version of the *Two Month Notice to End Tenancy for Landlord's Use of Property* form used at the time it was served does not include a breakdown of who, specifically, in the family will occupy the rental unit. The version of the notice used in this dispute (#RTB-32 2018/06) has since been superseded by form #RTB-32 (2021/03/22) which requires a landlord to now indicate whether it is the landlord, their child, or their parents, who will occupy the rental unit.

However, the reason indicated on the Notice covers all range of possibilities. In other words, while the landlord may have intended for the son to eventually occupy the rental unit, for whatever reason the landlord instead chose to “occupy” the rental unit. The Act, and the then-approved form used to end the tenancy, both permitted the landlord to occupy the rental unit, regardless of whether the son ever moved in.

Of course, I place the word occupy in quotes, because I am not persuaded that the landlord occupied the rental unit in a manner that is consistent with the intention of the Act. Given that the Act itself does not define what is meant by “occupy” we must turn to the policy guidelines for assistance in interpreting the word.

Residential Tenancy Policy Guideline 2A: Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member states that (on pages 2 and 3):

> Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that “occupy” means “to occupy for a residential purpose.” (See for example: *Schuld v. Niu,* 2019 BCSC 949) The result is that a landlord can end a tenancy sections 49(3), (4) or (5) if they or their close family member, or a purchaser or their close family member, intend in good faith to use the rental unit as living accommodation or as part of their living space. [. . .]
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> Other definitions of “occupy” such as “to hold and keep for use” (for example, to hold in vacant possession) are inconsistent with the intent of section 49, and in the context of section 51(2) which – except in extenuating circumstances – requires a landlord who has ended a tenancy to occupy a rental unit to use it for that purpose (see Section E). Since vacant possession is the absence of any use at all, the landlord would fail to meet this obligation. The result is that section 49 does not allow a landlord to end a tenancy to occupy the rental unit and then leave it vacant and unused. [. . .]
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> The landlord, close family member or purchaser intending to live in the rental unit must live there for a duration of at least 6 months to meet the requirement under section 51(2).

The landlord argued that he lived in the rental unit over a period of six months in order to carry out repairs and renovations. He indicated that he slept at the rental unit. Moreover, he testified that he was living there throughout the winter and undertook such things as snow removal and so forth. As for the renovations, he undertook them little by little every day.

While I accept that the landlord was doing repairs and renovations as his free time permitted, there is no evidence before me to find that he in fact “lived” in the rental unit as a resident or as a tenant would.

Setting aside for a moment the argument that he did not require a furnished suite in which to live (“some people have different requirements for living”), that the landlord’s primary residence was but a ten-minute drive from the rental unit raises in my mind serious doubts as to the landlord’s claim that he in fact resided in the rental unit.

Certainly, I accept as a fact that the landlord undoubtedly dropped by to work on the rental unit, cut grass, and shovel snow. Yet, the landlord’s frequent or occasional attendance at the rental unit does not, I find, fulfil the purpose of occupancy as contemplated by the Act. Even the occasional sleeping overnight at the rental unit does not create a residential occupancy (see landlord’s affidavit, “On many nights, I would sleep in the suite in my son’s room located the back of the house [. . .].”)

With respect to the photographs submitted by the landlord showing the interior of the rental unit, the photographs do not, by themselves, prove that the landlord was in fact occupying the rental unit. Rather, what the photographs strongly suggest is that the landlord used the bathroom and kitchen while undertaking the occasional repair or renovation.

It is not lost on me that some individuals lead a rather ascetic and minimalist lifestyle. Some landlords and tenants perhaps do not require much in the way of furniture. However, I am not persuaded that the landlord somehow lived in the rental unit for a period of six months without a single piece of furniture. Not one chair can be seen in the photographs. No evidence of the landlord having actually lived in or occupied the rental unit can be seen.

For these reasons, I am not persuaded that the landlord lived in or occupied – as intended and contemplated by the legislation – the rental unit for a period of six months. And it goes without further argument that the landlords’ son certainly did not occupy the rental unit.

Next, while the landlord did not explicitly raise the defence of extenuating circumstances (the tenant’s advocate mentioned this on several occasions), as per the Supreme Court of British Columbia’s decision in *Furtado v. Maasanen,* 2020 BCSC 1340:

> [. . .] if evidence of extenuating circumstances is presented, the adjudicator must consider it to determine whether those circumstances prevented the landlord from accomplishing, within a reasonable period after the effective date of the Notice, the stated purpose for ending the tenancy.

Once a *prima facia* case is proven, as it was here, I must then turn to the issue of whether the landlord is excused from having to compensate the tenant if extenuating circumstances prevented the landlord from fulfilling the reason why they ended the tenancy. Section 51(3) of the Act (as it was in force at the time that the Notice was served and at the time the tenant's application was made) states that:

> (3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
>
> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
>
> (c) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

In this case, there is, quite frankly, no evidence before me that the landlord (or his son) was prevented from occupying the rental unit due to extenuating circumstances. That the rental unit was so badly damaged that "There was no way my son, let alone another tenant, could occupy this unit without substantial renovations." (see landlord's affidavit, page 2) is, I find, not an extenuating circumstance. While there was damage to the rental unit, the damage was not, I find, so severe that the landlord or his son could not have occupied the rental unit.

As for any extenuating circumstances involving the pandemic, it should be noted that the Notice was served on July 3, 2019. The corrected effective date of the Notice was September 30, 2019. The provincial government did not declare a state of emergency until March 18, 2020, a full five-and-a-half months after the corrected effective date of the end of tenancy. There is nothing in evidence before me to make a finding that the son was in any way prevented from occupying the rental unit due to the pandemic.

Taking into careful 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 tenant has met the onus of proving her claim for $24,600.00 in compensation pursuant to section 51(2) of the Act.

Further, I find on a balance of probabilities that the landlord has not met the onus of proving that there were extenuating circumstances, under section 51(3) of the Act, that would excuse the landlord from paying the tenant this compensation.

Last, in respect of the tenant's claim for recovery of the filing fee, section 72 of the Act permits me to order compensation for the cost of the filing fee to a successful applicant. As the tenant succeeded in their application, I grant her $100.00 in compensation to cover the cost of the filing fee. Therefore, the tenant is entitled to compensation in the total amount of $24,700.00.

Conclusion

The tenant's application is hereby granted.

The tenant is granted a monetary order in the amount of $24,700.00. A copy of this monetary order is issued, in conjunction with this decision, to the tenant. The tenant must serve a copy of the monetary order on the landlord. If the landlord fails to pay the tenant the amount owed then the tenant may file and enforce the order in the Provincial Court of British Columbia.

This decision is made on delegated authority pursuant to section 9.1(1) of the Act.

Dated: October 18, 2021

Residential Tenancy Branch