Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Tenant: CNL
Landlord: OPL, MNDCL-S

Introduction

This hearing was reconvened from a hearing on October 17, 2022 regarding the parties' applications under the *Residential Tenancy Act* (the "Act").

The Tenant had applied to dispute a Two Month Notice to End Tenancy for Landlord's Use dated June 30, 2022 (the "Two Month Notice") pursuant to section 49.

The Landlord had applied for:

- an Order of Possession under the Two Month Notice pursuant to sections 55;
- compensation in the amount of $450.00 for monetary loss or other money owed pursuant to section 67; and
- to retain the security and/or pet damage deposit pursuant to section 72.

The original hearing resulted in an interim decision dated October 17, 2022 (the "Interim Decision"). This decision should be read together with the Interim Decision.

The Landlord, the Landlord's agents MF and JF, the Tenant, and the Tenant's advocate PL attended this reconvened hearing. They were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Preliminary Matter – Service of Evidence

The parties acknowledged receipt of each other's evidence as required in the Interim Decision. I find the Landlord and the Tenant were sufficiently served with each other's evidence pursuant to section 71(2) of the Act.

Issues to be Decided

1. Is the Tenant entitled to cancel the Two Month Notice?
2. Is the Landlord entitled to an Order of Possession?
3. Is the Landlord entitled to compensation of $450.00 and to retain the security deposit?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the parties' applications and my findings are set out below.

This tenancy commenced in April 2015 and is month-to-month. Rent is currently $800.00 due on the first day of each month. The Tenant paid a security deposit of $450.00. The Landlord submitted a 1-page rental agreement into evidence which shows that rent was initially $900.00 per month.

The rental unit is a two-bedroom suite part of a two-unit home. The Landlord resides in the other unit, which is a one-bedroom suite.

Previously, the parties attended a hearing on December 2, 2021 to dispute a Two Month Notice to End Tenancy for Landlord's Use dated July 24, 2021 (the "First Notice"). This hearing resulted in an Order of Possession that was subsequently set aside by the Supreme Court of British Columbia on judicial review. The Supreme Court remitted the matter back to the Residential Tenancy Branch for a new hearing on June 21, 2022 (file number referenced on the cover page of this decision).

The new hearing resulted in a decision dated June 22, 2022 (the "Decision"), in which the First Notice was cancelled. The arbitrator found there was "insufficient evidence that [the Landlord] or a spouse intended to occupy the rental unit as living accommodation" at the time that the First Notice was issued.

On June 30, 2022, the Landlord issued another two month notice to end tenancy for landlord's use to the Tenant. This notice is the Two Month Notice that is currently in dispute.

Copies of the Two Month Notice submitted into evidence show that it is signed by the Landlord and has an effective date of September 1, 2022. It states that the rental unit will be occupied by the Landlord or the Landlord's spouse. The Tenant's application indicates that she received the Two Month Notice in person on June 30, 2022.

During this hearing, MF explained the Landlord intends to end the tenancy so that the Landlord can live in the entire home as a single-family dwelling. MF stated that there is currently a partition separating the rental unit from the Landlord's suite.

MF testified that there has been a significant amount of "bullying and harassment" from the Tenant. MF testified the Tenant is up regularly at all hours of the night, making noise, and using the sliding door to let her pets in and out. MF stated the Landlord had asked the Tenant not to use this sliding door due to the loud noise. MF testified the Tenant then retaliated by telling her advocate that the door was broken.

MF stated that the Tenant was not supposed to have any pets, but currently has four cats. MF testified that the Tenant leaves food outside which attracts wildlife.

MF stated that the Tenant does not take care of the rental unit. MF testified that there is clothing piled everywhere, and the floor cannot be seen due to being covered in paper and cardboard that the cats play with.

MF argued that the Tenant uses "intimidation tactics" by having her partner tower over the Landlord and having a "tall man" accompany the Tenant's sister to deliver rent. MF testified the Tenant's partner also kicked in a dog fence built by the Landlord. MF referred to a police file number.

MF testified that there was a disagreement about garbage can use and the Landlord was concerned about the Tenant hoarding garbage in the rental unit.

MF testified that the Tenant regularly moved the Landlord's outdoor property, including a firepit, without the Landlord's permission. MF testified that the Tenant leaves an uninsured vehicle on the property.

The Landlord testified that the monetary claim on his application is "not an issue at this point". The Landlord emphasized that it is about his well-being, and the stress that this tenancy is causing him. The Landlord explained he is in his seventies, and that there is no place to accommodate his children and grandchildren for visits.

The Landlord confirmed that he did not issue a one month notice to end tenancy for cause to the Tenant. The Landlord acknowledged that he had a realtor inspect the rental unit for him on September 15, 2022, on his former lawyer's advice. The Landlord denied that he intends to sell the property at this time. The Landlord denied that the September 15, 2022 inspection was for a potential sale of the property.

The Landlord acknowledged that his former lawyer issued a four month notice to end tenancy for demolition dated September 30, 2022 (the "Four Month Notice"). MF explained that the proposed work would be as simple as removing the lock in the door and removing a piece of plywood that is part of the insulation, which does not require any permit. MF testified that if the partition is removed, the rental unit is "gone" and the property is converted back into a single dwelling. The Landlord testified he tried to withdraw the Four Month Notice and had let his former counsel go.

In addition, the Landlord submitted documents in support of his application as follows:

- Written statement
- Statement of MF in an email dated September 6, 2022
- Record of complaints received from the Tenant
- Statement of a former neighbour, BG, in an email dated September 5, 2022
- Landlord's statement in an email dated August 17, 2022
- Rental ad for one-bedroom suite
- Warning letter to Tenant regarding removal of cats

In response, the Tenant's advocate PL argued that the Landlord issued the Two Month Notice days after the First Notice was cancelled, so the issue is *res judicata*.

PL argued that the Landlord has ulterior motives for ending the tenancy, which include renovating and selling the property, and that the Landlord doesn't like the Tenant and wants to evict for cause.

PL noted references in the Decision about the Landlord's intention to renovate and sell the rental property. PL referred to the affidavit of another advocate, AN, which affirmed that the Landlord's realtor, DB, had talked about putting the listing back on the market. PL explained that this same realtor had put up the "for sale" sign on the property in December 2021 and performed the inspection on September 15, 2022.

PL referred to an email dated September 30, 2022 from the Landlord's former counsel which suggests that the Landlord is "contemplating putting the residence up for sale".

PL argued that the Landlord's true intention is to renovate and sell the rental property. PL pointed out that the testimonies advanced on behalf of the Landlord have been focused on cause for ending the tenancy more than anything else.

The Tenant submitted numerous documents and evidence including written submissions and documents from the parties' previous proceedings.

In reply, MF stated he thought the Tenant would go first and the Landlord was supposed to defend the claims. MF argued that the Landlord acted in "good faith", and gave examples of the Landlord agreeing to reduce rent when the Tenant didn't pay rent on time, not charging the Tenant for utilities, and not increasing the rent. MF testified that the listing to sell the rental property had been removed prior to the previous hearings. MF explained they were unable to take down the "for sale" sign earlier because of flooding and ice over the carport area. MF disagreed that the Landlord's realtor was referring to the Tenant giving the Landlord grief. MF testified that the other "tenant" who was evicted was a squatter and didn't pay any rent. MF testified that it took fully armed police to remove that person from the home.

Analysis

1. Is the Tenant entitled to cancel the Two Month Notice?

Pursuant to section 49(3) of the Act, a landlord is permitted to end a tenancy if the landlord or a close family member of the landlord intends, in good faith, to occupy the rental unit.

Section 49(7) of the Act requires the notice given by the landlord under section 49(3) to comply with section 52, which states:

> **Form and content of notice to end tenancy**
> 52 In order to be effective, a notice to end a tenancy must be in writing and must
> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,

> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
> (d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
> (e) when given by a landlord, be in the approved form.

I have reviewed a copy of the Two Month Notice and find that it complies with the requirements set out in section 52.

Section 49(8)(a) of the Act permits a tenant to dispute a two month notice to end tenancy for landlord's use with 15 days of receiving such notice. In this case, I find the Tenant received the Two Month Notice on June 30, 2022, meaning the Tenant had until July 15, 2022 to made an application for dispute resolution. Records of the Residential Tenancy Branch indicate the Tenant submitted her application on July 15, 2022. I find the Tenant made her application within the time limit prescribed by section 49(8)(a) of the Act.

When a tenant applies to dispute a notice to end tenancy, Rule 6.6 of the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") places the onus on the landlord to prove, on a balance of probabilities, the reasons set out in the notice.

Rule 7.18 of the Rules of Procedure further states:

> **7.18 Order of presentation**
> The applicant will present their case and evidence first unless the arbitrator decides otherwise, or <u>when the respondent bears the onus of proof</u>.
>
> <u>One instance when the respondent bears the onus of proof is where a tenant applies to cancel a Notice to End Tenancy. In such a case, the hearing will begin with the landlord presenting first</u> unless the arbitrator decides otherwise.
>
> (emphasis added)

In this case, the Tenant has applied to cancel the Two Month Notice and the Landlord bears the onus of proof. Therefore, I directed the Landlord to present first during the hearing.

Before considering the Two Month Notice on its merits, I note the Tenant raised the argument of *res judicata* ("something already decided"). I will first consider whether this doctrine applies such that I should decline jurisdiction with respect to this dispute.

As explained by the Supreme Court of British Columbia in *Q-14 Holdings Ltd. v. Cowern,* 2021 BCSC 2637 at para. 19, "*Res judicata* is predicated on the principle that a dispute is not subject to re-litigation once decided with finality".

The Supreme Court of Canada summarized the purpose of *res judicata* in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*] at para. 18 as follows:

> [18] The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

In *Khan v. Shore*, 2015 BCSC 830 [*Khan*], the Supreme Court of British Columbia stated:

> [35] It is clear that arbitrators may consider and apply the principles of *res judicata*. Section 62(2) of the *Residential Tenancy Act* authorizes the director to make any finding of fact or law that is necessary or incidental to making a decision or order. In *Jonke v. Kessler*, [1991] BCJ No 250 (SC), it was held that an arbitrator had no jurisdiction to hear a matter that had already been decided by another arbitrator.

The Court in *Khan* explained at paragraph 30 that "issue estoppel" is a type of *res judicata* which "prevents a litigant from raising an issue that has already been decided in a previous hearing".

Issue estoppel requires three things: (1) the same question has been decided; (2) the prior judicial decision was final; and (3) the parties to the prior judicial decision or their

privies are the same persons as the parties to the current proceedings or their privies (*Khan* at para 32).

The arbitrator had stated in the Decision as follows:

> The undisputed submission of the advocate was that the landlord testified at the original hearing he had been trying to sell the home since May 2020.
>
> It is not necessary to consider the good faith of the landlord as there was no intent to occupy the rental unit at the time the Notice was issued.
>
> While the landlord said that his circumstances changed sometime after issuing the 2 Month Notice as he moved into the other unit, that is not relevant as that occurred many months after the 2 Month Notice was issued.
>
> As I have found that the landlord submitted insufficient evidence that he or a spouse intended to occupy the rental unit as a living accommodation when the Notice was issued, I ORDER that the 2 Month Notice dated July 24, 2021, for an effective move-out date of September 30, 2021, is cancelled, and it is of no force or effect. The tenancy will continue until it is ended in accordance with the Act.

I find the Two Month Notice states the same reason for ending the tenancy as the First Notice, which is that the Landlord or a spouse of the Landlord intends to occupy the rental unit. I further find the Two Month Notice was issued soon after the parties received the Decision cancelling the First Notice. However, I find the Two Month Notice and the First Notice were issued nearly one year apart. In my view, it is possible that the Landlord's circumstances may have changed during this time. According to the Decision, the Landlord did state that his circumstances had changed since issuing the First Notice. Therefore, I find that while the parties are the same in both proceedings and that the Decision was judicial and final, the Landlord is not re-litigating the exact same issue in this proceeding such that issue estoppel would apply in the circumstances.

I now turn to the merits of the parties' dispute regarding the Two Month Notice.

Residential Tenancy Policy Guideline 2A. Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member ("Policy Guideline 2A") states that to "occupy" under section 49 of the Act means "to occupy for a residential purpose". This

means the landlord or their close family member must intend in good faith to “use the rental unit as living accommodation or as part of their living space".

According to Policy Guideline 2A, 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 dishonest motive.

Regarding the requirement of good faith, Policy Guideline 2A states:

> In *Gichuru v Palmar Properties Ltd.*, 2011 BCSC 827 the BC Supreme Court found that good faith requires an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy. When the issue of a dishonest motive or purpose for ending the tenancy is raised, the onus is on the landlord to establish they are acting in good faith: *Aarti Investments Ltd. v. Baumann, 2019 BCCA 165*.
>
> 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 purpose for ending the tenancy, and they are not trying to avoid obligations under the RTA or the tenancy agreement. This includes an obligation to maintain the rental unit in a state of decoration and repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant (section 32(1)).
>
> (emphasis added)

In this case, I find the Landlord has not met the burden of establishing good faith with no dishonest or ulterior motive for ending the tenancy.

I emphasize that as held by the Supreme Court of British Columbia in *Gichuru*, good faith requires “an honest intention with no dishonest motive, regardless of whether the dishonest motive was the primary reason for ending the tenancy”.

Based on the evidence before me, I am unable to conclude that the Landlord intends to occupy the rental unit as a residence solely for valid reasons unrelated to the Tenant. I agree with PL’s submission that MF and the Landlord’s testimonies show an ulterior purpose for ending the tenancy, which is essentially that the parties do not get along with each other and the Landlord wants the Tenant to leave due to a series of alleged misconduct on the part of the Tenant. I note the Landlord had denied that he wishes to

sell the property under cross-examination by PL. I find on a balance of probabilities that the Landlord does not intend to sell the property (without occupying it for at least 6 months). However, I do not find the Landlord's stated reason for wishing to reclaim the rental unit as part of his living space—that is, for his children and grandchildren to be able to visit him—to be particularly compelling given the amount of time and effort focused on describing the Landlord's complaints against the Tenant.

I accept the Landlord's evidence that the parties' acrimonious relationship is causing him significant stress. Nevertheless, I find the Landlord has not issued the correct notice to end tenancy that would address the root of his concerns.

Based on the foregoing, I conclude the Landlord has not established "good faith" in issuing the Two Month Notice within the legal meaning of that term as described above.

Accordingly, I order that the Two Month Notice be cancelled and of no force or effect.

2. Is the Landlord entitled to an Order of Possession?

Section 55(1) of the Act states:

> **Order of possession for the landlord**
> 55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
>
> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

The Tenant has been successful in cancelling the Two Month Notice. As such, I conclude the Landlord is not entitled to an Order of Possession under section 55(1) of the Act.

3. Is the Landlord entitled to compensation of $450.00 and to retain the security deposit?

The Landlord had indicated on his application that he is seeking compensation for damage to the rental unit as follows:

TENANT HAS 5 UNAUTHORIZED CATS AND PREPARATION WILL BE REQUIRED TO ELIMINATE ODOR

I find the Landlord did not pursue this claim in earnest during the hearing. I find that in any event, this issue is unrelated to the party's dispute regarding the Two Month Notice.

Rule 2.3 of the Rules of Procedure states:

> **2.3 Related issues**
> Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Pursuant to Rule 2.3, I dismiss the Landlord's claim under this part with leave to re-apply.

Conclusion

The Tenant's application is granted. The Two Month Notice is cancelled and of no force or effect. This tenancy shall continue until ended in accordance with the Act, the regulation, and the parties' tenancy agreement.

The Landlord's claim for monetary compensation and to keep the security deposit is severed under the Rules of Procedure and dismissed with leave to re-apply. The Landlord's claim for an Order of Possession under the Two Month Notice is dismissed without leave to re-apply.

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 23, 2022

Residential Tenancy Branch