Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, MNDCT, OLC, FFT

Introduction

This hearing dealt with two Applications for Dispute Resolution (the Applications) and a Tenant Request to Amend a Dispute Resolution Application (Amendment) that were filed by the Tenant on August 17, 2022, October 7, 2022, and September 15, 2022, respectively, under the *Residential Tenancy Act* (the Act), seeking:

- Cancellation of a Two Month Notice to End Tenancy for Landlord's Use of Property (Two Month Notice);
- Compensation for monetary loss or other money owed;
- An order for the Landlord to comply with the Act, regulations, or tenancy agreement; and
- Recovery of the filing fees.

The hearing was convened by telephone conference call at 11:00 A.M. (Pacific Time) on January 13, 2023, and was attended by the Tenant, the Tenant's father G.B., the Tenant's partner C.K., the Landlords, and the Landlords' adult child S.M. All testimony provided was affirmed. As the Landlords acknowledged service of the Notice of Dispute Resolution Proceeding (NODRP), and stated that there are no concerns regarding the service date or method, the hearing proceeded as scheduled. As the parties acknowledged receipt of each other's documentary evidence, and raised no concerns with regards to service dates or methods, I accepted the documentary evidence before me for consideration. The parties were provided the opportunity to present their evidence orally and in written and documentary form, to call witnesses, and to make submissions at the hearing.

The parties were advised that pursuant to rule 6.10 of the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being

muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over me and one another and to hold their questions and responses until it was their opportunity to speak. The parties were also advised that pursuant to rule 6.11 of the Rules of Procedure, recordings of the proceedings are prohibited, except as allowable under rule 6.12, and confirmed that they were not recording the proceedings.

Although I have reviewed all evidence and testimony before me that was accepted for consideration as set out above, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses confirmed in the hearing.

Preliminary Matters

Preliminary Matter #1

In their Applications and Amendment, the Tenant sought remedies under multiple unrelated sections of the Act. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

As the Tenant applied to cancel a Two Month Notice, I find that the priority claim relates to whether the tenancy will continue or end. As the other claims are not sufficiently related to the end or continuation of the tenancy under section 49 of the Act, I exercise my discretion to dismiss the following claims by the Tenant with leave to reapply:

- Compensation for monetary loss or other money owed; and
- An order for the Landlord to comply with the Act, regulations, or tenancy agreement.

As a result, the hearing proceeded based only in relation to cancellation or enforcement of the Two Month Notice and recovery of the filing fee(s).

Preliminary Matter #2

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority

delegated to me by the Director of the Residential Tenancy Branch (Branch) under Section 9.1(1) of the Act. However, when explaining to the parties that settlement was an option under section 63 of the Act, I also explained both section 49 and 51 of the Act to the parties so that they could make an informed choice about whether they wished to engage in settlement discussions regarding enforcement of the Two Month Notice. The Landlord D.M. subsequently became fixated on their concern that despite S.M.'s current intentions and best efforts, S.M. will either not be able to occupy the rental unit within a reasonable period, or that they will not be able to stay for a duration of at least 6 months, due to their disability.

The Landlord D.M. repeatedly attempted to have me advise them whether a change in S.M.'s health/disability would constitute extenuating circumstances under section 51(3) of the Act if S.M. either never moved-into the rental unit and/or failed to reside there for six months after moving in. I advised them that I cannot decide in advance whether a hypothetical future situation does or does not qualify as an extenuating circumstance under section 52(3) of the Act. I advised the Landlords that they have been forewarned of the requirements of section 51(2) and 51(3) of the Act and that in the event that they receive an Order of Possession and S.M. ultimately either does not move into the rental unit within a reasonable period, or does not occupy the rental unit for at least 6 months beginning within a reasonable period, the Tenant will be entitled to file a claim under section 51(2) of the Act. I advised the Landlords that at that time, it would be up to them to satisfy an arbitrator that either the stated grounds for ending the tenancy set out in the Two Month Notice had been accomplished within and for the required periods of time, or that extenuating circumstances prevented compliance.

I also advised the Landlords that an inability to comply with the stated grounds for ending the tenancy set out in the Two Month Notice due to S.M.'s disability, may or may not constitute extenuating circumstances, as the Landlords openly acknowledged during the hearing that it is not only possible but perhaps even likely, that S.M. will not move into the rental unit or reside there for at least six months, and as a result, S.M.'s inability to accomplish the stated purpose for ending the tenancy may be deemed to have been reasonably foreseeable by the Landlords.

Issue(s) to be Decided

Is the Tenant entitled to cancellation of the Two Month Notice?

If not, are the Landlords entitled to an Order of Possession?

Is the Tenant entitled to recovery of the filing fee(s)?

Background and Evidence

The parties agreed that a tenancy agreement under the Act exists between them, and that the tenancy is currently periodic (month-to-month) in nature. They also agreed that the Two Month Notice in the documentary evidence before me was sent to the Tenant by registered mail. In the Application dated October 7, 2022, the Tenant stated that the Two Month Notice was received on September 29, 2022. The Landlords stated that they sent this Two Month Notice to the Tenant by registered mail on September 20, 2022, and provided me with the registered mail tracking number, which I have recorded on the cover page of this decision. While another Two Month Notice for the same purpose was also in the documentary evidence before me, which was signed and dated April 20, 2022, the parties agreed that this notice was previously cancelled by me in a decision rendered on September 14, 2022, as I was not satisfied that it complied with the form and content requirements set out under section 52 of the Act.

The Landlords stated that the Two Month Notice now before me was served for the same reason as the first one. The Two Month Notice in the documentary evidence which is the subject of this dispute is on a 2021 version of the form, is signed and dated September 19, 2022, has an effective date of November 30, 2022, and states that the tenancy is being ended because the rental unit will be occupied by the Landlords' child. Although only the first two pages of the Two Month Notice were submitted, the Tenant acknowledged receipt of all four pages.

The Landlords stated that the Two Month Notice was issued because their adult child S.M., who currently resides with them, wishes to go back to post-secondary school and lead a more independent life. The Landlords stated that they and S.M. currently live in another community, which is many hours away from the post-secondary school S.M. wishes to attend, and that they want to support S.M. in their goals as a person with disabilities in returning to school and leading a more independent life. They stated that S.M. has applied to the post-secondary school and has previously been accepted into

their program of choice, but has been unable to attend or complete the program to-date, as the Tenant is still residing in the rental unit and therefore S.M. has nowhere to live while attending the program. The Landlords stated that S.M. previously had to leave post-secondary school because of their disability, but has now selected a program they believe to be a better fit for their skills and abilities. The Landlords stated that they believe the rental unit offers S.M. the best opportunity for success, as S.M. has poor social skills, anxiety, and paranoia, which make it difficult for them to live with unfamiliar people, such as in a dorm, and/or in unfamiliar places.

The Landlords' adult child S.M. provided affirmed testimony at the hearing that they want to go back to post-secondary school and find it difficult, given their disability, to find accommodation. S.M. stated that they have found a program they want to take in the community in which the rental unit is located, and as a result, they want to move into the rental unit. S.M. stated that although they had to leave school in the past due to paranoia associated with their disability, and therefore cannot guarantee that their plans will work out, they want to try.

The Tenant argued that the Two Month Notice was not served in good faith and that the Landlords simply want more money for the rental unit. The Tenant stated that the Landlords offered them the opportunity to stay if they increased their rent to $1,700.00, but repeatedly attempted to pressure them into signing a mutual agreement to end their current tenancy prior to the signing of a subsequent tenancy agreement. The Tenant also called their partner C.K. as a witness in support of this position. C.K. stated that they witnessed multiple attempts by the Landlords to harass, coerce, and guilt the Tenant into signing the mutual agreement to end tenancy. C.K. stated that the Landlord was concerned that their daughter would not be able to stay in the rental unit and finish their program, and therefore they wanted the Tenant to sign a mutual agreement to end the tenancy, and raise the rent.

Although the Landlords agreed to entering into negotiations with the Tenant with regards to mutually agreeing to end the current tenancy and establishing a new tenancy at a higher rent amount, they argued that it was the Tenant who proposed this arrangement as they did not want to move out. The Landlord stated that the Tenant wanted to pay more rent so that instead of having to move out so that S.M. could move in, the Landlord would have enough money from the increased rent amount to rent S.M. a different place. The Tenant disagreed, reiterating their position that the Landlords just wanted to get them out, which is why they were only ever sent a mutual agreement to end tenancy by the Landlords, and not a new tenancy agreement. In their written

submissions the Tenant stated that they resided in the rental unit as a tenant prior to the purchase of the rental unit by the Landlords and argued that the Landlords have been unhappy with the amount of rent the Tenant pays since it was purchased, as they consider it too low in comparison to market rent and taking into consideration their mortgage and annually increasing strata fees. The Landlords denied that the Two Month Notice was served due to the amount of rent paid by the Tenant or as an attempt to increase the rent.

The Tenant also argued that although the Landlords submitted proof that S.M. applied to a program at a post-secondary school near the rental unit in April of 2022, no proof of acceptance was submitted and therefore they question whether S.M. is really planning to attend. The Landlords stated that S.M. has been unable to attend the school yet, as the Tenant is still residing in the rental unit and therefore S.M. has nowhere to live. The Landlords stated that this whole situation has been very stressful and has significantly delayed their child's ability to go to school. They stated that as rent has been paid for January of 2023, they want an Order of Possession for January 31, 2023, so as not to further delay their child's ability to move into the rental unit and attend school.

Despite the assurance of the Landlords and S.M. at the hearing that S.M. intends, as of the date and time of the hearing, to move into the rental unit and attempt to return to school, the Landlord D.M. repeatedly mentioned throughout the course of the hearing that it is possible, and even likely, that S.M. may not move into the rental unit or may not stay there for six months, as their disability is unpredictable and they have left school in the past as a result. The Landlord D.M. even stated during the hearing on more than one occasion that they are worried that S.M. will become paranoid after the hearing, now that they have become aware of the hearing and been called upon as a witness, that the Tenant will be following or watching them, and therefore may not want or be able to move into the rental unit.

Overall, the parties simply disagreed about whether the Two Month Notice was served in good faith and whether there is a reasonable expectation that S.M. will move-into the rental unit and occupy it for at least six months. The parties submitted documentary evidence for my consideration including but not limited to written timelines/arguments/submissions, witness statement(s), copies of text messages, audio recordings, self-authored transcripts of audio recordings, copies of emails, the Two Month Notice, and documents from a post-secondary school.

Analysis

Section 49(3) of the Act 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. Section 49(1) of the Act defines a close family member as the individual's parent, spouse, or child, or the parent, or child of that individual's spouse. There was no dispute between the parties that the person the Landlords alleged is going to reside in the rental unit in the Two Month Notice, their adult child, meets the criteria of a close family member under section 49(1) of the Act. There was also no dispute that a tenancy to which the Act applies exists between them.

In the Two Month Notice and at the hearing, the Landlords stated that their adult child S.M. intends in good faith to occupy the rental unit so that they can go back to school. S.M. also attended the hearing and stated that their intention is to occupy the rental unit. However, the Tenant argued that the Two Month Notice has not been served in good faith, and for the following reasons, I agree.

First, although the Landlords stated that they were attempting to negotiate the continuation of the tenancy agreement at a higher rental rate, as suggested by the Tenant, I am not satisfied that this is the case. I am not satisfied that it was the Tenant who proposed this arrangement, as argued by D.M. at the hearing, as D.M. can be heard stating the following in the recording of the May 25, 2022, telephone conversation:

> *I offered this as a, you know what I mean, as a half-way for both you and me, cause, cause, cause my daughter its kind of, she may stay and she may not. She went to school before, she changed couple of schools, she didn't last. I don't know whether she'll last.*

As a result of the above, I find that the Landlords were not entirely truthful with me at the hearing regarding who proposed the ending of the current tenancy by way of a mutual agreement and the continuation of the tenancy at a higher rental rate under a separate tenancy agreement.

Second, it is clear to me from the recordings of the telephone conversations on May 17, 2022, and May 25, 2022, that the Landlord was unwilling to enter into a new tenancy agreement with the Tenant until after they had already signed a mutual agreement to end their current tenancy, and even then, the offer of a new tenancy agreement was

subject to the condition that the Landlords were able to find suitable short-term or month to month accommodation for S.M., at an acceptable rate. The Tenant argued that this demonstrates their dishonest intentions with regards to both the issuance of the Two Month Notice and their discussions to continue the tenancy under a separate tenancy agreement after the mutual agreement to end the current tenancy was signed, and I agree. Although D.M. argued at the hearing, and stated numerous times in the recordings, that this is the only way to make the proposed arrangement work as they could not otherwise increase the rent, I disagree. The Act already has provisions in place under section 43(1)(c) of the Act for landlords and tenants who wish to mutually agree to a rent increase above the allowable annual rent increase amount. The parties simply need to agree in writing to the additional rent increase amount, and the landlord needs to serve the notice of rent increase in accordance with the Act.

Had the Tenant signed the mutual agreement to end tenancy sent to them by email by the Landlords on May 20, 2022, without having first entered into a new tenancy agreement with the Landlords, nothing would have prevented the Landlords from simply declining to enter into a new tenancy agreement with the Tenant thereafter. In the recordings there is even evidence that this may well have been the Landlords' intention as D.M. stated the following in response to the Tenant's repeated requests that they be sent something in writing regarding their agreement to continue the tenancy at the higher rental rate after the mutual agreement to end tenancy is signed "I can only verbally promise this, I cannot put anything in writing" and "yeah, but I I don't want to promise you anything because you can sue me to to to residential tenancy branch". Had the Tenant signed the mutual agreement to end the tenancy effective June 30, 2022, which they did not, the dispute of the Two Month Notice would have been rendered moot, and the Tenant would then have been left with little to no recourse if the Landlords declined to honor their verbal agreement to continue the tenancy at a higher monthly rental rate under a new tenancy agreement. As a result, I am concerned that the proposal of a mutual agreement to end tenancy was an attempt by the Landlords to not only end the tenancy without having to satisfy me that the Two Month Notice was served in good faith, and an attempt to absolve themselves of any future liability under section 51(2) of the Act.

I also find the relentlessness with which the Landlords attempted to have the Tenant enter into a mutual agreement to end the tenancy concerning. Rather than wait for the hearing regarding validity of the first Two Month Notice, the Landlords repeatedly attempted to have the Tenant agree to end their tenancy, often threatening them with the prospect of having to owe significant housing/hotel costs for S.M. to have the

Tenant agree to end their own tenancy, rather than wait for the dispute resolution hearing. Further to this, I find that the Landlords repeatedly made verbal offers to continue the tenancy after the mutual agreement was signed, albeit at an increased rental rate, while simultaneously refusing to either enter into the new tenancy agreement or put anything in writing about it.

I also find the tactics engaged in by the Landlords to have the Tenant sign the mutual agreement to end tenancy dishonest, coercive, and manipulative in nature. The Landlords repeatedly advised the Tenant by phone and text that they have been told by the Branch that not only is there no hope of success for the Tenant at the hearing, but that the Tenant will be responsible for costs incurred by the Landlords to provide S.M. with accommodation between the effective date of the Two Month Notice and the date of the hearing, including hotel costs and any costs associated with S.M. having to withdraw from or re-apply to school, if necessary, should the Tenant not be successful in having the Two Month Notice cancelled. Not only is there no evidence in any of the Branch records for any of the three Applications relating to this tenancy, that these conversations occurred between D.M. and a Branch staff member, for compensation to be owed by one party to another under the Act, there first must have been a breach of the Act by one party, that resulted in a loss to the other. As the Tenant was entitled by law to dispute the Two Month Notice, and therefore was not in breach of the Act by continuing to reside in the rental unit pending the outcome of their hearings, I do not see how the Tenant could be responsible for the above noted costs as alleged by the Landlord(s).

Although these interactions occurred in relation to the issuance of the first Two Month Notice served in April of 2022, which I cancelled on September 14, 2022, the parties agreed that the Two Month Notice now before me was simply a re-issuance of the first Two Month Notice. I therefore find that the above noted matters are still relevant to the issue of good faith.

Third, Although the Landlords submitted documentation showing that S.M. applied for a program at a post-secondary institution in the community where the rental unit is located, these documents are from April of 2022. Further to this, no proof that S.M. was ever accepted to the school or the program of their choice has been submitted and the Landlords acknowledged at the hearing that S.M. is not currently registered for a course at that school. I find the lack of this proof significant, as the Landlords bear the burden of proof regarding validity of the Two Month Notice and the reason given for S.M.’s need

to occupy the rental unit in the first place, was to attend a specific program at this specific post-secondary school.

Fourth, D.M. repeatedly stated during the hearing that it is not only possible, but maybe even likely, that S.M. will either not move into the rental unit at all or will not reside there for six months thereafter. While I appreciate that S.M. may want to try and go back to school and may want to try to move into the rental unit, in order to end the tenancy for this purpose I find that there also needs to be some credible and reliable evidence to show that there is a realistic expectation under the circumstances that S.M.'s intentions will be followed through with and I simply do not find that to be the case. Regardless of whether S.M. wants to move into the rental unit and wants to go back to school, I am not satisfied that there is a realistic expectation, given the issues set out above, that S.M. will either move into the rental unit within a reasonable period or reside there for six months thereafter.

In the recordings D.M. stated the following, which I find relevant to this issue:

- "She may stay in school and she may not."
- "She went to a couple of schools before and didn't last"
- "If she hears this she may just go, you know, might decide not to go to school"
- "If she [still] wants to go to school in September and doesn't give up"
- "With her, I don't know how long she'll stay in school"

At the hearing D.M. also stated several times that just becoming aware of the hearing, and providing witness testimony at the hearing may have been enough to trigger paranoia so severe that S.M. may no longer want to go to school, reside in the rental unit, or feel comfortable residing there.

Fifth, although the Landlords made numerous arguments that S.M. is not only a person with disabilities, but that S.M. must essentially reside in the rental unit to be able to attend school due to their disability, no documentary or other corroboratory evidence was submitted by the Landlords with regards to either of these claims. While I accept that the S.M. is a person with disabilities, I do not accept the Landlords' argument that due to the nature of S.M.'s disability, S.M. is being prevented from attending post-secondary school by the Tenant's continued occupancy of the rental unit.

Finally, in the May 25, 2022, recording D.M stated "I'd rather have it empty for six months, than lose the case, then I have to pay you for a whole year". This satisfies me on a balance of probabilities that the Landlords are not only already concerned that

S.M. will not be able to accomplish the stated purpose for ending the tenancy set out in the Two Month Notice, either within the required time period, or for the required length of time, but that they are aware of the compensation requirements set out under section 51(2) of the Act, and already have a plan in place to avoid having to pay this compensation, either having the Tenant sign a mutual agreement to end the tenancy instead or leaving the rental unit vacant should S.M. either not move in or move out early. For the benefit of the parties, and despite my finding below, I wish to point out that leaving a rental unit vacant is not consistent with the definition of occupancy of the rental unit for residential purposes under section 49 of the Act.

Based on the above, I find that the Landlords have failed to satisfy me on a balance of probabilities that the Two Month notice has been served in good faith or that there is a reasonable expectation that S.M. will occupy the rental unit for residential purposes within a reasonable period after the end of the tenancy and for at least six months duration thereafter, regardless of their intentions. As a result, I grant the Tenant's Application seeking cancellation of the Two Month Notice and I order that it is therefore cancelled and of no force or effect.

As the Tenant was successful in their Application, I also grant them recovery of one filing fee in the amount of $100.00, pursuant to section 72(1) of the Act. Although the Tenant submitted two Applications, which were set to be heard together, and therefore paid two separate filing fees, the Tenant could have amended their first Application filed on August 17, 2022, at no additional cost, rather than filing a second Application. As a result, I award them recovery of only one filing fee. Pursuant to section 72(2)(a) of the Act, the Tenant is permitted to withhold $100.00 from the next month's rent payable under the tenancy agreement in recovery of this amount.

Conclusion

The Tenant's Application seeking cancellation of the Two Month Notice and reimbursement of the $100.00 filing fee is granted. I therefore order that the Two Month Notice is cancelled, and that the tenancy continue in full force and affect until it is ended by one or both of the parties in accordance with the Act.

Pursuant to section 72(1) and 72(2)(a) of the Act, the Tenant is permitted to deduct $100.00 from the next months rent payable under the tenancy agreement.

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

Dated: January 18, 2023

Residential Tenancy Branch