Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, FFT

Introduction

The Tenant seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order pursuant to s. 51(2) for compensation equivalent to 12 times the monthly payable under the tenancy agreement; and
- return of the filing fee pursuant to s. 72.

L.W. appeared as the Tenant. A.O. appeared as the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other's application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Issues to be Decided

1) Is the Tenant entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement?
2) Is the Tenant entitled to the return of her filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on April 1, 2004.
- The Tenant vacated the rental unit on September 30, 2021.
- At the end of the tenancy, rent was payable in the amount of $946.00 on the first day of each month.

I am advised by the parties that the Landlord issued a Two-Month Notice to End Tenancy signed on August 14, 2021 (the "Two-Month Notice"), a copy of which was provided to me by the Tenant. The Two-Month Notice lists that it was issued due to the Landlord's intention to occupy the rental unit and lists its effective date as November 1, 2021.

The rental unit in question is in coastal BC. The Landlord testified that she lives in the interior but used to reside in the community in which the rental unit is located. The Landlord says that she wished to use the rental unit as a vacation home while visiting the community. According to the Landlord, she moved into the rental unit on October 4, 2021 and moved her belongings to the rental unit on that occasion.

The Landlord directs me to a series of statements in her evidence variously attesting to the Landlord residing with the rental unit. D.M. says that she accompanied the Landlord to the rental unit on October 4, 2021 and spent 4 days cleaning and painting the rental unit. B.B. says that he was hired by the Landlord to help her move furniture into the rental unit on October 26, 2021 and did "work on the apartment" for three days. C.A. says that she is a resident of the community and a friend of the Landlord and attests to visiting the Landlord at the rental unit several times, though does not specify when or the frequency.

According to the Landlord, she spent less time at the rental unit than she had otherwise planned, citing disruptions in the roads coming from the interior following flooding in 2021 and contracting Covid-19. The Landlord says she contracted Covid-19 at the end of March 2022, which she says has left her fatigued and nauseous such that travelling to the coast was not possible.

The Landlord directs me to a letter from Dr. D.I. dated June 9, 2022 in which it describes the Landlord reported a positive rapid Covid-19 test in February and April 2022 and that she continued to report ongoing intermittent nausea, excessive mucous production, and fatigue limiting her ability to travel to her home in the community of the rental unit. The Tenant raises issue with the content of the Landlord's letter from her doctor, indicating that it largely contains information self-reported by the Landlord and is, thus, self-serving evidence.

The Landlord says that she went to the rental unit three occasions after issuing the Two-Month Notice for a week on each occasion. The Landlord says that she saw little point in keeping the rental unit for her use as she was no longer feeling well enough to drive herself such that she listed it for rental and found a new tenant for June 1, 2022. The Landlord's evidence includes utility statements for the rental unit in her name from October 2021 to June 2022 to further support her exclusive use of the space.

The Tenant denies the Landlord ever moved into the rental unit. I understand from the Tenant that she moved into a new rental unit across the street from the previous rental unit purported to be occupied by the Landlord. She says that she can look out her current window into the previous rental unit. According to the Tenant, she says she observed the Landlord attend the rental unit between October 4th and 8th, 2021 and did not notice furniture being moved. She says the Landlord was there again between October 26th and 30th, 2021.

The Tenant also reports the Landlord was present between March 7th and 12th, 2022 with a worker installing flooring at the rental unit. The Landlord's evidence includes a letter from M.B. dated May 26, 2022, in which he identifies himself as a flooring installer and indicates he was at the rental unit with the Landlord between March 7th and 12th, 2022. M.B. says the rental unit was furnished at that time.

The Tenant's written submissions indicate that at no point did the Landlord move furniture into the rental unit. The Tenant further indicated at the hearing that the Landlord listed the property for rental on April 7, 2022 setting rent at $2,300.00 per month. The Tenant's evidence includes a copy of the posting.

Analysis

The Tenant seeks compensation pursuant to s. 51(2) of the *Act* after being served with the Two-Month Notice.

Pursuant to s. 51(2) of the *Act*, a tenant may be entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement when a notice to end tenancy has been issued under s. 49 and the landlord or the purchaser who asked the landlord to issue the notice, as applicable under the circumstances, does not establish:

- that the purpose stated within the notice was accomplished in a reasonable time after the effective date of the notice; and
- has been used for the stated purpose for at least 6 months.

In this instance, there is no dispute that the Two-Month Notice was issued on the basis that the Landlord would occupy it, which means it was issued under s. 49(3) of the *Act*. The primary issue here is whether the Landlord can be said to have occupied the rental unit at all. By the Landlords own admission, she says that she visited the property on three occasions for a total of three-weeks during the relevant 6-month window after she took back possession of the rental unit. According to the Tenant, she says that it was shorter, totaling 16-days.

Policy Guideline #2A, which provides guidance on ending tenancies for occupancy by a landlord, citing *Schuld v. Niu,* 2019 BCSC 949 ("*Schuld*") specifies that occupancy means occupation for residential purposes. *Schuld* dealt with the judicial review of a decision before the Residential Tenancy Branch in which a tenant's claim for compensation under s. 51(2) of the *Act* was dismissed. In that matter, the two-month notice was issued due to landlord's occupation, though the landlord admitted to not moving into the rental unit as he had planned to demolish it. The arbitrator in that matter, as cited in *Schuld* at paras 13 and 14, reasoned as follows:

> [13] The tenant, the petitioner here, applied for compensation under s. 51(1) and (2) of the *Act*. The application relied on s. 51(2), and claimed compensation in the amount of $10,200. The arbitrator's decision reasons as follows:
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> > The Landlord issued the Notice pursuant to section 49(3). Notably, section 49(3) uses the word "occupy" not "reside" or "live in". Meaning must be given to the words actually used in the legislation. "Occupy" and "reside" have different meanings. Since the *Act* does not require the Landlord to "reside" in the rental unit, whether the Landlord actually resided or lived in the rental unit is not relevant.

> [14] The arbitrator refers to definitions of "occupy" or "occupied" as found in *Black's Law Dictionary*. The arbitrator then says:
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> > Based upon the undisputed evidence before me, I find that no other person took possession of the rental unit from the Landlord following the issuance of the Notice. Since no other person took possession of the rental unit for nearly a year after the tenancy ended, I am satisfied that the Landlord occupied the rental unit for at least six months starting December 31st, 2017 (the effective date of the Notice).
> >
> > I am satisfied the landlord fulfilled the stated purpose of the 2 Month Notice such that I find the Tenant is not entitled to compensation under section 51(2). Therefore, I dismiss his claim against the Landlord.

In *Schuld*, Verhoeven J. reasoned that the arbitrator's analysis was irrational, stating the following:

> [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 (see *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 21, 154 D.L.R. (4th) 193, cited by *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36). 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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> [19] I am satisfied, however, that the arbitrator's interpretation of the word "occupy" as found in s. 49(3) led the arbitrator into error, and the arbitrator did not therefore evaluate the claim of the tenant within the proper legal context. The arbitrator ruled that the claim was invalid because the premises had, in fact, been used for the purpose indicated in the notice, which was occupation by the landlord. In my respectful view, that interpretation, within the context of the statute, and bearing in mind its purposes, is patently unreasonable and, in fact, irrational.

I provide the summary of *Schuld* because the guidance within Policy Guideline #2A likely overstates occupation being for residential purposes. The analysis of Verhoeven J. as limits the interpretation of “occupation” for use “as a residence for [the landlord’s] own purposes” (para 17). It should also be noted that this guidance was given in the context of an arbitrator’s interpretation of “occupy” that was so broad that it practically obliterated the useful purpose of s. 49(6) of the *Act*. Though in a different context, I find that *Schuld* to be instructive as it provides interpretation of occupation within the meaning of s. 49(3) of the *Act*.

I am cognizant of the protective purpose of the *Act* and interpreting it within this context. However, there is no specific wording within s. 49(3) of the *Act*, or by implication s. 51(2), that requires landlords to make exclusively use of a rental unit for their home to the exclusion of other homes. In other words, it is entirely consistent with the meaning of occupy under s. 49(3) of the *Act* for a landlord to occupy two spaces, making periodic use of the rental unit as a vacation home, provided they do so for their own purposes.

I accept that the Landlord here, by her own evidence, made direct use of the space for a mere three-weeks. It is worth considering the hypothetical question that if three-weeks of physical occupancy are insufficient to establish occupancy within the meaning of s. 49(3), would 8-weeks meet that threshold. If not that, would three-months? Would five-months? If physical occupancy is the sole criteria upon which this is assessed, what of a landlord that moved into a rental unit and went on vacation for a month or two.

I provide these hypotheticals because there is no specific definition of “occupy” under s. 49 or anywhere else in the *Act* for that matter. The only means by which this is resolved, in my view, is to return to the interpretation set out in *Schuld*, which is use of the space for the landlord’s own purposes. I find that a vacation home used periodically by a landlord for their use fits that definition.

I accept that the Landlord did make use of the rental unit for her own purposes after October 1, 2021. The Landlord testified to moving some of her belongings to the rental unit in early October 2021, which is supported by the statement from D.M.. The Tenant herself observed the Landlord at the property on October 4, 2022. I have been provided no evidence to suggest that the Landlord rented the rental unit, even temporarily on a short-term basis, over the relevant 6-month window.

The Landlord says she moved her furniture into the rental unit, which the Tenant denies. I accept that the Tenant likely has a good vantage point into the rental unit. However, the Landlord has provided signed statements from five others attesting that there was furniture for occupancy. All these individuals say they were in the rental unit and made the observations during the relevant 6-month period. I have no reason to disbelieve the Landlord’s evidence in this regard. I find that the Landlord did begin to occupy the rental unit within a reasonable period of the tenancy coming to an end.

I further accept that she continued to occupy the rental unit until June 1, 2022, which is when the space was rented to a new tenant. This is after the 6-month window imposed by s. 51(2) of the *Act*. I find that the Landlord has demonstrated that the purpose stated within the Two-Month Notice was fulfilled within a reasonable period and for at least 6 months.

Accordingly, I dismiss the Tenant’s application without leave to reapply.

Conclusion

The Tenant’s application for compensation under s. 51(2) of the *Act* is dismissed without leave to reapply.

As the Tenant’s application was unsuccessful, I find that she is not entitled to the return of her filing fee. Her claim under s. 72 of the *Act* is dismissed without leave to reapply.

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: January 03, 2023

Residential Tenancy Branch