Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNETC, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- a monetary order in an amount equivalent to twelve times the monthly rent payable under the tenancy agreement under section 51(2); and
- an authorization to recover the filing fee for this application, under section 72.

Tenant NL (the tenant) and landlord BZ (the landlord) attended the hearing. The landlord was assisted by interpreter WZ. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing all the parties were clearly informed of the Rules of Procedure, including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11, which prohibits the recording of a dispute resolution hearing. All the parties confirmed they understood the Rules of Procedure.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: “A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5,000.00.”

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with section 89 of the Act.

Issues to be Decided

Is the tenant entitled to:

1. a monetary order in an amount equivalent to twelve times the monthly rent?

2. an authorization to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties: "Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered."

Both parties agreed the tenancy started on March 01, 2021 and ended on January 31, 2022. Monthly rent when the tenancy ended was $2,400.00, due on the first day of the month. The landlord collected and returned a security deposit.

Both parties also agreed the landlord served and the tenant received a two month notice to end tenancy for landlord's use (the Notice) on December 17, 2021. The landlord served the Notice for her son HC, born on August 1, 1998, to occupy the rental unit.

The tenant submitted a copy of the Notice dated December 17, 2021 into evidence. It states the landlord's close family member will occupy the rental unit. The effective date was February 28, 2022.

Both parties agreed the rental unit is a 3 bedroom, 1,000 square feet suite.

The landlord affirmed that her son could not move to the rental unit because of extenuating circumstances. The landlord stated that HC's grandfather, YC, a resident of China, was diagnosed with Cancer on December 15, 2021. The landlord testified that the landlord and HC only learned that YC was diagnosed with Cancer on March 01 or 02, 2022.

The landlord submitted HC's visa to China issued on March 03, 2022. The landlord said that HC needed to go to China to help to care for his grandfather. HC could only travel to China on March 24, 2022 due to the pandemic's travel restrictions. HC could only return to Canada on August 01, 2022, as he was helping to care for his grandfather and could not return to Canada sooner due to the pandemic's travel restrictions.

The landlord re-rented one bedroom for $1,000.00 per month in May 20220 and the remaining 2 bedrooms for $1,000.00 for each bedroom in July 2022, as she faced financial difficulties.

The landlord affirmed that her son would pay her rent for the rental unit. Later the landlord stated that her son would move in with the girlfriend and that they would occupy one bedroom and use a second bedroom as office space. The landlord testified that her son would pay monthly rent in the amount of $800.00 for each bedroom he used and that her son would rent the third bedroom and pay rent to the landlord. The landlord refused to give HC's girlfriend's name.

The landlord said the tenant emailed the landlord in December 2021 and mutually agreed to end the tenancy:

> Hi [landlord]
> Thank you for giving us the appropriate notice. I have found a place for January 15 and [the roommate] will be out by January 31.
> As I'm sure you are aware, in the case of having a family member move in, tenants are entitled to one months rent in compensation in BC. We have chosen to not pay rent for January 1 in lieu of compensation.

The tenant affirmed the email sent in December 2021 is not a mutual agreement to end the tenancy and that the tenancy ended because of the Notice.

The tenant stated that the landlord refused to do repairs and did not serve the Notice in good faith.

The parties texted on December 10, 2021:

> LANDLORD: I have actually asked a few different repair man, and sent them the picture, and they discussed and all of them said their isn't problem with the washer if it is used as instructed. And when I have washed clothes in the washer after you told me there is a problem, but it seems to work fine, we are not planning to buy a new washer. Right now we don't know how to solve this problem, also you have an option to end our contract early we won't use this excuse to not return your deposit. We will return the deposit in time. Lastly, when the contract ends we don't plan to rent it any more because out son is becoming an adult. Thank you.
> TENANT: We're so sad to hear this. Could you provide further clarification?> Will your son be moving into the suite?

LANDLORD: Hi tenant, not now, but after our contract ends which is on March, you might have misunderstand what I said earlier, I don't mean to kick you guys to move out early, it's one of the options I can think of right now because I don't plan to buy a new washer, and many repair man said there isn't a problem and I have tested my self there isn't a problem.

The landlord testified that she replaced the washing machine in October 2021 with a used machine that worked properly.

Analysis

Section 49 of the Act states:

(2)Subject to section 51 [tenant's compensation: section 49 notice], a landlord may end a tenancy

(a)for a purpose referred to in subsection (3), (4) or (5) by giving notice to end the tenancy effective on a date that must be

(i)not earlier than 2 months after the date the tenant receives the notice,

(ii)the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, and

(iii)if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy, or

[…]

(3)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 51(2) of the Act states:

(1)**A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property]** is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

[…]

(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 the landlord** or purchaser, as applicable, **does not establish that**

(a)the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and

> (b)the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
>
> (emphasis added)

I accept the undisputed testimony that the landlord served the Notice for her son HC to occupy the rental unit.

I find that HC must have occupied the rental unit from March 01 to August 31, 2022, as the Notice's effective date was February 28, 2022.

Based on the December 2021 email, I find the parties did not mutually agree to end the tenancy.

Rule 6.6 of the Residential Tenancy Branch Rules of Procedure states that 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 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 most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

Per Section 51(2) and Rule of Procedure 6.6, the landlord has to onus to prove on a balance of probabilities that extenuating circumstances prevented HC to occupy the rental unit from March 01 to August 31, 2022.

<u>Occupying the rental unit</u>
RTB Policy Guideline 2A states:

> C. Occupying the rental unit
> Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). 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.
> […]
> Reclaiming a rental unit as living space
> If a landlord has rented out a rental unit in their house under a tenancy agreement, the landlord can end the tenancy to reclaim the rental unit as part of their living accommodation. For example, if a landlord owns a house, lives on the upper floor and rents out the basement under a tenancy agreement, the landlord can end the tenancy if the landlord plans to use the basement as part of their existing living accommodation. Examples of using the rental unit as part of a living accommodation may include using a basement as a second living room, or using a carriage home or secondary suite on the residential property as a recreation room.
> **A landlord cannot reclaim the rental unit and then reconfigure the space to rent out a separate, private portion of it. In general, the entirety of the reclaimed rental unit is to be occupied by the landlord or close family member for at least 6 months.** (See for example: Blouin v. Stamp, 2021 BCSC 411)
> […]
> 6-month occupancy requirement
> 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).
> […]
> E. CONSEQUENCES FOR NOT USING THE PROPERTY FOR THE STATED PURPOSE
> If a tenant can show that a landlord (or purchaser) who ended their tenancy under section 49 of the RTA has not:
> • taken steps to accomplish the stated purpose for ending the tenancy within a reasonable period after the effective date of the notice to end tenancy, or
> • used the rental unit for that stated purpose for at least six months beginning within a reasonable period after the effective date of the notice
> the tenant may seek an order that the landlord pay the tenant additional compensation equal to 12 times the monthly rent payable under the tenancy agreement.
>
> (emphasis added)

The British Columbia Supreme Court stated in Blouin v. Stamp, 2021 BCSC 411 (Blouin v. Stamp), that the landlord must occupy all the rental unit:

> [36] I conclude that the Guidelines are consistent with the objectives of the Act in that a landlord issuing a termination of tenancy notice must abide by the reason given

and, if the reason is to occupy the unit, the landlord must then "occupy" the unit as living accommodations and as part of their residential use of the property for at least the ensuing six-month period.

[…]

50] The facts before the Arbitrator were clear in terms of what the Landlords did with the Rental Unit after Mr. Stamp vacated the premises. Firstly, they re-occupied one bedroom as their home office.

[51] Secondly, the Landlord's own evidence is that they re-configured the remainder of the space in the Rental Unit into a one-bedroom suite for AirBnb rentals. While this may not have been the Landlords' intention when they decided to reconfigure the Rental Unit and issued the Two Month Notice, the fact is that these rentals took place within six months of Mr. Stamp leaving.

[…]

[53] The Arbitrator concluded that renting out part of the Rental Unit – based on its later re-configuration – for AirBnb rentals during the six-month period could not be characterized by the Landlords' occupying that space for their own residential purposes, as intended under s. 49(3) of the Act. This was consistent with his earlier finding that the Landlord's intention to rent out the downsized Rental Unit to Mr. Stamp during that period would also have been a violation of the Act. In essence, whether the downsized Rental Unit was rented to Mr. Stamp (or any new tenant) or rented through short term rentals on AirBnb, both scenarios resulted in a landlord not "occupying" the premises. The fact that they regained the use of one bedroom of the Rental Unit for their own use and occupation did not overcome the characterization of the use of the remainder of the space.

[…]

[59] I agree with Mr. Stamp that the Arbitrator's Decision was a rational one and in keeping with the objectives of the Act. It cannot be said that it is other than "transparent, intelligible and justified" (Vavilov at para. 15). This is not simply a homeowner renting out a "room" to an occasional person. **In my view, it cannot be said that renting out this very separate and private space to AirBnb clients, inherently a commercial endeavor, is occupation of that space by a landlord "as a residence for his own purposes"**: Schuld at para. 17.

[60] **Indeed, I agree with Mr. Stamp that any other interpretation would allow a landlord to terminate a tenancy, take over only a small or insignificant portion of the space and then re-rent the remainder at far greater rent amounts. Providing such a "loophole" for landlords would clearly be contrary to the remedial objectives of the Act and the protections intended to be afforded to tenants by the Act**: Berry and Kloet at para. 23 and Schuld at para. 17.

(emphasis added)

I accept the landlord's uncontested testimony that HC would use 2 of the 3 bedrooms and the third bedroom would be re-rented.

Based on the landlord's uncontested testimony, I find that the landlord's intention when she served the Notice was to allow HC to re-rent the third bedroom, acting as an agent for the landlord. I find the landlord would have a residential tenancy with the occupant of the third bedroom and HC would not occupy the entire rental unit.

Considering Blouin v. Stamp, as HC and the landlord did not intend that HC would occupy the entire rental unit, the tenant is entitled to the monetary award sought.

Extenuating circumstances

Furthermore, if the landlord had intended for HC to occupy the entire rental unit, the tenant would still be entitled to the monetary award requested.

RTB Policy Guideline 50 states:

> E. EXTENUATING CIRCUMSTANCES
> **An arbitrator may excuse a landlord from paying compensation if there were extenuating circumstances that stopped the landlord from accomplishing the purpose or using the rental unit. These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation. Some examples are:**
> □ A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies before moving in.
> □ A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
> □ A tenant exercised their right of first refusal, but didn't notify the landlord of any further change of address or contact information after they moved out.
> **The following are probably not extenuating circumstances:**
> □ A landlord ends a tenancy to occupy a rental unit and they change their mind.
> □ A landlord ends a tenancy to renovate the rental unit but did not adequately budget for renovations
>
> **(emphasis added)**

RTB Policy Guideline 2A states that when issuing a notice under section 49 of the Act the landlord must demonstrate there is not an ulterior motive for ending the tenancy:

> 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 RTA and MHPTA or the tenancy agreement.

In Gallupe v. Birch, 1998 CanLII 1339, the British Columbia Supreme Court states:

> [35] I conclude from the observations of Taylor J.A. and Melvin J. that a consideration of dishonest motive or purpose is a matter that should be undertaken in a consideration of the good faith of a landlord in serving an eviction notice under s. 38(3). When the question of good faith is put in issue by a tenant, the arbitrator (or panel, if on a review) should consider whether there existed a fundamentally dishonest motive or purpose that could affect the honesty of the landlord's intention to occupy the premises. In such circumstances, the good faith of a landlord may be impugned by that dishonest motive or purpose.

Based on the landlord's uncontested testimony, I find that HC was 23 years old on the Notice's effective date.

The tenant claims the landlord did serve the Notice in good faith.

I find the landlord's testimony about HC intending to occupy the rental unit is not convincing. The landlord refused to give HC's girlfriend's name. HC did not attend the hearing as a witness. The landlord did not provide details about HC's financial capabilities, education or professional situation.

Furthermore, based on the December 10, 2021 text messages and the tenant's convincing testimony, I find the landlord intended to end the tenancy on December 10, 2021 because of disputes with the tenant regarding repairing the washing machine.

The landlord claims that HC learned that his grandfather was diagnosed with Cancer on March 01 or 02, 2022 and that HC needed a visa to travel to China. HC's visa was issued on March 03, 2022, one or two days after the day the landlord claims that HC learned about his grandfather's health condition.

The tenant vacated the rental unit on January 31, 2022 and the landlord and HC only learned about HC's grandfather's health issue on March 01 or 02, 2022. The landlord did not explain why HC could not move to the rental unit in February 2022.

Thus, I find the landlord failed to prove, on a balance of probabilities, that extenuating circumstances did not allow HC to move to the rental unit and occupy it for six months after the Notice's effective date.

As such, per section 51(2) of the Act, the tenant is entitled to a monetary award in the amount of 12 times the monthly rent payable. Thus, I award the tenant a monetary award in the amount of $28,800.00 (12 x $2,400.00).

As the tenant was successful, I authorize the tenant to recover the filing fee in the amount of $100.00.

In summary, the tenant is entitled to a monetary award in the amount of $28,900.00.

Conclusion

Pursuant to sections 51(2) and 72 of the Act, I grant the tenant a monetary award in the amount of $28,900.00.

The tenant is provided with this order in the above terms and the landlord must be served with this order. Should the landlord fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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: March 06, 2023

Residential Tenancy Branch