Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNL, FFT

Introduction

On November 28, 2022, the Tenants applied for a Dispute Resolution proceeding seeking to cancel the Landlords' Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") pursuant to Section 49 of the *Residential Tenancy Act* (the "*Act*") and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

Both Tenants attended the hearing. Both Landlords attended the hearing as well, with K.C. attending as an agent for the Landlords. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

The Tenants advised that a separate Notice of Hearing and evidence package was served to each Landlord by attaching them to the Landlords' door on December 1, 2022. As well, they stated that they also served these packages by hand to another resident on the property who would collect the Landlords' mail and rent payments when the Landlords were out of town.

K.C. advised that Landlord J.C. happened to find these packages under the mat in the first week of January 2023, and she stated that the Landlords may not have ever received these if J.C. did not happen to return from her trip. Landlord D.C. advised that rent was always paid by auto-deposit. K.C. stated that these packages were not served

in a manner in accordance with the *Act*; however, she did not make any submissions about how this was prejudicial to the Landlords.

When reviewing this issue, I acknowledge that these packages were not served in a manner permitted in accordance with Section 89 of the *Act*. With respect to K.C.'s statement that the Landlords may never have received these if J.C. did not happen to return, I note that had the Tenants served these packages in a manner pursuant to this Section, say by registered mail for example, this method would have complied with the *Act* and the packages would have been deemed received after five days regardless. So, this matter would have still proceeded even if the Landlords did not return from their trip to find the registered mail packages. Furthermore, I note that the address that the Landlords provided for service on the Notice was their home address, and not some other address out of town, so it is not clear to me how serving to the address that was provided by the Landlords would be unreasonable.

Nevertheless, as the Landlords received these packages in January 2023, as they had approximately three months to prepare for this hearing, and as there were no submissions made about how it would be prejudicial to proceed, I am satisfied that the Landlords were duly served the Tenants' Notice of Hearing and evidence packages. Moreover, as this evidence has been served in accordance with the timeframe requirements of Rule 3.14 of the Rules of Procedure (the "Rules"), I have accepted this evidence and will consider it when rendering this Decision.

I do find it important to note though that the Tenants provided solemnly affirmed testimony that they served these packages on December 1, 2022. However, records indicate that they contacted the Residential Tenancy Branch on December 6, 2022, and spoke with an Information Officer because these documents had not yet been served. Given that this information is in direct contradiction with the Tenants' solemnly affirmed testimony, this causes me to question the credibility and reliability of the Tenants.

K.C. advised that the Landlords' evidence was served to the Tenants by registered mail on February 4, 2023. J.M. confirmed that they received notification of this mail, but they did not bother to pick it up. As this evidence has been served in a manner in accordance with Section 88 of the *Act*, I am satisfied that it was deemed to have been received five days after it was mailed. Moreover, as this evidence was served pursuant to the timeframe requirements of Rule 3.15 of the Rules, I have accepted this evidence and will consider it when rendering this Decision.

All parties acknowledged the evidence submitted and were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that complies with the *Act*.

Issue(s) to be Decided

- Are the Tenants entitled to have the Landlords' Two Month Notice to End Tenancy for Landlord's Use of Property dismissed?
- If the Tenants are unsuccessful in cancelling the Notice, are the Landlords entitled to an Order of Possession?
- Are the Tenants entitled to recover the filing fee?

Background, Evidence, and Analysis

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on May 1, 2015, as an unwritten, month-to-month agreement. Rent was currently established at an amount of $1,122.00 per month and it was due on the first day of each month. A security deposit was also paid, but this was returned to the Tenants within a few years of the tenancy commencing. It was not clear why this was returned, and the Landlords were cautioned that the *Act* requires that they document the tenancy by creating a written tenancy agreement.

All parties also agreed that the Tenants were served the Notice by hand, via a process server, on November 24, 2022. The reason the Landlords served the Notice is because "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)." As well, it

was indicated on the Notice that “The landlord or the landlord’s spouse” would be the person(s) specifically occupying the rental unit. The effective end date of the tenancy was noted as January 31, 2023, on the Notice.

Neither party submitted a copy of the Notice for consideration. As I was unable to view the relevant Notice to determine if it complied with Section 52 of the *Act*, in accordance with Rule 3.19 of the Rules, I provided direction on requesting late evidence. A copy of the Notice, that is the subject of this dispute, was requested to be provided by the Landlords as it is essential to the matter at hand. K.C. provided a copy of this Notice by uploading it to the Residential Tenancy Branch system during the hearing. In addition, while waiting for this document to be submitted, the information on the Notice was reviewed with both parties, and they agreed that the details discussed were accurate and consistent.

K.C. advised that J.C. has had a history of mobility issues, that her movement has been declining in recent years, and that she has suffered from a series of falls. As well, she testified that D.C. recently received a life altering health diagnosis on October 28, 2022. She referenced the medical documentation submitted to corroborate these submissions regarding the Landlords’ health.

She stated that the Landlords’ current residence is old, and that there are many stairs, which is a significant safety concern. She submitted that the rental unit was a rancher style duplex that the Landlords built in anticipation of having to move into eventually, for a better quality of life, once they were unable to adequately live in their home. She advised that the Landlords need a home that is open and easily accessible for them, including space for the use of a wheel chair. In order to accommodate the Landlords’ needs, she submitted that a ramp will be installed in front of the doors to the rental unit, and that a walk-in shower would be set up as well. She cited the estimates submitted as documentary evidence to support these submissions.

She then testified that once the rental unit was vacant, her and her husband would conduct the renovations to prepare the rental unit for the Landlords to move into. She advised that the Landlords historically vacation in the US, for approximately five months, and return usually at the end of March or April every year. She testified that the Landlords did not have a specific date for when they would return from this trip in 2023. When it was brought to her attention that the Notice requires that it should have been the Landlords’ intention, when serving the Notice in November 2022, to move in within a reasonable period of time after the effective date of the Notice, she then contradictorily

stated that had the rental unit been vacant, it was the Landlords' intention to cut their vacation short, and move in. D.C. then testified that they would have returned to the rental unit in the event that the rental unit was vacant.

Tenant R.M. advised that K.C.'s testimony was false and that the Landlords are dishonest. He testified that the Landlords are spry, that they work day and night, that D.C. digs ditches on the property, and that he also mows the lawn. However, he acknowledged that J.C. does have hip problems. He claimed that the Landlords primarily live on the main floor of their home, and that the Landlords told them that the other half of the duplex is where they actually intended to retire.

R.M. then suggested that the Notice was not served in good faith, and he alleged that it was served because he complained to the Landlords, in the spring of 2022, about being inappropriately touched by J.C. in the past. He stated that he filed a police report related to this issue, but they were unable to press charges as he could not remember times or dates of any alleged incidents. He submitted that J.C. left a phone message apologizing that she "hurt [him]", and that the Landlords coordinated a meeting in April 2022, where J.C. read from a letter stating that she was "sorry for what [she] had done." While he could not specifically recall what exactly she had apologized for, he testified that she "essentially admitted" to engaging in the behaviour that he claimed occurred.

K.C. responded that the Tenants are attempting to "spin" this around to make the Landlords look bad. She reiterated that this Notice would not have been served if not for the Landlords' deteriorating health. As well, she testified that J.C. apologized for making R.M. uncomfortable, but stated that she never apologized for the specific act that R.M. was alleging as she had no knowledge of what may have transpired six years ago. Despite J.C. attending the hearing, when given the opportunity, she elected not to provide any direct testimony to speak to these allegations, or to provide any clarification or details of what she was apologizing for. K.C. advised that J.C. was under too much stress to talk about this situation.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 49 of the *Act* outlines the Landlords' right to end a tenancy in respect of a rental unit where the Landlords or a close family member of the Landlords intend in good faith to occupy the rental unit.

Section 52 of the *Act* requires that any notice to end tenancy issued by the Landlords must be signed and dated by the Landlords; give the address of the rental unit; state the effective date of the Notice, state the grounds for ending the tenancy, and be in the approved form. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

With respect to the Notice, in considering the Landlords' reason for ending the tenancy, I find it important to note that the burden of proof lies on the Landlords, who issued the Notice, to substantiate that the rental unit will be used for the stated purpose on the Notice. Moreover, when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, given the contradictory testimony and positions of the parties, I may turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

Furthermore, Section 49 of the *Act* states that the Landlords are permitted to end a tenancy under this Section if they intend in **good faith** to occupy the rental unit.

Policy Guideline # 2A discusses good faith and states that:

> In Gichuru v Palmar Properties Ltd., 2011 BCSC 827 the BC Supreme Court found that a claim of 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.
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> 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).

Moreover, this policy guideline also states the following regarding vacant possession:

> 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.

When reviewing the evidence and submissions before me, I note that when the Notice was served on November 24, 2022, the Landlords’ intentions prior to service of the Notice must have been to move into the rental unit within a reasonable period of time after the effective date of the Notice of January 31, 2023. However, K.C.’s initial testimony was that the plan was for her and her husband to complete the renovations to prepare the rental unit for the Landlords to eventually move into when they returned from their annual vacation, typically around early April.

Firstly, I note that K.C.’s testimony about completing the renovations themselves is contradictory to the documentary evidence of estimates submitted from contractors about doing this work. Moreover, I note that these estimates are dated December 18, 2022, and January 2, 2023, which were provided after service of the Notice. Given that it is unclear who will be conducting the renovations, as this testimony was not consistent, and given that the estimates are dated after the Notice was served, these inconsistencies cause me to be somewhat skeptical of the legitimacy that it was the Landlords’ intention prior to service of the Notice to move in.

Moreover, it was K.C.’s original testimony that renovations would have commenced in order for the rental unit to meet the Landlords’ needs, and the unit would have been held until the Landlords returned from their vacation. It was only after this was questioned did this testimony change to it being the Landlords’ intention all along to come back early, and that they would have done so had the rental unit been vacant on January 31, 2023.

However, given that the Landlords received the Notice of Hearing packages in early January 2023, it would be reasonable to conclude that they did not know that the Notice was disputed. As such, I can reasonably infer that prior to this, as the effective date was fast approaching, there would have been some plans made by the Landlords to return in anticipation of moving in. As there was no evidence submitted to corroborate that the

Landlords, prior to receiving the Notice of Hearing packages, were intending on returning and then having plans to move in within a reasonable period of time after the effective date of the Notice, I find that this causes me to be skeptical that they had any intention of returning to the rental unit prior to their typical, annual vacation in or around April 2023.

Consequently, I find it more likely than not that the Landlords' intention when the Notice was served was to have it readied for occupation, and then it would be held for the Landlords to occupy when it was convenient for them later in April 2023. As the policy guideline indicates that holding a property in vacant possession to keep for use later is inconsistent with the intent of Section 49 of the *Act*, I am not satisfied that this Notice was served in good faith. As such, as the Landlords have not established persuasive grounds to justify service of the Notice, I hereby order that the Two Month Notice to End Tenancy for Landlord's Use of Property dated November 12, 2022, to be cancelled and of no force or effect.

As an aside, I have not made any findings or determinations on the Tenants' allegations of why it was their belief the Notice was not served in good faith, as it was not necessary to consider. However, I note that there were clear inconsistencies in the submissions from the Landlords' side, which caused me to question their credibility and reliability, as well as obvious vagueness in responding to the Tenants' allegations. On the other hand, I found there to be some questions, and possibly suspect submissions, in the Tenants' testimony as well, which also caused me to question their credibility and reliability. In my view, it is clear that there are likely some matters that have contributed to the downfall of the relationship between the parties, and I find it likely that neither party is being entirely forthcoming or truthful about the reasons behind this.

Regardless, as the Tenants were successful in this Application, I find that the Tenants are entitled to recover the $100.00 filing fee for their Application. The Tenants are permitted to withhold this amount from a future month's rent.

Conclusion

Based on the above, I hereby order that the Two Month Notice to End Tenancy for Landlord's Use of Property dated November 12, 2022, to be cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act.*

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: April 5, 2023

Residential Tenancy Branch