Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNETC, FFT

Introduction

This hearing dealt with a tenant's application for additional compensation payable where a landlord does not use the rental unit for the purpose stated on a Two Month Notice to End Tenancy for Landlord's Use of Property ("Two Month Notice"), as provided under section 51(2) of the Act.

Both parties appeared and/or were represented at the hearing and the parties were affirmed. The hearing process was explained to the parties and the parties were given the opportunity to ask questions about the process. Both parties had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

I confirmed the tenant served his application and evidence to the landlord and the landlord received the materials.

As for the landlord's evidence, I heard the tenant received the first package that was mailed to him on February 23, 2023; however, the tenant did not receive the landlord's subsequent mailings of March 16, 20 and 21, 2023. The tenant also stated he did not check for mail at his service address since early March 2023. The landlord stated that they determined the tenant had not pick up the registered mail so they also emailed their evidence to the tenant on March 20, 2022 and March 23, 2023. The tenant objected to being served by email initially, as he had not given consent to being served by email; however, I was also of the view the tenant ought to have been checking for mail beyond early March 2023. The tenant then stated he was willing to be deemed sufficiently served to avoid an adjournment. Accordingly, I deemed the tenant sufficiently served as permitted under section 71 of the Act.

Given the above, I admitted the materials of both parties into evidence for consideration in making this decision.

It should be noted that I was provided a considerable amount of submissions, arguments and evidence, both in writing and orally, all of which I have considered; however, with a view to brevity in writing this decision I have only summarized and referenced that which is most relevant and necessary to understand my decision.

Issue(s) to be Decided

Is the tenant entitled to additional compensation under section 51(2) of the Act?

Background and Evidence

A tenancy agreement between the landlord and four co-tenants started on August 1, 2020. The tenancy had a fixed term expiry date of October 31, 2021 requiring the tenants to vacate so that the landlord may occupy the rental unit. The tenancy did not end on the fixed term. Rather, the tenancy continued on a month to month basis until May 31, 2022.

The rental unit is a four bedroom upper main unit of a house in a resort destination town known for its winter activities. The house also has a smaller basement suite. Prior to and during the tenancy the landlord, landlord's husband and children had occupied the basement suite intermittently, as their family vacation home. The landlord and her family ordinarily resided in a major city in the province.

On March 26, 2022 the landlord issued the subject Two Month Notice to the tenants with a stated effective date of May 31, 2022. The stated reason for ending the tenancy was that the landlord or landlord's spouse intended to occupy the rental unit.

The tenant submitted that he returned to the residential property to check for mail after the tenancy ended and he noted that it did not appear the landlord was staying in the rental unit since the exterior of the property did not look well maintained, as he saw beer bottles and garbage on the exterior of the house. Also, vehicles in the driveway were not the landlord's vehicles. On another occasion, the tenant observed men on the property that were not the landlord or landlord's spouse. The tenant explained that he works in the area of the rental unit and he would drive by the property fairly frequently. The tenant provided photographs of the exterior of the property, including the vehicles parked in the driveway, and images of the men seen at the property. The tenant

testified that in driving by, he saw the landlord's vehicle in the driveway only rarely until January 2023 when he saw the landlord's vehicle there more often.

The landlord and her spouse testified that they used the basement suite as their family vacation home for many years. When the tenancy ended, they moved their furniture and possessions out of the basement suite and into the rental unit starting on May 31, 2022 and ending on June 1, 2022. One of the co-tenants, referred to by initials SM, was still moving out on May 31, 2022 and the landlord offered for SM to stay in the rental unit another night to help her out. SM saw the landlord and landlord's spouse and son moving their possessions from the basement suite and into the rental unit and began to occupy it on June 1, 2022.

The basement suite was rented to new tenants starting on June 1, 2022.

Right after the tenancy ended, the landlord's spouse proceeded to undo the "man cave" the tenants had created in the equipment storage room and install a ski rack and organizers in the room as it accessible to occupants of the main living unit and the basement suite.

For the month of June and part of July 2022 the landlord's son ordinarily resided in the rental unit, along with his friend who was in need of temporary accommodation. In August 2022 the landlord's son split his time between the rental unit and the family home in the major city before leaving for university in another city in September 2022.

The landlord acknowledged that the rental unit was not used much prior to the ski season, which starts in late November 2022, as the landlord's spouse had knee surgery. Once the ski season arrived, the landlord's spouse made a number of repairs and alterations to the property prior to the family arriving for the holiday season. Since then, the landlord's husband has been ordinarily staying in the rental unit as he can work remotely from the rental unit and enjoy the ski season. The landlord is self employed and splits her time between the rental unit and their family home in the major city and when she goes to the family home she takes the couple's vehicle with her.

Evidence provided by the landlord included written statements from themselves, their son, the basement suite tenants, the co-tenant SM who was still present on June 1, 2022, hydro bills, and photographs showing the landlord, landlord's spouse, landlord's children and friends in the rental unit. The photographs were taken in December 2022 and February 2023. The photographs show the landlord's furnishings in the rental unit and alterations made to the property.

The tenant suggested the photographs show what could be a hotel. The landlord scoffed as the suggestion.

Arguments and submissions

The landlord argued that they moved their possessions into the rental unit immediately after the tenancy ended, which was even witnessed by one of the tenant's co-tenants, and since they have continued to use the rental unit as intended, as a family vacation home, for their own use and use by their children.

The tenant was of the position that moving furniture into a rental unit is not immediate and continuous occupancy.

The tenant was of the position the landlord issued the Two month Notice, in bad faith, as it was issued after the tenant raised an issue with paying too much of the hydro bill. The landlord denied that was the reason for issuing the Two Month Notice and testified that they had been using the basement suite more often since Covid struck and with their children growing up and no longer attending high school (the landlord's daughter is 20 years old and the landlord's son is 24 years old) the basement suite had become too small for their family to use and entertain guests.

The landlord submitted that she was of the view the tenants would have the easiest time finding new accommodation at the end of the 2021/2022 ski season which is why they issued the Two Month Notice in March 2022 to be effective at the end of May 2022; however, they were open to giving the tenants more time to vacate if they needed it. The tenant agreed that the landlord and her family were using the basement suite more after Covid struck but to obtain more time to vacate the landlord wanted the tenants to sign a Mutual Agreement to End Tenancy which would disentitle the tenants to the additional compensation.

The tenant argued the landlord's evidence demonstrates that other people occupied the rental unit after the tenancy ended other than a close family member, such as the friend

of the landlord's son, and then the unit was empty/vacant for a long period of time before the landlord started using it during the holiday season.

As for reclaiming the rental unit and renting out the basement suite, the tenant pointed to Residential Tenancy Policy Guideline 2A, where it states:

> *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)*

The tenant submitted that he was an occupant of the rental unit under a previous tenancy agreement the landlord had with a different tenant and the landlord has always included a vacate clause as a means to avoid rent increase limitations and then when vacate clauses were eliminated by the government, except for landlord's use, the landlord used that reason on the subject tenancy agreement. The landlord did not require the tenants to vacate on the expiry of the fixed term. The landlord's spouse stated that the landlord did not require the end of the tenancy on October 31, 2021 due to financial circumstances and the landlord had notified the tenants that they did not have to vacate the rental unit on October 31, 2022.

I noted that there is a term in the addendum that provides a mechanism for the landlord to avoid or withdraw the vacate clause, which would likely be viewed as unenforceable. The fixed term clause is irrelevant to the matter before me since the tenancy did not end due to the fixed term clause. Nevertheless, I cautioned the landlord that including a vacate clause for landlord's use and not using the unit for that reason upon expiry of the fixed term is subject to additional compensation for the tenant (section 51.1 of the Act) and that terms in a tenancy agreement are to be clear and unequivocal and landlord's cannot attempt to avoid the Act by inserting additional terms. Since section 51.1 came into effect on July 11, 2022, and after the subject tenancy ended, section 51.1 is not applicable in this case.

Analysis

With respect to the tenant's claim against the landlord, I provide the following findings and reasons.

Section 49 provides that a tenancy may be ended where the landlord or close family member of the landlord intends to occupy the rental unit. In order for a landlord to end a

tenancy, the landlord must give the tenant a Two Month Notice to End Tenancy for Landlord's Use of Property, in the approved form.

In this case, the tenants were in receipt of a Two Month Notice and this notice brought the tenancy to an end.

Where a tenancy is ended under section 49 of the Act, the landlord is obligated to pay compensation to the tenant, as provided under section 51 of the Act.

The application before me is for additional compensation equivalent to 12 months of rent. This compensation is provided for under section 51(2) of the Act. Section 51(2) provides as follows:

> (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
>
> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
>
> (b) **the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice**.

[My emphasis added]

Subsection 51(3) provides a mechanism for the Director, as delegated to an Arbitrator, to excuse the landlord from having to pay the compensation provided under section 51(2) if "extenuating circumstances" prevented the landlord from accomplishing the stated purpose within a reasonable amount of time after the tenancy ended or using the rental unit for the stated purpose for at least six months.

The reason for ending the tenancy, as stated on the Two Month Notice, is consistent with section 49(3) of the Act, which provides that a landlord may end a tenancy where:

> (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 49(1) defines “close family member” to include a landlord’s spouse and the landlord’s children or children of the landlord’s spouse.

Although the tenant made arguments with respect to lack of “good faith” on part of the landlord in issuing the Two Month Notice, the good faith of a landlord is only relevant where a tenant disputes a Two Month Notice and the Arbitrator must consider the landlord’s good faith intention in determining whether the Two Month Notice should be upheld or cancelled. The “good faith” of the landlord is not relevant in a claim made under section 51(2). Rather, what is relevant is whether the landlord used the rental unit for the stated purpose, starting within a reasonable amount of time after the tenancy ended, and for at least six months. Therefore, I find it unnecessary to determine whether the Two Month Notice was issued in “good faith”.

In this case, the landlord submitted that she and her spouse began occupying the rental unit immediately and consistently since the tenancy ended. The tenant is of the position the landlord’s occupancy of the upper unit did not begin until December 2022 or so and prior to that the unit was either vacant or occupied by persons that included a non-close family member. The burden of proof rests with the landlord to demonstrate the rental unit was used for the stated purpose within a reasonable amount of time after the tenancy ended and for at least six months.

It is apparent to me that the parties have a different interpretation of the landlord’s requirement to “occupy” the rental unit after the tenancy ended. The Act and its regulations do not define the word “occupy”. Residential Tenancy Policy Guideline 2A: *Ending a Tenancy for Occupancy by Landlord, Purchaser or Close Family Member* does provide reference to “occupy” and vacant possession under the heading “Occupying the rental unit” as follows:

> 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**.

> 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.

Neither the Act, nor the policy guideline specifically requires the landlord, or landlord's close family member, to reside or live in the rental unit on a full time basis as one's primary and permanent residence. If that was the requirement, the Act would have used such words rather than the more broad term of "occupy". From policy guideline 2A, I am of the view there may be different uses that would constitute "occupy" so long as it is for residential living space used by the landlord or landlord's close family member (and not for purposes of a significant renovation, demolition or conversion) and it is not left vacant.

The landlord testified and provided a written statement of one of the co-tenants, SM, that on May 31, 2022 and June 1, 2022 the landlord's furniture and possessions that were in the basement suite were moved into the rental unit. Having furniture and possessions in the rental unit right after the tenancy ended makes sense to me having heard undisputed evidence that the tenant's son and his friend were residing in the rental unit in June 2022 and July 2022. I did not hear any evidence to suggest the landlord's furniture and possessions were removed after the landlord's son left for university and I accept that the landlord's furniture and possessions remained in the rental unit until the landlord and her spouse began making repairs and then using it as a vacation home when the ski season started in November 2022 or December 2022. Using the rental unit to store the landlord's furniture and possessions is not the same as leaving the unit empty and vacant. Therefore, I find the landlord did not hold vacant possession of the rental unit after the tenancy ended.

I heard the basement suite had been used for many years by the landlord, landlord's spouse and the landlord's children as a vacation home. In moving from the basement suite to the rental unit, which is a larger four bedroom unit, I find it reasonable to expect that the same arrangement would continue and from the evidence presented to me, I find I am satisfied that did continue. I am also of the view that having the landlord's son's friend stay with the son for a short period of time, especially considering the size

of the rental unit, it was not ski season and the landlord was not travelling to the rental unit at that time of year, does not automatically put the landlord in breach of the Act. In other words, the son's use of the rental unit, along with his friend, does not mean the landlord or her spouse lost the right or ability to use the rental unit as their vacation home while their son's friend was also staying in one of the four bedrooms. Also of consideration is that the landlord was using the rental unit to some extent while the landlord's son's friend was staying in the rental unit, to store her furniture and possessions. Therefore, I am satisfied the landlord or landlord's close family member began occupying the rental unit starting when the tenancy ended on May 31, 2022.

The landlord provided photographs showing the landlord, landlord's spouse, and landlord's children, along with their friends using the rental unit during the Christmas 2022 holiday season and in February 2023. Therefore, I accept the landlord's position that the landlord or landlord's close family member have been occupying the rental unit since May 31, 2022 until February 2023 and this is at least six months.

As for the tenant's argument that the landlord moved into the rental unit and rented out the basement suite, I find the circumstances before me are distinct from the case referenced in the policy guideline. In the case before me, I heard there has been a separate basement suite and upper main suite for many years and throughout the subject tenancy. There continued to be separate main unit and basement suite after the tenancy ended. I did not hear of a portion of the rental unit being reconfigured so as to create a new separate space that could be rented out as happened in the court case cited by the tenant. Therefore, I find the landlord renting the basement suite that was always separate from the rental unit does not mean the landlord did not use the rental unit for landlord's use.

Based on all of the above, I find I am satisfied that the landlord, or landlord's close family member, has occupied the rental unit starting within a reasonable period after the tenancy ended and for at least six months. Therefore, I find the tenant is not owed additional compensation under section 51(2) of the Act and I dismiss his application in its entirety.

Conclusion

The tenant's application is dismissed, without leave.

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 19, 2023

Residential Tenancy Branch