Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes MNETC, FFT

Introduction

The Tenants seek 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 rent payable under the tenancy agreement; and
- return of the filing fee pursuant to s. 72.

C.T. and W.T. appeared as the former Tenants. C.P. and R.P. appears as the former Landlords.

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 Tenants advise that they served their application and initial evidence on the Landlords. The Landlords acknowledge receipt of the Tenants' application and initial evidence without objection. I find that pursuant to s. 71(2) of the *Act* that the Landlords were sufficiently served with the Tenants' application and initial evidence.

The Landlords advise having served their response evidence on the Tenants, which the Tenants acknowledge receiving without objection. I find that pursuant to s. 71(2) of the *Act* that the Tenants were sufficiently served with the Landlords' evidence.

The Tenants further advise that additional evidence was sent via registered mail to the Landlords on April 11, 2023. I am provided tracking information as proof of service. The Landlords deny receiving the Tenants' additional evidence and say that they have been back and forth to an adjacent community some distance away as their son is in hockey.

Service of additional evidence via registered mail is permitted under s. 88 of the *Act*. Section 90 of the *Act* permits me to deem a party received a document, regardless of whether it has been received or not. However, caselaw on the application of s. 90 of the *Act* is clear that deemed receipt merely forms an evidentiary presumption of service that can be rebutted when fairness requires it.

I accept that the Landlords were away from home in a community some distance away such that there is a clear explanation for why they could not retrieve their mail. This is not a situation where a party has wilfully refused to retrieve documents. I am unable to apply s. 90 of the *Act* as I find it would be unfair to do so. As the additional evidence was not served, I do not include it and shall not consider it.

Issues to be Decided

1) Are the Tenants entitled to compensation equivalent to 12 times the monthly rent payable under the tenancy agreement?
2) Are the Tenants entitled to their filing fee?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

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

- The Tenants moved into the rental unit on October 15, 2020.
- The Tenants vacated the rental unit on or about March 21, 2022.
- Rent of $2,000.00 was due on the first of each month.

I am provided with a copy of the tenancy agreement by the parties.

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.

The Tenants provide me with a copy of a Two-Month Notice to End Tenancy signed on February 10, 2022 (the "Two-Month Notice"), which lists it was issued on the basis that the landlord or their spouse would occupy the rental unit. The effective date of the Two-Month Notice is May 1, 2022.

The Landlords live in a community some distance from the rental unit, but I am told by them that they own and operate a campground in the community in which the rental unit is located. The Landlords say that they moved into the rental unit on or about May 4, 2022 so that they had somewhere to live that was close to the campground during the 2022 season. C.P. tells me that the campground opened on May 12th and closed for the on September 18th. I am told by the Landlords that they resided at the rental unit while the campground was open, though one or both sometimes went back to their home as their children were in school during a portion of time while the campground was open.

The Landlords further advise that their children went to summer camp near to the rental unit. The Landlords' evidence includes receipts for the summer camp. It also includes various receipts for what appears to be gasoline from stations between the rental unit and their home community, with those receipts being dated between May 2022 and September 2022. The Landlord's evidence also includes photographs of what appears to be their children inside the rental unit. Finally, I have been provided with an affidavit, the details of which were confirmed by the Landlords at the hearing.

The Tenants advise that after they were served with the Two-Month Notice, they were forced to move to another community given the lack of rental options. The Tenants tell me that their former neighbour, G., kept them apprised of the comings and goings at the rental unit. Their evidence includes an email from G. dated August 2, 2022 saying that he had not yet seen anyone move into the rental unit and that it appeared to be under renovation.

Another email dated August 29, 2022 from G. states that the neighbours come by infrequently and they had been at the rental unit for less than a week since the Tenants moved out. G. further states in the same email that the Landlords were attempting to subdivide the property. Further email dated September 9, 2022 from G. says that the yard had not been kept up and that Scottish Broom had taken over the lawn.

The Landlords emphasize that they did live in the property while their campground was open and that no one else has lived there. They acknowledge some work was undertaken at the property, including paint, counter replacement, and septic tank repairs. They say this was minor and that they continued to reside in the rental unit during that time. They say that they do not know the neighbour G. and do not see why they would report to him when they come and go. According to the Landlords, they would go to the campground around 6:00 AM and sometimes return at 10:00 PM.

The Landlords further advise that after their children returned to school in the fall of 2022, they made less use of the rental unit, though someone remained periodically in September 2022 until the campground closed and was winterized. The Landlords acknowledge that after the campground shut down, they returned to residing primarily in their home community. However, the Landlords say that they would periodically take weekend trips to the rental unit but could not provide a clear idea on the frequency of those trips.

I enquired with the Landlords what they had done during the 2021 season as the Tenants occupied the rental unit during that period. The Landlords tell me that they lived at the campground in an RV and that they did not wish to do so the following summer given it was less accommodating for them and their family.

Much of this dispute comes down to how one characterizes occupation for the purposes of a landlord ending a tenancy under s. 49(3) of the *Act*. Policy Guideline #2A, citing *Schuld v Niu*, 2019 BCSC 949, specifies that when a notice to end tenancy for landlord's use is served for occupancy, it must be for them to use as living accommodation.

I have considered the meaning of occupation and I find that moving into a space for personal use as living accommodation, even on a temporary basis, satisfies the occupancy requirement. Section 49(3) of the *Act* does not require occupancy of a space for personal use to the exclusion of all other living accommodations. It is entirely consistent with the *Act* for a landlord, as here, to make use of their property for personal occupation even if it is on an ad hoc basis. The Landlords tell me that no one else has lived in the rental unit. There is no suggestion that the rental unit was put to any other use than personal occupation.

Dealing first with the question of whether the Landlords occupied the rental unit within a reasonable period of the effective date of the Two-Month Notice, I find that the Landlords have demonstrated they did. The Landlords testify that they did move into the rental unit in early May 2022 such that they had a place to live while running a campground nearby. The documentary evidence supports that they were back and forth to the rental unit from May to September 2022. The evidence also suggests that Landlords' children were in summer activities in a nearby community at the time.

The Tenants provide emails from the neighbour suggesting that no one had moved into the rental unit as of August 2, 2022. However, the neighbour did not provide direct evidence at the hearing. Further, the Tenants no longer reside in the community and, so far as I am aware, have not returned since moving away in March 2022. They cannot provide evidence based on their direct observations on whether the Landlords did not move into the rental unit. Indeed, it appears the Tenants have taken the neighbour's view of things on faith. I am cognizant that it is the Landlords' onus to prove the relevant aspects set out under s. 51(2) of the *Act*. I make the comments on the Tenants' evidence not to shift the onus of proof onto them, only to make clear that I accord little weight to the hearsay evidence from the neighbour and that I have scant evidence to demonstrate that the Landlords are not otherwise telling me the truth.

I accept the Landlords' affirmed testimony, which is supported by their documentary evidence, that they did move into the rental unit in early May 2022. I find that this was within a reasonable time of the effective date of the Two-Month Notice.

Looking next to whether the Landlords occupied the space for 6 months, I am satisfied that they have done so. By the Landlords own admission, the rental unit was primarily used primarily between May and September 2022 and much less so afterwards. Do periodic weekend visits from October 2022 onwards somehow mean the Landlords only occupied the rental unit for 5 months and not the required 6 months? I think not. There is no rigid requirement under the *Act*, or in the caselaw, that one needs to live in a space full time to occupy it. Making use of a property for weekend getaways, provided it is only for personal use, continues to satisfy the occupancy requirement. I find that the Landlords have demonstrated that they have occupied the rental unit for at least 6 months.

Accordingly, I find that the Landlords have established the relevant aspects under s. 51(2) of the *Act* such that the Tenants are not entitled to compensation. Their application is, therefore, dismissed without leave to reapply.

Conclusion

The Landlords have demonstrated that they occupied the rental unit within a reasonable period from the effective date of the Two-Month Notice and did so for at least 6 months. As such, I dismiss the Tenants application for compensation under s. 51(2) of the *Act* without leave to reapply.

As the Tenants were unsuccessful, I find that they are not entitled to their filing fee. I dismiss their claim under s. 72 of the *Act* 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: May 03, 2023

Residential Tenancy Branch