

Decision

Dispute Codes:

CNL

FF

OLC

Introduction

I have been delegated the authority under Section 9.1 of the *Residential Tenancy Act* (the “Act”) to hear this matter and decide the issues.

I reviewed the evidence on the case file prior to the Hearing. The Landlord’s agent and the Tenants gave affirmed testimony and this Application proceeded on its merits.

Issue(s) to be Decided

This is the Tenants’ application to: cancel a 2 month Notice to End Tenancy for Landlord’s Use of Property; for a monetary order for compensation for damage or loss under the Act; an order that the Landlord comply with the Act; an order to suspend or set conditions on the Landlord’s right to enter the rental unit; and to recover the filing fee from the Landlord for the cost of this application.

The issues to be determined based on the testimony and the evidence are:

- What is the effective date of the Notice to End Tenancy?
- Has the Landlord proven, on the balance of probabilities, that it intends to renovate or repair the rental unit in a manner that requires the rental unit to be vacant?

- Have the Tenants proven, on a balance of probabilities, that they are entitled to: a monetary order; an order that the Landlord comply with the Act; and an order setting conditions of the Landlord's right to enter the rental unit?

Preliminary Matter

At the onset of the hearing, the Tenant questioned the effective date of the 2 Month Notice to End Tenancy.

The Landlord's agent testified that she mailed the Tenant the 2 Month Notice to End Tenancy dated December 23, 2008, by registered mail on December 24, 2008. The Landlord's agent testified that the registered mail package was not picked up by the Tenant, and so she posted a copy of the Notice to End Tenancy on the Tenant's door on January 6, 2009.

Section 49(2) of the Act states:

(2) Subject to section 51 *[tenant's compensation: section 49 notice]*, a landlord may end a tenancy for a purpose referred to in subsection (3), (4), (5) or (6) by giving notice to end the tenancy effective on a date that must be

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

(b) 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

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

Section 90 of the Act states, in part:

90 A document given or served in accordance with section 88 *[how to give or serve documents generally]* or 89 *[special rules for certain documents]* is deemed to be received as follows:

(a) if given or served by mail, on the 5th day after it is mailed;

I therefore find that, notwithstanding the fact that the Tenants did not pick up their registered mail, the Tenants were deemed to have received the 2 Month Notice to End Tenancy on December 29, 2008. Therefore, the effective date of the Notice to End Tenancy is February 28, 2009.

Background and Evidence

The Tenants testified that they filed their Application for Dispute Resolution on January 7, 2009, and subsequently filed an amended Application on January 19, 2009. The amendment was made to reflect the accurate name of the Landlord.

The Tenants testified that they mailed Landlord their original Application for Dispute Resolution by registered mail on January 10, 2009. The Landlord's agent agreed that the Landlord received the registered mail, but that the Notice of Hearing was missing from the package. The Landlord's agent testified that she attended at the Residential Tenancy Office and was provided with a copy of the Notice of Hearing.

The Tenants testified that they mailed the Landlord their amended Application for Dispute Resolution by registered mail on January 19, 2009. The Landlord's agent agreed that the Landlord received the registered mail package together with copies of the Tenants' evidence on January 28, 2009, and did not dispute service of the Tenants' amended Application and notice of hearing package.

Tenants' evidence

The Tenants testified that they believe Landlord is trying to end the tenancy for reasons other than to make major renovations to the rental unit. The Tenants stated that they believe the Landlord wants to get rid of them, due to having lost a previous Application to raise their rent beyond what is specified in the Act.

The Tenants testified that the renovations that the Landlord wishes to make are cosmetic and do not require that the Tenants to vacate the rental unit. The Tenants do not dispute the Landlord's assertion that there is 1% asbestos in the vermiculite insulation in the upper bedrooms. With respect to the Landlord's assertion that the Tenants have to vacate the rental unit because of safety issues around the removal of asbestos in the upstairs bedrooms, the Tenants stated that there is no danger from the asbestos if it is left undisturbed. The Tenants stated that the Landlord provided a document into evidence which confirms this. The Tenant referred to a document entitled "Vermiculite Insulation Containing Asbestos", which the Landlord entered into evidence. The last paragraph of this document states:

"The information stated here was found on the Health Canada Website and by contacting WCB. As it states, vermiculite containing asbestos poses very little risk when it is not being disturbed. Removal of vermiculite containing asbestos is a costly measure and benefits will need to be weighed by you and your family."

With respect to the Tenants' application for an order that the Landlord comply with the Act, and that I make an order setting conditions of the Landlord's right to enter the rental unit, the Tenants testified that they felt the Landlord's agent was harassing them by entering the rental unit on short notice, or without proper notice.

Landlord's evidence

The Landlord's agent testified that it is necessary for the Tenants to vacate the rental unit. The Landlord's agent testified that the Landlord's insurance company will not insure the property after September, 2009, unless the property has a new roof in place. The Landlord's agent testified that in order to redo the roof, the whole roof, including the rafters, will have to be replaced. The Landlord's agent stated that in so doing, the vermiculite insulation will be disturbed as it is located in the ceiling of the upstairs bedrooms.

The Landlord provided a long list of renovations that it wishes to do to the rental unit, including: repairing and painting of walls; replacing old windows; caulking of a bathtub or possible replacement of the bathtub; installing fans; replacing flooring (not replacing the sub-flooring); new cabinets and countertops in the kitchen; replacing water pipes in the basement; installing hard-wired smoke detectors; removing the vermiculite insulation in the upstairs bedroom's ceilings; and total replacement of the roof.

The Landlord provided an estimate (proposal) for removing the vermiculite insulation and replacing it with new insulation. The Landlord provided quotes for: new kitchen cabinets, crown molding, counter tops, a new range hood; and to replace the windows.

Analysis

Has the Landlord proven, on the balance of probabilities, that it intends to renovate or repair the rental unit in a manner that requires the rental unit to be vacant?

In an application such as this, where the Landlord has issued a Notice to End Tenancy for Landlord's Use of Property, and the Tenant has questioned the "good faith" intent of the Landlord, the burden is on the Landlord to establish that it truly intends to do what

the Landlord indicates on the Notice to End Tenancy. The Landlord must establish that it does not have an ulterior motive for ending the tenancy as its primary motive.

I find that with the exception of replacing the roof and the then necessary removal of the vermiculite insulation, all other items in the Landlord's list of improvements are items that could be completed with the Tenant remaining in the rental unit.

In the Landlord's Notice to End Tenancy, it indicates (by ticking a box on the form):

“The landlord has all necessary permits and approvals required by law to demolish the rental unit or repair the rental unit in a manner that requires the rental unit to be vacant.”

Replacing the roof is a structural change to the building. Normally structural changes to a building require building permits. The Landlord did not provide any documentary evidence that it had the required building permits in place to do this work. Even if the re-roofing does not require permits, the Landlord did not provide any evidence to show that permits were not required. Examples of such evidence might be an engineer's report or a letter from the municipality stating that permits were not required.

The Landlord did not provide corroborative evidence from its Insurance Company that they would not insure the property beyond September, 2009 without a new roof.

I accept that there are renovations required to the building. However, based on the evidence and oral testimony of the Landlord's agent and the Tenant, I find that the Landlord has not met its burden of proof that it intends to make major renovations to the rental unit which require the Tenants to vacate the rental unit in order for those renovations to be made. I therefore cancel the 2 Month Notice to End Tenancy for Landlord's Use of Property.

This decision does not preclude the Landlord from making a further application with respect to removal of the roof if it can provide the required evidence with respect to building permits.

Have the Tenants established that they are entitled to: a monetary order for compensation or loss in the amount of \$870.00; an order that the Landlord comply with the Act; and an order setting conditions of the Landlord's right to enter the rental unit?

The Tenants did not provide a detailed calculation, as is required, of the amount claimed, or what it was in relation to. I therefore dismiss the Tenant's application for a monetary order.

I have no concrete evidence of the Landlord failing to comply with the Act, and I dismiss the Tenant's application for an order that the Landlord comply with the Act.

The Landlord is required to give proper written notice of intent to enter the rental unit, with few exceptions. Section 29 of the Act states:

Landlord's right to enter rental unit restricted

29 (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

(a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

(i) the purpose for entering, which must be reasonable;

(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;

(d) the landlord has an order of the director authorizing the entry;

(e) the tenant has abandoned the rental unit;

(f) an emergency exists and the entry is necessary to protect life or property.

(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

I provide this section of the Act to the Tenants and the Landlord for their information. I find no reason to set conditions on the Landlord's right to enter the rental unit, other than those already set out in the Act. I dismiss the Tenants' application for an Order setting conditions on the Landlord's right to enter the rental unit.

The Tenants have been successful in their application to cancel the 2 Month Notice to End Tenancy and is therefore entitled to recover the filing fee from the Landlord for the cost of this application.

Conclusion

The 2 Month Notice to End Tenancy for Landlord's Use of Property, effective February 28, 2009, is cancelled and this tenancy will remain in full force and effect.

This decision does not preclude the Landlord from making a further application with respect to removal of the roof if it can provide the required evidence with respect to building permits.

Pursuant to Section 72(2)(b) of the Act, I order that Tenant is entitled to apply the \$50.00 towards next month's rent.

February 12, 2009
