Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

DECISION AND REASONS

Dispute Codes CNL, FF

Introduction

This hearing dealt with the tenant's application for dispute resolution, seeking to cancel a notice to end tenancy issued by the landlord for the landlord's use of the property. The tenant also applied for the recovery of the filing fee.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me. I have considered all the written evidence and oral testimony provided by the parties but have not necessarily alluded to all the evidence and testimony in this decision.

At the start of the hearing, I asked the landlord if there was any change in his position, from the date that the tenant had filed this application. The landlord stated that he intended to pursue his initial plan of renovating the unit and requested that he be granted an order of possession, in the event that the notice to end tenancy was upheld.

The rental unit is a penthouse suite located on the eleventh floor of the building. The landlord is a company consisting of five shareholders who bought the building in November 2007 and obtained a permit to renovate in December 2008. The building is approximately 50 years old and the landlord stated that several systems were problematic resulting in complaints from the residents. At the time of this hearing, about 30 suites were already renovated and the dispute suite was the only one left for renovation.

Issues(s) to be Decided

Has the landlord validly issued the notice to end tenancy and does the landlord intend, in good faith, to carry out extensive renovations to the property?

Background and Evidence

The landlord issued the Tenant a two month notice to end tenancy, on June 09, 2009, to be effective on August 31, 2009.

The reasons the landlord gave the notice to the tenant is described as, the landlord has all necessary permits and approvals required by law to demolish or repair the rental unit in a manner that requires the unit to be vacant and that the unit will be occupied by the landlord or a close family member after renovations.

The tenant has alleged the landlord is issuing the notice in bad faith, and has no intention of occupying the rental unit. However the tenant agreed that the landlord had intentions of renovating the unit and has the required permits to do so. The tenant also agreed that the renovations were extensive and required the unit to be vacant for the period that the work was carried out.

The tenant stated that she has lived in the rental unit for eight years and is very attached to the area and the community and would like the tenancy to continue. The tenant alleges that the landlord wants to renovate and rent the unit for a higher rent. The tenant agreed that she was offered another fully renovated unit in the building but could not come to an agreement with the landlord regarding the amount of the rent.

When the Tenant alleges bad faith on the part of the Landlord, the Landlord has an onus to prove they are acting in good faith. The landlord argued that the renovations were necessary to update failing systems in the building. The renovated units were completely gutted and the plumbing and electrical systems were replaced. In addition, meters and new cabinets in the kitchen and bathroom were installed.

The crux of the landlord's testimony was that the rental unit would be entirely gutted and uninhabitable during the renovation process. The landlord testified that the intended renovations to the dispute suite were expected to cost approximately $50,000.00 and take about two months to complete. The landlord stated that tenants of the other renovated units were offered options to move into a different renovated suite at fair market rent and approximately four tenants accepted the offer. The landlord also added that this option was available to the tenant.

The landlord stated that he spoke with the tenant in January of 2008, regarding the upcoming renovations. The tenant requested the landlord to allow her to stay through summer of 2008 after which she would move out. The landlord obliged and scheduled the renovation work for this unit after the other units were completed. The landlord also stated that he offered the tenant a fully renovated unit, located one floor below hers, but she did not want to pay the new rent of $2,200.00.

The landlord stated that the five owners of the building want to share the use of the penthouse after the renovations. The landlord also indicated that he planned to have all the rental documentation housed in the penthouse and therefore would be using the unit for his personal use.

Analysis

Section 49(6)(b) of the Act, pursuant to which the notice to end tenancy was issued, provides as follows:

- 49(6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:

- 49(6)(b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant;

The landlord must show that that (a) they have all the necessary permits and approvals required by law; (b) they intend in good faith to renovate; and (c) the intended renovations require the rental unit to be vacant. As the tenant did not dispute that the landlord has complied with the requirements of the Act, I will address each of these criteria very briefly.

The tenant did not dispute that all required permits and approvals were in place before the notice to end tenancy was served and I find that the landlord had all necessary permits and approvals required by law at the time that the notice to end tenancy was served.

The landlord has already conducted renovations in the other units that are named on the building permit. The tenant argued that the landlord had failed to act in good faith and in the absence of any evidence to support this allegation, I find the landlord has met the good faith requirement of the legislation and intends to carry out the renovations.

The parties agreed that the residential units would need to be vacant for a period of approximately two months to accommodate the repairs and renovations.

The crux of the tenant's argument was that although he agreed that vacancy was required in order to perform the renovations, he was willing to vacate the rental unit with the understanding that the tenancy would continue in the renovated unit. In support of his argument, the tenant relied on the recent BC Supreme Court decision in *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)* 2007 BCSC 257 (hereinafter "*Berry and Kloet*").

In that case, the landlord issued a notice to end tenancy under section 49(6) and it was determined that vacancy for a period of at least three days was required. The Dispute Resolution Officer upheld the notice to end tenancy, but the court found that as the tenants had volunteered to vacate the rental unit for the period of time in which vacancy was required, it was not necessary to terminate the tenancy and the court set aside the decision of the Dispute Resolution Officer.

The tenant specifically relied on paragraph 22 of the decision in which the arbitrator wrote,

> … [I]t must be the case that the only manner in which to achieve the necessary vacancy, or emptiness, is by terminating the tenancy. I say this based on the purpose of 49(6). The purpose of s. 49(6) is not to give landlords a means for evicting tenants; rather, it is to ensure that landlords are able to carry out renovations. Therefore, where it is possible to carry out renovations without ending the tenancy, there is no need to apply s. 49(6).

I find that *Berry and Kloet* can be distinguished on its facts as it dealt with a required vacancy period of three days whereas in the case at bar, the required vacancy period is at least two months.

I agree with comments in paragraph 23 of *Berry and Kloet*:

> "Practically speaking, if the tenant is willing to empty the unit for the duration of the renovations, then an end to the tenancy is not required. It is irrational to think that s. 49(6) could be used by a landlord to evict tenants because a very brief period was required for a renovation in circumstances where the tenant agreed to vacate the premises for that period of time. It could not have been the intent of the legislature to provide such a 'loophole' for landlords."

In this paragraph, the writer appears to take issue with the idea that a brief period of vacancy could lead to a termination of the tenancy in a situation where the tenant was willing to accommodate the landlord. In this case, the period of vacancy is not brief, but significant. I find that *Berry and Kloet* is distinguishable on its facts.

After having carefully reviewed the submissions of the parties, I am unable to find that a tenancy can continue when the rental unit is not available for occupation. By its very definition, a tenancy requires the rental unit to be available for occupation. If I were to find that the tenancy continued under the circumstances before me, it would open the door to a claim by the tenant for compensation for loss of use of the rental unit as the renovations severely impaired his rights. It could not have been the intent of the legislature to require a landlord to compensate a tenant for many months in which the rental unit was uninhabitable due to renovations.

To find that a two month period of vacancy does not warrant the ending of a tenancy is to render the provisions of section 49(6) meaningless and rather than balancing the rights of landlords and tenants, would severely prejudice the ability of the landlord to improve the value and durability of his investment.

I find that vacant possession is required for the landlord to proceed with the renovations.

Conclusion and Order

For the reasons given above, I dismiss the tenant's application. The tenant will bear the cost of the application fee.

At the hearing the landlord made a request under section 55 of the legislation for an order of possession. Under the provisions of section 55, upon the request of a landlord, I must issue an order of possession when I have upheld a notice to end tenancy. Accordingly, I so order. The tenant must be served with the order of possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

The Notice to End Tenancy is upheld and l grant the Landlord an order of possession effective on or before **1:00 p.m. on August 31, 2009**.

Dated August 05, 2009.

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Dispute Resolution Officer