

Decision

Dispute Codes: CNC, MNDC, OLC, LRE, FF

Introduction

This hearing dealt with an application from the tenants for cancellation of the landlord's 1 month notice to end tenancy for cause, a monetary order for damage or loss under the Act / regulation / tenancy agreement (alleged breach of the right to quiet enjoyment), an order instructing the landlord to comply with the Act, an order suspending or setting conditions on the landlord's right to enter the unit, and recovery of the filing fee.

The landlord seeks an order of possession in the event that the application from the tenants to set aside the notice to end tenancy fails.

Both parties participated in the hearing and gave affirmed testimony.

Issues to be decided

- Whether either party is entitled to any of the above under the Act

Background and Evidence

Pursuant to a written residential tenancy agreement, the month-to-month tenancy began on June 1, 1997. Currently, rent in the amount of \$1,035.00 is payable on the first day of the month. A security deposit of \$359.00 was collected on May 30, 1997.

The landlord issued a 1 month notice to end tenancy for cause dated September 8, 2009. A copy of the notice was submitted into evidence. Reasons shown on the notice for its issuance are as follows:

Tenant or a person permitted on the property by the tenant has:

significantly interfered with or unreasonably disturbed another occupant or the landlord

seriously jeopardized the health or safety or lawful right of another occupant or the landlord

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so

The tenants disputed the notice by filing an application for dispute resolution on September 18, 2009.

The landlord's notice arises principally out of difficulties encountered between the parties in association with inspection of the unit. The landlord's agent testified that unit inspections are to take place annually, and that this year they were scheduled during the three month period of June, July and August 2009. An inspection of the subject unit took place on August 27, 2009. The landlord was represented at the inspection by an agent, "JG," and two resident building managers, "YB" and "VB." Also present were 4 police officers.

The tenants' application for a monetary order arises out of an alleged breach of the right to quiet enjoyment. Particular circumstances and events in this regard include the conduct of the landlord's agent, "YB," during the inspection on August 27, 2009; the tenants consider that "YB's" behaviour was intimidating, and state that he took unauthorized pictures in the unit. While neither "YB" nor "VB" were present at the hearing, a detailed written submission including attachments was provided by "YB."

The tenants also identify concerns arising from the landlord's disregard of their request to re-schedule the inspection from August 27, 2009, in addition to the involvement of police. The tenants state that they were not informed in advance that police would be present during the inspection, and claim also that the involvement of police has served to damage their reputation. Specifically, the tenants claim to have been informed by police that the purpose of their presence was to determine the existence of a drug lab.

Further, the alleged breach of the right to quiet enjoyment arises out of circumstances surrounding a follow up inspection that was scheduled to occur on September 8, 2009,

but which for a variety of reasons did not take place. This is addressed in greater detail below.

Following the inspection on August 27, 2009, the landlord issued a "Breach Letter – Sanitary Conditions" dated September 1, 2009. Specific concerns were identified in the letter and the tenants were instructed to "clean your premises within 48 hours of receipt of this letter." The tenants were also informed in this letter, in part, that "failure to rectify the breach within the time mentioned above will result in a one (1) month Notice to End a Residential Tenancy...."

The tenants state they received the above letter on September 3, 2009, and attempted on September 4, 2009 to contact the landlord's senior property manager, "DL." In a voice mail message left with "DL" on September 4, 2009, the tenants confirmed receipt of the Breach Letter, as well as receipt from "YB" of notice that a follow up inspection would take place on September 8, 2009.

Arising from their concern about the circumstances surrounding the inspection on August 27, 2009, the tenants contacted police to request that an officer be present with them for the follow up inspection on September 8, 2009. The follow up inspection was scheduled to occur at 9:30 a.m. The tenants claim that "DL," "YB" and "VB" arrived at approximately 9:49 a.m. As police had not yet arrived, according to the tenants, "DL" agreed to wait downstairs with "YB" and "DL." Subsequently, the tenants contacted "DL" by telephone and proposed that if she wished to attend the unit to complete the unit inspection on her own (without either "YB" or "VB") then the tenants would cancel their request for a police presence and the inspection could proceed quickly. The tenants claim that "DL" said she would be "up in five minutes."

Thereafter, however, an officer arrived at the unit and decided to wait with the tenants for "DL" to come up to the unit. Time passed and "DL" did not again appear. The tenants then attempted to again reach "DL" by telephone, but were only able to reach "YB." At that point "YB" informed the tenants that "DL" had left the building about half

an hour ago. The tenants claim that as police were already present, they suggested to “YB” that he attend the unit to conduct the inspection. However, the tenants state that “YB” declined and, in the result, the follow up unit inspection did not take place that day.

Subsequently, the tenants were served with the 1 month notice dated September 8, 2009. Accompanying the notice was a letter dated September 8, 2009 from “DL” to the tenants in which she stated, in part:

As per our company's policy, no suite inspection is to be performed by any of our Head Office or / and site staff by themselves, due to safety, security and witnessing reasons. Due to the circumstances, I found myself in the position of cancelling the inspection of your unit.

As per Residential Tenancy Act, your actions have jeopardize [sic] a lawful right of the Landlord, and significantly interfered with building operations. As a result, please find enclosed a one month end of Tenancy notice.

Analysis

Based on the documentary evidence and testimony of the parties, I find that the tenants were served with a 1 month notice to end tenancy for cause dated September 8, 2009. The tenants disputed the notice within 10 days of receiving the notice.

Section 47 of the Act speaks to **Landlord's notice: cause**. Following careful consideration of the documentary evidence and testimony of the parties, I am unable to conclude that the landlord has met the burden of proving, on a balance of probabilities, that it has cause for ending this tenancy. The unit inspection proceeded on August 27, 2009 and I am not persuaded that the tenants acted in bad faith to thwart the landlord's efforts to inspect the unit again on September 8, 2009. At worst I must conclude that miscommunications, misunderstandings and frustration contributed to what was ultimately an unsatisfactory outcome for both parties. Accordingly, I hereby cancel the

landlord's 1 month notice to end tenancy for cause. The tenancy therefore continues in full force and effect.

Section 29 of the Act addresses **Landlord's right to enter rental unit restricted.**

Further, Residential Tenancy Policy Guideline # 7 addresses **Locks and Access**, and provides in part as follows:

Regarding written notices, the notice must state a reasonable purpose for the entry and must give the date and time intended for the entry. The time stated must be between 8:00 a.m. and 9:00 p.m.

The notice must be served in accordance with the *Residential Tenancy Act*. If the landlord leaves the notice in the mailbox or mail slot, or attaches it to the door or other conspicuous place on the rental unit, the notice is not deemed to be received until 3 days after posting or placing it in the mailbox or slot. If the notice is sent by mail, the notice is not deemed received until 5 days after mailing. If the notice is sent by fax, the notice is not deemed received until 3 days after faxing it. This additional time must be taken into consideration by the landlord when advising of the date and time of entry.

Where a valid notice has been given by the landlord it is not required that the tenant be present at the time of entry. [emphasis added]

Where possible [emphasis added] the parties should agree beforehand on reasonable times for entry.

Where a tenant prevents a landlord entering, after a valid notice of entry has been given, the landlord may apply for an Order for entry at a specified time and for a specified purpose. The arbitrator can, at that time, determine if the reason for entry is a reasonable one.

Section 28 of the Act addresses **Protection of tenant's right to quiet enjoyment**. Further, Residential Tenancy Policy Guideline # 6 speaks to **Right to Quiet Enjoyment**, and provides in part, as follows:

This guideline deals with a tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. At common law, the covenant of quiet enjoyment "promis(es) that the tenant...shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy."

Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.

The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment. Such interference might include serious examples of [among other things]:

- unreasonable and ongoing noise
- persecution and intimidation

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

- **Claim for damages**

In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.

The Supreme Court has decided that arbitrators have the ability to hear claims in tort, and that the awarding of monetary damages might be appropriate where the claim arises from the landlord's failure to meet his obligations under the Legislation. Facts that relate to an issue of quiet enjoyment might also be found to support a claim in tort for compensation in damages. An arbitrator can award damages for a nuisance that affects the use and enjoyment of the premises, or for the intentional infliction of mental suffering.

On application, an arbitrator may award aggravated damages where a very serious situation has been allowed to continue. Aggravated damages are those damages which are intended to provide compensation to the applicant, rather than punish the erring party, and can take into effect intangibles such as distress and humiliation that may have been caused by the respondent's behaviour.

The full text of the legislation, Residential Tenancy Policy Guidelines, Fact Sheets, forms and more can be accessed via the website: www.rto.gov.bc.ca

While I accept that the tenants were upset as a result of the unit inspection on August 27, 2009, and frustrated by the outcome of the anticipated follow up inspection scheduled to take place on September 8, 2009, so too was the landlord upset and inconvenienced by being unable to complete the follow up inspection. Had the

inspection been able to proceed, it is conceivable that the matter may have been concluded to the satisfaction of both parties. Again, I note the circumstances surrounding the dispute have been unfortunate for both parties. In the result, on a balance of probabilities, I am unable to conclude that the tenants have established entitlement to a monetary order as compensation for breach of the right to quiet enjoyment.

Going forward, the parties are encouraged to familiarize themselves with the relevant legislative provisions concerning unit access. Further, the parties are encouraged to undertake anew to work cooperatively in order to determine whether a follow up unit inspection can be scheduled at a time that is agreeable to both.

Conclusion

Pursuant to all of the above, I hereby set aside the landlord's 1 month notice to end tenancy for cause. The tenancy therefore continues in full force and effect.

For the purposes of the follow up unit inspection, I hereby order the landlord to ensure that a senior property manager participates alongside of either or both of the resident building managers.

The tenants' application for a monetary order as compensation for damage or loss under the Act / regulation / tenancy agreement is dismissed.

As the tenants have succeeded in their application to have the notice to end tenancy set aside, in response to their application to recover the filing fee I hereby order that they may withhold **\$100.00** from the next regular payment of monthly rent.

DATE: November 16, 2009

Dispute Resolution Officer