



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FF

Introduction

This hearing dealt with the tenants' application to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property. Both parties appeared at the hearing and were provided the opportunity to make submissions, in writing and orally, and to respond to the submissions of the other party.

At the commencement of the hearing I determined that the landlord had not served all of the landlord's evidence upon the tenants, namely photographs and a written submission, and I did not accept or consider that evidence in making this decision. Rather, the landlord was provided the opportunity to make verbal submissions and verbally describe the renovations done to other units.

Issue(s) to be Decided

Should the Notice to End Tenancy be upheld or cancelled?

Background and Evidence

The tenancy commenced October 9, 1993 and is currently on a month to month basis. I heard that the monthly rent is either \$609.50 or \$611.74 although I found it unnecessary to determine which amount is correct for purposes of this decision.

On June 25, 2011 the landlord put a *2 Month Notice to End Tenancy for Landlord's Use of Property* (the Notice) in the tenants' mail slot. The Notice has an effective date of August 31, 2011 and indicates the reason for ending the tenancy is because:

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.

The tenants disputed the Notice on June 30, 2011 and on July 15, 2011 the landlord wrote a letter to the tenants describing repair work that the landlord intends to perform.

The July 15, 2011 letter indicates the rental unit will not be in a liveable condition for two to three weeks and that the repair work shall consist of:

1. Replacement of entire flooring of the suites;
2. Repainting of the apartments suites, and
3. Re-doing the bathroom.

[reproduced as written]

Both parties agreed that the landlord does not have any permits for repairs and that the above described repairs do not require permits.

The landlord submitted that since purchasing the apartment building a few years ago continuous upgrades have been made to the property. I heard that the building is approximately 40 years old and it is the landlord's business plan to prioritize and budget renovations for one-bedroom units, such as the one occupied by the tenants. Two or three units are upgraded every year. In this particular unit the carpeting in the rental unit is old and smells of smoke so it will be replaced with tile and hardwood flooring. The kitchen and bathroom flooring will also be upgraded to tile. The landlord estimated that the work will be completed in about one week but due to the hardwood floor finishing an additional two weeks may be required to let the fumes dissipate.

The landlord submitted that some small repairs have been made to the rental unit since purchasing the building and that the tenants are very demanding and difficult to deal with. The landlord cited an example where the female tenant called the landlord three times in 15 minutes when a contractor was late. The landlord cited another example where only a small area of wall was in need of painting but the tenant demanded the entire wall be repainted. The entire wall was repainted by the landlord because the walls are nicotine stained.

The tenants' agent called into question the landlord's motivation for choosing to renovate this unit. The tenants' agent suggested that the landlord's motivation is to end the tenancy to raise the rent and re-coup the rent reduction the tenants obtained after the landlord terminated cable service. The tenant's agent submitted there were two other units that are vacant and not undergoing renovation.

The agent submitted that the flooring in the rental unit is in excellent condition although it is older. The tenants keep the rental unit immaculate and can accommodate the landlord's decision to make renovations by storing their furniture and using a bathroom elsewhere for a temporary period of time. The agent stated the tenants have are

minimalists and that people have offered them storage space and use of their bathroom while renovations are underway.

The agent also stated that he, himself, moved into another rental unit in the building after the hardwood floors were finished and the fumes had dissipated after two days. The agent also pointed to the fact the landlord has not tried to make an arrangement with the tenants for temporary accommodation while renovations are underway.

he landlord rebutted the agent's submissions by stating that one of the vacant units is currently in the process of being renovated and the other unit was updated more recently than the rental unit. The landlord also responded by stating the tenants have a lot of furniture and possessions in their unit that it would be impossible to remove them temporarily.

In making this decision, I have considered the following evidence. The Notice to End Tenancy and subsequent letter from the landlord dated July 15, 2011; the photographs taken by the tenants; Notices of Rent Increase and letters from the landlord concerning rent increases.

Analysis

Where a Notice to End Tenancy comes under dispute, the landlord bears the burden to prove the tenancy should end for the reasons provided on the Notice. A Notice to End Tenancy given under section 49(6) of the Act, as is the case here, requires the landlord to show that the renovations being proposed require vacant occupancy of the rental unit and that the landlord has obtained all necessary permits and approvals required by law. In addition, the landlord must serve the Notice in good faith.

Residential Tenancy Policy Guideline 2: deals with the "good faith" requirement in ending a tenancy. It provides, in part, the following:

The "good faith" requirement imposes a two part test. First, the landlord must truly intend to use the premises for the purposes stated on the notice to end the tenancy. Second, the landlord must not have a dishonest or ulterior motive as the primary motive for seeking to have the tenant vacate the residential premises.

For example, the landlord may intend to occupy or convert the premises as stated on the notice to end. That intention may, however, be motivated by dishonest or undisclosed purposes. If the primary motive for the landlord ending

the tenancy is to retaliate against the tenant, then the landlord does not have a “good faith” intent. Similarly, if the landlord is attempting to avoid his/her legal responsibilities as a landlord, or is attempting to obtain an unconscionable or undue advantage by ending the tenancy, the intent of the landlord may not be a “good faith” intent. Rather, the circumstances may be such that dishonesty may be inferred.

If the “good faith” intent of the landlord is called into question, the burden is on the landlord to establish that he/she truly intends to do what the landlord indicates on the Notice to End, and that he/she is not acting dishonestly or with an ulterior motive for ending the tenancy as the landlord's primary motive.

While the tenants’ agent suggested the landlord has ulterior motives for ending the tenancy, I am not satisfied that the landlord has issued this Notice to End Tenancy in an attempt to retaliate against the tenants or that the primary motive is to raise the rent. While a higher rent may be a benefit seen by a landlord who upgrades a rental unit, a landlord has the right to decide to update, upgrade or improve his property as he sees fit. I find the landlord’s submissions that this unit was chosen for renovation based on a business plan to be reasonable given the age of the building and the number of years since it was last updated. Therefore, I am satisfied that the landlord issued the Notice to End Tenancy with a good faith intention to renovate it.

I am also satisfied that the landlord does not require any approvals or permits to complete the work he intends to make. Not all renovations or work require permits from the municipality and in the circumstances before me both parties have investigated the need for permits to my satisfaction. Since permits are not required to complete this type of renovation, the landlord does not need to obtain a permit in order to satisfy the requirements of section 49(6) of the Act.

The remaining issue to determine is whether vacant occupancy is required for the renovation work to be completed. From the submissions before me I find it clear that the tenants’ ability to use the rental unit would be significantly affected while the renovation is underway. However, the tenants have indicated a willingness and capacity to accommodate the landlord’s requirements for temporary vacancy while the unit is being renovated.

The British Columbia Supreme Court addressed the issue of requiring a vacant unit for purposes of a renovation in *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257. The decision provides, in part:

“[21] First, the renovations by their nature must be so extensive as to require that the unit be vacant in order for them to be carried out. In this sense, I use “vacant” to mean “empty”. Thus, the arbitrator must determine whether “as a practical matter” the unit needs to be empty for the renovations to take place. In some cases, the renovations might be more easily or economically undertaken if the unit were empty, but they will not require, as a practical matter, that the unit be empty. That was the case in **Allman**. In other cases, renovations would only be possible if the unit was unfurnished and uninhabited.

[22] Second, it 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 upon the purpose of s. 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 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). On the other hand, where the only way in which the landlord would be able to obtain an empty unit is through termination of the tenancy, s. 49(6) will apply.”

As indicated in paragraph 22 of the above decision, I find it unlikely the legislature intended to provide landlords with a mechanism to evict tenants simply because a brief period is required for a renovation, especially in circumstances where the tenant agreed to vacate the premises for that period of time. Thus, while I accept that the landlord requires the unit to be empty while the flooring is being replaced I find the landlord must also satisfy me that it is not possible to have the unit emptied without ending the tenancy.

I find a one to three week renovation period to be brief and temporary in nature, which the tenants have indicated they can accommodate. Upon review of the tenants’ photographic evidence I do not find the tenants have a lot of possessions, as submitted by the landlord. Rather, the photographs depict a very tidy unit with only basic furnishings and possessions. Therefore, I find it reasonable that the tenants would be able to empty the unit of their possessions, or at least remove the contents from some of the rooms, in order to accommodate the installation of new flooring.

Since the tenants have indicated they can accommodate the landlord’s need to have possessions moved from the unit, and to use another bathroom, while renovations are underway for one to three weeks, and I find the tenants’ position to be reasonably likely, I am not satisfied that the landlord has shown that the only way to have the unit empty for that period of time is to end the tenancy.

In light of the above, I cancel the Notice to End Tenancy with the effect that this tenancy continues. Since the tenants were successful in this application the tenants are awarded the filing fee paid for this application. The tenants are authorized to withhold \$50.00 from a subsequent month's rent in satisfaction of this award.

For clarity, since the Notice has been cancelled the landlord is at liberty to decide to proceed with the plans to renovate or not. If the landlord proceeds with renovation, I encourage the landlord give the tenants sufficient advance notice of the anticipated renovation dates. I also encourage the tenants to cooperate with the landlord's ability to carry out renovations.

The landlord retains the right and obligation to enter the unit as provided by section 29 of the Act.

Conclusion

The Notice to End Tenancy has been cancelled and the tenancy continues. The tenants are authorized to recover the filing fee by withholding \$50.00 from a subsequent month's rent.

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: July 28, 2011.

Residential Tenancy Branch