Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, CNL, OLC, FF

Introduction

This hearing was scheduled to deal with a tenant's application to cancel a Notice to End Tenancy for Unpaid Rent and a Notice to End Tenancy for Landlord's Use of Property; a tenant's request for monetary compensation for damage or loss under the Act, regulations or tenancy agreement; and, a tenant's request for orders that the landlord comply with the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Procedural and Preliminary Matters

The landlord pointed out that his name was spelled incorrectly on the Application. I have amended the Application to reflect the spelling of the landlord's name as he stated and that appears on the Notices to End Tenancy that were provided as evidence.

Since filing this Application the landlord has served the tenant with another Notice to End Tenancy for Unpaid Rent. The tenant had provided a copy of the most recent Notice to End Tenancy for Unpaid Rent. The landlord objected to amending the Application to include the most recent Notice to End Tenancy. The tenant submitted that the two Notices to end Tenancy for Unpaid Rent related to the same dispute. I was satisfied that the withholding of rent for both November and December was sufficiently related and I amended the Application to include the most recent Notice to End Tenancy for Unpaid Rent. I offered the landlord the opportunity to adjourn the proceeding in order to gather evidence with respect to the most recent Notice to End Tenancy for Unpaid Rent. The landlord declined the offer and stated that he wished to proceed.

During the hearing the landlord demonstrated a sarcastic and argumentative approach to the issues raised and interrupted the proceedings on a number of occasions. The landlord had to be cautioned three times that antagonistic and disruptive behaviour was inappropriate and unacceptable during a hearing. The teleconference call ended with both parties still in attendance.

Issue(s) to be Decided

1. Should the 10 Day Notices to end Tenancy for Unpaid Rent and the 2 Month Notice to End Tenancy for Landlord's Use be upheld or cancelled?
2. Is the tenant entitled to compensation from the landlord under the Act, regulations or tenancy agreement?
3. Is it necessary to issue Orders to the landlord for compliance with the Act, regulations or tenancy agreement?

Background and Evidence

The rental unit is a basement suite and the upper level of the house is also tenanted. There is a common laundry room that services all the tenants on the residential property.

The tenancy formed February 12, 2006 and was set to commence March 1, 2006. The tenancy is currently on a month-to-month basis. The tenant is currently required to pay rent of $895.00 per month.

At the commencement of the tenancy the rent was $725.00 payable on the 1st day of every month. Since then the landlord has issued Notices of Rent Increase to increase the rent as follows:

New rent	Increase	Effective date
$ 810.00	$ 25.00	May 1, 2008
$ 840.00	$ 30.00	July 1, 2009
$ 860.00	$ 20.00	December 1, 2010
$ 895.00	$ 35.00	Not provided
$ 923.00	$ 28.00	February 1, 2013

On April 2, 2009 the tenant wrote the landlord a letter informing him that the rent increases did not comply with the requirements of the Act. The tenant submitted that in response to the letter the landlord told the tenant to accept the rent increases or he would evict her. The landlord had a different viewpoint and was of the position the parties verbally resolved their dispute on April 3, 2009. The landlord explained that he informed the tenant that his rental expenses warranted the rent increase and that she agreed with him. The landlord was of the position that the tenant's continued occupation of the rental unit is evidence she agreed to pay the rent increases.

It was undisputed that the tenant continued to pay the rent increases as indicated on the Notices of Rent Increase served upon her.

In October 2012 there was a sewer backup at the property and the tenant stayed in a hotel starting October 14, 2012 and returning to the rental unit November 5, 2012. The tenant had tenant's insurance which covered her hotel bill except for a $500.00 deductible. The landlord submitted that the sewer back up was a result of a blockage in the city's sewer line. The landlord also submitted that the remediation was completed on November 2, 2012. The tenant did not return to the property until November 5, 2012 because the air purifiers had been turned off which she needed to run for a sufficient period of time because of her health conditions. The landlord commented that the tenant's spouse was in the rental unit frequently during the remediation process.

It was undisputed that the tenant did not pay any rent for November 2012 and paid only $621.19 for December 2012. The landlord served a 10 Day Notice to End Tenancy for Unpaid Rent, in an outdated version of the Notice, on November 2, 2012 for the unpaid November rent. The landlord served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent, in the currently approved form, on December 1, 2012 for the unpaid December rent. These Notices are under dispute.

The tenant seeks to recover the insurance deductible and loss of use of the rental unit for October 14 through November 5, 2012 due to the sewer back-up. In addition, the tenant estimated in filing her application that she has overpaid $480.00 in rent due to the non-compliant rent increases.

On November 3, 2012 the landlord served the tenant with a 2 Month Notice to End Tenancy for Landlord's Use in an older version of the form. The Notice indicates that "*the landlord has all the necessary permits and approvals required by law, and intends in good faith, to ... renovate or repair the rental unit in a manner that requires the rental unit to be vacant*." This Notice is under dispute.

The landlord submitted that he intends to paint, install new carpets and countertops in the rental unit in order to list the property for sale. The landlord submitted that he needs vacant possession to perform these tasks as the tenant is a hoarder.

The tenant denied being a hoarder. The tenant acknowledged that there are boxes stacked in the hallway because she previously used space in the common laundry room for storage but the landlord took that away and the hallway is where the stored items have been placed.

The tenant questioned the landlord's need for vacant possession. The tenant submitted that the unit has been painted twice during her tenancy without having to vacate. The tenant submitted that the drywall had to be cut and replaced as a result of the sewer back up and it was not necessary for her to vacate the rental unit. Further, the tenant stated that she is willing to accommodate the landlord's desire to remodel and will move her possessions as needed.

The tenant also questioned the landlord's good faith intention by providing a written statement of a third party dated November 29, 2012. In this statement the person claims the landlord told him the tenant was moving out and the landlord offered to rent the unit to him after the tenant vacates.

In addition to the above issues, the tenant requested the landlord remove rat droppings from the sump pump area that were discovered by the plumber. The parties agreed during the hearing that the landlord would attend the property the day following the hearing to address this issue.

Finally, the tenant requested that the landlord cease his bully tactics and explained that the landlord is at the property almost daily even though he lives elsewhere and that recently he took her laundry form the laundry room and left it on the patio. The landlord acknowledged he did this.

The landlord submitted that he had told the tenant to keep the laundry area clear of her possessions and that any clothes that are air-drying should be done in her unit. The landlord was concerned that if he did not remove the tenant's laundry form the laundry room he may receive complaints from the other tenants living upstairs.

The tenant submitted that she and the upstairs tenants do not have issues with respect to usage of the common laundry room and that it is not unusual for the tenants to remove the other tenant's clothing from the laundry machines if necessary.

I asked the landlord if the upstairs tenants had complained about the tenant's laundry to which he acknowledged they had not. Rather, the landlord indicated he is at the property frequently as he was of the belief that if does not frequently monitor the goings-on at the property disorder would result.

The landlord was cautioned during the hearing that the tenant has the right to right to quiet enjoyment, including reasonable privacy. It became apparent the landlord either did not agree or did not understand this concept as demonstrated by his desire to

continue arguing this point. Therefore, I gave him the following ORDERS orally during the hearing:

1. The landlord shall not move or touch the tenant's personal property anywhere on the residential property or in the rental unit at any time.
2. Should the landlord be of the position the tenant is in breach of the Act, Regulation or a term of the written tenancy agreement, the landlord shall serve the tenant with a written notice describing the breach, how the breach is to be corrected, and the time frame in which it is to be corrected.

The documentary evidence provided to me by the tenant included copies of the following: the Notices of Rent Increase for the years 2007, 2009 and 2010; the tenant's letter of April 2, 2009; some of the pages of Notices to End Tenancy issued November 2, November 3 and December 1, 2012; hotel statements; registered mail receipt and tracking information .

The landlord confirmed that he did not provide any documentary evidence for this proceeding.

Analysis

Upon consideration of everything presented to me I provide the following findings and reasons.

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove that a valid Notice to End Tenancy was served and that the tenancy should end for the reason indicated on the Notice.

Section 46 of the Act provides that a landlord may issue a 10 Day Notice to End Tenancy for Unpaid Rent on a day that is after the rent is due. In this case the Notice to End Tenancy issued December 1, 2012 for December's unpaid rent was premature since the landlord issued it and served it on the day rent was due. Therefore, the Notice issued December 1, 2012 was not issued in accordance with the requirements of the Act and it is invalid and unenforceable.

Under section 52 of the Act, a landlord who wishes to end a tenancy is required to issue a Notice to End Tenancy "in the approved form". Such forms are approved by the Director and are available from the Residential Tenancy Branch, including its website.

The Notices to End Tenancy issued November 2, 2012 and November 3, 2012 are not in the current approved form. Rather, the Notices are an older version produced in 2004 which had a total of four pages. The currently approved 10 Day Notice to End Tenancy for Unpaid rent and 2 Month Notice to End Tenancy for Landlord's Use were approved in March and April 2011.

Section 10 of the Act provides that a deviation from an approved from does not invalidate the document if the deviation does not affect its substance and does not mislead the recipient.

While I was not provided all four pages of the Notices used by the landlord on November 2 and November 3, 2012 neither party indicated whether or not all four pages were served upon the tenant and neither party raised this as an issue. Therefore, I proceed to consider whether the tenant had a right to withhold rent for November 2012 and whether the landlord has established that he requires vacant possession to renovate the rental unit.

Upon review of the Notices of Rent Increase, the tenant's letter of April 2, 2009, and upon consideration of the testimony provided by both parties, I find the landlord has not increased the rent in accordance with the requirements of the Act. I further find the tenant has overpaid the rent and was entitled to recover the overpaid rent by withholding it from rent otherwise payable.

The Act limits the timing and amount of a rent increase. If a landlord wishes to increase the rent beyond the amount calculated in accordance with the Regulations, the landlord must either: obtain the tenant's written consent, or, obtain authorization from the Director by making an Application for an Additional Rent Increase.

In 2007 the regulated rent increase was 4.0% yet the landlord increased the rent by approximately 8.3%. The landlord did not have the tenant's written consent for the additional rent increase and the landlord did not obtain the Director's authorization for such an increase. Payment of a rent increase in an amount more than the allowable annual increase does not constitute a written agreement to a rent increase in that amount. Therefore, I find the landlord collected a rent increase that did not comply with the requirements of the Act.

Considering the above, I find the Notice of Rent Increase given in 2007 to be invalid and unenforceable and, as such, the landlord did not have the legal right to collect rent in excess of $725.00 per month. Further, all of the subsequent rent increase calculations were incorrect and rendered the subsequent Notices of Rent Increase incorrect and

invalid. Therefore, I find all of the Notices of Rent Increase issued to the tenant by the landlord to be invalid and unenforceable.

In light of the above, I find the rent remains at $725.00 per month and I order that it be set at that amount until such time the landlord legally increases the rent from $725.00.

Pursuant to section 43(5) of the Act a tenant is entitled to deduct rent increases that the landlord has collected from the tenant that do not comply with the Act. The landlord has collected rent in excess of $725.00 per month for a number of years and the sum of those overpayments easily exceeds the rent withheld by the tenant for November and December 2012. Therefore, I find the tenant had a basis under the Act to withhold rent for November 2012 and December 2012 and I cancel the 10 Day Notice issued in November 2012. Further, the landlord is precluded from issuing any 10 Day Notice to End Tenancy for Unpaid Rent to the tenant until such time the tenant has recovered all of the overpaid rent.

The overpaid rent is calculated as the amount of rent paid in excess of $725.00 per month during this tenancy. Without being provided the effective date of the increase to $895.00 I find I have insufficient particulars to calculate the exact amount the tenant is entitled to recover from the landlord as of this date. Therefore, I shall leave it upon the parties to perform their own calculations. To aid the parties in calculating the total overpayment I provide the following formula:

> Overpayment = the sum of (X - $725.00) for each month since tenancy commenced
>
> X = rent actually paid by tenant and collected by landlord

Should the parties arrive at a different sum they are at liberty to file an Application for Dispute Resolution seeking an Order and/or Monetary Order from an arbitrator as to the exact amount owing. In addition, if the tenancy is going to end before the overpaid rent is fully recovered the tenant is at liberty to file another Application for Dispute Resolution seeking a Monetary Order for the unrecovered portion.

The 2 Month Notice to End Tenancy for Landlord’s Use was given under section 49(6) of the Act which requires the landlord to prove multiple criteria. Firstly, I accept that painting, carpeting and installing countertops likely does not require permits. Secondly, the landlord must demonstrate that the landlord needs the tenancy to end and acquire vacant possession in order to accomplish these tasks.

The British Columbia Supreme Court addressed this issue in *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator),* 2007 BCSC 257:

> "[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.

The tenant has indicated a willingness and capability to accommodate the landlord's requirements to temporarily move her possession while the unit is being renovated. I accept that the landlord can re-paint while the unit is occupied as it has been done by the tenant in the past and more recently portions of the wall were replaced while the tenancy was in effect. I find insufficient evidence the tenant is a hoarder as alleged by the landlord.

While I appreciate that it may be easier and more economical for the landlord to renovate while the rental unit is vacant, the test the landlord must satisfy is that there is no possible way to carry out the renovations unless the unit is vacant for more than temporary period of time. It is inconceivable to think that section 49(6) of the Act was created as a mechanism for landlords to evict tenants merely because a relatively brief period of time is required for a renovation especially in circumstances where the tenant agreed to accommodate the landlord's needs. Surely, it could not have been the intent of the legislature to provide such a "loophole" for landlords.

Based upon the foregoing, I find the landlord has not satisfied me that the only way to accomplish t he intended renovation is to end the tenancy and obtain vacant

possession. Therefore, I find it unnecessary to further consider the landlord's good faith intention and I cancel the 2 Month Notice to end Tenancy for Landlord's Use.

With respect to the insurance deductable paid by the tenant I find insufficient evidence the sewer back up was the result of the landlord's negligence. Residential Tenancy Policy Guideline 16: *Claims in Damages* provides that in order for a Claim in Tort to succeed, the claim must be made under the law of negligence. In the absence of evidence the sewer back up was the result of the landlord's negligence or that the landlord failed to act reasonably in response to the sewer back-up, I do not order the landlord to compensate the tenant for the insurance deductable.

I do, however, authorize the tenant to recover rent during the days the unit was uninhabitable. As provided in Residential Tenancy Policy Guideline 16: *Claims in Damages* under the section "Claims for Breach of Contract":

> A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. <u>If, on the other hand, the tenant is deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected.</u>

[my emphasis added]

I accept that the rental unit was uninhabitable from October 14, 2012 through November 2, 2012 through no fault of either party. I accept that the tenant's need to have the air purifiers running for her health conditions is her responsibility and could have been accomplished when her spouse was at the rental unit. Therefore, the tenant is authorized to recover the following amount from the landlord for loss of use of the rental unit:

> 20 days/31 days x $725.00 monthly rent = $467.75

I am satisfied the landlord shall address the rat droppings issue by the time this decision is received; however, in the event it was not, I ORDER the landlord to remove the rat droppings from the rental unit without delay.

Below, I have recorded the oral ORDERS given to the landlord during the hearing for both parties' future reference:

1. The landlord shall not move or touch the tenant's personal property anywhere on the residential property or in the rental unit at any time.
2. Should the landlord be of the position the tenant is in breach of the Act, Regulation or term of the tenancy agreement, the landlord shall serve the tenant with a written notice describing the breach, how the breach is to be corrected, and the time frame in which it is to be corrected.

Should the landlord require the tenant to move her possessions to accommodate renovations the landlord is further ORDERED to give the tenant written instructions with sufficient advance notice of what is required of the tenant. Given the landlord's attitude towards the tenant's right to quiet enjoyment that he demonstrated during the hearing the landlord is cautioned that the instructions must be reasonable and necessary to accommodate the renovation. Should the landlord's requirements or instructions be unreasonable the tenant may make another Application for Dispute Resolution seeking further ORDERS against the landlord.

I have reproduced the tenant's right to quiet enjoyment as provided under the Act for the landlord's futhur reference:

> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
>
> (b) freedom from unreasonable disturbance;
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> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

A landlord's breach of a tenant's right to quiet enjoyment may be grounds for compensation for a tenant. For further information on a tenant's right to quiet enjoyment I encourage the parties to read Residential Tenancy Policy Guideline 6: *Right to Quiet Enjoyment* that I have enclosed with this decision.

I find the tenant's application to meritorious and I award the $50.00 filing fee to the tenant. Therefore, I provide the tenant with a Monetary Order in the total amount of $468.25 [$467.75 + $50.00]. The Monetary Order must be served upon the landlord and if the landlord does not satisfy the order it by may be satisfied by withholding this amount from rent otherwise payable to the landlord or by filing it in Provincial Court to enforce as an Order of the court. This Monetary Order is in addition to the tenant's right to withhold rent until such time the non-compliant rent increases are recovered.

Conclusion

The Notices to End Tenancy issued November 2, 2012; November 3, 2012 and December 1, 2012 have been cancelled with the effect that this tenancy continues.

I order that the rent is set at $725.00 per month until such time it is legally increased. The tenant is entitled and authorized to withhold rent until such time the rent paid in excess of $725.00 per month during the tenancy has been recovered. The landlord must not issue a 10 Day Notice to End Tenancy for Unpaid Rent while the tenant is withholding rent to recover the illegal rent increases. If the tenancy ends before the overpaid rent is recovered by withholding rent the tenant may apply for a Monetary Order for the balance.

The tenant has been provided a Monetary Order to compensate her for the days the rental unit was uninhabitable and recovery of the filing fee in the amount of $468.25. Should the landlord not pay this amount within a reasonable time, the tenant is at liberty to withhold rent in order to satisfy this Order or file it in Provincial court to enforce as an Order of the court.

The landlord has been issued orders with respect to repairs and compliance as contained in this decision.

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: December 12, 2012.

Residential Tenancy Branch