



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

CNL, MNDC

Introduction

This hearing dealt with an application by the tenant for an order setting aside a 1 Month Notice to End Tenancy for Landlord's Use and a monetary order. Both parties appeared and had an opportunity to be heard.

The tenant confirmed that he had received a copy of the landlords' evidence package and the he had not filed any written evidence.

Issue(s) to be Decided

- Is the 2 Month Notice to End Tenancy dated January 312, 2015 valid?
- Is the tenant entitled to a monetary order and, if so, in what amount?

Background and Evidence

This tenancy commenced July 1, 2011, as a one-year fixed term tenancy and has continued as a month-to-month tenancy. At the start of the tenancy the rent, which is due on the first day of the month, was \$745.00. As of the date of the hearing the rent is \$761.00.

The rental unit is a one bedroom apartment located on the first floor of a three story apartment building. The building was constructed by the landlord in 1978. The building sits on a concrete slab. The exterior walls consist of a two-foot concrete pony wall topped by frame construction walls. The exterior walls are clad with cedar siding.

According to the landlord the cedar reacts to water and temperature. At certain times of the year, depending on weather conditions, waters runs down the cedar siding and penetrates the exterior envelope at the top of the concrete pony wall. Although the water can penetrate at any level of the wall it shows up at floor level. The end result is that the interior carpets along this exterior wall get wet. The landlord says the affected area is about two feet wide.

The tenant testified that when the rains are heavy the water comes into the bedroom only, not the living room. The tenant says the moisture leads to the development of mold. The tenant testified that his step-father is a carpet cleaner and after he cleans the carpets the situation in the unit is good until the next heavy rains. Once summer comes, everything is fine for several months.

The tenant says the moisture and mold creates a particular problem for his seven-year-old son, who stays with him part-time and who suffers from asthma. It is also uncomfortable for him and his five-year-old daughter, who also stays with him part-time. He said this situation has been going on for about a year.

The landlord testified that moisture in this wall has been an ongoing problem and that he has been caulking on a regular basis. Last summer he hired a contractor to repair the wall but it turned out that their work was not satisfactory. More repairs are planned for the summer when the weather is drier. The tenant said that repairs were done to the exterior of the building but are not complete.

For the past several months the landlords have been engaged in a process of renovating the ground floor apartments. Five units have been renovated and there are four more to be done, including this rental unit.

Part of the renovation includes re-pouring the concrete floors. The purpose of re-pouring the concrete is to make the floors even so laminate flooring can be installed and to adjust the slope so that if any water does penetrate the exterior wall it will run back towards the exterior of the building. As this repair requires emptying the suite in most cases the landlords install a new kitchen, new bathroom, new flooring and paint. Their experience is that a full renovation takes about three months. The photographs submitted by the landlord show that the end result is very attractive.

The landlords have been doing these renovations as vacancies occur and as their finances permit. Building permits are not required because there are no structural changes being made.

The tenant's step-father used to be the resident manager of this building. His employment was terminated in May 2014. Since then the landlords' daughter has been the resident manager.

The resident manager testified that the tenant has a history of being late with the rent but her parents did not take any action because of the personal relationships within the building. However, since she assumed the role of manager she has served the tenant with a 10 Day Notice to End Tenancy whenever he is late with the rent. (In the hearing the tenant expressed his unhappiness with the landlord's procedure expressing the view that a tenant has five days to pay the rent. I explained that rent is due on the date specified in the tenancy agreement and that a tenant may avoid eviction if they pay the arrears of rent within five days of being served with a 10 Day Notice to End Tenancy.)

In January there was a conversation between the landlord and the tenant about water in the bedroom. The landlord inspected the unit and in a letter dated January 13, 2015, acknowledged the issue and advised that the fix would be a substantial renovation; one that required a vacant

suite; and suggested “that you look for alternate accommodations in order to assure your son’s best interests.”

On January 28 the tenant sent the landlords a letter where he listed a number of repairs that he wanted done to the suite. A copy of the letter was not filed in evidence.

The landlords’ response was. The landlords’ letter pointed out that several of the repairs requested were items that he landlord had paid the previous caretaker – the tenant’s stepfather – to do and that either the repairs had not been done or had to be redone.

The landlords’ letter noted that the leak in the bedroom requires a substantial renovation, one that required the unit to be unoccupied, and included a 2 Month Notice to End Tenancy for Landlord’s Use for service on the tenant.

The landlords also undertook to repair the other items listed in the tenant’s letter and the in the hearing the tenant acknowledged that those items had all been repaired.

The tenant says that:

- The repair that is required is an exterior repair, not an interior repair.
- He can stay with friends while the renovations are being done and he is prepared to do so.
- When he asked the landlords if he could stay in another unit in the building while his unit was being repaired they replied that they were not willing to do that “because of his attitude”.
- Ever since his mother and step-father moved out he has felt that the landlords are trying to get rid of him.

The landlords testified that they served the notice to end tenancy because the renovations are required and the nature of the renovations requires the unit to be vacant. They were also clear that they would not re-rent to the tenant because of his past difficulties with the rent and the attitude he had exhibited towards them, including the use of foul language to the resident manager’s mother. The manager’s father, who is one of the landlords, said they don’t want the tenant in the building for personal reasons.

The tenant filed this application for dispute resolution on February 10, 2015, within the time limit for doing so. He has paid the February and March rent when due.

The tenant seeks compensation for not being able to use the bedroom part of the time and for the time involved in participating in the dispute resolution process. He calculated his claim based upon the bedroom representing 22% of the total floor space of the unit.

Analysis

When a landlord seeks to end a tenancy for purposes of renovation section 49(6)(b) sets out three requirements:

1. The landlord must have the necessary permits.
2. The landlord must be acting in good faith with respect to the intention to renovate.
3. The renovations are to be undertaken “in a manner that requires the rental unit to be vacant.

The first requirement does not apply to this dispute, as there is no evidence that permits are required for the work contemplated.

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

The British Columbia Supreme Court has considered and ruled upon the third requirement in *Berry & Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)* 2007 B.C.S.C. 257 where the learned judge held at page 257:

“The third requirement, namely, that the renovations are to be undertaken in a manner that requires the rental unit to be vacant, has two dimensions to it.

First, the renovations by their nature must be so extensive as to require the unit to 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 will not require, as a practical matter, that the unit be empty. . . .

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 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). 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.”

I accept the landlords’ evidence that they do intend to renovate all the apartments on this floor, including this one, and that the nature of the work does require the unit to be vacant when it is

being done. I do not think that the poor relationship with the tenant is the reason why the unit will be renovated but I do think it has influenced the order in which the landlords propose to renovate the remaining units.

However, the landlords do not have to end this tenancy in order to obtain vacant possession. The tenant has indicated that he can find alternative accommodation while the renovations are being done and he is prepared to give the landlord vacant possession for that purpose. The landlords have not met the standard imposed by the British Columbia Supreme Court as set out above. Accordingly, I find that the 2 Month Notice to End Tenancy for Landlord's Use dated January 31, 2015 is set aside and is of no force or effect. The tenancy continues until ended in accordance with the legislation.

With regard to the tenant's claim for compensation the *Residential Tenancy Act* does not permit an arbitrator to award financial compensation to any party for their participation in a dispute resolution hearing.

I accept the landlord's evidence that they know a problem exists with this wall and they are taking action to fix it. However, there is no argument that water does enter the bedroom and make a portion of the floor wet.

This is a claim in contract by the tenant against the landlords. As explained in *Residential Tenancy Policy Guideline 16: Claims in Damages*:

"Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. 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. 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."

Section 65(1) allows an arbitrator who has found that a landlord has not complied with the Act, regulation or tenancy agreement to order that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of the tenancy agreement.

Having considered the weather this past winter, the size of the bedroom, and the fact that tenant would still be able to use the bedroom for certain purposes, even if the smell made it impossible for him to sleep there, I find that the value of the tenancy has been reduced by 15% for the months of November, December, January and February. Accordingly I award the tenant the sum of \$460.00 (\$115.00/month X four months) as compensation for the leaking wall.

In addition, as the tenant has been substantially successful on his application he is entitled to reimbursement from the landlords of the \$50.00 fee he paid to file it.

In total I find that the tenant has established a total monetary claim of \$510.00.

Conclusion

- a. For the reasons set out above, the 2 Month Notice to End Tenancy for Landlord's Use dated January 31, 2015 is set aside and is of no force or effect. The tenancy continues until ended in accordance with the legislation.
- b. The tenant has established a total monetary claim of \$510.00. Pursuant to section 72(2) this amount may be deducted from the next rent payment due to the landlord.

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: March 16, 2015

Residential Tenancy Branch

