Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC, OLC, PSF, LRE, FF (Tenants' Application)
OPC, FF (Landlords' Application)

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by both the Landlords and Tenants. The Tenants made their Application on May 7, 2015, which was then amended on May 11, 2015. The Landlords made their Application on May 15, 2015.

The Landlords applied for an Order of Possession and to recover the filing from the Tenants. The Tenants applied for the following issues:

- to cancel a 1 Month Notice to End Tenancy for Cause (the "Notice");
- for money owed or compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulation or tenancy agreement;
- for the Landlords to comply with the Act, regulation or tenancy agreement;
- to provide services or facilities required by law;
- to suspend or set conditions on the Landlords' right to enter the rental unit; and
- to recover the filing fee from the Landlords.

Both Tenants and the female Landlord appeared for the hearing and provided affirmed testimony. The parties confirmed receipt of each other's Application in accordance with the Act. No issues were raised in relation to the service of parties' evidence prior to the hearing in accordance with the Rules of Procedure.

The hearing process was explained to the parties and they had no questions about the proceedings. Both parties were given a full opportunity to present their evidence only on the issues to be decided, make submissions to me, and cross examine the other party on the evidence provided. I have carefully considered the evidence provided by the parties. However, I have only documented that evidence which I relied upon to make findings in this Decision.

Preliminary Issues

Rule 2.3 of the Rules of Procedures sets out that in the course of the dispute resolution proceeding, Arbitrators may use their discretion to dismiss unrelated claims contained in a single Application with or without leave to re-apply.

The Notice to end the tenancy in question was served because it is alleged that the Tenants have caused extraordinary damage to the property. The Tenants explained at the start of the hearing that the remainder of their Application deals with unauthorised entry of the Landlord into the rental suite and a dispute over access to storage under the rental unit. Therefore, as these matters are unrelated, I determined during the hearing that I would only deal with the Landlords' Application for an Order of Possession, the Tenants' Application to cancel the Notice, and the recovery of the filing fees on both Applications. However, the Tenants were given leave to re-apply for the claims not dealt with in this Decision as detailed below.

Prior to the hearing, the Tenants had submitted a written request to summons their cell phone service provider to release their phone records which would prove cell phone communication between the Landlords and the Tenants. The Tenants were informed that pursuant to Rule 7 of the Rules of Procedure, I did not have authority to issue a summons to a cell phone provider to produce that party's own private data and that this should be a request that should be made by the Tenants to their cell phone provider. As a result, I dismissed the Tenants' request for a summons for this purpose.

Issue(s) to be Decided

- Is there sufficient evidence in this case to warrant the ending of the tenancy with the Notice?
- Is the Landlord entitled to an Order of Possession?

Background and Evidence

Both parties agreed that this tenancy for the basement suite started on July 25, 2013 for a fixed term of one year after which it continued on a month to month basis. Rent under the written tenancy agreement is $750.00 payable on the first day of each month.

The Landlord testified that in late February or early March 2014 she had cause to visit the rental suite. While she was in the back garden of the rental unit she noticed that the Tenants had cut down two hazelnut trees. In their place the Tenants had created a patio area and a walled garden area which she provided photographic evidence of. The

Landlord testified that the Tenants had no verbal or written authority to remove these trees and she was very upset by this as the trees provided shade and privacy to the rental unit. However, the Landlord did not challenge the Tenants about this as one of the Tenants had suffered the loss of a loved one and was going through a difficult time.

The Landlord testified that she had a verbal agreement in 2014 with the male Tenant that he would perform seasonal landscaping services for the Landlord because he was a professional landscaper. The Landlord testified that in return she paid the male Tenant $720.00 for these services.

The Landlord testified that in March 2015, she again had cause to visit the rental unit at which point the Tenant explained that because he had a new born child he would be unable to provide gardening services for the rental unit for the foreseeable future. At this point the Landlord noticed that the male Tenant had pruned the rhododendron bush in the front garden of the property right down to the stump of the plant.

The Landlord explained that she was devastated by this action as she had purchased the property for the appeal this plant gave to her. The Landlord stated that the Tenants explained that the plant was getting in their way as it was brushing up against the Tenants' son as they went past it. The Landlord testified that the Tenants did not ask her permission or consult with her before this drastic action was taken and neither would she have consented to it. The Landlord explained that again she did not pursue this matter with the Tenants as they were undergoing a lot of stress at the time.

The Landlord testified that on April 29, 2015 she sent the Tenants a handwritten letter in which she explained her devastation for the pruning of the rhododendron and asked the Tenants to replace it by May 8, 2015. The Landlord provided the written letter into evidence and explained in it that if the Tenants had not done this by May 8, 2015 she would serve them with the Notice. The Landlord submitted that this was a fair compromise to settle the issue.

The Landlord explained that the Tenants had not replaced the rhododendron and as a result she served the Tenants with the Notice on May 9, 2015 which she posted to the rental unit door. The Notice was provided into evidence and shows an effective vacancy date of June 30, 2015; the reason for ending the tenancy on the Notice is because the "Tenant has caused extraordinary damage to the unit/site or property".

The Landlord was asked if she had any photographic evidence of the trees before and after they had been alleged to have cut down by the Tenants. The Landlord referred to one photograph which showed the hazelnut trees on the advertisement pictures when

the property was being sold to her. The Landlord pointed to another black and white photograph indicating the rhododendron in the front garden.

The Tenants confirmed they received the Notice on May 11, 2015. The female Tenant testified that the Landlord did not raise the rhododendron pruning issue until after they had had a dispute about storage space provided to the Tenants at the start of the tenancy. The female Tenant provided e-mail correspondence to show that the dispute about the storage space took place after the Landlord had visited the rental suite in March 2015, the point at which she had discovered the state of the rhododendron. As a result, the Tenant submitted that the Notice had not been issued in good faith and was being used to end the tenancy based on a dispute not related to extraordinary damage which the Landlord took no issue with at the time she discovered it. The female Tenant also pointed out that the Landlord had visited multiple times after the rhododendron had been pruned and made no issue of this until now.

In relation to the allegation that the Tenants had cut down the hazelnut trees in the back garden of the rental property, the Tenants disputed this. The female Tenant testified that the hazelnut trees had been cut down to their stumps when they took occupancy of the rental unit and that the Landlord had given the Tenants permission to create the patio and walled gardens shown in the Landlord's photographic evidence. The female Tenant explained that the male Tenant was a professional landscaper and because the back of the garden was a mess with the hazelnut tree stumps, the Landlord verbally agreed that he could landscape the area in an effort to add value and enhance the property.

The Tenant referred to the Landlord's photographic evidence of the hazelnut trees and noted that the date at the bottom of the picture was taken in 2012, a date which was before their tenancy started. Therefore, this did not show that the hazelnut trees were present at the start of the tenancy.

In relation to the rhododendron, the male Tenant testified that he was an experienced landscaper and that he was under a contractual obligation with the Landlord in 2014 to maintain the lawn and to prune the weeds and flower beds as required. The male Tenant testified that the rhododendron had grown so much that it was encroaching on the pathway going to and from the rental unit. This was becoming a safety hazard to his child as he attempted to navigate the path with the push chair around the bush each time he used it.

The male Tenant testified that the leaves in the top part of the plant were beginning to die and that the plant was blocking the street light which was creating a safety hazard to his family. The male Tenant cited the city regulations which had been provided into

written evidence. This requests that a minimum of 3 feet wide walkway is needed which connects the suite entry door to the public side walk. The male Tenant submitted that the rhododendron was impeding the pathway so much so that it was not meeting the city standards.

The male Tenant testified that he had conducted “renovation pruning” of the rhododendron; this was way of scaling back the plant to allow it to then regrow. The Tenants provided photographic evidence to show that the plant stumps were beginning to grow and flower again. The male Tenant submitted that he had been pruning the rhododendron to keep the sidewalk clear of it but the more it is pruned, the faster it grows. Therefore, it was necessary to take this measure. The male Tenant submitted that his contract with the Landlord allowed him to prune as required and this pruning was essential.

The Landlord responded by explaining that she wanted the Tenants to replace the rhododendron for a like plant and that she was not bothered by the hazelnut trees. The Tenant responded by saying that if he were to replace it with a like plant then he would only be faced with the same issue of having to prune it back to prevent the impedance of the pathway because it was located so close to it. The male Tenant submitted that the rhododendron was not dead and that Tenants have an obligation to deal with any damages at the end of the tenancy; therefore, by the likely end of the tenancy the plant would have re-established itself and grown back to his original size. The male Tenant acknowledged that he may have gone beyond his contractual obligation to prune the garden in 2014 but that this was not a reason to end the tenancy.

Analysis

In examining the Notice, I find it was issued to the Tenants in the correct form and contained the required contents as required by the Section 52 of the Act. I also accept that the Tenants received the Notice on May 11, 2015 and disputed the Notice within the ten day time limit afforded to them under Section 47(4) of the Act.

When a landlord issues a tenant with a Notice for the reason documented above, the landlord bears the burden to prove, on the balance of probabilities, the reason on the Notice to end the tenancy. In this case, I must examine whether the damages caused by the Landlord were extraordinary in nature and are they sufficient to end the tenancy.

In relation to the Landlord’s disputed allegation that the Tenants cut down the hazelnut trees, I find the Landlord has failed to provide convincing and conclusive evidence to suggest that the Tenants had actually cut the tress. I find that the Landlords’

comparative photographic evidence to show the trees were in existence at the start of the tenancy is not reliable evidence; this is because the photographs of the hazelnut trees provided by the Landlord were taken in 2012 and the Tenants did not take occupancy of the unit until July 2013. Therefore, I am not satisfied that there is sufficient evidence before me to prove the hazelnut trees were in full existence at the start of the tenancy.

Furthermore, I find that if the Landlord was so upset about the Tenants cutting down the hazelnut trees in the spring of 2014, then it would have been prudent for the Landlord to have addressed this issue with the Tenants in writing or with a Notice at that time. Based on the foregoing, I find the Landlord has provided insufficient evidence that the Tenants caused extraordinary damage to the hazelnut trees.

In relation to the pruning of the rhododendron, I find that the Landlord and Tenant engaged into an agreement for the Tenant to provide gardening services which included the pruning of the plants in the gardens in 2014. I find that this oral agreement ended the following year in 2015 when services could not be performed by the Tenant.

The Act defines a tenancy agreement as an agreement with respect to possession of a rental unit and the use of common areas. Section 32 of the Act requires a tenant to repair damage to the rental unit or common areas that is caused by the action or neglect of the tenant. In this case, the male Tenant performed work to the common areas of the rental property and therefore was under an obligation to comply with the Act.

In determining whether the damage caused to the rhododendron was extraordinary, I find that while the Tenant did not prune the rhododendron with malicious intent or as a reactionary measure, the Tenant did cross the line in pruning the rhododendron excessively. I find that the Tenant had a duty to prune the rhododendron to the point at which it was no longer impeding his access and if his intention was to prune it beyond this level, it was prudent to seek guidance and consent from the Landlord.

However, the photographic evidence indicates that the rhododendron has not been killed by the pruning and if this was the intent of the Tenants then it would have been removed completely. Instead, the plant is showing evidence of growth and I anticipate that in due course it will recover its original condition. Having weighed the evidence of both parties, I make a finding that the male Tenant in this respect has not caused extraordinary damage. However, I acknowledge that the Tenant went above and beyond his obligation to prune the plant but I find that the remedy for the Landlord in this respect may be more suited to other relief provided by the Act.

I am also concerned that the evidence before me suggests that the Landlord did not take issue with the Tenants regarding the rhododendron at the time she noticed it, instead she chose to deal with it later in conjunction with another dispute about storage which materialised in the interim period.

Although the Act does not require a notice to end tenancy for cause to be issued in good faith, I am not satisfied that the Landlord is using the Notice appropriately to end the tenancy for damage caused to the rhododendron. I find that the evidence points to a larger dispute between the Tenants regarding the storage issues which is the likely catalyst for this Notice.

Based on the foregoing, I find the Landlords have not provided sufficient evidence that the Tenants have caused extraordinary damage to the rental property. While there is evidence the Tenants have breached the Act in respect of over pruning the rhododendron, I am not satisfied this is cause to end the tenancy and more appropriate remedies are available to the Landlord. As a result, I cancel the Notice dated May 9, 2015 and the tenancy will continue until it is ended in accordance with the Act.

As the Tenants have been successful in cancelling the Notice, pursuant to Section 72(2)(a) of the Act the Tenants may recover the $50.00 filing fee by deducting it from a future installment of rent. As the Landlords have failed to prove the Notice, the Landlords' request to recover the filing fee from the Tenants is dismissed.

Conclusion

The Landlord has failed to prove the Notice. Therefore the Notice dated May 9, 2015 is cancelled. The Tenants are granted their filing fee from their next installment of rent. The remainder of the Tenant's Application was not heard and is dismissed with leave to re-apply. The Landlord's Application is dismissed.

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: June 22, 2015

Residential Tenancy Branch