Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPE, MNR, FF; CNE, CNC, MNDC, OLC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for end of employment pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

This hearing also dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the Act) for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause and End of Employment (the 1 Month Notice) pursuant to sections 47 and 48;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord was represented by its agent.

Preliminary Issue – Service

The agent acknowledged service of the tenants' application and amendments.

The agent initially testified that the dispute resolution package was delivered at the front desk of the residential property and left for pick up, but was uncertain about how the documents were actually served. The landlord provided a statement of service that indicated that an agent of the landlord served the tenants with the dispute resolution package by attaching the package to the tenants' door. The tenants indicated in their submission that they received the dispute resolution package on their door. The best evidence appears to indicate that the landlord served the tenants with the dispute resolution package by posting the package to the tenants' door.

The tenants object to service in this manner and relied on section 89(1) of the Act. Service by posting the dispute resolution package is contemplated for the purposes of an order of possession (subsection 89(2) of the Act), but not contemplated for the purposes of a monetary order (subsection 89(1) of the Act).

On the basis of this evidence, I am satisfied that the tenants were deemed served with the dispute resolution package pursuant to subsection 89(2) and paragraph 90(c) of the Act. This means that the landlord's application for a monetary order is procedurally defective. As such, the landlord's application for a monetary order is dismissed with leave to reapply. Leave to reapply is not an extension of any applicable time limit.

The tenants acknowledge service of the 1 Month Notice on 18 June 2015 in their application. On the basis of this evidence, I am satisfied that the tenants were served served with the 1 Month Notice on 18 June 2015.

Preliminary Issue – Tenant's Second Amendment Refused

The tenants sought to amend their application for an order of return of belongings that they allege are being held by the landlord. The request for this amendment was received 21 August 2015. This amendment was not received in time for the landlord to have an opportunity to respond to the amendment. As such, the second request to amend the tenant's application was refused.

I did provide the parties with information regarding the return of belongings at the hearing. I am a delegate of the director pursuant to paragraph 9(5)(a) of the Act. Pursuant to this delegated authority, I provide the following information from the Act to the parties:

26(3) Whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not
- (a) seize any personal property of the tenant, or
- (b) prevent or interfere with the tenant's access to the tenant's personal property.

30(1) A landlord must not unreasonably restrict access to residential property by
- (a) the tenant of a rental unit that is part of the residential property, or
- (b) a person permitted on the residential property by that tenant.

57(1) In this section:…
"overholding tenant" means a tenant who continues to occupy a rental unit after the tenant's tenancy is ended.

(2) The landlord must not take actual possession of a rental unit that is occupied by an overholding tenant unless the landlord has a writ of possession issued under the Supreme Court Civil Rules.

(3) A landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

This information should not be construed as an order of this Branch.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an order of possession as a result of the tenants' end of employment? Are the tenants entitled to a monetary award for compensation for damage or loss under the Act, regulation or tenancy agreement? Are the tenants entitled to an order requiring the landlord to comply with the Act, regulation or tenancy agreement? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenants' claim and the landlord's cross claim and my findings around each are set out below.

The tenants began employment with the landlord on or about 25 September 2007. The tenants are resident managers of the residential property. The tenant LCB testified that the tenants' combined annual salary was $65,000.00. The landlord deducted $900.00 per month from this amount as compensation for the tenants' rent of the rental unit. The rental unit was provided as part of the tenants' employment as resident caretakers of the residential property.

The tenants' employment was terminated 17 June 2015. The agent testified that the landlord asked for rent payments to commence immediately at the economic rent of $900.00 monthly.

On 18 June 2015, the landlord served the 1 Month Notice by posting the notice to the tenants' door. The 1 Month Notice set out an effective date of 25 July 2015. The 1 Month Notice set out that it was given as the tenants' rental unit is part of an employment arrangement that has ended and the unit is needed for a new employee.

The tenant LCB testified that the rental unit was full of mould. The tenant LCB testified that as a result of the mould exposure she became ill and has been diagnosed with a lung disease. The tenant LCB testified that the mould genera *aspergillus* and *stachybotrys* caused this illness. The tenant LCB testified that she was told that these moulds were toxic, but admits that she does not have any documentary evidence to show this. The agent does not admit to the presence of toxic moulds.

I was provided with a document titled "laboratory analytical results" dated 12 June 2015. The report notes a variety of moulds were present in the samples including *aspergillus* and *stachybotrys*. The report does not make any recommendations or conclusions about habitability or include any comparative standards.

The tenant TWB testified that the tenants had been concerned about mould in the rental unit for a few years. The tenant TWB testified that the tenants asked the landlord to remediate the problem. The tenant TWB testified that one of the landlord's agents directed the tenant TWB to open the walls to fix the problem. The agent denied that the tenants were directed to open the walls. The tenant TWB testified that the tenants could have provided proof that they were directed to open the walls by the landlord's agent but did not.

The tenant LCB testified that as a result of the mould, the tenants had to vacate the rental unit. The tenant TWB testified that the mould problem existed before the walls were opened but was worsened by the opening.

The tenant TWB testified that on or about the 15 or 16 of June 2015, the tenants called the health authority as well as WorkSafeBC to investigate the contaminants. The tenant LCB testified that representatives of a health authority and WorkSafeBC attended at the rental unit. The tenant LCB testified that these representatives would not go into the rental unit because of the risk of exposure to mould and asbestos. A stop-work order was issued in respect of the repairs to the wall. I was provided with WorkSafeBC reports. While there are passing mentions to mould, it appears that the main health and safety concern for the stop-work order was asbestos.

I was provided with a photograph of the bathroom wall. The photograph is of very low quality and nothing of note is discernible.

The tenants are claiming for the cost of their alternate accommodations for July as well as a monetary order for the economic rent for July. The tenants also seek an order to the landlord that it must issue a proper notice if it wishes to enter the rental unit. The tenants also seek a reference letter and an order restricting the landlord's agents from "spreading rumours".

The tenants claim for $4,000.00, but have set out $4,725.27 in claims:

Item	**Amount**
Filing Fee	$50.00
Camping Fees	594.90
Hotel Charges	442.75
Storage	491.41
Loss of Living Space	900.00
Tent	299.95
Moving Boxes and Supplies	49.26
Moving Company	700.00
Mould Assessment	1,197.00
Total Monetary Order Sought	**$4,725.27**

The parties agree that the mould assessment amount has been paid directly to the third-party provider and should be removed from the claim.

The parties have initiated several other proceedings:

- the tenants have initiated claims with WorkSafeBC;
- the tenants have initiated Employment Standards Branch claims;
- the tenants have initiated claims with the Human Rights Tribunal;
- the landlord has brought a civil, small-claims action; and
- the landlord has alleged criminal activity by the tenants in the course of their employment—the RCMP is investigating and no charges have yet been approved.

The tenant LCB says that she was caused to be ill by environmental toxins present in the rental unit, which was provided as part of her employment. The tenant LCB's claim before WorkSafeBC has been approved. The tenant TWB's application is subject to reapplication as a result of evidentiary deficiencies contained in his first application.

Analysis

Jurisdiction of this Branch

For the purposes of these applications (as amended) the civil claim, human rights action, criminal investigation, and Employment Standards Branch complaint are not relevant. The issues engaged by the WorkSafeBC claims will overlap with the tenants' claim.

The parties have two types of relationships: employee/employer and tenant/landlord.

The Act regulates the relationship between tenants and landlords who have entered into tenancy agreements. A "tenancy agreement" is an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

The *Workers Compensation Act*, RSBC 1996, c 492 (the WCA) establishes a regime to provide compensation to workers for personal injury or death arising out of and in the course of the employment. The WorkSafeBC claims relates to personal injury resulting from mould and asbestos that the tenants allege was contained in the rental unit. The rental unit was provided as a benefit of employment.

By necessity, the subject matter that is also the matter of the WorkSafeBC claim will overlap; however, the factual findings in this application are made for the purposes of this application only. Compensability within the "no-fault" system of WorkSafeBC is a very different system from that of the Residential Tenancy Branch.

Further, I am conscious of the extinguishment of rights contained in subsection 10(2) of the *Workers Compensation Act*, RSBC 1996, c 492. The tenants have elected into the workers' compensation regime and by doing so have extinguished their rights to claim outside that regime insofar as the claim relates to compensation for the personal injury arising out of and in the course of employment.

After review of the tenants' claim, it is apparent that the claim is in relation to the costs associated with finding alternate accommodation and moving. As this is not directly related to personal injury, I find that this Branch has jurisdiction to consider the issue.

1 Month Notice

Pursuant to subsection 48(1) of the Act, a landlord may end the tenancy of a person employed as a caretaker, manager or superintendent of the residential property of which the rental unit is a part by giving notice to end the tenancy if:

(a) the rental unit was rented or provided to the tenant for the term of his or her employment,
(b) the tenant's employment as a caretaker, manager or superintendent is ended, and
(c) the landlord intends in good faith to rent or provide the rental unit to a new caretaker, manager or superintendent.

The landlord has provided evidence that the rental unit was provided to the tenants as part of their employment. Further, the landlord has proven that the tenants' employment has been terminated. The landlord has indicated that the rental unit is made available for resident caretakers.

Residential Tenancy Policy Guideline "2. Good Faith Requirement when Ending a Tenancy" helps explain the "good faith" requirement:

> A claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the Notice to End the Tenancy…
>
> If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy.
>
> If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy.

The tenants have not called into question the landlord's good faith intent to provide the rental unit to the new caretaker. There is no evidence before me that shows a lack of good faith on the part of the landlord.

On this basis, I find that the 1 Month Notice was validly issued. The tenants' application to cancel the 1 Month Notice is dismissed without leave to reapply. The landlord's application for an order of possession on the basis of the 1 Month Notice is granted.

Tenants' Claim for Compensation

The tenants seek compensation for their moving costs and their costs associated with alternate accommodation. The tenants say that they are entitled to these amounts as they could not live in the rental unit because of the mould and asbestos contamination.

In order to show that the landlord is liable to pay the tenant compensation, the tenants must show that the landlord has committed some breach of the Act, regulation or tenancy agreement. Section 67 of the Act provides that, where an arbitrator has found that damages or loss results from a party not complying with the Act, an arbitrator may determine the amount of that damages or loss and order the wrongdoer to pay compensation to the claimant. The claimant bears the burden of proof. The claimant must show the existence of the damage or loss, and that it stemmed directly from a violation of the agreement or a contravention of the Act by the wrongdoer. If this is established, the claimant must provide evidence of the monetary amount of the damage or loss. The amount of the loss or damage claimed is subject to the claimant's duty to mitigate or minimize the loss pursuant to subsection 7(2) of the Act.

Subsection 32(1) of the Act requires a landlord to maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by the tenant.

The tenants submit that there were environmental contaminants in the rental unit that caused the unit to become uninhabitable. The tenants allege that these contaminants existed in the rental unit for some time and were made worse by the landlord's direction to open the walls to remediate the issue.

I was provided with an environmental screening that occurred after the walls were opened. There is no sampling for the period that existed prior to the walls opening. I was not provided with any corroborating medical evidence that prove that there was an air quality issue that existed prior to the walls' opening.

On this basis, I find that the tenants have failed to show on a balance of probabilities that the condition of the rental unit prior to the wall opening was in violation of subsection 32(1) of the Act.

The tenants testified that they opened the wall in response to direction from an agent of the landlord. The agent denies that the tenants were directed to perform such specific remediation. These actions by the tenant and landlord are complicated by the overlapping relationship between the parties, that is, one of landlord and tenant and employer and employee.

"Landlord" is defined in section 1 of the Act:

> "landlord", in relation to a rental unit, includes any of the following:
>
> (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
>
> (i) permits occupation of the rental unit under a tenancy agreement, or
>
> (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement; …
>
> (c) a person, other than a tenant occupying the rental unit, who
>
> (i) is entitled to possession of the rental unit, and
>
> (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;…

I accept, on the basis of the stop work order that the rental unit was not suitable for habitation after the opening of the wall due to asbestos containing materials present in the rental unit. If the tenant was acting as employee than by virtue of the act they are an agent of the landlord and thus, in accordance with the highly inclusive definition of "landlord" in section 1 of the Act a "landlord"; however, it is trite law that a person cannot bring suit against themselves. I find, on

the basis of the evidence before me, that the landlord did not specifically instruct the tenants to open the wall. I find, on a balance of probabilities, that the landlord instructed the tenants to explore remediation of the issue, but that the specific instruction to open the wall to investigate was not given. Thus the landlord did not create the circumstances that led to the contamination of the rental unit and the tenants cannot satisfy the causal requirement of section 67 as it was their own actions that led to the contamination.

Further, the tenant LCB asks me to take notice of my own initiative that the genera of moulds she mentioned have mycotoxic properties. "Judicial notice" is an evidence rule that allows a fact to be introduced into evidence by a decision maker if the truth of that fact is so notorious or well known, or so authoritatively attested, that it cannot reasonably be doubted. The landlord does not concede the moulds identified are toxic. Mould toxicity requires complex environmental and medical analysis: this is not the sort of fact of which I am capable of taking notice. The tenant LCB has provided testimony that the mould spores detected caused her health symptoms. This is the type of opinion that is not within the realm of normal knowledge. It is appropriate to tender evidence from a health practitioner as this conclusion as to causation can only be appropriately tendered by an expert in that field.

For the reasons set out above, I find that the tenants are not entitled to a monetary order for compensation.

Tenants' Claim for an Order the Landlord Comply

There is no basis under the Act for me to make an order requiring a landlord to produce a reference letter. Further, there is no statutory or contractual obligation upon a landlord to issue a reference letter to a current or past tenant. Similarly, there is no basis under the Act to make an order for the landlord not to speak with other residents about the tenants. On the basis that I do not have the authority to make these orders, I dismiss these claims for an order that the landlord comply.

The tenants seek an order that the landlord comply with the notice provisions under the Act with respect to entering the rental unit. The tenants have not provided me with any evidence that indicates that the landlords are failing to comply with the provisions of the Act that restrict the landlord's right to entry. On this basis, I decline to make a specific order; however, the landlord is subject to the provisions restricting entry even in the absence of a specific order.

Recovery of Filing Fee

As the tenants have not been successful in their application, they are not entitled to recover their filing fee from the landlord.

As the landlord did not serve their application in accordance with subsection 89(1), it is not entitled to a monetary order for its filing fee.

Conclusion

The tenants' application is dismissed without leave to reapply.

The landlord's application for a monetary order is dismissed with leave to reapply.

The landlord is provided with a formal copy of an order of possession. Should the tenant(s) fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: September 25, 2015

Residential Tenancy Branch