Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CKL INVESTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FF

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover his 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 corporate landlord was represented by its agent, the individual landlord (the landlord). The tenant was assisted by two agents who also represent a non-profit housing society that provides a rent subsidy to the tenant.

Preliminary Issue – Landlord's Request for Order of Possession

At the commencement of the hearing, the landlord confirmed that the landlords sought an order of possession in the event I found the 1 Month Notice was validly issued.

I explained to the landlord that, if I found the 1 Month Notice was valid, the order of possession would be effective the later of the period for which the tenant had paid for his use and occupancy of the rental unit and two days. I asked the landlord if the landlords were prepared to make any concession with respect to the effective date of any order of possession that might be issued. The landlord stated that the landlords would accept an order of possession effective 30 September 2015.

Preliminary Issue – Late Evidence

Both parties submitted late evidence. The landlords submitted evidence on 24 August 2015 and the tenant submitted evidence on 19 August 2015.

Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* (the Rules) establishes that evidence from the applicant must be submitted not less than 14 days before the hearing. Rule 3.15 sets out that an applicant must receive evidence from the respondent not less than seven days before the hearing. The definition section of the Rules contains the following definition:

> In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, qualified by the words "not less than", the last day for the tenant to file and serve additional evidence was 12 August 2015. In accordance with rule 3.15 and the definition of days, the last day for the landlords to file and serve evidence in reply to the tenant's application was 19 August 2015.

At the commencement of the hearing the tenant's agents inquired as to the exclusion of the landlords' evidence on the basis that it was late. I informed the tenant's agents that the late evidence from both parties would be dealt with at the beginning of the hearing. Rather than provide submissions on the late evidence, the tenant's agents elected to consent to the admission of the landlords' late evidence. The landlords did not raise any issues with my consideration of the tenant's late evidence.

I would encourage both parties to be mindful of the timelines contained in the Rules in any future application.

Preliminary Issue – No Property in a Witness

The tenant and tenant's agents suggested that I should draw a negative inference from the landlords' failure to call the caretaker, "BP", as a witness. The tenant's agents expressed that they wished to ask BP questions.

It is a general rule of adversarial proceedings that there is no property in a witness. As such, either the applicant or respondents could have elected to call BP. Where a party requires evidence from a witness to prove his or her claim or disprove the claims of another, it is that party's responsibility to call the necessary witnesses to prove those

facts. If BP refused to attend as a witness for the tenant, there is a procedure for issuing summons to testify that the tenant could have used: see section 76 of the Act and *Residential Tenancy Policy Guideline*, "15. Summons to Testify".

Accordingly, I draw no negative inference from the landlords' failure to call BP as a witness in this application.

Issue(s) to be Decided

Should the landlords' 1 Month Notice be cancelled? If not, are the landlords entitled to an order of possession? Is the tenant entitled to recover the filing fee for this application from the landlords?

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 submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

This tenancy began on or about 15 March 2009. The tenant and corporate landlord entered into a tenancy agreement dated 14 March 2009. Current monthly rent is $948.00. The rental unit is contained within a multi-unit residential property.

On 19 June 2015, the corporate landlord issued the 1 Month Notice to the tenant. On 19 June 2015, the corporate landlord served the 1 Month Notice by registered mail. The 1 Month Notice set out an effective date of 31 July 2015. The 1 Month Notice was given as:

- the tenant or person permitted on the property by the tenant has:
    - seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
    - put the landlord's property at significant risk; or
- the tenant has engaged in illegal activity that has, or is likely to:
    - damage the landlord's property;
- the tenant has caused extraordinary damage to the unit.

In or about July 2014, the tenant removed the toilet, sink, and vanity from the rental unit and replaced them with a new toilet and pedestal sink.

The tenant stated in his written submissions that there were various water leaks in the bathroom. The tenant stated that he could smell mould in the unit and that he believed that the leaks were the cause. The tenant stated that he tried to bleach the problem

several times to fix it. The tenant stated that he and the landlords' agents tried to caulk the fixtures in order to repair the leak. The tenant stated that he complained about the issue to BP in April, May and June 2014. The tenant testified that BP's response was to tell the tenant to fix it himself. The tenant testified that at a later date he told BP he was going to a home repair store. The tenant testified that BP responded "okay". The tenant testified that BP viewed the completed renovation and that BP stated that he wished that he had a sink like the tenant's.

The tenant testified that he has made this sort of repair before although he is not a licenced plumber. The tenant testified that the vanity had rotten and required replacement. The tenant testified that the sink, toilet, and vanity have all been disposed of and are no longer in the tenant's possession. The landlord testified that the sink, toilet and vanity are of a standard type in the units within the residential property.

The landlord testified that he became aware of the alteration to the rental unit in or about June 2015. The landlord testified that a tradesperson working in the building had been approached by the tenant to renovate the tenant's kitchen. The landlord testified that he spoke with the tenant. The tenant informed the landlord over the telephone about the changes to the bathroom.

After being alerted to the changes, the landlord hired a plumbing contractor who inspected the changes. With the exception of a minor deficiency, the toilet and sink were installed correctly.

The landlord testified that BP deals with the day-to-day interactions with the residents of the residential property. The landlord testified that he is only brought in to authorize expenditures. Unless something in particular happens, the landlord testified that he would not know about it. The landlord testified that it has been BP's practice to relay matters related to plumbing to the landlord. The landlord testified that BP does not have the authority to contact tradespersons.

On cross examination, the landlord testified that he was not aware when BP may have become aware of the changes to the rental unit. The landlord testified that he was not aware of any conversation the tenant may or may not have had with BP regarding the renovations.

Analysis

In an application to cancel a 1 Month Notice, the landlord has the onus of proving on a balance of probabilities that at least one of the reasons set out in the notice is met.

Subparagraph 47(1)(d)(ii) of the Act permits a landlord to terminate a tenancy by issuing a 1 Month Notice in cases where a tenant or person permitted on the residential property by the tenant seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant. The landlords have set out in the 1 Month Notice, among other reasons, that the tenant seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant.

Section 91 of the Act preserves the common law respecting landlords and tenants in British Columbia. There is a common law implied covenant in tenancy agreements that a tenant will not commit "waste". The doctrine of waste was recently considered in *British Columbia (Director of Civil Forfeiture) v Onn*, 2009 BCCA 402:

> [25] The doctrine of waste generally refers to conduct by either a life tenant or a leasehold tenant which permanently alters the nature of the property they occupy. It is defined in Halsbury's Laws of England, 4th ed., vol. 27(1) 2006 at 10, para. 431:
>
> > Waste consists of any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land.
>
> [26] There are four types of waste recognized at common law:
>
> (1) ameliorating;
> (2) permissive;
> (3) voluntary; and
> (4) equitable.
>
> [27] Ameliorating waste is an act which results in an improvement to the property and is only actionable where the improvement results in an increased burden to the owner of the property. …
>
> [29] Voluntary waste, in contrast to permissive waste, is active conduct by a tenant which injures the inheritance of the remainder person or owner. For example, by pulling down a house, felling trees, or in some way increasing the burden on the estate.

The reasoning behind waste is that the landlord is presumed to have intended the rental unit to be kept in its original condition.

The principles surrounding waste are alluded to in *Residential Tenancy Policy Guideline*, "1. Landlord & Tenant – Responsibility for Residential Premises"

1. Any changes to the rental unit and/or residential property not explicitly consented to by the landlord must be returned to the original condition.
2. If the tenant does not return the rental unit and/or residential property to its original condition before vacating, the landlord may return the rental unit

> and/or residential property to its original condition and claim the costs against the tenant. Where the landlord chooses not to return the unit or property to its original condition, the landlord may claim the amount by which the value of the premises falls short of the value it would otherwise have had.

An alteration is not waste if the tenant has permission from the landlord.

The tenant has testified that he had BP's permission to make the renovations. Purportedly in response to complaints from the tenant, BP responded "*fix the [expletive]ing thing yourself if you want it fixed*". The tenant stated that he told BP that he was going to a home repair store and BP said "*Okay*!" The landlord testified as to BP's normal practices, but could neither confirm nor deny the content of any conversation between the tenant and BP.

The tenant's testimony about what BP said is hearsay evidence as it is a statement from outside of these proceedings being introduced for the proof of its contents. Section 75 of the Act deals with the admissibility of evidence in these proceedings:

> The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be
>
> (a) necessary and appropriate, and
>
> (b) relevant to the dispute resolution proceeding.

In this case, it is necessary and appropriate to admit the evidence as it provides the tenant with a defence to the allegations against him. As well, the evidence is relevant. However, the tenant should have called BP as witness to provide testimony himself. If BP had been called as a witness he would have provided sworn testimony as to the content of his and the tenant's conversation and could have been cross examined. While I am admitting the hearsay evidence, I am assigning it little weight as this hearsay evidence is inherently less reliable than sworn evidence.

The tenant submits that BP provided him with permission to conduct the renovations. I disagree. BP's statements are at best ambiguous. The tenant did not provide the specifics of the purpose of the trip to the repair store and the proposed renovations in order for BP's "okay" to have any real meaning. I find, on a balance of probabilities, that the tenant has failed to show he had the landlord's permission to make the renovations.

I find, on a balance of probabilities, that the tenant committed waste by renovating the rental unit. I find that while the changes may be regarded as an upgrade by some

people, in the context of a commercial landlord with multiple unit buildings, there is a value in consistency among the units. The tenant has disposed of the original fixtures. I find that by causing the fixtures in the rental unit to be different from those in the rest of the residential property, the tenant has caused voluntary waste and that this waste is not ameliorating waste. The nature of the waste was a wholesale alteration of the bathroom in the rental unit. This is not the same as installing a shelf or painting a wall: the tenant has removed and disposed of the landlords' property. This goes to the severity of the wrong. In committing voluntary waste of this severity, I find, on a balance of probabilities, that the tenant has seriously jeopardized a lawful right or interest of the landlord. Accordingly, I find that the 1 Month Notice is valid. As the 1 Month Notice is validly issued and will not consider the other reason for cause set out by the landlord in the 1 Month Notice.

Pursuant to subsection 55(1) of the Act, where an arbitrator dismisses a tenant's application or upholds the landlord's notice and the landlord makes an oral request for an order of possession at the hearing, an arbitrator must grant the landlord an order for possession. As the tenant's application is dismissed and the landlords have made an oral request for an order of possession, I am obligated by the Act to grant the landlords an order of possession. Based on the landlords' concession with respect to the effective date of an order of possession, I grant the order of possession effective 30 September 2015.

As the tenant has not been successful in his application, he is not entitled to recover his filing fee.

Conclusion

The tenant's application is dismissed without leave to reapply.

The landlords are provided with a formal copy of an order of possession effective 30 September 2015. 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 1, 2015

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