Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AZIZAMALCO HOLDINGS CO.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes ET, FF; ERP, FF, O

Introduction

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

- an early end to this tenancy and an order of possession pursuant to section 56; and
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the Act for:

- an order to the landlord to make emergency repairs to the rental unit pursuant to section 33;
- authorization to recover her filing fee for this application from the landlord pursuant to section 72; and
- an "other" remedy.

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 and counsel.

Preliminary Issue – Service of Dispute Resolution Packages

The landlord served the tenant with the dispute resolution package on 11 December 2015 by posting that package to the tenant's door. The tenant neither confirmed nor denied receipt of the dispute resolution package. On the basis of this evidence, I am satisfied that the tenant was deemed served with the dispute resolution package pursuant to subsection 89(2) and paragraph 90(c) of the Act.

The tenant did not serve her application for dispute resolution. The landlord had no knowledge of the application scheduled for today.

The tenant stated that she was only concerned with continuing the tenancy and did not wish to proceed with her application. On this basis the tenant's application is withdrawn.

Preliminary Issue – Tenant's Late Evidence

The tenant provided her evidence to the Residential Tenancy Branch on 13 January 2016. The tenant testified that she served her evidence to the landlord by registered mail on 13 January 2016.

The tenant submitted that she was confused as to the date of the hearing and believed that the hearing for this file was to be held on 27 January 2016. The tenant submitted that she was confused as to which applications were being heard today and contacted the Residential Tenancy Branch to confirm the date. The tenant submitted that it was at that time she was made aware that this hearing was proceeding today. The tenant submitted that it was important to her case to be able to refer to her evidence.

The landlord submitted that the tenant is aware of her obligations under the Act and has conducted dispute resolution hearings on the landlord's behalf for other tenancies in the residential property. The landlord submitted that as the tenant did not deny being served she had sufficient notice of this hearing date. The landlord submitted that this is an attempt by the tenant to delay the proceedings. The landlord submits that it would be unduly prejudicial to the landlord to accept the evidence without the ability to examine it or to adjourn the hearing.

I informed the parties at the hearing that I would exclude the tenant's evidence. I informed the parties that I would provide written reasons. These are the reasons.

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 3.15 and the definition of days, the last day for the tenant to file and serve evidence in reply to the landlord's application was 7 January 2016.

This evidence was not served within the timelines prescribed by rule 3.15 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case, the landlord has not been able to examine the evidence submitted by the tenant. Further, the landlord would be unduly prejudiced by an adjournment (in order to allow time for service) as the end to tenancy is at issue. On this basis, I decline to admit the tenant's late evidence and it is excluded.

Preliminary Issue – Suspension of Jurisdiction

At the beginning of the hearing I raised the issue of the Branch's competency to issue a decision in these applications. In particular, there appears to be significant factual overlap between the subject matter of a British Columbia Supreme Court civil claim that has been filed by the landlord. That claim relates to allegations of impropriety committed by the tenant in the course of her activities as property manager for the landlord.

Pursuant to paragraph 58(2)(c), this Branch's ability to determine this dispute may have been suspended:

> Except as provided in subsection (4), if the director receives an application under subsection (1), the director must determine the dispute unless…
>
> (c) the dispute is linked substantially to a matter that is before the Supreme Court.

The Supreme Court of British Columbia considered a parallel provision to paragraph 58(2)(c) in *Palmer v Gerbrandt et al,* 2005 BCSC 1711 at para 43 (*Palmer*):

> In response to the defendant's counterclaim, the plaintiff submitted that the defendant was obliged to bring their claim under the provisions of the ***Manufactured Homes Park Tenancy Act*** as the Act requires the arbitration of disputes. However, s.51(4)(a) of the Act allows the Supreme Court of British Columbia to hear a matter if "the dispute is substantially linked to a matter before the Supreme Court." Since the counterclaim arises out of the same facts as the plaintiff's claim, the defendant's counterclaim is substantially linked to a matter before the Supreme Court. As a result, the Supreme Court had discretion to hear and determine the defendant's counterclaim.

On the basis of paragraph 58(2)(c) and *Palmer*, insofar as the landlord alleges a reason for cause that is substantially factually linked to the claim currently before the Supreme Court of British Columbia, I find that I am prevented from issuing a decision on those matters. Any bad acts of the tenant outside the scope of her activities as property manager (and therefore not substantially linked in fact to the Supreme Court of British Columbia matter) could form the basis for ending the tenancy.

Issue(s) to be Decided

Is the landlord entitled to an early end to this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

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

In August 2013 the tenant entered into a tenancy agreement with herself on behalf of the landlord. The tenancy purportedly began 1 September 2013. The tenant testified that her monthly rent was subject to a monthly rent abatement of $400.00. The tenant paid net monthly rent of $850.00. The tenancy agreement indicates that the rental unit is the "management suite". The tenant admitted that she is the individual that made this notation.

The tenant and landlord entered into a "Residential Management Services Agreement" on 22 April 2015. On 27 November 2015, the tenant's duties as resident manager were terminated by the landlord.

On 30 November 2015, the corporate owner of the residential property filed a notice of civil claim against the tenant. The notice of civil claim sets out that the tenant has:

- breached the Residential Management Services Agreement;
- breached her fiduciary duties by:
    - failing to act in the best interest of the corporate owner;
    - failed to account;
    - acting in conflict of interest; and
    - benefitting improperly;
- converted property, rent and opportunities of the corporate owner to the tenant's own use; and

- embezzled, misappropriated, and defalcated.

The acts alleged by the landlord to support the early end to tenancy include:

- failing to account for rents received from units within the residential property;
- comingling the landlord's rents with the tenant's personal funds;
- breach of trust;
- failure to account;
- subleasing rental units within the residential property at a profit;
- subleasing rental units without the landlord's permission; and
- altering units (other than the rental unit) by installing walls and removing doors.

The agent was asked by way of cross examination how the alleged wrongdoings relate to the tenancy. The agent answered that it was because the tenant is currently residing in the management suite.

The tenant denies that she has acted improperly.

Landlord's Submissions

The landlord relies on subsection 56(2) of the Act. The landlord further submits that the rental unit is the manager's suite and as the tenant's duties have ended she is no longer entitled to occupy that suite.

The landlord submits that the temporary structures erected by the tenant impede egress and pose a threat of danger.

Tenant's Submissions

The tenant had possession of the rental unit as well as another unit within the residential property. The tenant has relinquished possession of the second unit to provide a rental unit for the new management. The tenant submits that this unit is the suite for the resident manager.

Analysis

In accordance with section 56 of the Act, in receipt of a landlord's application to end a tenancy early and obtain an order of possession, an arbitrator may grant the application where the tenant has:

- significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property;
- seriously jeopardized the health and safety or a lawful right or interest of the landlord or another occupant;
- put the landlord's property in significant risk;
- engaged in illegal activity that:
    - has caused or is likely to cause damage to the landlord's property;
    - has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property; or
    - has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;
- caused extraordinary damage to the residential property.

In addition to showing at least one of the above-noted causes, the landlord must also show why it would be unreasonable or unfair to the landlord to wait for a 1 Month Notice to take effect.

The bases for end to the tenancy are, tellingly, largely set out in the agent's affidavit in support of the corporate owner's chambers application. The only exception is the allegation of altering units in the residential property; however, these alterations were carried out in the tenant's capacity as property manager to unit other than the rental.

While undoubtedly the acts committed by the tenant are very concerning, most of the acts alleged to support the early end to tenancy are substantially linked to the factual matters before the British Columbia Supreme Court, that is, that the tenant acted improperly as resident manager. For this reason, they cannot form the basis of the early end to tenancy before the Residential Tenancy Branch.

In any event, if I was not prevented from issuing a decision pursuant to paragraph 58(2)(c) of the Act, a one month notice to end tenancy for cause is the standard method of ending a tenancy for cause. An order to end tenancy early pursuant to section 56 requires that there be particular circumstances that lend urgency to the cause for ending the tenancy. That is the reason for the requirement that the landlord show it would be "unreasonable or unfair" to wait for a cause notice to take effect.

An early end to tenancy is a remedy reserved for situations where there are serious and immediate risks to persons or property. The bad acts were committed by the tenant *qua* property manager. The continued risk or threat of the bad acts ceased when the tenant

was removed from this role. Accordingly, the bad acts do not represent serious or immediate risks to persons or property in such a way that it would be unreasonable or unfair for the landlord to wait for a notice for cause to take effect.

Whether the rental unit was designated as the “management suite” is immaterial for the purposes of an application pursuant to subsection 56(2) of the Act; however, it may be relevant for the purposes of a notice delivered pursuant to section 48 of the ACt.

For these reasons, I cannot order an early end to the tenancy and the landlord’s application is dismissed.

Conclusion

The tenant’s application is withdrawn.

The landlord’s application is dismissed.

The tenancy will continue until it is ended in accordance with the Act.

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: January 29, 2016

Residential Tenancy Branch