Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MACDONALD COMMERCIAL REAL ESTATE SERVICES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL, FF

Introduction

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

- cancellation of the landlord's 2 Month Notice to End Tenancy for Landlord's Use of Property (the 2 Month Notice) pursuant to section 49; and
- authorization to recover their filing fees for these applications from the landlord pursuant to section 72.

With the exception of the tenants' amendments the service of the dispute resolution package and evidence was acknowledged by the parties.

The tenant LG (the tenant) attended on behalf of all tenants. The tenants were represented by an advocate. The landlord was represented by its agents.

Procedural History

This hearing was originally scheduled to be heard on 22 July 2016.

Initially the agent MC appeared on behalf of the landlord. The agent MC informed me that she did not feel comfortable speaking to some of the prehearing issues. The hearing was stood down for 45 minutes in order to allow another agent to call in.

When the hearing reconvened at 1030, I informed the parties of the availability of settlement. The tenant informed me that he would need to consult the other tenants. The agent CS informed me that he would need to speak with the owner of the corporate landlord. By consent, the hearing was adjourned to 26 July 2016 to permit the parties to discuss the possibility of settlement.

The parties were unable to reach a settlement agreement and the hearing continued by way of adjudication on 26 July 2016.

Preliminary Issue – Impartiality

At the hearing I disclosed that I know the tenants' advocate socially as we have mutual friends. I expressed my position that I would be able to conduct the hearing in an unbiased and impartial manner notwithstanding the fact that the tenants' advocate and I have mutual friends.

I asked the parties for their submissions on the issue. The parties consented to the hearing proceeding before me.

On the basis that I have no financial or personal interest in the outcome of this matter, I have no financial or personal dealings with the tenants, and that both parties consented, I determined that I was able to conduct the hearing.

Preliminary Issue – Amendment

On or about 4 July 2016, the tenants filed amendments to their application for dispute resolution. The tenants' amendments sought to include dispute of a second 2 Month Notice issued on or about 21 June 2016.

The agent CS submitted that the landlord did not understand that the tenants were disputing the second set of 2 Month Notices and believed that the tenants had accepted the landlords' offer of additional compensation. The agent admitted that the tenants did not accept payment of the compensation. The tenants deny that at any point they accepted the second set of 2 Month Notices and say that the amendment flows from substantially the same issues.

The tenants did not serve the amendment as required by Rule 4.8 of the *Residential Tenancy Branch Rules of Procedure* (the Rules). The tenants requested that I permit the amendments at the hearing. Rule 4.2 of the Rules permits me to amend an application at a hearing where the amendment can be reasonably anticipated.

Section 59 of the Act provides that a person who makes an Application for Dispute Resolution must give a copy of the application to the other party within three days of making it, or within a different period specified by the director. However, the Act does not specify any particular consequences or penalty for failing to serve such documents

within the prescribed time limit. Similarly, there is no prescribed penalty for failure to serve an amendment.

Although the late service of the amendment to a does not automatically mean that a hearing will not proceed, there may be some circumstances where administrative fairness requires that a respondent be granted more time to prepare for a hearing.

Administrative fairness requires that a responding party have notice of the case which they must meet. This means disclosing the material facts on which the application will be based including all relevant notices. The landlord submits that it did not have adequate notice to respond to the amendments and did not know the tenants objected to the second notice until 22 July 2016.

The tenants say that they will be prejudiced if the amendment is not granted: In particular, operation of subsection 49(9) of the Act and the conclusive presumption to end of tenancy.

The reason on which the second notice is based involves substantially the same issues raised in the first notice and as such is reasonably anticipated. Further, the tenants did not accept the landlords' offer of compensation and accordingly the landlord knew or ought to have known that the tenants did not accept the second set of notices. Further, on balance, the prejudice to the tenant is greater than that to the landlord. Given the possible prejudice by the failing to provide notice, the landlord was provided with the option of requesting an adjournment to the hearing.

Preliminary Issue – Adjournment

The landlord requested an adjournment so that it might arrange for an engineering expert to provide evidence regarding the structural soundness of the residential property. The tenants did not consent to the adjournment and submitted that the engineer's evidence would not be relevant as the only issue in dispute is whether or not the landlord has all necessary permits. After the tenants' submissions, the landlord withdrew its request for an adjournment.

Issue(s) to be Decided

Should the landlord's 2 Month Notices be cancelled? If not, is the landlord entitled to orders of possession? Are the tenants entitled to recover their filing fees for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and testimony, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenants' claims and my findings around them are set out below.

The landlord and tenants agree that there are valid tenancy agreements between the landlord and each respective tenant(s).

The landlord has issued two sets of 2 Month Notices: one set was issued 24 May 2016; and the second set was issued 21 June 2016. Each 2 Month Notice set out that "the landlord has all necessary permits and approvals required by law to demolish the rental unit, or renovate or repair the rental unit in a manner that requires the rental unit to be vacant".

The agent CS testified that the building is structurally unsound and that there is an engineer's report to that effect. The agent CS testified that the building is sinking and leaning. The agent CS testified that the landlord must end the tenancies because of this safety issue.

The landlord's agent CS testified that the landlord is considering whether it will repair or demolish the building. The agent CS agreed that either scope of work would require permits. The agent CS admits that the landlord does not have permits in place to demolish the building or to repair the building.

The tenants submit that as the landlord does not have all the permits required, it is not entitled to end the tenancies on the basis of subsection 49(6) of the Act.

Analysis

Paragraph 49(6)(b) of the Act permits a landlord to end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to renovate or repair the rental unit in a manner that requires the rental unit to be vacant.

As set out in *Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator),* 2007 BCSC 257 at paragraph 19, the test in paragraph 49(6)(b) of the Act is composed of three elements:

(a) The landlord must have the necessary permits;

(b) The landlord must be acting in good faith with respect to the intention to renovate; and

(c) The renovations are to be undertaken in a manner that requires the rental unit to be vacant.

The landlord admits that it does not have permits and that permits would be required for either of the contemplated outcomes. For this reason, the 2 Month Notices issued on this basis are invalid. The 2 Month Notices are cancelled. The landlord may not use the 2 Month Notice to end these tenancies in this manner. The tenancies will continue until they are ended in accordance with the law.

As the tenants have been successful they are entitled to recover their filing fees paid from the landlord. Pursuant to paragraph 72(2)(a) of the Act, the tenants may elect to deduct the amount of the monetary order from their next month's rents.

Conclusion

The tenants' applications to cancel the 2 Month Notices are allowed. The 2 Month Notices are cancelled and of no force and effect. The tenancies will continue until they are ended in accordance with the Act.

I issue a monetary order in each of the tenant(s) favour in the amount of $100.00. Should the landlord(s) fail to comply with this(/these) order(s), this(/these) order(s) may be filed in the Small Claims Division of the Provincial Court and enforced as an order(s) of that Court.

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: July 29, 2016

Residential Tenancy Branch