



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, MNDC, FF

Introduction

This hearing dealt with the tenant's application 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;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

The tenant appeared. The landlord was represented by its agents. Both parties 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 tenant elected to call two witnesses IH and JS.

Neither party raised any issue with service of documents.

Amendment

At the hearing, I asked the parties if the individual landlord that was named was a proper party to this application. The corporate landlord acting through its agent SM issued the 2 Month Notice. The tenant and agent SM both asked that I amend the application to remove the agent SM as a named party and instead name the corporate landlord. The agents for the landlord both consented to this and acknowledged that the corporate landlord was the proper party. As there is no prejudice to the parties in granting this amendment to reflect the corporate landlord as the respondent, the application was amended. This amendment is reflected in the style of cause to this decision.

Issue(s) to be Decided

Should the landlord's 2 Month Notice be cancelled? If not, is the landlord entitled to an order of possession? Is the tenant entitled to a monetary order for compensation for

damage or loss under the Act, regulation or tenancy agreement? Is the tenant 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 testimony, 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.

The parties entered into a written tenancy agreement on 12 April 2013. The tenancy began 1 May 2013. Monthly rent in the amount of \$989.00 is due on the first. The landlord continues to hold the tenant's security deposit in the amount of \$470.00.

On 21 June 2016, the landlord's agent SM personally served the tenant with the 2 Month Notice. The 2 Month Notice set out that it was give as "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 2 Month Notice set out an effective date of 31 August 2016.

I was provided with a copy of the condition inspection report that was created on move in. There is nothing remarkable about this report. The report notes that the condition of the rental unit is "satisfactory".

Testimony of Agent SM

SM is an employee of the landlord. SM has taken some plumbing courses.

SM testified that the rental unit must be renovated as it is older and requires repairs. The agent testified that the rental unit is in its original condition and that the building was constructed over forty years ago. The agent testified that the landlord cannot let the tenant reside in an "ancient" rental unit.

SM submits that this is not a "renoviction" and submits that the landlord wishes to conduct this renovation because it cares about the tenant and wants her to like where she lives. SM submits that this is not about increased rent.

SM testified that the tenant is a good tenant. SM submits that the landlord has acted reasonably by offering the tenant another unit at rent of \$1,200.00, but the tenant has refused this.

SM testified that on 11 June 2016 he received a maintenance request from the tenant regarding the cabinet. The agent SM testified that the condition inspection report on move in does not note any deficiencies.

SM referred me to the landlord's photographs. One photograph shows the linoleum lining the cupboard is lifting. Other photographs show that the tiles in the bathroom are cracked. SM testified that the tiles are sinking into the wall; however, this is not readily observable from the photograph provided. SM testified that the tiles are cracked because the wall is soft and wet.

SM testified that if the rental unit were larger it might have been possible to complete the repairs and renovations with the unit occupied; however, the rental unit is a bachelor. SM testified that the rental unit is 300sf, but admitted on cross-examination that the rental unit is likely closer to 500sf. SM submits that it is not possible to pull out the bathroom and kitchen and still have the tenant reside in the unit. SM submitted that it would take one month to renovate the rental unit.

The agent SM points to the inconsistency in the tenant's email of 14 June 2016. In that email, the tenant notes that the landlord has "been wonderful to [her] when it comes to repairs and [she is] truly grateful for that." The tenant also states in that email that the repairs regarding the cabinet have been outstanding for more than three years.

SM submits that no permits are required as the landlord will not conduct any plumbing or electrical work beyond new fixtures.

Testimony of Agent JT

JT testified that when rental units become vacant the landlord would renovate the unit. JT testified that there is no other way to remedy the issues other than a complete renovation. JT estimates that the unit would be without water for one and a half weeks.

JT admitted that the rental unit has not been inspected by a certified tradesperson and that it is the landlord's agents that have made the determination about the scope of work.

Testimony of the Tenant

The tenant testified that, when the condition inspection was conducted on move in, renovations were occurring in the kitchen and she did was not able to inspect within the cupboard in issue.

The tenant testified that she noticed the smell of wood rot when she began occupying the rental unit.

The tenant testified that when she had the agent SM in the rental unit to inspect the cupboard, SM indicated that if the landlord repaired this issue, the landlord would have to replace all the cabinets and the flooring. The tenant testified that SM then asked how much more the tenant would be willing to pay and if she knew what a “renoviction” was. The tenant testified that SM then offered a rental unit at a rent of 40% more.

The tenant submits that this renovation is not for the purpose of improving the rental unit, but to increase rent by circumventing the rent increase regulations.

The tenant testified that she had a contractor (IH) attend at the rental unit to look at the sink. The tenant testified that IH informed her that there was no need for vacant possession and the repair could happen within five days.

The tenant submits that the renovations in unit 702 are cosmetic and do not involve plumbing or electrical work. The tenant submits that it would be possible to live in a rental unit like 702 during the renovation.

The tenant testified that the cracked tiles are preexisting damage. The tenant submits that if the cracks were an issue they should have been dealt with prior to her occupancy. The tenant submits that replacing tile will not require vacant possession.

Testimony of JS

JS testified that he was with the tenant during the condition inspection that beginning of the tenancy. JS testified that it was not possible to enter the kitchen during the inspection. JS testified that the condition at the beginning of the tenancy is very similar to the condition in which the rental unit is currently. JS testified that the kitchen might have worsened.

Testimony of IH

IH testified that there is leaking on the side of the sink and water damage to the cupboard. IH testified that he only inspected the kitchen area and did not do a full inspection of the entire rental unit and did not inspect the bathroom.

IH testified that the repair of the kitchen area and cupboards could be done in five business days but may stretch out to six days if an anti mould spray was required for the drywall behind the cupboards. IH testified that depending on the way the water was connected to the rental unit, it might be possible to only turn off water to either the bathroom or kitchen and not both.

Analysis

The 2 Month Notice

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.

Residential Tenancy Policy Guideline “2. Good Faith Requirement When Ending a Tenancy” provides me with guidance in determining whether or not a landlord has “good faith”:

Good faith is an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage.

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.

[emphasis added]

The circumstances leading up to the issuance of the 2 Month Notice bring into question the landlord's good faith. I accept the tenant's testimony that the rot issue existed at the commencement of the tenancy: Neither of the current agents attended the condition inspection; further the tenant provided corroborating evidence from JS, who attended the condition inspection. As the condition is similar to the condition at the beginning of the tenancy, it appears spurious to suggest that these renovations are now necessary. This is combined with the offer to relocate the tenant to a rental unit for a rent increase of more than 40% initially, which was subsequently reduced to a 20% increase.

As the question has been raised, it is the landlord's onus to establish that it does not have another purpose that negates the honesty of intent or demonstrates a lack of an ulterior motive. I find, on a balance of probabilities that the landlord has not shown that it lacks an ulterior motive for ending the tenancy.

As the landlord has not proven, on a balance of probabilities that it has a good faith intention, the landlord does not meet the test as set out in paragraph 49(6)(b) of the Act. The 2 Month Notice is cancelled and is of no force and effect. The tenancy will continue until it is ended in accordance with the Act.

In the alternative, I agree with the tenant's submissions that the renovation is not of such an extent that it requires vacancy by way of termination of the tenancy. In particular, I am guided by the Court in *Berry*:

[22] Second, it must be the case that the only manner in which to achieve the necessary vacancy, or emptiness, is by terminating the tenancy. I say this based upon the purpose of s. 49(6). The purpose of s. 49(6) is not to give landlords a means for evicting tenants; rather, it is to ensure that landlords are able carry out renovations. Therefore, where it is possible to carry out renovations without ending the tenancy, there is no need to apply s. 49(6). On the other hand, where the only way in which the landlord would be

able to obtain an empty unit is through termination of the tenancy, s. 49(6) will apply.

- [23] This interpretation of s. 49(6) is consistent with the instruction in *Abrahams* and *Henricks* to resolve ambiguities in drafting in favour of the benefited group, in this case, tenants. Practically speaking, if the tenant is willing to empty the unit for the duration of the renovations, then an end to the tenancy is not required. It is irrational to think that s. 49(6) could be used by a landlord to evict tenants because a very brief period was required for a renovation in circumstances where the tenant agreed to vacate the premises for that period of time. It could not have been the intent of the legislature to provide such a “loophole” for landlords.

[emphasis added]

The tenant's witness IH testified that it is likely that the water could be shut off to the kitchen and bathroom at different times, thus leaving the tenant with a water source. The landlord has not provided evidence that refutes this evidence. The tenant has testified that she believes that she can continue to occupy the rental unit during the renovations and that an end to the tenancy is not required. Furthermore, even if the water must be shut off to both the kitchen and bathroom, the tenant could relocate for the brief period of one week to allow the renovations to occur. For these reasons, I find that the landlord has also failed to show that vacant possession (as determined in *Berry*) is required.

Monetary Compensation & Filing Fee

The tenant claims for the costs associated with preparing for this claim and obtaining a letter from the city regarding permits. These costs are best characterized as “disbursements” incurred in the course of these proceedings.

Section 72 of the Act allows for repayment of fees for starting dispute resolution proceedings and charged by the Residential Tenancy Branch. While provisions regarding costs are provided for in court proceedings, they are specifically not included in the Act. I conclude that this exclusion is intentional and includes disbursement costs. The tenant is not entitled to recover the cost of disbursements from the landlord.

As the tenant has been successful in this application, she is entitled to recover her filing fee from the landlord. Paragraph 72(2)(a) of the Act sets out:

If the director orders a party to a dispute resolution proceeding to pay any amount to the other...the amount may be deducted...in the case of payment from a landlord to a tenant, from any rent due to the landlord...

Accordingly, the tenant may recover the \$100.00 monetary order by deducting that amount from rent or seek recovery of that order directly from the landlord. If the tenant elects to deduct his monetary order from rent, payment of the net amount of rent will satisfy the tenant's obligations pursuant to section 26 of the Act.

Conclusion

The 2 Month Notice is cancelled. The tenancy will continue until it is ended in accordance with the Act.

I issue a monetary order in the tenant's favour in the amount of \$100.00. The tenant is provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order 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: August 12, 2016

Residential Tenancy Branch