Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPC, MND, MNSD, FF
Tenants: CNC, FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution. The landlord sought an order of possession and a monetary order. The tenants sought to cancel a notice to end tenancy.

The hearing was originally conducted on September 28, 2016 via teleconference and was attended by the landlord; both tenants and their advocate. The hearing was reconvened on October 7, 2016 via teleconference and was attended by the landlord; both tenants and their advocate.

At the outset of the original hearing the tenants requested an adjournment and raised several procedural issues. As a result, I wrote an Interim Decision on September 28, 2016 making rulings on the issues raised and granting the adjournment. This Decision must be read in conjunction with the September 28, 2016 Interim Decision.

I note the landlord had submitted, prior to the hearing, a request to have all evidence submitted by the tenants for a different hearing be added to and included as evidence in this hearing. The landlord also requested the same arbitrator be assigned to this file "as it is a continuation/follow-up of the previous hearing."

As proceedings are adjudicated based on the evidence that is served by each party to the other party and to the Residential Tenancy Branch each Application and evidence must be considered independent of each other.

In addition, if evidence was simply transferred from one file to another it would be difficult to determine what evidence may have been served on the other party and what was not.

Furthermore, decisions made on one Application, in particular, when made regarding a specific Notice to End Tenancy has been issued are not a "continuation" of the issue when the landlord has issued a new Notice to End Tenancy, as is the case before me.

If the issues are the same and the Notice is the same then the principal of res judicata applies. *Res judicata* is the doctrine that an issue has been definitively settled by a judicial decision. The three elements of this doctrine, according to Black's Law

Dictionary, 7th Edition, are: an earlier decision has been made on the issue; a final judgment on the merits has been made; and the involvement of the same parties.

Based on the submissions of both parties I find that the landlord has issued a new Notice to End Tenancy that is distinct from the one determined to be ineffective during the previous hearing. As a result, I have only considered evidence that was submitted as result of this Application and not the previous file.

I also find that because the issues identified in this Application are distinct from the previous hearing, the previous Arbitrator is not seized of these matters and the Residential Tenancy Branch can assign to any Arbitrator. The landlord's request to have this matter heard by the previous Arbitrator is declined.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession for cause to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 38, 47, 55, 67, and 72 of the *Residential Tenancy Act (Act).*

It must also be decided if the tenants are entitled to cancel a 1 Month Notice to End Tenancy for Cause and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 47, 67, and 72 of the *Act.*

Background and Evidence

Both parties submitted portions of a tenancy agreement for a 1 year fixed term tenancy beginning on April 1, 2015 that converted to a month to month tenancy on April 1, 2016 for a monthly rent of $1,050.00 due on the 1st of each month with a security deposit of $525.00 and a pet damage deposit of $525.00 paid.

Both parties submitted a copy of a 1 Month Notice to End Tenancy for Cause issued on July 30, 2016 with an effective vacancy date of August 31, 2016 citing the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord and put the landlord's property at significant risk; the tenant has caused extraordinary damage to the unit/site or property/park; Tenant has not done required repairs of damage to the unit/site.

The landlord submitted the most significant issue in relation to the 1 Month Notice is the damage caused by the tenants' dogs. The landlord testified that upon entering the rental unit it smells of dog feces and urine. He stated that there are urine stains on the flooring and he found feces on the floor. He asserted the dogs have been using the carpets that the tenants have taped down to the laminate flooring as "pee pads". As a result, the landlord submitted, the laminate floors are starting to peel and bubble.

The landlord also submitted that other damage caused by the tenants includes:

- The installation of a grab bar in the bathroom where the tenants had to drill holes into the tile surround;
- Dents in the new dishwasher the landlord install after the tenants had complained of leaks from the old dishwasher;
- A broken cat door; and
- Plywood has been screwed to the walls.

The landlord testified that he had received complaints from a neighbour who lives on the property and several complaints from the residents of a senior's complex in an adjoining property. He also stated that the tenants had failed to maintain the grounds of the property and that he has received complaints about the unsightliness of the tenants' bus parked on the property.

The landlord seeks to end the tenancy for these causes and monetary compensation in the amount of $4,716.08 to replace the laminate flooring. In support of both issues the landlord has submitted several photographs as well as some written statements from witnesses and himself. The landlord has also provided two estimates to support his financial claim.

The landlord testified that he first became aware of the condition of the rental unit in December 2015 when he was called by the tenants to attend the property because of a problem with the dishwasher. The parties agree the landlord attempted to repair it but later when the same problem occurred the landlord replaced the dishwasher.

The landlord stated there was a problem with a seal in the dishwasher and it only leaked when it was being used. The landlord submitted that the floor damage that he has identified is across the room from the dishwasher. The landlord has submitted a receipt for a new dishwasher dated February 17, 2016. The receipt shows the dishwasher would be available for the landlord to pick up on February 23, 2016.

The landlord submitted that as a result of these problems he issued the tenants, in May 2016 a 1 Month Notice to End Tenancy for Cause. As noted above, that 1 Month Notice was the subject of a previous hearing between the parties at which time the 1 Month Notice was cancelled by the Arbitrator. The Arbitrator cancelled the Notice based on the lack of any supporting evidence from the landlord to support his position that he had cause to end the tenancy.

As a result, the landlord scheduled an inspection of the rental unit. In his written submissions the landlord stated that from the start of the inspection the tenants were rude, belligerent, and using foul language. The landlord submitted the tenant was recording the inspection and they would not leave the landlord and his witness alone so they left after 10 minutes.

The landlord issued the 2nd 1 Month Notice to End Tenancy Cause on July 30, 2016 after this inspection.

The tenants submitted the landlord has never informed them that they had been disturbing any other occupants or the landlord. They submitted that they are allowed to have two vehicles on the property and the bus is their second vehicle. The tenants stated that they could not complete the work in the yard because the landlord had failed to ensure the fruit tree had not been pruned.

They also stated that the dishwasher the landlord had installed was already dented and they have caused no damage to it. They stated also that they had installed the plywood on the walls to prevent damage from the female tenant's wheelchair but that since this began they have removed the plywood and repaired the walls. The tenants have provided photographs of this work.

The tenants confirmed that they had recorded the inspection. The female tenant stated she records all of her interactions with the landlord. The tenant stated that she had not submitted this recording because she had sent it to another agency for a different proceeding. Despite having a copy of the recording she is not sure why she did not submit as evidence in this proceeding.

Initially, through their advocate, the tenants submitted that they had expressed some frustration with the landlord during the inspection because he had breached their privacy by contacting the female tenant's Ministry of Social Development and Social Innovation worker regarding issues with the tenancy.

Later the male tenant clarified that the privacy breach was not why they were frustrated with the landlord but rather because the landlord had ripped up a rug that he had taped down with no consideration for returning it to the way he found it. The male tenant stated that he had to tape down the rugs so that it was safer for the female tenant's wheelchair and he had gone to great lengths to do the taping.

The tenants asserted that the installed the grab bar in the bathroom because the landlord was not in compliance with Section 32 of the *Act* because he failed to ensure that the rental unit was compliant with the 2012 BC Building Code Article 3.7.2.10. The tenants submitted the landlord was required to install grab bars as they are necessary for safe access and he has a responsibility to accommodate. The tenants did not provide a copy of any Building Code or any information on a landlord's responsibility to accommodate.

The male tenant testified that at the start of the tenancy he spoke to the landlord about installing a ramp at one of the external doors and the landlord agreed and stated that the tenants could make any modifications to the rental unit that would make it safe for the female tenant. The landlord agrees he provided verbal agreement for the tenant to install a ramp but did not give the tenant permission, at any time, to make any other modifications.

The tenants submit that the landlord did not complete a condition inspection at the start of the tenancy and therefore he has no evidence to confirm the condition of the floors at the start of the tenancy and therefore he cannot prove that the damage was caused during the tenancy.

The tenants submitted that the floor damage was, in fact, caused by the landlord's failure to repair the dishwasher in a timely fashion. The tenants submitted that because the dishwasher was leaking the bubbling began. Neither party provided a photograph specifically of the floor near the dishwasher; however the landlord's picture of damage to the dishwasher shows one small section of the flooring.

During the hearing I questioned the tenants as to why, despite having a previous hearing where the issue of the damage to floor was the primary reason for the landlord trying to end the tenancy with the May 30, 2016 1 Month Notice, and the submission of substantial evidence from both parties that the assertion that the damage to the floor was from the dishwasher had not been raised by them previous to this hearing.

The tenants responded by stating they did not know until they received the landlord's photographs for this hearing specifically what damage he was speaking about.

I note that in the July 7, 2016 Decision the Arbitrator wrote: "The Landlord testified that he conducted an inspection of the rental unit and noticed damage to the unit. He testified that the Tenants have four small dogs that are causing damage because they are urinating and defecating on the floors. He testified that the laminate flooring is bubbling and peeling away."

Later the Decision states: "In response, the Tenants testified that they have four dogs that have gone through training. They state that they have a pet pad for the dogs. The Tenants testified that their house is very clean and they do not understand where the Landlord's story is coming from."

The tenants submit that they contacted the landlord when they noticed the dishwasher was leaking again and that he responded that he was out of the country and that he would repair it when he returned. The tenants cited that this was an emergency repair as outlined in Section 33 of the *Act* and that contrary to the requirements of that Section the landlord had not provided them with an emergency contact number to deal with these emergencies.

The tenants confirmed that they did not respond to the landlord after he advised them that he would repair it when he returned to advise him that they thought it should be dealt with sooner. The tenants also confirmed that they did not seek to make the repairs themselves, in part because they could not afford to.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property or put the landlord's property at significant risk; the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to the rental unit or residential property; the tenant does not repair damage to the rental unit or other residential property, as required under section 32(3), within a reasonable time;

While I accept that the landlord has provided no evidence of the condition of the floors at the start of the tenancy, the tenants provided testimony that the floors were damaged during the tenancy. It was the tenants' position that the floors were damaged because of the landlord's failure to repair the dishwasher in a timely fashion. Based on the tenants' testimony I find, on a balance of probabilities that floors were damaged during the tenancy.

As to the cause of that damage, I am not persuaded by the tenant's submissions that the damage was caused by the dishwasher. I make this finding, in part, because I find it is extremely unlikely that the tenants would not have raised their assertion that the damage to the floor was caused by the dishwasher until this hearing. According to the July 7, 2016 decision the tenants could not think of any reason the landlord would have thought their dogs were damaging the floors and yet they did not offer their assertion of any damage being caused by the dishwasher.

I am not persuaded by their submission that they were not clear on what damage the landlord was talking about until they got his photographic evidence. After receiving the May 1 Month Notice and participating in the July 7, 2016 hearing where the landlord described the damage, I find that if the tenants truly believed damage to the floor had been caused by the dishwasher it would be reasonable for them to raise the claim some time earlier than this, such as when the landlord was attending the inspection on July 27, 2016.

I note that despite the landlords repeated submissions regarding the smell of urine and feces the tenants provided no explanation as to why such an odour would be so prominent or disputed that there was such an odour.

For these reasons, I prefer the landlord's submissions that the damage to the floors was caused by urine and feces from the tenants' dogs.

I also note that in regard to the tenants installing the grab bar and plywood to protect the drywall as modifications that the tenants say the landlord is required to provide by Building Code, the tenants have provided no evidence that there is such a requirement.

In addition, even if the landlord was required to install such modifications, I find the tenants have provided no evidence that the landlord had agreed to make any modifications or that the tenants ever asked the landlord if they could make them.

When one party to a dispute provides testimony regarding circumstances related to a tenancy and the other party provides an equally plausible account of those circumstances, the party making the claim has the burden of providing additional evidence to support their position.

In this case the landlord disputes having a discussion with the tenant where he agreed that the tenant could make whatever modifications were necessary to make it safe for the female tenant and the tenants have provided no evidence to corroborate their position that they had the landlord's approval.

In regard to the damage to the dishwasher, I prefer the landlord's testimony over the tenants. From the landlord's receipt for the dishwasher I note that the landlord actually had to order the dishwasher in and it arrived a week after it was purchased. I find it is unlikely, on a balance of probabilities, that the dishwasher was damaged when it was installed.

When I consider the damage to the flooring; the tenant's modifications in the rental unit (in particular the installation of the grab bar into existing tile); and the damage to the dishwasher, I find the landlord has established sufficient cause to end the tenancy based on the tenants causing extraordinary damage to the residential property.

As I have found the landlord has established this as cause to end the tenancy, I make no findings on the other causes identified in the 1 Month Notice issued on July 30, 2016.

I find the landlord's claim for compensation for the damage to flooring and to retain the security deposit is premature. I find that the landlord has not been able to completely assess the damage to the flooring sufficiently to determine if the entire floor needs replacement.

In addition, the tenants have until the end of the tenancy to make any repairs to the property to allow them time to comply with their obligations under Section 37 of the *Act.* Section 37 states that when a tenant vacates a rental unit at the end of a tenancy the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear and give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

Section 23 of the *Act* requires that the landlord and tenant must complete an inspection of the condition of the rental unit on the day the tenant is entitled to possession of the unit or on another mutually agreed upon day. The landlord must offer the tenant at least 2 opportunities with the second offered time being offered in writing and in the approved form.

Section 23(4) requires the landlord to complete a Condition Inspection Report with both the landlord and tenant signing the report. Pursuant to Section 18 of the Residential

Tenancy Regulation the landlord must provide a copy of the Report to the tenant within 7 days after the inspection has been completed.

Section 24 of the *Act* states that the right of the landlord to claim against a security deposit for damage to the residential property is extinguished if the landlord does not comply with the requirement to offer the tenant 2 opportunities to attend the inspection; if the landlord has provided 2 opportunities the landlord does not participate in the inspection; or complete the condition inspection report and give the tenant a copy as required under the Regulation.

As I am not making a finding in regard to the landlord's monetary claim for damage to the residential property I have made no finding on the issue of extinguishment in this decision. I note however the issue of extinguishment for claims against the security deposit is specifically restricted, pursuant to Section 24, to claims for damage to the property. As such, I can allow the landlord to deduct from the security deposit any other liability related to the tenancy, such as recover of the filing fee.

Conclusion

Based on the above, I dismiss the tenants' Application for Dispute Resolution in its entirety, without leave to reapply.

I find the landlord is entitled to an order of possession effective **two days after service on the tenants**. This order must be served on the tenants. If the tenants fail to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

As I have found the landlord's monetary claim to be premature, I dismiss that portion of the landlord's Application for Dispute Resolution with leave to reapply.

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **$100.00** comprised of the fee paid by the landlord for his application.

I order the landlord may deduct this amount from the security deposit in accordance with Section 72(2)(b).

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

Dated: October 7, 2016

Residential Tenancy Branch