Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNL, FF

Introduction

The tenant has applied to cancel a two month Notice to end tenancy for landlords' use of the property that was issued on August 30, 2016 and to recover the filing fee cost from the landlord.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed testimony and to make submissions during the hearing.

Issue(s) to be Decided

Should the two month Notice ending tenancy for landlords' use of the property issued on August 30, 2016 be cancelled or must the landlord be issued an order of possession?

Background and Evidence

The tenancy commenced in September 2004; the tenant rents one of several units in a home built in 1912. Rent is due on the first day of each month.

The landlord and the tenant agreed that on August 31, 2016 a two month Notice to end tenancy for landlords' use of the property was served on the tenant indicating that the tenant was required to vacate the rental unit on October 31, 2016.

The tenant applied to cancel the Notice within the required time limit.

The Notice provided two reasons:

"The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse of child, or the parent of child of that individual's spouse); and

The landlord has all necessary permit 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 landlord provided a written summary setting out the work to be completed in the unit. At the time the Notice was issued the landlord had not obtained permits as they

did not believe they required permits. When the tenant objected to the absence of permits the landlord did have two individuals obtain permits; one for plumbing and another for electrical.

The landlord wishes to remodel he suite, which the landlord described as “surface and cosmetic.” The landlord wishes to replace all flooring, replace light fixtures install new bathroom and kitchen cabinets and countertops, sinks, basin tub, toilet, wall tile, backsplash, faucets, tub filler, shower nozzle, retile a floor, and add new appliances. The units’ walls and baseboards will be prepared and painted.

The landlord said that as a designer with years of experience, the unit must be vacated for this work to be completed. The landlord has not considered any accommodation that might allow the tenant to remain in the rental unit during the remodeling as the landlord has a method for completing this kind of work and the unit must be a vacant shell before work is completed. No wall construction or deconstruction is required.

The landlord supplied a copy of a note signed by the contractor who will complete the remodel. The contractor wrote that he will be able to commence the work on December 1, 2016 and that the job should be completed by the end of March 2017. As the contractor will be juggling several jobs the work will take longer than previously expected. The contractor hoped to complete by the time the landlords’ son arrived in March, 2017.

On September 23, 2016 the landlords’ son wrote a note to explain that he will be moving to the city with his fiancé. They will be married in July 2017 and plan on relocating in April 2017. The sons’ fiancé wrote an email on October 17, 2016 indicating they would need to reside in Victoria by April 2016 (obvious typographical error) to allow her to attend an educational program that commences in September 2017. The email included a response from the college regarding the requirements for provisional acceptance to the program.

The landlord said that the day prior to the hearing her future daughter-in-law called to say that she will be commencing school in Victoria on January 10, 2017 as she needs to take some preparatory classes. The landlord said that this will result in the need to occupy the rental unit earlier than planned.

The landlord said that they plan, in good faith, to complete the remodel and then to have their son and his fiancé occupy the rental unit.

The tenants’ counsel responded to the Notice. Counsel argued that the Notice issued on August 30, 2016, cannot be supported by facts that were established following the issue date of the Notice.

When the Notice was issued the landlord had not obtained permits. The electrical permit was issued on September 23, 2016 and the plumbing permit was issued on September 26, 2016. The tenant obtained copies of the permits. The permits were issued to individuals who are not the same as the contractor identified by the landlord. The electrical includes installation of new appliance outlets and a CGCI outlet in the bathroom. The plumbing permit includes installation of a bathtub, dishwasher, basin, sink and washer dryer.

In relation to occupation by the landlords' son counsel submits that it would have been appropriate to issue a Notice effective March 31, 2017, to allow the son to take possession on April 1, 2017; when they plan on relocating. It does not make sense to issue a Notice for possession of a unit for a date that was so far in the future. When asked to respond to the landlords' submission that the family member now required the rental unit effective January 1, 2017, the counsel stated the landlord wants to complete a renovation saying the unit must be vacant for three to four months and that you cannot then say the unit is needed for family if a renovation must first be completed. If a renovation must be completed the unit would not be ready for occupation by the family member either.

Counsel submitted that the renovation is cosmetic and surface. The tenant is willing to accommodate any work that must be carried out in the unit. For example, the tenant will place belongings in one room, to allow work to be completed in the remainder of the unit. The tenant will also be away from the unit during the month of December, which would allow the landlord to complete work in his absence. The most basic service is use of a toilet and toilets are usually left in place for use by construction workers. The tenant is able to shower elsewhere during the time the bathroom tub is being replaced. Counsel submitted that the duty to accommodate the tenant is important.

Analysis

Pursuant to sections 49(3) and 49(6) of the Act a landlord may issue a two month Notice to end tenancy for landlords' use of the property for the following reasons:

> *(3) A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.*
>
> *(6) A landlord may 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 do any of the following:*
>
> > *(a) demolish the rental unit;*
> > *(b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant*

I will first address the need for vacant possession due to renovation.

In relation to the suite modelling the landlord must meet the standard found in a judgment issued by the British Columbia Supreme Court in *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator),* 2007 BCSC 257. This decision sets out issues an arbitrator should consider when a landlord wishes to end a tenancy based on section 49(6) of the Act. The decision referenced the reasoning when a Notice to end tenancy has been issued:

> *"[21] First, the renovations by their nature must be so extensive as to require that the unit be vacant in order for them to be carried out. In this sense, I use "vacant" to mean "empty". Thus, the arbitrator must determine whether "as a practical matter" the unit needs to be empty for the renovations to take place. In some cases, the renovations might be more easily or economically undertaken if the unit were empty, but they will not require, as a practical matter, that the unit be*

empty. That was the case in Allman. In other cases, renovations would only be possible if the unit was unfurnished and uninhabited.

[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.

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."

From the evidence before me and by the landlords' own account the work to be completed in the rental unit is a remodel that is 'strictly surface and cosmetic.' I find that a large portion of the work (new appliances, possible outlet installations, sink, bathtub, light fixtures, basins toilet, faucets, tub filler, shower nozzle) constitutes work that could reasonably be expected to be endured by any occupant of a home without the need to vacate or empty the unit of all belongings.

I find that the same conclusion can be reached for the balance of the work to be completed; however it would be expected that the tenant accommodate the need for vacant space so that flooring may be installed. Painting, tiling and installation of cabinets and counters do not require, as a practical matter, that a unit be completely vacant. Accommodation is a practical solution and allows the tenancy to be maintained while the landlord completes the remodel.

The landlord has a method for completing surface and cosmetic remodels and while vacant possession may make the process easier that reasoning does not support ending a tenancy. From the evidence before me I find on the balance of probabilities that vacant possession is not required, as a practical matter; but is a matter of preference of the landlord. Therefore, on this ground included on the Notice ending tenancy the tenant has succeeded in his application.

The landlord may commence the remodel as planned. The tenant has undertaken to accommodate the work. The parties are encouraged to communicate in relation to issues such as access and specific time-frames for work to be completed. I note that the plan is to commence on December 1, 2016 and that work could take place over a four month period of time during which the contractor has indicated he will be working at other sites for periods of time.

The landlord presented two reasons on the Notice and was faced with having to defend both reasons. The reason of remodeling has failed. However, I find that the landlord does intend in good faith, to allow her son to take possession of the rental unit and that the Notice is upheld for this reason.

I considered the written submission of the landlords' son and his fiancé and found them reliable and consistent with the need to possess the rental unit. The son has issued written notice of the intent to relocate and settle in Victoria in April 2017. During the hearing the landlord submitted that the plan had changed and possession is required effective January 1, 2017. I have no reason to doubt that plans have changed due to courses the sons' fiancé must take; resulting in a need to change the possession date. The tenant did not argue that the family member would not possess the unit.

I have then considered the effective date of the Notice. If the landlord were to issue a second Notice to end tenancy and served that Notice in November 2016, based on the current requirement for possession by the family member the Notice would take effect on January 31, 2017. I agree that issuing a Notice in August 2016 for possession by a family member in April of the next year is not reasonable; however the landlord had assumed vacant possession would be granted first, for remodelling.

Section 68(2) of the Act provides:

> ***Director's orders: notice to end tenancy***
>
> ***68*** *(2) Without limiting section 62 (3) [director's authority respecting dispute resolution proceedings], the director may, in accordance with this Act,*
>
> *(a) order that a tenancy ends on a date other than the effective date shown on the notice to end the tenancy, or*
>
> *(b) set aside or amend a notice given under this Act that does not comply with the Act.*

Therefore, I have applied section 68(2) of the Act and order the tenancy will end effective January 31, 2017 based on possession of the unit by a family member. As the tenant is able to accommodate renovations I can see no reason why the family member cannot do so.

I find that the tenants' request to cancel the Notice ending tenancy for the reason of a close family member occupying the unit is dismissed. As the tenants' application to dispute the Notice for this reason is dismissed I have applied section 55 of the Act, which provides:

> ***55*** *(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if*
>
> *(a) the landlord's notice to end tenancy complies with section 52 [form and content of notice to end tenancy], and*
>
> *(b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.*

Therefore, the landlord has been granted an order of possession that is effective at 1:00 p.m. on January 31, 2017. This order may be served on the tenant, filed with the Supreme Court of British Columbia and enforced as an order of that Court.

As the tenants' application has some merit I find that the tenant is entitled to deduct the $100.00 filing fee from the next months' rent due.

The tenant is entitled to compensation as set out in section 51 of the Act. The tenant may also give notice to end the tenancy earlier, in accordance with section 50 of the Act.

Conclusion

Vacant possession is not required for the purpose of renovation.

The application disputing the Notice based on a family member occupying the rental unit is dismissed.

The landlord is entitled to an order of possession effective January 31, 2017.

This decision is final and binding and 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: November 10, 2016

Residential Tenancy Branch