Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, MNDC, FF

Introduction

This hearing dealt with a tenant's application to cancel a *2 Month Notice to End Tenancy for Landlord's Use of Property* and request for monetary compensation for damage or loss under the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

I heard unopposed testimony that the tenant served his hearing package upon the landlord via registered mail sent within three days of receiving the hearing package. The tenant personally served his evidence package upon the shareholder of the corporate landlord on May 11, 2017. The landlord's representative sent an evidence package to the tenant via registered mail and email on May 12, 2017.

The landlord's representative pointed out that the tenant's evidence was served one day late but that the landlord was not prejudiced by the late service and did not object to admittance of the tenant's evidence package. The tenant did not make any submissions that the landlord's evidence package was served late; however, it should be noted that service by email is not a permitted method of service under the Act and that when sending mail to the other party, section 90 of the Act deems the other party to have received it five days later. If the tenant received the landlord's registered mail five days after mailing on May 17, 2017 then the landlord's evidence would be considered late as well since the date of the documents are received and the date of the hearing must be excluded in calculating the service deadline for evidence. Since neither party objected to admittance of the other party's evidence, I admitted and have considered all of the documentary evidence provided by both parties despite any lateness by either party.

At the outset of the hearing, the tenant requested that the hearing be adjourned so that he could obtain the service of legal counsel. The tenant pointed out that there have been three previous hearings and the landlord was not represented by legal counsel at any of those hearing. The tenant only learned that a lawyer would be appearing on behalf of the landlord when he received the landlord's evidence package. The tenant stated he had made efforts to obtain legal services since then but had difficulty given the limited amount of time, including a long weekend, and limited financial resources. The landlord's representative objected to the tenant's request for adjournment on the basis it would be prejudicial to the landlord as an adjournment would likely result in a future hearing date after the effective date of the Notice to End Tenancy; and, the tenant was at liberty to obtain legal serves at any time after receiving the Notice to End Tenancy which was several weeks ago. The landlord's representative pointed out that the reason for the tenant's request does not form a basis for granting an adjournment under the Rules of Procedure. I considered both parties' submissions and decided to proceed with the hearing for the following reasons:

Rule 7.9 of the Rules of Procedure provides criteria for granting an adjournment. Below, I reproduce Rule 7.9 for the parties' reference:

> **7.9 Criteria for granting an adjournment**
>
> Without restricting the authority of the arbitrator to consider other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:
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> • the oral or written submissions of the parties;
> • the likelihood of the adjournment resulting in a resolution;
> • the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment;
> • whether the adjournment is required to provide a fair opportunity for a party to be heard; and
> • the possible prejudice to each party.

This is the fourth time the tenant has filed to dispute a *2 Month Notice to End Tenancy for Landlord's Use of Property* served upon him by the landlord in the last 10 months and it is readily apparent that both parties have opposing objectives. Accordingly, I was of the view that adjourning the hearing so that the tenant may obtain legal advice or representation would not result in a resolution of this dispute. Also, as pointed out by the landlord's representative, the tenant was at liberty to seek legal counsel at any time after receiving the subject Notice to End Tenancy and it was his decision to not do so or

wait until after receiving the landlord's evidence. Finally, I accept the landlord's representative's position that adjourning the proceeding past the effective date of the Notice to End Tenancy would be prejudicial to the landlord and not warranted in the circumstances.

The hearing proceeded and in the hearing time that remained and I heard from both parties with respect to whether the Notice to End Tenancy should be upheld or cancelled. However, there was insufficient time to hear the tenant's monetary claim.

Rule 2.3 of the Act provides that I have the discretion to sever an application where unrelated issues are identified under a single application. Part of the tenant's monetary claim pertained loss of quiet enjoyment due to issuance of multiple Notices to End Tenancy to him but it also appeared that the tenant was attempting to amend the monetary claim by way of a Monetary Order worksheet that included an additional claim related to hydro costs. While I heard about and considered the previous Notices to End Tenancy in making a decision with respect to upholding or cancelling the subject Notice to End Tenancy, I am satisfied that the tenant is not prejudiced by severing this application and permitting the tenant to pursue all of his monetary claims in a separate application. Therefore, I dismiss the tenant's monetary claim with leave to reapply.

Issue(s) to be Decided

Should the *2 Month Notice to End Tenancy for Landlord's Use of Property* dated March 24, 2017 be upheld or cancelled?

Background and Evidence

The tenant has been occupying the rental unit since January 2014. The landlord and tenant initially executed a one year fixed term tenancy agreement. A second one-year fixed term tenancy started January 2015. Upon expiration of the second one-year fixed term tenancy, the current tenancy agreement commenced. The current tenancy agreement commenced on January 1, 2016 for a six month fixed term that converted to a month-to-month tenancy thereafter. The tenant is required to pay rent of $1,250.00 on the first day of every month.

The rental unit is described as being a two-bedroom apartment, approximately 1,700 square feet in size, located above two commercial store-fronts close to downtown. The landlord owns the entire property.

On March 24, 2017 the landlord issued the subject *2 Month Notice to End Tenancy for Landlord's Use of Property* (the Notice). The Notice was mailed to the tenant although neither party knew whether it was sent to the tenant via regular mail or registered mail and neither party knew the date the Notice was mailed or the date it was received. The tenant filed to dispute the Notice on April 12, 2017. Neither party indicated the tenant failed to dispute the Notice within the time for doing so and I proceeded on the basis the Notice was disputed within the 15 days of receiving it, as permitted under the Act.

The Notice has a stated effective date of May 31, 2017 and indicates two reasons for ending the tenancy:

- The landlord is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit; and,
- The landlord has all the 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.

Landlord's position

The landlord's representative submitted that the all of the voting shares of the corporate landlord are owned by one individual, referred to by initials GH in this decision, which means the landlord is a "family corporation" as defined in section 49 of the Act. The son of GH's spouse (herein referred to by initials JA) intends in good faith to occupy the rental unit after renovations are made to the rental unit.

The planned renovations include:

- replacement and installation of plumbing fixtures and piping which will require the water and sewer service to be disconnected while this work is underway;
- replacement of electrical outlets, switches, electrical panel and breakers which will require the termination of electrical service while this work is underway;
- replacement of kitchen cabinets and flooring;
- repainting; and,
- replacement of interior stairs which will limit ingress and egress to the rental unit to the exterior stairs only while this work is underway.

I heard that the renovation project is expected to take 2 to 3 weeks. The landlord has obtained permits with the city to perform the plumbing, electrical and stair replacement. Permits are not required for the other renovation work.

As for the requirement to have the unit vacated, the landlord's representative submitted that while the plumbing and electrical work is underway there will be no water and sewer service or electrical service. Further, the lack of the interior stairs poses a safety hazard, such as in the case of fire, since egress would be limited to one way out of the rental unit.

After the renovations are completed it is intended that JA will occupy the rental unit. I heard that JA is a young man in his early 20's currently residing with GH and his mother, attending or contemplating attendance at a post-secondary educational institution, and he is ready to move out on his own. This rental unit will suit JA's purposes.

In summary, it is the landlord's position that the Act provides a mechanism to end a tenancy in these circumstances and that all of the criteria for ending this tenancy have been met.

Tenant's position

The tenant questioned whether the two reasons appearing on the subject Notice are competing reasons. The tenant had included a copy of the immediately preceding dispute resolution decision whereby the Arbitrator concluded the two reasons appearing on the previous 2 Month Notice were competing. I noted that the reasons indicated on the immediately preceding 2 Month Notice were different than the reasons appearing on the subject 2 Month Notice. After pointing this out the tenant did not make any further submissions as to competing reasons appearing on the subject 2 Month Notice.

The tenant acknowledged that if the landlord proceeds with the planned renovations there will be times when the plumbing service is not functional and the electrical service is not available; however, the tenant was of the position that the time needed to shut down these serves is not overly great; the tenant is prepared to accommodate that by staying elsewhere during those times; and, there is no need for him to completely vacate the rental unit. The tenant pointed out that he has offered to stay elsewhere during renovations when he was issued the previous Notices to End Tenancy but rather than proceed with renovations the landlord has repeatedly issued Notices to End Tenancy to him. The tenant submitted that after speaking with a plumber, the planned plumbing work would likely take 2 days. As for the electrical work, the tenant spoke with an electrician and understands that replacing the electrical panel and breakers would necessitate a few days without power, but that the electrical switches and outlets may be replaced by isolating individual circuits. As for the stair replacement, the tenant

submitted that both sets of stairs are very functional although they could be improved cosmetically, but that he ordinarily uses the exterior stairs anyways.

As for the landlord's good faith intention, the tenant called into question the landlord's good faith intention and was of the position the landlord is trying any and every way to end this tenancy. The tenant is of the position that the landlord's motivation is most likely to renovate and re-rent the unit for much greater rent. The tenant pointed out a number of factors to consider:

- JA was not called to testify or provide a sworn affidavit to indicate he has an intention to occupy the rental unit.
- The rental unit is in need of repainting and/or renovating and the rental unit would is sure to garner a greater amount of rent afterward since it is a large unit close to down town and the rental market is very lucrative right now for landlord's given the very low vacancy rate.
- The tenant has stated he is willing and able to accommodate the need to temporarily shut down plumbing and electrical systems during renovations; yet, the landlord persists in issuing Notices to End Tenancy rather than commence renovations.
- The tenancy converted to a month-to-month basis under the most recent tenancy agreement and the tenant speculates that the landlord views conversion to a month to month tenancy to have been an error considering the previous tenancy agreements were fixed term tenancy agreements that were renewed at the end of the fixed terms.
- This Notice is the fourth 2 Month Notice the landlord has served upon him in 10 months and the landlord has failed to establish the previous Notices should be upheld and the reasons the landlord has provided for issuing the Notices keeps changing. Not only have the stated reasons on the Notices changed but the reasons for ending the tenancy given during the hearing have changed. For instance, in a previous hearing the landlord's agent submitted that it was GH's daughter that was supposed to move into the rental unit.

The tenant provided copies of the previous 2 Month Notices issued to him and the decisions that were issued after hearings were held in each case. I have referenced the file numbers on the cover page of this decision. Below, I have summarized the pertinent details of the previous Notices and decisions.

First 2 Month Notice:

The 2 Month Notice was issued on May 24, 2016 indicating the landlord "had 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 tenant submitted that the landlord had not obtained any permits for renovations. The landlord did not appear at the hearing held on August 4, 2016 and the Notice was cancelled.

Second 2 Month Notice:

Shortly after the first hearing, a second 2 Month Notice was issued on August 12, 2016 indicating the same reason cited above. The landlord was represented at the hearing. The landlord's agent submitted that renovations were planned for the rental unit and that it would be more convenient for the landlord if the rental unit was vacant. The landlord's agent also stated that it was contemplated that the daughter of GH would be moving in to the rental unit. On October 20, 2016 the Arbitrator issued a decision finding the landlord failed to establish that the renovation requires the tenant to move out and vacate the rental unit as required to end the tenancy.

Third 2 Month Notice:

A third 2 Month Notice was issued on December 28, 2016 indicating the reasons for ending the tenancy were:

- The rental unit will be occupied by the landlord or the landlord's close family member (parent, spouse or child, or the parent or child of that individual's spouse); and,
- The landlord has all of the necessary permits and approvals required by law to convert the rental unit to non-residential use.

During the hearing, GH testified that his step-son intended to occupy the rental unit.

The Arbitrator found the Notice was not valid on its face because the two reasons cited on the Notice were incompatible since GH had stated his step-son would be moving in but that the landlord had indicated on the Notice that the rental unit was going to be converted to non-residential use. Further, since the landlord is a corporation the first cited reason was not possible.

In summary, the tenant is of the position the landlord is motivated to end this tenancy because it is in a month to month status that is not subject to “renewal” and the landlord would likely garner a much larger amount of rent by renovating and re-renting this unit.

The landlord’s representative characterized the tenant’s position as akin to conspiracy theories and the tenant’s submissions concerning the time needed to shut down plumbing and electrical systems as hearsay evidence which should be disregarded in favour of the sworn affidavit of GH and the building permits. The landlord’s representative pointed out that if the landlord does not use the rental unit for the stated purpose the Act provides a remedy for the tenant, which is additional compensation equivalent to two months of rent.

The tenant explained that until he was served with the landlord’s evidence package of May 12, 2017 he did not have all of the particulars of the planned renovations and that the best evidence he could obtain in the limited amount of time before the hearing was to contact plumbing and electrical contractors and make enquiries. The tenant dismissed the suggestion that watching the rental unit for six months after the tenancy were to end in hopes to pursue a claim for further compensation of two month’s rent as a feasible remedy for him.

Analysis

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove, based on a balance of probabilities, that the tenancy should end for the reason(s) indicated on the Notice.

The Notice that is before me provides two reasons for ending the tenancy and I have considered each reason as set out below:

Rental unit to be occupied by a close family member of the family corporation’s shareholder

The first reason indicated on the 2 Month Notice corresponds to section 49(4) of the Act which provides that a tenancy may be ended where:

> (4) A landlord that is a family corporation may end a tenancy in respect of a rental unit if a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

I was provided unopposed submissions that the landlord meets the definition of a "family corporation", as provided under section 49(1) of the Act, since all of voting shares are owned by one individual, GH. I was also provided unopposed submissions that JA is the son of GH's spouse and that JA meets the definition of "close family member" under section 49(1) of the Act. In the absence of any opposition to these statements, I accept them to be accurate.

Evidence that JA intends to occupy the rental unit is a statement in the sworn affidavit of GH. Since GH did not appear at the hearing GH was not subject to further examination and I am left with only the statements contained in his affidavit. Upon review of the affidavit, I note that GH does not explain what information he relied upon or how he otherwise determined that JA has an intention to occupy the rental unit. Further, as pointed out by the tenant, JA did not appear at the hearing to provide direct testimony or even swear an affidavit affirming his intention. Also of consideration, as pointed out by the tenant, is that in a previous hearing held six months earlier in October 2016 it was stated that GH's daughter may occupy the rental unit. No explanation was given by the landlord for the change in intentions. Ultimately, I find that in the absence of any direct evidence from JA or other corroborating evidence, I find the landlord failed to satisfy me that JA has an intention to occupy the rental unit within a reasonable amount of time after the tenancy ends. Therefore, I find this reason for ending the tenancy has not been sufficiently proven.

Renovations

The second reason given on the 2 Month Notice corresponds to the section 49(6) of the Act. Section 49(6) provides:

> (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;
> >
> > (c) convert the residential property to strata lots under the *Strata Property Act*;
> >
> > (d) convert the residential property into a not for profit housing cooperative under the *Cooperative Association Act*;

> (e) convert the rental unit for use by a caretaker, manager or superintendent of the residential property;
>
> (f) convert the rental unit to a non-residential use.
>
> [Reproduced as written with my emphasis underlined]

Giving a Notice to End Tenancy under section 49(6) of the Act requires the landlord to satisfy a number of criteria such as: showing the applicable permits and approvals required by law have already been obtained; demonstrating that the renovations or repairs being proposed require vacant possession of the rental unit; and, that the landlord served the Notice to End Tenancy with good faith.

As to requiring vacant possession in order to perform the renovations, the British Columbia Supreme Court addressed this issue in *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator),* 2007 BCSC 257 in the following paragraphs:

> [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.
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> [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.
>
> While I appreciate that it may be easier and more economical for the landlord to complete the renovations while the rental unit is vacant for approximately four weeks, the test the landlord must satisfy is that there is no possible way to carry out the renovations unless the unit is vacant for more than brief periods of time. It is irrational to think that section 49(6) of the Act 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.

With respect to permits and approvals required by law, the permits and approvals must have already been obtained when the Notice is given. I was provided copies of three permits obtained by the landlord with respect to the rental unit; however, I note that one of the permits, for the electrical work, was not obtained until April 3, 2017 which is after the 2 Month Notice was issued. Accordingly, the electrical work was not permitted at the time the 2 Month Notice was issued and cannot be considered further in determining whether the 2 Month Notice should be upheld. The permits to perform the plumbing work and replacement of the interior stairs were obtained before the 2 Month Notice was issued and I proceed to consider whether the landlord requires vacant possession of the rental unit to perform these activities.

Upon review of the plumbing permit, I accept that the landlord intends to replace and/or install plumbing fixtures in the bathroom, and possibly another sink in the rental unit, as well as clothes washer which would include replacement and/or installation of piping for these fixtures. I also accept the landlord's submission that flooring and paint will also be replaced in the rental unit and that it is likely the bathroom will get new flooring and paint. The issue to determine is does the rental unit need to be vacant and the tenancy ended to accomplish this work, especially considering the tenant has stated he will accommodate the shutdown of water and sewer services by staying elsewhere temporarily.

The tenant submitted that he understands that the water and sewer service need only to be shut-down for a few days. While the landlord's representative submitted that this is only hearsay evidence, when I turn to the landlord's evidence package, I do not see a specific estimate from the landlord or its plumbing contractor indicating how much time is needed to accomplish the work. Nor, was a plumber called to testify at the hearing. Rather, the landlord's only evidence pointing to the amount of time the water and sewer will be shut-down is the landlord's vague reference to a "considerable period of time" in the affidavit which I find to be a subjective description meaning different things to different people. Since the landlord bears the burden to prove that the rental unit needs to be vacant and the tenancy ended to accomplish this work I find it reasonable to expect sufficient evidence from the landlord or the landlord's plumber that would demonstrate a more specific amount of time anticipated to accomplish the planned plumbing work. In the absence of such, I find I am not satisfied that the replacement of

plumbing fixtures and related piping requires the tenant to vacate the rental unit and bring the tenancy to an end as opposed to have the tenant stay elsewhere temporarily.

The tenant questioned whether the interior stairs require replacement; however, if the landlord choses to replace the interior stairs I am of the view it is within the landlord's right as the property owner to make that decision, conditional upon obtaining necessary permits which the landlord appears to have done in this case. The issue to determine is does the replacement of the interior stairs necessitate the rental unit to be vacant and the tenancy ended. The parties provided consistent testimony that there is an exterior staircase that the tenant may use to ingress and egress the rental unit. It was submitted to me that reducing the number of stairways from two to one poses a risk to the occupants of the rental unit in the event there was an emergency such as a fire. I accept that the risk is greater if there are fewer ways to exit the rental unit but I was not provided evidence to show that reducing the number of staircases to one would be in violation of applicable health and safety or building codes. Nor, did the landlord provide evidence to show how long it will take to replace the stairs. Therefore, I find the landlord has not satisfied me that the rental unit needs to be vacated and the tenancy ended in order to replace the interior stairs.

The other planned renovations include replacement of flooring, paint, and kitchen cabinets. I appreciate these activities are considerable and I accept that they do not require the issuance of permits. However, the issue that remains is does this work require the rental unit to be vacated and the tenancy ended in order to accomplish this work. I note that these renovations were described during the October 20, 2016 hearing and as that Arbitrator noted such renovations are not uncommon for homeowners to undertake and such activities do not require the homeowner to move out of their home to accomplish these activities. As pointed out by that Arbitrator, while it may be more convenient to accomplish these activities while the unit is vacant, to end the tenancy it must be shown that vacant possession is <u>required</u>. I find the landlord has not sufficiently demonstrated that the rental unit needs to be vacant and the tenancy ended in order to accomplish these renovation activities. Of course, should the landlord proceed with these activities while the rental unit is tenanted, the tenant is expected to accommodate the landlord's efforts by moving his possessions out of the way as necessary.

In light of all of the above, I find the landlord did not sufficiently prove that the rental unit needs to be vacant and the tenancy ended in order to accomplish the renovations and repairs the landlord seeks to make.

Having found the landlord failed to prove that the tenancy should end for either of the reasons indicated on the 2 Month Notice before me, I grant the tenant's request to cancel the 2 Month Notice and the tenancy continues at this time.

I award the tenant recovery of the filing fee paid for this application and I authorize the tenant to deduct $100.00 from a subsequent month's rent in satisfaction of this award.

Going forward, the landlord is cautioned that repeatedly issuing Notices to End Tenancy to a tenant, especially where the Notices have been cancelled as a result of a dispute resolution proceeding, may be viewed as persecution or harassment of the tenant and a basis to find the landlord has breached the tenant's right to quiet enjoyment of the rental unit. Where a landlord is found to be in breach of a tenant' right to quiet enjoyment, the tenant may seek monetary compensation from the landlord.

As pointed out by the landlord's representative, the Act provides various remedies to both landlords and tenants. As stated by the tenant, the planned renovation work is welcomed by him and he is willing to accommodate the landlord's efforts. Accordingly, the landlord may choose to proceed with renovations and the tenant will be expected to accommodate the landlord's efforts. The parties also remain at liberty to renegotiate their terms of tenancy by mutual consent; reach a mutual agreement to end tenancy; and, the landlord has a right to make an Application for Additional Rent Increase if the circumstances warrant an additional rent increase.

Conclusion

The 2 Month Notice dated March 24, 2017 is cancelled and the tenancy continues at this time. The tenant has been authorized to deduct $100.00 from a subsequent month's rent to recover the filing fee he paid for this application.

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: May 26, 2017

Residential Tenancy Branch