



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL

Introduction

This hearing convened as a result of joined applications by five Tenants of the same rental building who applied to dispute 2 Month Notices to End Tenancy for Landlord's Use issued pursuant to section 49 of the *Residential Tenancy Act*.

The Landlord, G.A.B. and his father G.L.B., as well as the Landlord's Executive Assistant, K.K. called into the hearing on behalf of the Landlords.

The Tenants, F.N., F.S., D.K. and S.G. called into the hearing and were represented by legal counsel. The Tenant A.M. did not call in.

The parties in attendance were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form, and make submissions to me.

Preliminary Matter—Tenant's Late Evidence

After the Landlord had completed his submissions he stated that he received the Tenants' original hearing package in accordance with the *Rules*, another package the day before the hearing and another package half an hour before the hearing.

Residential Tenancy Branch Rules of Procedure Rule 3.17 deals with the introduction of late evidence and reads as follows:

3.17 Consideration of new and relevant evidence

Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC office in accordance with the Act or Rules 3.1, 3.2,

3.10, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

If the arbitrator decides to accept the evidence, the other party will be given an opportunity to review the evidence. The arbitrator must apply Rule 7.8 [*Adjournment after the dispute resolution hearing begins*] and Rule 7.9 [*Criteria for granting an adjournment*].

Counsel for the Tenants confirmed that the information he submitted late included the following:

- A copy of a B.C. Supreme Court Case upon which he intended to rely in his submissions. Counsel confirmed that this case was provided to the Landlord as courtesy.
- A real estate listing for the rental building as a whole. Counsel stated that he only became aware of the listing recently. He also confirmed that the purpose of submitting the listing was to show the Landlord's intention to raise rent to increase the value of the property and that the listing would be within the Landlord's knowledge and control.
- Photos of F.N.'s rental unit. Counsel submitted that as the Landlord purports to renovate the unit its condition is relevant to the issue of whether such renovations are necessary.

After counsel completed his submissions regarding the introduction of this late evidence, the Landlord stated that he was prepared to proceed with the hearing, did not oppose the evidence being considered, and did not want an adjournment.

Although the Landlord initially opposed the introduction of the Tenants' late evidence he agreed the evidence could be considered. I therefore considered the Tenants' late evidence in making my decision.

Preliminary Matter—Tenant A.M.

The Tenant, A.M., did not attend the hearing. The Tenants in attendance stated that she had moved out of the rental unit and indicated to them an intention to withdraw her application. At the time of the hearing A.M. had not withdrawn her application.

Rule 7.3 of the *Rules of Procedure* provides as follows:

7.3 Consequences of not attending the hearing

If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party, or dismiss the application, with or without leave to re-apply.

Accordingly, in the absence of any evidence or submissions A.M., I dismiss her application without leave to reapply.

Preliminary Matter—Tenant D.K.

At the outset of the hearing counsel for the Tenants confirmed that the Tenant, D.K., agreed to move from the rental unit as of March 31, 2018, provided that he was not required to pay rent for the month of March 2018. The Landlord accepted this proposal and as such the Landlord and D.K. resolved matters relating to D.K.'s application.

Pursuant to section 63 of the *Residential Tenancy Act* and Rule 8.4 of the *Residential Tenancy Branch Rules of Procedure* I record the terms of their agreement in this my Decision and Order. As the parties resolved matters by agreement I make no findings of fact or law with respect to their relative claims. Further, D.K. and the Landlord confirmed that this agreement was made on a voluntary basis and that they understood the nature of this full and final settlement of this matter.

The terms of their settlement follow.

Settlement and Conclusion

1. D.K.'s tenancy shall end and D.K. shall vacate the rental unit by no later than 1:00 p.m. on March 31, 2018.
2. The Landlord is granted an Order of Possession with respect to D.K.'s rental unit effective 1:00 p.m. on March 31, 2018. The Landlord must serve the Order on

D.K. as soon as possible and may if necessary, file and enforce the Order in the B.C. Supreme Court.

3. Pursuant to section 51(1) of the *Residential Tenancy Act*, D.K. shall not be required to pay rent for the month of March 2018.

As D.K.'s matter was resolved, he disconnected from the hearing prior to any party giving affirmed evidence.

Issue to be Decided

1. Should the Notices for F.N., F.S. and S.G. be cancelled?
2. Are the Tenants entitled to recovery of the filing fee paid?

Background and Evidence

Residential Tenancy Branch Rules of Procedure provide that when a tenant applies to cancel a notice to end tenancy, the landlord must present their case first as it is the landlord who bears the burden of proving the reasons set out in the notice. Accordingly, the Landlord provided his evidence first.

The Landlord testified that he has had the rental property "under contract" since December 2017 with the intention to purchase the property. A copy of the contract of purchase was provided in evidence which indicated that the closing date is November 2018.

Pursuant to paragraph 12(a) of the Contract of Purchase and Sale the purchaser/Landlord may:

[d]o all things in the discretion of the Buyer as if the Buyer is the Landlord of the Property including without limiting the generality...

Counsel for the Tenants confirmed that he did not take issue with the Landlord's authority to issue a 2 Month Notice to End Tenancy. He stated that it is his understanding that the purpose of the Contract of Purchase and Sale is to allow the Landlord to flip the property once the property is generating income. The Landlord did not dispute this characterization.

The Landlord testified that there are 32 units in the rental building which was built in the early 1970's. He stated that he is in the business of renovating apartment buildings.

The Landlord confirmed that he issued the Notices as he intends to substantially renovate the subject rental units. He further stated that the extent of the renovations proposed is to completely "gut and renovate" the rental units and involves the following:

- completely stripping down the rental units to the walls;
- removing and replacing the fixtures in the bathroom fixtures
- removing and replacing the carpet, laminate and linoleum flooring; and,
- removing and replacing the fixtures and cabinetry;

The Landlord stated that they do not have any permits for the planned work and don't require them unless they go inside the walls as they are not moving any plumbing and electrical.

The Landlord stated that they have not commenced any work on other units as they have been waiting for this matter to be resolved as they wish to renovate all units at the same time to keep the cost down.

He further stated that his normal course of action is to issue a 2 Month Notice to End Tenancy and commence renovations on a vacant building. In support of the application he submitted photos of work he had done on a building in another city.

The Landlord characterized this as a unique situation in that he stated that he was trying to preserve the existing tenancies as much as possible. He stated that in November 2017 he went around to the entire building and tried to formulate a plan that allowed the tenants to remain in the building, to renovate and improve the building around them, and increase the rent to a fair market value. All of the tenants were offered the opportunity to remain in their unit without any improvements to their particular unit, provided that they agreed to have their rent increased to \$800.00. If they chose to have new windows and in-suite laundry, they had to agree to an increase to \$900.00; in this case, the additional rent would be subsidized for one year by \$100.00 per month such that they would only pay \$800.00. Documentary evidence confirmed this proposal.

The Landlord confirmed that all but seven tenants agreed to the \$900.00 rent option; he further confirmed that he then issued 2 Month Notices to End Tenancy for Landlord's Use to all seven tenants who disagreed.

The Landlord confirmed that five of the Tenants applied to dispute the Notice. At the time of the hearing, two had have moved out (including A.M. whose matter was included in this joined application).

The Landlord confirmed that the Tenants in the within action pay the following in rent:

F.N. pays \$650.00;
F.S. pays \$610.00; and,
S.G. pays \$545.00.

As such, the proposed increase was between \$250.00 and \$355.00 more a month than they are currently paying.

The Landlord stated that he initially intended to make an application for an additional rent increase. He claimed that by the time he submitted his completed application the law changed such that Landlords are no longer permitted to issue additional rent increases based on fair market value and geographically comparable rentals. He then stated that he believed that the only way to increase rental income for these three units was to issue 2 month Notices to End Tenancy, renovate and re-rent.

In terms of the requirement to have vacant possession the Landlord stated that the turn-around time for the renovations to the units is 4-8 weeks. He confirmed that during the renovations there is no way to control what they may discover as often the renovations uncover problems which may necessitate permits. He also stated that they can't confirm a schedule.

The Landlord agreed that he currently has the rental property listed for sale and has had it listed for a couple of weeks. He noted that the listing is contingent on the completion of the previously stated renovations. He also claimed that the value of the building is determined by the value of the revenue generated by the building such that the units need to be generating more rental income. He noted that the potential buyers are going to look at the condition of the building, but the ultimate revenue of the building will dictate the sale price. He stated that when he listed the property he anticipated these tenancies would be ended and their units renovated.

The ad for the apartment building was provided in evidence and reads in part as follows:

Stable investment apartment building for sale in [city name]. Featuring 32 units, [address] is undergoing renovations and upgrades which benefit future owner.

All windows and doors are being replaced. Convenient in-suite laundry is being installed in every unit. Modern security system is being installed creating peace-of-mind for tenants and landlord.

Electricity is individually metered for each suite. Hot water is provided by separate electric hot water tanks in each suite. Heat is electric baseboard. As a result, landlord utility expenses and maintenance costs are low.

The roof is a brand new torch-on membrane installed in 2015. The central elevator has been updated to meet current elevator safety regulations. Construction is poured concrete slab foundation, wood frame and stucco exterior.

All upper front-facing suites enjoy stunning panoramic water views over the ocean and [identifying Bay.]

As a result of building upgrades, solid construction and convenient location, [address] will provide a solid income for many years to come.”

[reproduced as written with identifying information removed]

The listing also indicates the “average rent” of the units as \$900.00 per month.

The Landlord confirmed the purpose of purchasing the property was to increase the value, not necessarily sell.

In terms of the need to renovate #303, 102 and 203 specifically (the subject rental units) as opposed to the other 29 units, the Landlord stated that these are the only units on a month to month basis and as such the only units where the renovations can begin. He stated that the other renters who signed the rental increase to \$900.00 also signed on for a one year fixed term tenancy. He stated that all the other units require renovations as well.

As the Tenants intended to call the former tenant, C.W., as a witness, the Landlord provided testimony as to her tenancy. The Landlord confirmed that they issued a 2 Month Notice to End Tenancy to C.W., although at the time they issued it she had already moved out and therefore “moved out on her own accord”. He further stated that they wish to do all the renovations at the same time and as such they allowed new renters to move into C.W.’s rental on a month to month basis with the “warning” that they would be starting the renovations any time. C.W. was paying rent in the amount of \$650.00 and the new tenants pay \$950.00 without new windows, doors or in-suite laundry.

In response to the Landlord's submissions the Tenant's counsel called C.W. as a witness.

C.W. testified that she was a tenant of the rental building from August 2014 to December 29, 2017. C.W. stated that on December 28, 2017 she received a 2 Month Notice to End Tenancy for Landlord's Use. The reasons cited on her notice were that the Landlord intended to renovate the rental unit. She confirmed that she did not receive her free months' rent, she just moved out.

C.W. also confirmed that she received a form titled "Rental Options" on November 16, 2017. She stated that she needed time to think about it because the amount requested was approximately \$300.00 more than she was paying. She said that she asked for more time to consider the offer. C.W. stated that she initially worked with other tenants to oppose the rent increase.

C.W. stated that to her knowledge her rental unit was not renovated after she moved out but was rented for substantially more.

The Tenant F.N. also testified. He confirmed that he moved into the rental unit June 2015 and pays \$650.00 in rent.

F.N. testified that he also received a "Rental Options form" requesting a substantial rent increase but he did not sign it. He confirmed that he and approximately six other renters refused to sign the rent increase and each of those renters received a 2 Month Notice to End Tenancy for renovations, which he described as "renovictions".

F.N. stated that the Landlords have not been renovating the units as they claimed and noted that in particular when units 304, 307 and 309 were vacated the Landlord did not renovate them but rented them out. He stated that to his knowledge 309 may have been painted although he did not observe any other tradespeople. He stated that he also saw people moving on the second floor.

F.N. stated that approximately two weeks ago the girl in 309 moved out and on February 27 new renters moved in. F.N. further stated that he did not observe any tradespeople.

F.N. stated that the fellow who was in rental unit 307 passed away. He said that when the new renter moved in, he helped her move in her items and he observed at that time that 307 did not appear to be renovated either.

Counsel submitted that the recent listing of the rental property the Landlord advertised that the average rent is \$900.00 and that all the rental units will have their windows and doors replaced as well as in-suite laundry.

Counsel also submitted that the scale of work contemplated by the Landlord is contained in the "General Contractor's Quote" and does not support a finding that the renovations are needed or necessitate vacant possession. A copy of this document was provided in evidence and in which the description of work includes:

- Kitchen: Average (cabinets, countertops, MEP rough-in)
- Bathroom: Average (new finished, fixtures, MEP finish work)
- GFI outlets/ground back to panel

Counsel stated that the work does not coincide with the Landlord's submissions that a 4-8 week timeline is required; rather, it would appear that a couple of days of vacant possession would be sufficient.

He also submitted that from looking at the electrical work proposed, it is unclear whether permits are actually required as it was his understanding that most electrical work involving changing wires requires permits.

With respect to the Contract of Purchase Counsel submitted that the only improvements contemplated by the agreement are in paragraph 12 and are described as "cosmetic improvements"; further, they become the property of the seller in the event the contract does not complete "as a result of the fault of the Buyer". Counsel submitted that no other improvements are referenced in this contract such that it is questionable whether the "extensive renovations" are permitted.

Counsel also noted that the Contract provides that the Landlord is to pay \$19,000.00 per month to the seller which is \$593.75 per unit for 32 units. Counsel also submitted that the Landlord is able to pull out of the contract on or before February 1, 2018 if he isn't satisfied that the rent has increased sufficiently. Counsel submitted that this speaks to the Landlord's true intention, which is to increase rent, not renovate.

In all the circumstances, counsel submitted that the Notices were not issued in good faith as the true intention of the Landlord is to raise rent.

In reply, the Landlord stated that the reason why they have not begun renovating the units as they have become vacant is because it is essential that they group all the renovations together. He also stated that he has been in a negative cash flow position since entering the Contract of Purchase and sale. He confirmed the following:

- unit 304 was re-rented within two weeks of the tenant moving out some time in mid-January;
- 307 was re-rented within a month and a half, although this was impacted by the fact the prior tenant had passed away in the unit and was just re-tenanted last month;
- 309 was re-rented as of the day before the hearing; and,
- 105 is not yet rented.

The Landlord reiterated that the work that is to be done is contained within the construction quote, and is a “complete demolition” requiring vacant possession.

The Landlord stated that he believes the “cosmetic repairs” contemplated by the Contract of Purchase and sale are in fact “major renovations” requiring vacant possession. He stated that it is his understanding that anything over cosmetic requires the seller’s consent.

The Landlord reiterated that he will apply for permits as and when required.

Finally, the Landlord stated that it is his full intention to do as much work as possible in the “current circumstances” and has no intention of going back or getting out of the contract.

Analysis

The Landlord issued the Notices pursuant to section 49(6) of the *Act* which provides as follows:

(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:

...(b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant;

The Tenants applied, pursuant to section 47(4) of the *Act*, for an order setting aside the notice to end their tenancies.

When a Landlord seeks to end a tenancy for purposes of renovation, section 49(6) of the Act sets out three requirements

- (1) the Landlord must have the necessary permits;
- (2) the landlord must be acting in good faith with respect to the intention to renovate; and
- (3) the renovations are to be undertaken “in a manner that require the rental unit to be vacant”

(*Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257.)

The Landlord testified that the renovations were extensive and involved “gutting the rental units” such that the rental unit would need to be vacant for many weeks. The Landlord submitted a quote from the contractor which did not specify the period of time in which the units would need to be vacant. The Contract of Purchase and Sale submitted in evidence only references cosmetic improvements.

The Tenants counsel submitted that the renovations do not require vacant possession, and that the Tenants should be given the opportunity to move out of the units temporarily to facilitate the work. I agree. Mr. Justice Williamson, in *Berry and Kloet v. B.C. (R.T.A., Arbitrator)*, found as follows:

[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. The burden is on the Landlord to establish that vacant possession is required...

[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 on 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 [to] 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).

I find that the extent of the renovations, the plumbing and electrical work involved in the renovation, and the impact of that work on possible occupation, or duration of vacancy, was not clear based on the evidence filed. Accordingly, find the Landlord has not met

the test in section 49(6) of the *Act* and has not satisfied me that *vacant possession is required*.

Counsel aptly noted *Residential Tenancy Branch Policy Guideline 2—Good Faith Requirement when Ending a Tenancy*. As noted in this document, if the Tenant calls into question the good faith intention of the Landlord, the burden is on the Landlord to prove that they truly intend to renovate and does not have another purpose.

Policy Guideline 2 further provides that a claim of good faith requires honesty of intention with no ulterior motive. I find that the Landlord has such an ulterior motive namely, that he wishes to increase the rental income. The Landlord was not evasive about this; rather he was forthright that his intention is to increase the revenue from the rental building in order to facilitate a higher sale price. As well, the rental building is currently listed for sale and the advertisement of the rental building references higher average rent than that which is currently being paid by the 32 tenants.

Additionally, the Landlord's negotiations with other tenants in November of 2017 further confirm his intention to increase rental revenue.

The most problematic factor in my view is that the only tenants who received a 2 Month Notice to End Tenancy for Landlord's Use were the tenants who refused to agree to increased rent. I agree with Counsel that this calls into question whether the renovations are necessary and whether the Landlord intends to make those renovations. There was insufficient evidence that these units are in any way different or more needing of renovations than the other units.

The Landlord confirmed in his testimony that he initially intended to make an application for an additional rent increase for all the rental units, however, by the time he submitted his completed application the law changed such that Landlords are no longer permitted to issue additional rent increases based on fair market value and geographically comparable rentals. He concede that he believed that the only way to increase rental income for these three units was to issue 2 month Notices to End Tenancy, renovate and re-rent. This speaks to his true intention, to increase the rent in the subject rental units.

Further, the evidence was clear that numerous other units were vacated shortly before the hearing, yet not renovated, including C.W.'s, where she was given a 2 Month Notice indicating renovations were required. The Landlord stated that these units were not renovated because he needed to get cash flow going. However, he then entered into

further tenancy agreements such that he will now need to issue a 2 Month Notice to End Tenancy to those new tenants.

In all the circumstances, I find the Landlord has failed to show he has a good faith intention to end the tenancies as provided for on the Notices, and that he does not have another purpose that negates the honesty of that intent.

I therefore cancel the Notices issued to the Tenant, F.N., F.S. and S.G. The tenancies shall continue until ended in accordance with the *Residential Tenancy Act*.

Conclusion

The Tenant A.M. failed to attend the hearing and her application is dismissed. As she has vacated the rental unit an order of possession is not required.

The Tenant D.K. agreed to move from the rental unit. The Landlord is entitled to an Order of Possession effective March 31, 2018. The Landlord must serve that Notice on D.K. and may file and enforce the Notice in the B.C. Supreme Court. D.K. shall not be required to pay rent for March 2018.

The Notices issued to F.N., F.S. and S.G. are cancelled. Their tenancies shall continue until ended in accordance with the *Act*.

F.N. is entitled to recover his filing fee. Pursuant to section 72 of the *Act*, F.N. is permitted to reduce his next months' rent by \$100.00 as recovery of the filing fee paid.

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: March 9, 2018

Residential Tenancy Branch