Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BC HOUSING
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC LRE OLC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- Cancellation of the landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to section 47;
- An order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70; and,
- An order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord acknowledged receipt of the Notice of Hearing and Application for Dispute Resolution. Both parties acknowledged that they received the other party's evidence package. No issues of service were raised. I find each party was served in accordance with the *Act*.

Preliminary Issue: Name Correction

The landlord testified that its name was stated incorrectly on the tenant's application. In accordance with rules 4.2 and 6.1 of the *Residential Tenancy Branch Rules of Procedure*, I have corrected the landlord's name which is referenced on the cover page of this decision.

Both parties were informed of section 55 of the *Act* which requires, when a tenant submits an Application for Dispute Resolution seeking to cancel a One Month Notice to End Tenancy for Cause issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy in compliance with the *Act*.

Issue(s) to be Decided

Is the tenant entitled to cancellation of the One Month Notice pursuant to section 49 of the *Act*?

Is the tenant entitled to an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70?

Is the tenant entitled to an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62?

If the tenant's application is dismissed and the One Month Notice is upheld, is the landlord entitled to an order of possession, pursuant to section 55 of the *Act*?

Background and Evidence

The tenancy started in 2012. The tenancy agreement provides that the rent is geared to the tenant's income. The tenancy agreement has a provision stating that the landlord may enter the rental unit upon providing reasonable notice not less than 24 hours and not more than 30 days before the entry.

The landlord testified that a full building envelope restoration project was required to protect the building from water damage. The landlord testified that this was a large project which involved the removal of exterior walls. The landlord testified that this project was necessary because water damage was found in the walls.

On March 21, 2019, the tenant was sent a notice of entry for repairs from March 29, 2019 to April 4, 2019, from 8:00 a.m. to 5:00 p.m. each day. The repair services included the following schedule:

Day No. 1:

- Creating opening in drywall in bathroom ceiling for new fan
- Installing new fan and light switch

- Replacement of vanity fixture
- Replacement of wall heater in living room

Day No. 2:

- Repair ceiling in in drywall in bathroom ceiling
- Repair wall in living room from heater replacement

Day No. 3:

- Sanding of first layer of drywall and applying second layer of drywall in bathroom and living room as required.

Day No. 4

- Apply first coat of paint

Day. No. 5

- Apply final coat of paint
- Replacement of kitchen fan
- Fix any work deficiencies

The landlord testified that the building manager went to the rental unit on March 29, 2019 multiple times to access the unit for the repair work. The building manager knocked on the door loudly but the tenant did not respond or open the door. A note was left on the door which stated “NO ENTRY this will have to be rescheduled.”

The landlord hand delivered a letter to the tenant on April 3, 2019 stating that the tenant’s refusal to allow entry for repairs was a breach of a material term of the tenancy agreement and the landlord would seek an end of this tenancy if the tenant did not contact the landlord to reschedule by April 5, 2019. The landlord testified that the tenant did not respond to the letter.

The tenant also changed his locks without the landlord’s permission. The landlord demanded that the locks be reset and the tenant complied.

The landlord posted another notice for entry for repairs on April 8, 2019 for repairs from April 24, 2019 to April 26, 2019, from 8:00 a.m. to 5:00 p.m. each day. The repair services included the following schedule:

Day No. 1:

- Installation of plastic barrier inside rental unit
- Removal of exterior wall
- Reconstruction of exterior wall
- Installation of exterior wall boards
- Installation of temporary window

- Installation of interior wall boards and first application of drywall plaster

Day No. 2:

- Second installation of drywall plaster
- Installation of new window valances

Day No. 3:

- Painting of exterior wall inside rental unit

The landlord also posted another notice for entry for repairs on April 8, 2019 for repairs from May 6, 2019 to May 9, 2019, from 8:00 a.m. to 5:00 p.m. each day. The repair services included the following schedule:

Day No. 1:

- Remove window and install waterproofing inside rental unit
- Install new window

Day No. 2:

- Installation of wood trims around windows

Day No. 3:

- Installation of new heaters
- Finishing work

Day No. 4:

- Installation of new curtain rods
- Correcting deficiencies

Day No. 5:

- Correcting deficiencies
- Final inspection

The landlord issued a One Month Notice dated April 8, 2019, which was personally served on the tenant the same say. The One Month Notice stated a move out date of May 31, 2019. The landlord checked the following as grounds for the Notice:

- The tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and,
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The tenant provided an email he sent on April 23, 2019 to the landlord asking for all of the repairs to be completed in a single four day period rather than multiple entries.

The landlord testified that the tenant did not permit access to the rental unit April 24, 2019 for the repairs. The landlord also testified that the tenant posted a sign on the door of his rental unit stating that access was denied.

The tenant argued that the notices to enter for repairs were improper because the landlord requested excessive entry time for the repairs. The tenant argued that each notice demanded entry for multiple days from 8:00 a.m. to 5:00 p.m. The tenant testified that he has construction experience and he believes that these notices are excessive. The tenant testified that these repairs could be completed in a single day. The landlord testified that these are the entry requirements which its contractors stated was necessary.

On May 1, 2019 the landlord again discovered that tenant changed his locks without the landlord's permission. The landlord again demanded that the locks be reset and the tenant complied.

The parties had another hearing before the Residential Tenancy Branch on May 14, 2019. The file number for that hearing is referenced on the first page of this decision. In that hearing, the parties argued over the validity of these same notices to enter the tenant's rental unit. In that hearing, the tenant also argued that the notices to enter were invalid because they were excessive. In that hearing, the arbitrator found the notices to enter for repairs to be valid and the arbitrator ordered the tenant to provide access to the rental unit.

Analysis

The tenant has requested a determination that the notices to enter for repairs issued by the landlord are invalid. However, this matter was already addressed in the previous Residential Tenancy Branch Hearing. This raises the issue of res judicata, a legal principle that precludes the re-litigation of an issue that was contested and decided in a prior action.

The issue of the validity of the landlord's notices to enter was an issue argued by the parties and ruled upon by the arbitrator in the prior hearing. The previous arbitrator determined that:

> I find that the notices of entry issued by the Landlord were issued in compliance with 29(1) of the Act. I find that the notices of entry are very detailed and the purpose for entry is reasonable.

Having read a copy of the other arbitrator's decision, I conclude that these issues have already been decided. This application is subject to the doctrine of *res judicata* which bars me from re-weighing the evidence and rendering another decision. Accordingly, I dismiss the tenant's application for a determination that the notices to enter for repairs issued by the landlord are invalid.

The tenant has also requested an order for the cancellation of the landlord's One Month Notice. Section 47(1) states that a landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

…

(d) the tenant or a person permitted on the residential property by the tenant has

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or

(iii) put the landlord's property at significant risk;

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so"

I will first address the landlord's contention that the tenant breached a material term of the tenancy agreement in violation of section 47(1)(h). A party may end a tenancy for the breach of a material term of the tenancy, but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term.

The Residential Tenancy Branch Policy Guidelines, Guideline No. 8 defines material terms as follows:

> A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
>
> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences

of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
• that there is a problem;
• that they believe the problem is a breach of a material term of the tenancy agreement;
• that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
• that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

In this matter, I find that the term in the tenancy agreement permitting the landlord access into the rental unit is a material term of the tenancy agreement. I find that this a critical term of the tenancy agreement that goes to the root of the agreement. If the landlord was unable to access the rental unit to make necessary repairs the entire building could be jeopardized. Accordingly, I find the term in the tenancy agreement permitted the landlord access is a material term of the tenancy agreement.

I find that that the tenant has violated the tenancy agreement but failing to provide access to the rental unit on March 29, 2019. The landlord provided proper written notice of the request for entry for the repairs on March 29, 2019 and the tenant refused to comply with the request for entry for repairs. I find that the landlord gave

the notice in proper time before the entry and the reason for the entry was reasonable. Further, I note that the previous arbitrator has determined that the notice to entries were properly issued.

I find that the landlord provided a written warning letter on April 3, 2019 advising the tenant that the landlord considered this a breach of a material term and that the landlord would seek an end to the tenancy if the tenant did not make other arrangements by April 5, 2019.

As such, I find that the landlord has adequately advised the tenant that there is a problem; that the landlord believes that the problem is a breach of a material term of the tenancy agreement; that the problem must be fixed by a deadline included in the letter; that the deadline be reasonable; and that if the problem is not fixed by the deadline, the party will end the tenancy.

Accordingly, I find that the landlord has provided sufficient evidence to establish that a valid basis exists to end this tenancy for breach of a material term. As such, the tenant's application to cancel the One Month Tenancy is denied.

Based on the testimony of the landlord, and the documents provided, I find that the One Month Notice complies with the form and content provisions of section 52 of the *Act,* which states that the Notice must: be in writing and must: (a) be signed and dated by the landlord or tenant giving the notice, (b) give the address of the rental unit, (c) state the effective date of the notice, (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and (e) when given by a landlord, be in the approved form. Accordingly, I grant the landlord's application for an order of possession pursuant to section 55 of the Act. The landlord is granted an order of possession effective on May 31, 2019 at 1:00 p.m.

Since this tenancy is ending, I dismiss the tenant's application for an order to suspend or set conditions on the landlord's right to enter the rental unit as no longer disclosing a dispute that may be determined under the *Act* pursuant to section 62(4) of the *Act*.

Conclusion

The tenants' applications are dismissed.

I find the landlord is entitled to an order of possession effective **on May 31, 2019 at 1:00 p.m**. This order must be served on the tenant. If the tenant fails 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.

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 27, 2019

Residential Tenancy Branch