Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCT**

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "**Act**") for a monetary order in the amount of $11,400 representing an amount equal to twelve times the monthly rent, pursuant to section 51(2) of the Act.

Both parties attended the hearing. The tenant was represented by an advocate. The parties were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant's advocate stated, and the landlord confirmed, that the tenant served the landlord with the notice of dispute resolution form and supporting evidence package. The landlord testified, and the tenant's advocate confirmed, that the landlord served the tenant with his evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Issue(s) to be Decided

Is the tenant entitled to a monetary order in the amount of $11,400?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

No copy of the tenancy agreement was entered into evidence. However, the parties agreed that monthly rent was $950. The parties agree that the tenant resided in the rental unit since 2013. The respondent landlord was not the tenant's original landlord.

The respondent landlord purchased the rental property in early 2018. The parties agreed that the tenant paid a security deposit to the original landlord at the start of the tenancy, and that it was returned to her by the respondent landlord when the tenancy ended. The parties agreed that the tenant vacated the rental unit on November 30, 2018.

The rental unit is the basement suite of two-story house. During the tenancy, the landlord lived on the upper level.

On September 6, 2019, the landlord issued a Two Month Notice to End Tenancy (the "**Notice**"). The Notice stated that the reason for ending the tenancy as:

> 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).

The tenant did not dispute the Notice.

On May 18, 2019, the tenant discovered a posting on Facebook marketplace advertising the rental unit for rent for $1500 per month (the "**Posting**"). The Posting listed the rental unit as available for June 14, 2019. The tenant entered screenshots of the Posting into evidence.

The Posting contained photos of the interior of the rental unit which, the tenant testified, show that the rental unit had been renovated since she vacated it. She testified that these renovations included the washer/dryer stack moved into a closet, the removal of an interior wall in the bathroom, the relocation of the oven, and new cupboards and a new hood vent in the kitchen.

The landlord did not dispute that he made the Posting, or that he renovated the rental unit as described by the tenant. He testified, however, that the primary purpose for issuing the Notice was so that he could make use of storage space located in the rental unit consisting of an area behind the washer/dryer stack and an adjoining area underneath the stairs which is accessible through a small, ground-level hatch behind the washer/dryer (the "**Storage Space**"). He testified that that the Storage Space was not accessible from the upper level, and that it was only accessible from the downstairs level once the washer/dryer stack was relocated.

The tenant testified that during the tenancy she was unaware of the existence of the Storage Space and made no use of it. She testified that the landlord never mentioned his desire to use the Storage Space when he issued the Notice.

The landlord testified that shortly after the tenancy ended he moved the washer/dryer stack to gain access to the Storage Space and placed a number of their belongings in it. He testified that those items continue to remain there.

The landlord testified that once the tenant moved out, he discovered mold in the rental unit and a cockroach infestation, both of which required remediation (he entered photographs of mold and of cockroaches, a report from a remediation company which shows mold present in the rental unit, and an invoice from an extermination company).

The landlord testified that given the extent of the mold remediation, he decided to renovate the rental unit. He testified that the cost of these renovations put him in some financial instability (he did not enter any evidence to show the cost of these renovations or any other documentation relating to his financial circumstances). He testified that as a result of this finically instability, he decided to re-rent the rental unit and renovate it such a way that would allow the exclusive access to the Storage Space from the upper floor (that is, the portion of the rental property occupied by the landlord). This involved relocating the washer/dryer stack into one of the bedrooms of the rental suite. The landlord testified that, at the time he issued the Notice, he did not intent to re-rent the rental unit.

Tenant's Position

The tenant's advocate argued that the landlord's behaviour is a violation of section 49(3) of the Act, as the tenancy was ended to allow the landlord to make renovations to the rental unit, and not occupy it, as permitted by section 49(3). She argued that the purpose of ending the tenancy was so that the landlord could renovate the rental unit. The tenant's advocate argued that if the landlord wanted to end the tenancy in order to make renovations, he should have issued a notice pursuant to section 49(6) (which would have required giving four month's notice rather than two month's notice, among other things).

The tenant's advocate argued that as the rental unit was not used for the purpose stated on the Notice, she is entitled to an amount equal to twelve time the monthly rent, as per section 51(2) of the Act.

The tenant's advocate also argued that the Storage Space is not part of the rental unit, as it was not accessible by the tenant. As such, she argued, the landlord has not occupied any part of the rental unit following the end of the tenancy.

Landlord's Position

The landlord denied that he violated section 49(3) of the Act. He testified that the reason he issued the Notice was so that they could occupy the rental unit.

He argued that by moving his belongings into the Storage Space he occupied the rental unit. He argued that the Storage Space is part of the rental unit, as access could only be gained to it from within the rental unit.

The landlord argued that he acted in good faith when issuing the Notice, as he only decided to re-rent the basement once he learned of the cost of the mold remediation.

Analysis

I must first note that, while both parties made submissions as to what was in the mind of the landlord when the Notice was issued (that is, whether or not he ended the tenancy for the purpose of making renovations to it), such considerations are not relevant to this application.

Section 49(3) allows a landlord to end the tenancy if they intend in good faith to occupy the unit. A lack of good faith (that is, an ulterior motive for ending the tenancy) would cause a notice to end tenancy to be invalid, and the tenancy to continue.

As the tenancy has already ended, section 49(3) is not applicable here. The tenant is not seeking a reinstatement of the tenancy. Rather she seeks compensation pursuant to section 51(2), which reads:

> **Tenant's compensation: section 49 notice**
>
> 51(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or

> (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

So, it is not necessary for me to determine if the landlord issued the Notice in good faith. It is only necessary for me to determine if the landlord failed to take steps within a reasonable period of time to occupy the rental unit or failed to occupy the rental unit for at least six months following the end of the tenancy.

As such, I make no findings as to whether or not the landlord acted in good faith when issuing the Notice.

However, before I determine if the landlord met the criteria set out in section 51(2), I must first determine if the Storage Space is a part of the rental unit itself.

Is the Storage Space part of the rental unit?

Section 1 of the Act defines rental unit:

> **"rental unit"** means living accommodation rented or intended to be rented to a tenant;

I accept the tenant's uncontroverted testimony that she did not have access to the Storage Space and that she was unaware of its existence. I find that the Storage Space could only be accessed by moving the washer/dryer stack.

As no copy of the tenancy agreement was entered into evidence, I cannot determine if the Storage Space was explicitly included as part of the rental unit under its terms. Neither party gave evidence that this might have been the case.

In its absence, I must determine what areas could be reasonably intended to have been rented to the tenant. I do not find it reasonable that the original landlords would have intended to rent out a portion of the basement that would be inaccessible to a prospective renter. Likewise, I do not find it reasonable that the tenant would have agreed to rent a rental unit where a portion of it was inaccessible to her. The fact that the tenant was unaware of the Storage Space's existence supports the proposition that it was not intended to be rented to her.

I am not persuaded by the argument that because the Storage Space is only accessible from the rental unit, that the Storage Space forms part of the rental unit.

I find that the Storage Space is “accessible” from the rental unit in only the narrowest sense of the word. In order to access the Storage Space from the rental unit, the washer/dryer stack needed to be moved. The moving of a washer/dryer stack is not a small endeavour. The Storage Space is accessible the same way an area behind a locked door is accessible. The tenant could access it with the right tools, but, for all practical purposes, the way is barred.

I do not find that because the Storage Space is inaccessible from the upper level that it automatically becomes part of the rental unit. I find that the rental property is capable of having more areas than simply an “upstairs living area” and a “rental unit”. I find that the Storage Space is an independent area unto itself and is part of neither the upstairs living area nor the rental unit.

As such, I find that the Storage Space is not part of the rental unit.

Did the landlord occupy the rental unit?

Policy Guideline 2A states:

> C. OCCUPYING THE RENTAL UNIT
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> Section 49 gives reasons for which a landlord can end a tenancy. This includes an intent to occupy the rental unit or to use it for a non-residential purpose (see also: Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use). Since there is a separate provision under section 49 to end a tenancy for non-residential use, the implication is that “occupy” means “to occupy for a residential purpose.” (See for example: *Schuld v Niu*, 2019 BCSC 949) The result is that a landlord can end a tenancy to move into the rental unit if they or their close family member, or a purchaser or their close family member, intend in good faith to use the rental unit as living accommodation or as part of their living space.

I must determine what use the landlord made of the rental unit (which does not include the Storage Space, as discussed above) for at least six months following the end of the tenancy. Based on the testimony of the parties, I find that the landlord remediated and renovated the rental unit following the tenancy and then re-rented it.

In *Schuld v Niu* (referred to in Policy Guideline 2A above), the court reviewed a decision of a Residential Tenancy Branch arbitrator. The court wrote:

> [17] In my view, the word "occupy" as used in s. 49(3) must be read in the context of the statute and, bearing in mind statutory objectives, it is clear to me that the specific purpose of these sections is to limit the circumstances in which a landlord may give a Notice to End Tenancy [citation omitted]. There are two separate circumstances. One scenario is where the landlord intends to occupy the rental unit as a residence for his own purposes; the other scenario is where the landlord intends to demolish the rental unit to construct something different. The arbitrator has chosen to expand the definition of the word "occupy" in s. 49(3) so that it encompasses and takes within it, therefore, ss. (6), which is the subsection relating to demolishing the rental unit. In my respectful view, that deprives ss. (6) of practically all meaning. The result would be that landlords could give notice under s. 49(3) even if s. 49(3) is not applicable, but s. 49(6) is applicable.
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> [emphasis added]

In *Schuld,* the court found the arbitrator's interpretation of the word "occupy" to be "patently unreasonable" and set the arbitrator's decision aside.

Applying *Schuld* to the case at hand, I find that by only renovating the rental unit in the months following the end of the tenancy the landlord failed to "occupy" the rental unit. Making renovations does not fall under the definition of "occupy". To do so would render section 49(6) meaningless, as it would allow any landlord who wants to end a tenancy for the purpose of making renovations to avoid the more stringent requirements proscribed by section 49(6).

As the landlord failed to occupy the rental unit for at least six months (or at all) following the end of the tenancy, I find that one of the criteria of section 51(2) is met. As such, I order that the landlord pay the tenant $11,400, representing an amount equal to twelve times the months rent of $950.

Conclusion

Pursuant to sections 51(2) and 67, I order that the landlord pay the tenant $11,400. This order may be filed and enforced in the Provincial Court of British Columbia.

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: September 23, 2019

Residential Tenancy Branch