Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AARTI INVESTMENTS LTD. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL

Introduction

This hearing dealt with an Application for Dispute Resolution ("application") by the tenant seeking remedy under the *Residential Tenancy Act* (*"Act"*) to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property dated July 28, 2017 ("2 Month Notice").

Prior to this hearing, a previous decision dated January 28, 2018 for this file number ("previous decision") was rendered, which ultimately was vacated by Supreme Court Justice Brundrett upon a Judicial Review application initiated by the tenant. Justice Brundrett ordered a reconsideration of the original application to cancel the 2 Month Notice. Accordingly, the original decision is of no force or effect.

Attending the hearing for reconsideration of the original application to cancel the 2 Month Notice were the tenant, tenant's counsel KL ("tenant's counsel"), landlord agent DM ("agent"), landlord counsel MD ("landlord's counsel") and landlord's co-counsel KR ("landlord's co-counsel"). The parties were affirmed and the landlord's counsel began with a preliminary matter arguing that this hearing should only address the permit issue and the good faith requirement, and not include whether vacant possession of the rental unit was necessary. The parties were advised that I would address that preliminary matter in my decision, and only if I found the matter to be relevant. Only the evidence relevant to the matter before me are described in this decision.

As neither party raised any concerns at the outset of the hearing regarding service of documentary evidence, I consider the parties to have been sufficiently served.

Preliminary and Procedural Matters

The parties confirmed their email addresses during the hearing. The parties also confirmed their understanding that the decision would be emailed to both parties.

In addition to the above, and after the hearing had concluded, landlord's counsel submitted a letter, which I have not considered, pursuant to Rule 8.1 of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules").

Issue to be Decided

Should the 2 Month Notice be cancelled under the *Act?*

Background and Evidence

There is no dispute that the landlord issued the tenant with a 2 Month Notice, which was signed and dated and had an effective vacancy date of September 30, 2017. The reason stated on page two of the 2 Month Notice states:

> The landlord has 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 stated that they received the 2 Month Notice a few days after July 28, 2017, and filed their application to dispute the 2 Month Notice on August 1, 2017. Landlord's counsel confirmed that there was a plumbing permit and an electrical permit. Regarding the electrical permit, landlord's counsel confirmed that it required an amendment. That amendment was not obtained before issuing the 2 Month Notice and a new 2 Month Notice has not been issued based on the evidence before me. Once landlord's counsel confirmed that the electrical permit required an amendment, I found that it was not necessary to consider witness testimony from either party as testimony would not change the fact that landlord's counsel confirmed the electrical permit required an amendment.

The parties were then asked if they had any questions about my verbal decision, the tenant's counsel did not have any questions, and landlord's counsel stated that he will be taking my decision to Judicial Review and that I should set out my reasons in the decision. I confirmed for all parties that my decision would reflect my reasons.

Landlord's counsel then asked if I was aware of the Supreme Court decision regarding permits referenced in the decision of Justice Brundrett, which I confirmed I was. The parties were then thanked and the hearing concluded at 40 minutes.

Analysis

Based on the testimony of the parties, the evidence presented and on the balance of probabilities, I find the following.

When a 2 Month Notice is issued and reads "the landlord has 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." Section 49 of the *Act* applies and states:

> 49(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.
>
> [Emphasis added]

I note that it does not state that some of the permits are required, it states "all" permits are required. Also, and as noted by the Supreme Court in *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator), 2007 BCSC 257 ("Berry and Kloet")* at paras. 19-23:

> [19] …As noted, s.49(6) of the *Act* sets out three requirements:
>
> (a) The landlord must have the necessary permits;

(b) The landlord must be acting in good faith with respect to the intention to renovate; and
(c) The renovations are to be undertaken in a manner that requires the rental unit to be vacant.

In addition, as noted in the British Columbia Court of Appeal *Aarti Investments Ltd. V. Baumann, 2019 BCCA 165* at paras. 42 to 49:

> Did the arbitrator err in holding the landlord's permits were sufficient?
> [42] Because I would remit the matter to the RTB for determination, it might be helpful to address the question of whether the arbitrator erred in his assessment of the adequacy of the permits.
> [43] Section 49(6)(b) of the RTA requires the landlord to establish it "has all the necessary permits and approvals required by law" to "renovate or repair the rental unit in a manner that requires the rental unit to be vacant".
> [44] The record before us suggests the Landlord had the permits and approvals required by law to do some, but not all, of the work it contemplated. Both the electrical and the plumbing permits were in evidence at the hearing before the arbitrator. As the arbitrator noted, the electrical permit in evidence did "not reflect the full scope of the work to be done". An electrician testified the permit would be "upgraded to reflect the planned work".
> [45] The Landlord says "for all intents and purposes" it had the permits necessary to renovate the premises. The Landlord says the phrase "all the necessary permits and approvals required by law" has not been judicially considered and we must accord deference to the arbitrator, as a decision-maker interpreting his home statute and making a finding of mixed fact and law, in concluding possession of the permits in evidence was sufficient to meet the statutory requirement. The statute is open to a range of interpretations and the arbitrator's conclusion was reasonable and there was no reason to set it aside on judicial review.
> [46] It is the RTB's role, not the courts', to interpret the RTA and determine whether the statutory requirements of s. 49 are met on a case by case basis. It may be reasonable for an arbitrator to find s. 49(6)(b) is satisfied where a landlord has all the necessary permits to do enough work to require vacant possession, even if the landlord intends to do more extensive work for which it has not obtained permits. It may also be reasonable for an arbitrator to find s. 49(6)(b) is satisfied where a landlord had the necessary permits at the time of the Notice to End Tenancy but must renew them. An arbitrator cannot, however,

> waive or ignore the statutory requirement by issuing an Order of Possession under s. 49(6)(b) if the Landlord is not authorized and permitted, at the time it serves the Notice to End Tenancy, to conduct at least such work as will necessitate obtaining vacant possession.
>
> [47] In my view, the record before us is insufficient to confirm it was open to the arbitrator to consider the statutory test to have been satisfied on the evidence before him. The arbitrator simply "acknowledged the electrical permit required an update" but did not come to any conclusion with respect to the effect of the deficiency on the Landlord's ability to engage in work requiring vacant possession. I would not, therefore, accede to the Landlord's argument the arbitrator's treatment of the deficient electrical permit was a finding of mixed fact and law within the Arbitrator's exclusive jurisdiction. I cannot see any basis upon which we can conclude the arbitrator decided "for all intents and purposes" the appellant had all necessary permits and approvals required for s. 49(6)(b) to apply.
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> [48] In short, as the chambers judge noted, the arbitrator acknowledged the deficiency of the electrical permits but appears simply to have failed to apply s. 49(6) to determine whether that deficiency went to whether or not the renovations or repairs required vacant possession.
>
> Conclusion
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> [49] I would dismiss the appeal and confirm the order vacating the Order of Possession and remitting the matter to the RTB for reconsideration.

The tenant filed their application on August 1, 2017, which is within the 15-day timeline set out in section 49.1(5) of the *Act.* As the tenant filed their application to dispute the 2 Month Notice within the required timeline, I find the landlord has the onus to prove that the necessary permits were in place <u>at the time the 2 Month Notice was issued</u>, which in the matter before me was July 28, 2017. I find the landlord did not have all the necessary permits required by law in place as landlord's counsel confirmed that an amendment was necessary related to the electrical permit. While the landlord had the ability to reissue a new 2 Month Notice, they have not done so.

Based on the above, I do not find it necessary to consider (b) and (c) described above, as I find the landlord failed to satisfy me regarding the first part of the three-part requirement described above from *Berry and Kloet.*

Accordingly, I set aside the 2 Month Notice as I find that the landlord through their counsel has confirmed that an amendment to the electrical permit was required and that the amendment was obtained after the 2 Month Notice was issued, and not before.

The tenancy shall continue until ended in accordance with the *Act.*

I do not find it necessary to consider the preliminary issue raised by landlord's counsel regarding whether evidence should be heard regarding whether vacant possession is necessary, as I find that argument is now moot as the 2 Month Notice has been set aside. I therefore make no decision regarding the preliminary issue raised by landlord's counsel.

Conclusion

The tenant's application is successful.

The 2 Month Notice is set aside and is of no force or effect.

This decision will be emailed to the parties as indicated above.

This decision is final and binding on the parties, unless otherwise provided under the Act, 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: October 2, 2019

Residential Tenancy Branch