Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BLACK DOOR HOLDINGS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL-4M

Introduction

This hearing dealt with the tenant's application pursuant to section 49 of the *Residential Tenancy Act* (the *Act*) for cancellation of the landlord's 4 Month Notice to End Tenancy for Landlord's Use of Property (the 4 Month Notice).

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenant confirmed that they received the 4 Month Notice posted on the tenant's door by the landlord on August 28, 2019, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*. As Landlord LW (the landlord) confirmed that they received a copy of the tenant's dispute resolution hearing package sent by the tenant's advocate by registered mail on October 4, 2019, I find that the landlord was duly served with this package in accordance with section 89 of the *Act.* Since the landlord's legal counsel confirmed that the landlord received copies of the tenant's written evidence, I find that the tenant's written evidence was served in accordance with section 88 of the *Act*.

At the beginning of the hearing, the landlord's agent gave sworn testimony that they sent the tenant all of the landlord's written evidence with the 4 Month Notice, save for a document prepared and signed by the landlord's contractor. Landlord RC gave sworn testimony that this contractor document was handed to the tenant on the evening of October 23; the tenant said that they did not receive this until October 24. The tenant's advocate did not dispute this testimony at that time, accepting that the contractor document had been served in sufficient time to enable them to prepare for this hearing.

During the course of the hearing, it became apparent to the tenant's advocate that they did not have all of the documents referenced by the landlord or that had been provided by the landlord to the Residential Tenancy Branch (the RTB). In particular, there were two documents regarding estimates for the work involved in removing asbestos from this rental building, including portions of the tenant's rental unit which were apparently missing from the evidence package provided to the tenant. The tenant's advocate also testified that they had not received all of the landlord's document outlining the full nature of the renovation work that was proposed for this rental property.

Under these circumstances, I find that much of the landlord's written evidence was not served in accordance with section 88 of the *Act,* because it was provided to the tenant at a time that pre-dated the tenant's application for dispute resolution. However, I find that the portion of the evidence attached to the 10 Day Notice was sufficiently served to the tenant for the purposes of the *Act* (section 71). For the documents related to the asbestos estimates and with the permission of the landlord's legal counsel, the landlord provided sworn testimony at the hearing, which outlined the key elements of the landlord's evidence with respect to the removal of asbestos from the premises. Although the tenant was not provided with the full report that pertained to other units within this rental property, the tenant did possess the two pages of this report that had relevance to both the general work to common areas of this six-unit building and the tenant's own rental unit. Under these circumstances, we were able to proceed with a hearing of those matters relevant to the tenant's application to cancel the 4 Month Notice.

Issues(s) to be Decided

Should the landlord’s 4 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, estimates, miscellaneous letters, documents, reports and e-mails, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant’s claim and my findings around each are set out below.

This tenancy for a one bedroom unit in a six-unit rental building began on or about August 1, 2009. The landlord maintained that the building was constructed as a former

army barracks in the 1950s. Until the landlord company purchased this property in April 2019, the property was owned by someone elderly (i.e., over 90 years old) who had undertaken few upgrades of any type to this property. Although neither party entered into written evidence a copy of the original Residential Tenancy Agreement, the landlord's counsel testified that there was a written tenancy agreement in place for this month-to month tenancy that was signed in August 2009. Monthly rent at that time was $560.00, which has increased over time to the present $725.00, paid at the time that the tenant signed a new Residential Tenancy Agreement (the Agreement) with the landlord company on May 4, 2019. The landlord company retains the $280.00 security deposit paid by the tenant when this tenancy began.

The landlord has issued two 4 Month Notices, dated June 16, 2019 (see above) and the current one in dispute dated August 28, 2019. The reason identified for ending this tenancy by December 31, 2019 on the most recent of the 4 Month Notices was as follows:

I am ending your tenancy because I am going to:

- *perform renovations or repairs that are so extensive that the rental unit must be vacant*

The tenant's September 27, 2019 application to set aside the 4 Month Notice maintained that the landlord had not issued that Notice in good faith. In their application and written evidence, they asserted that the landlord's issuance of two previous Notices to End Tenancy, one for cause and one for landlord's use of property since purchasing the property in April 2019 called into question the landlord's current 4 Month Notice. Although the tenant provided copies of decisions issued by other Arbitrators appointed pursuant to the *Act* on July 9, 2019 and September 6, 2019, they provided nothing to support their assertion that rulings had been made by those Arbitrators that the previous two Notices to end this tenancy had been issued in bad faith. One of the tenant's applications to cancel a 1 Month Notice to End Tenancy for Cause was dismissed because the landlord failed to attend the hearing. The other was cancelled because the 4 Month Notice of June 16, 2019 was premature, and where the landlord's agent withdrew the notice because a subsequent 4 Month Notice had been issued and the current hearing was scheduled to hear that second 4 Month Notice.

The landlord provided written evidence and sworn testimony that the renovation and repair work planned would take from twelve to fourteen weeks to complete. All of the units in this building will be undergoing electrical and plumbing renovations and

upgrades, asbestos will have to be removed by asbestos remediation specialists, and the units will be renovated and upgraded to bring them up to modern standards for such rental housing. As work would need to be undertaken in each of the six units of this building, the general contractor will be having various tradespeople attend the property at one time to complete their work. In total, the value of the work that is to be performed commencing on February 1, 2020 is estimated to be $175,000.00. The landlord testified that they expect to incur at least another $10,000.00 to remove asbestos that is present in most of the rental units, and is present in the tenant's rental unit.

The landlord entered into written evidence copies of electrical and plumbing applications and permits for the work in those areas that is to be undertaken. While the tenant's advocate questioned one of these permits, the landlord and the landlord's legal counsel provided sworn testimony that the documents submitted reflected work that had been considered and approved by the relevant municipal and provincial agencies and departments. The landlord testified that because no load bearing walls are being changed that the remainder of the work they plan to undertake does not require the issuance of separate permits.

On the page identifying specific work to be undertaken on the tenant's rental unit, which the landlord's counsel maintained was in the worst shape of the units in this building, the landlord outlined the planned work in part as follows:

General Contractor
Remove ceilings and walls for rewire
Replace ceilings and walls: board, mud, tape, sand, paint
Gut bathroom entirely
Gut kitchen entirely
Attempt to retrofit/reinstall saved kitchen from unit 6
New flooring throughout
Install hood fan (venting)
Remove old natural gas heaters and repair venting holds to exterior
Basically gut entire unit and save anything we can for reuse if possible

Electrician
Rewire overall...
Install electric baseboard heaters
Install new lighting] Install hardwired smoke and CO detectors

Plumber
Map out existing plumbing with new plans for permit application
Kitchen sink re and re
Bathroom sink re and re
Toilet re and re
Replace shower if applicable
End gasline after removing old natural gas heaters

The tenant's advocate asserted that rather than the 12-14 weeks of work that are estimated in the landlord's 4 Month Notice and in evidence presented by the landlord that the work involved only required the tenant to be removed from the rental unit for a two week period. The tenant's advocate relied heavily on a September 17, 2019 email sent by the municipality's Manager of Building and Bylaw Enforcement. In that email, that Manager referenced only consideration of the Plumbing Permit that had been reviewed by the municipality and noted that their Division did not consider any of the plumbing work as requiring the eviction of the tenants from their rental units for the work to be conducted or completed. The Manager specifically noted that they could not speak for the electrical work that was planned. The manager also drew the tenant's advocate's attention to a "Reno-viction Policy" that the municipality was then developing that was intended to assist tenants who were being evicted for the purposes of enabling landlords to renovate or repair their buildings.

The tenant's advocate asserted that the contract with the general contractor as entered into written evidence was ambiguous, unclear and somewhat self-serving to the landlord's interests in clearing all of the existing tenants from this rental building. The tenant's advocate also questioned the need to take into account the sworn testimony with respect to asbestos in the rental building or that the existing units presented a fire hazard, as claimed by the landlord's legal counsel. The tenant's advocate claimed that the landlord had not demonstrated to the extent required that the building had to be cleared of tenants, as this work could be done unit by unit, thus reducing the amount of time that the tenants would need to be absent from the building. The tenant's advocate also maintained that the tenant had not been given an indication when they signed their new Agreement with the landlord on May 4, 2019 that they would be receiving repeated notices to end this tenancy over the ensuing four months.

During the course of the hearing, the tenant testified that they could stay elsewhere during the time that the landlord was renovating and repairing their rental unit. They explained that they had engaged in discussions with a friend who had offered to allow

them to stay with them during these renovations, so that the tenant could return to their rental unit once the renovations were completed. At the hearing, the tenant's advocate advised that the person the tenant planned to stay with was actually awaiting their turn to provide sworn testimony as a witness for this hearing.

The tenant's witness confirmed that they live not too far from the tenant, and that they had spoken to their landlord about the possibility of allowing the tenant to stay with them in their one bedroom rental unit while the renovations to the tenant's rental unit were occurring. The tenant's witness said that their landlord had agreed to this request and that the tenant could stay with the witness while they waited for the renovations to be completed.

The landlord's legal counsel questioned the tenant's witness about this proposal,. The landlord's legal counsel maintained that this evidence was not supported by anything in writing and that there had been little evidence supplied that the landlord of the tenant's witness had even considered a formal request from the tenant's witness to allow the tenant to live in that one bedroom rental unit.

Analysis

Pursuant to section 49(8)(b) of the *Act*, a tenant may dispute a 4 Month Notice by making an application for dispute resolution within 30 days after the date the tenant received the notice. If the tenant makes such an application, the onus shifts to the landlord to justify, on a balance of probabilities, the reasons set out in the 4 Month Notice. As the tenant submitted their application to cancel the 4 Month Notice on September 27, 2019, they were within the time limit for doing so, and the landlord must demonstrate that they meet the requirements of the following provisions of paragraph 49(6)(b) of the *Act.* This paragraph reads in part as follows:

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

Residential Tenancy Branch Policy Guideline 2.B reads in part as follows:

In Gichuru v Palmar Properties Ltd. (2011 BCSC 827) the BC Supreme Court found that a claim of good faith requires honest intention with no ulterior motive. When the issue of an ulterior motive for an eviction notice is raised, the onus is on the landlord to establish they are acting in good faith: Baumann v. Aarti Investments Ltd., 2018 BCSC 636.

Good faith means a landlord is acting honestly, and they intend to do what they say they are going to do. It means they do not intend to defraud or deceive the tenant, they do not have an ulterior motive for ending the tenancy, and they are not trying to avoid obligations under the RTA and MHPTA or the tenancy agreement. This includes an obligation to maintain the rental unit in a state of decoration and repair that complies with the health, safety and housing standards required by law and makes it suitable for occupation by a tenant (s.32(1)).

If a landlord gives a notice to end tenancy for renovations or repairs, but their intention is to re-rent the unit for higher rent without carrying out renovations or repairs that require the vacancy of the unit, the landlord would not be acting in good faith...

The onus is on the landlord to demonstrate that the planned renovations or repairs require vacant possession, and that they have no other ulterior motive...

This Policy Guideline further expands on the issue of requiring vacant possession of the rental unit under such circumstances as follows:

Section 49(6)(b) allows a landlord to end a tenancy to renovate or repair a rental unit in a manner that requires the rental unit to be vacant.

In Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator) (2007 BCSC 257), the BC Supreme Court found that "the renovations by their nature must be so extensive as to require the rental unit to be vacant in order for them to be carried out." The Court found "vacant" to mean "empty". The Court also found that it would be irrational to believe that a landlord could end a tenancy for renovations or repairs if a very brief period of vacancy was required and the tenant was willing to move out for the duration of the renovations or repairs.

In Aarti Investments Ltd. v. Baumann. (2019 BCCA 165), the Court of Appeal held that the question posed by the Act is whether the renovations or repairs "objectively" are such that they reasonably require vacant possession. Where the vacancy required is for an extended period of time, according to the Court of Appeal, the tenant's willingness to

move out and return to the unit later is not sufficient evidence to establish objectively whether vacancy of the rental unit is required.

In Allman v. Amacon Property Management Services Inc. (2006 BCSC 725), the BC Supreme Court found that a landlord cannot end a tenancy to renovate or repair a rental unit just because it would be faster, more cost-effective, or easier to have the unit empty. Rather, it is whether the "nature and extent" of the renovations or repairs require the rental unit to be vacant...

In considering the matter before me, I find that the nature and extent of the general renovation and repair work to be undertaken on this six-unit rental building scheduled to begin on February 1, 2020, and the work scheduled for the tenant's unit in this building is "objectively" extensive. The statement in the landlord's outline of the work to be performed noted that the tenant's rental unit will be essentially gutted. At the hearing, the landlord's representatives gave undisputed sworn testimony that of the six rental units in this building, the tenant's rental unit is in the poorest condition. Although the landlord will salvage anything they can for reuse if possible, the landlord does not apparently expect that there will be much of value from the existing rental unit that can be reused.

As explained at the hearing, I see no validity to the assertion made by the tenant's advocate that the history of previous notices to end tenancy had any bearing on whether the landlord is currently failing to act in good faith regarding the 4 Month Notice currently before me. The 4 Month Notice issued in June was issued before all of the permits required by the landlord had been obtained, and the landlord's representative withdrew that premature 4 Month Notice when that matter was heard on September 6, 2019. The prior hearing of the tenant's application to cancel the 1 Month Notice was not pursued by the landlord and the matter was dismissed by the presiding Arbitrator on July 9, 2019. There is no evidence that either Arbitrator made any finding in those decisions that the landlord's Notices to End Tenancy were not issued in good faith.

In coming to my determination, I attach little weight to the email from the municipality's Manager . In that email, the Manager clearly stated that they were only considering the plumbing work proposed by the landlord, and not the electrical work involved. There is also no indication that the Manager had been given information other than the plumbing plans or the outline of the general contracting work that the landlord is proposing for this rental unit or for this building. If the landlord's only renovation or repair plans were those connected to the plumbing upgrade, the landlord may very well have never issued

the 4 Month Notice, nor would I find that the plumbing plans on their own would have required the tenant to vacate the premises.

I have given a great deal of consideration to the sworn testimony at the hearing by the tenant and the tenant's witness that the tenant's witness will allow the tenant to stay with them while the renovations and repairs are being undertaken. This arrangement would enable the tenant to return to the rental unit when the landlord's work on this rental unit is completed. In this regard, I do not accept the assertion made by the landlord's legal counsel that this testimony was ingenuine. However, I cannot ignore the test established by the Court of Appeal as noted above as to whether the renovations or repairs “objectively” are such that they reasonably require vacant possession. As was noted in RTB Policy Guideline 2.B and the Court of Appeal decision, the tenant's willingness to move elsewhere and return to the rental unit later is not sufficient evidence to establish objectively whether the rental unit is required by the landlord in a case where the vacancy will last "for an extended period of time."

Based on a balance of probabilities, I find that the landlord has demonstrated to the extent required that the rental unit needs to be vacated for the purpose stated on the 4 Month Notice for an extended period of time. Given the interconnecting nature of the renovations and repairs throughout this building, requiring tradespersons to remove, revamp and potentially reuse parts of some rental units in other locations in this rental building, including major modifications to the basic services within this building, I find that the landlord has justification to attempt to undertake these repairs and renovations at the same time and not in a staged, unit by unit process. While the renovations and repairs may not actually take the full 12-14 weeks to complete, they could very well take longer, especially given that the landlord has only had partial testing completed with respect to the existing asbestos within the building and this rental unit. In addition, I note that the landlord has sought an Order of Possession that will take effect on December 31, 2019, to enable them to properly prepare for the work to be undertaken by their contractors on February 1, 2020. This would only add to the 12-14 week time frame estimated in the documents presented by the landlord and render this even less of a temporary period when the tenant would be living elsewhere while the premises were being renovated and repaired. For these reasons, I dismiss the tenant's application.

Section 55(1) of the *Act* reads as follows:

If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

(a) the landlord's notice to end tenancy complies with section 52 [form and content of notice to end tenancy], and

(b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I am satisfied that the landlord's 4 Month Notice entered into written evidence was on the proper RTB form and complied with the content requirements of section 52 of the *Act*. For these reasons, I issue an Order of Possession in the landlord's favour, which enables the landlord to take possession of this rental unit on December 31, 2019.

Having received the 4 Month Notice, the parties are reminded of the other obligations that ensue from the tenant's receipt of a valid 4 Month Notice. These include, but are not limited to provisions regarding allowances to the tenant pursuant to sections 51(1) and (2) of the *Act* that are predicated on the tenant's monthly rent payments and the landlord's implementation of the renovation and repairs that are leading to the end of this tenancy.

In addition, I remind the parties of the following wording of sections 51.2 and 51.3 of the *Act*, which also have significant monetary implications should they fail to abide by these provisions:

Right of first refusal

51.2 *(1)In respect of a rental unit in a residential property containing 5 or more rental units, a tenant who receives a notice under section 49 (6) (b) is entitled to enter into a new tenancy agreement respecting the rental unit upon completion of the renovations or repairs for which the notice was issued if, before the tenant vacates the rental unit, the tenant gives the landlord a notice that the tenant intends to do so.*

(2)If a tenant has given a notice under subsection (1), the landlord, at least 45 days before the completion of the renovations or repairs, must give the tenant

(a)a notice of the availability date of the rental unit, and

(b)a tenancy agreement to commence effective on that availability date.

(3)If the tenant, on or before the availability date, does not enter into a tenancy agreement in respect of the rental unit that has undergone the renovations or repairs, the tenant has no further rights in respect of the rental unit.

(4)A notice under subsection (1) or (2) must be in the approved form.

Tenant's compensation: no right of first refusal

51.3 *(1)Subject to subsection (2) of this section, if a tenant has given a notice under subsection (1) of section 51.2, the landlord must pay the tenant an amount that is the equivalent of 12 times the monthly rent payable under the previous tenancy agreement if the landlord does not comply with section 51.2 (2).*

(2)The director may excuse the landlord from paying the tenant the amount required under subsection (1) if, in the director's opinion, extenuating circumstances prevented the landlord from complying with section 51.2 (2)...

Conclusion

I dismiss the tenant's application to cancel the landlord's 4 Month Notice. The landlord is provided with a formal copy of an Order of Possession effective by December 31, 2019. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme 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: October 31, 2019

Residential Tenancy Branch