Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WINSON ESTATES LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL-4M FFT

Introduction

This hearing dealt with the applications of the tenants of 14 rental units pursuant to section 49 of the *Residential Tenancy Act* (the "*Act*") to dispute the landlord's 4 Month Notices to End Tenancy for Demolition, Renovation, Repair of Conversion of Rental Unit (the "4 Month Notices") and to recover the filing fees pursuant to section 72.

Both parties were represented by counsel who attended the hearing and were given a full opportunity to be heard, to make submissions and to call witnesses. The agents of the corporate landlord and some representative tenants attended the hearing.

As both parties were present service was confirmed. The parties each confirmed receipt of the other's materials. Based on the testimonies I find that each party was sufficiently served with the respective materials in accordance with sections 71, 88 and 89 of the Act.

At the outset of the hearing the tenants' counsel said that 2 of the applicants have withdrawn their applications. The applications for units 603 and 1001 are withdrawn.

Issue(s) to be Decided

Should the 4 Month Notices be cancelled? If not, is the landlord entitled to Orders of Possession?
Are the tenants entitled to recover the filing fees from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

I note that both parties were represented by counsel who provided comprehensive written submissions prior to the hearing in addition to testimonial evidence and submissions at the hearing.

The rental building is a multi-unit building containing 57 individual rental suites. The landlord issued each of the applicants a 4 Month Notice dated October 23, 2019. The reason provided on the notices for the tenancies to end is that the landlord intends to "perform renovations or repairs that are so extensive that the rental unit must be vacant". The landlord declared that they have obtained all permits and approvals required by law to do this work.

The landlord provided details of the planned work with their notices. A non-exhaustive list of the work planned include:

- New roof membrane
- Replacing windows at all levels
- Demolition and Hazmat management work for interior work with affected walls, sealants and tiles
- New interior finishes, including flooring, cabinetry and millwork
- Fire system upgrades to building and elevator systems; includes fire alarm speakers in building, smoke detectors in all units plus sleeping rooms
- New water stack for domestic water re-piping and plumbing – full building water shutdown and hazmat management
- New plumbing fixtures in all suites
- Demolition, Hazmat management and installation of new baseboard heaters throughout
- Electrical upgrades throughout building as specified by engineers
- New electrical fixtures throughout building requiring demo and hazmat management to affected bulkheads and walls

The landlord submitted into documentary evidence a Hazardous Materials Survey report prepared by a third-party environmental company outlining the specific hazardous materials found or would potentially be found in the rental building. The report contains a list of recommendations for how work should be conducted.

The landlord called the architect for the project and asset manager as witnesses. They each testified that they believe the scope or work contemplated requires vacant possession. They gave testimony that they have been informed that the rental building, due to its age, contains a large amount of hazardous materials which will become airborne while work is being performed. The witnesses testified that they believe that the hazardous materials will permeate throughout the building and it is not feasible to allow the tenants to reside in the rental building during the ongoing work. The witnesses also gave evidence that they understand that the scope of work will include a period of time when utilities including heat, electricity and running water will be either limited or shut off entirely for the building.

The landlord gave evidence that they believe the work will take at least a period of 4 months and likely double that length of time. The landlord submits that they have reviewed the options available and believe that vacant possession of the rental suites is necessary. The landlord gave evidence that they have been issued all necessary permits by the local municipality on the basis of their description of the project and a Tenant Relocation Plan required for the issuance of a development permit. The landlord submitted into evidence copies of the permits, their relocation plan and correspondence with the municipality.

The tenants dispute that there is a need to end the tenancies for the landlord's project to go ahead. The tenants gave evidence that they have offered to the landlord that they will vacate the rental building when necessary but seek to return to a reinstated tenancy after work is completed.

The tenants called NG as an expert witness. NG testified that they are a qualified professional in the building restoration and construction industry. NG testified that based on the description of the work contemplated by the landlord in their 4 Month Notice, they have conducted similar projects without displacing the residents. NG qualified their statements and stated that they have not been provided detailed information about the landlord's project, nor have they reviewed a project schedule or visited the rental building.

Preliminary Issue – Admissibility of Tenants' Witness

NG was called as an expert witness for the tenants. NG testified that they are a qualified professional in the building restoration and construction industry. They were called to provide testimony as to their expert opinion on whether they believed it was

necessary for the landlord to have vacant possession of the rental building to complete the scope of work. NG did not provide a written expert report and simply provided their opinion by testimony.

NG provided their opinion that based on their understanding of the work contemplated by the landlord, they have completed similar projects without the need for vacant possession of the rental building. NG testified that their opinion was based primarily on the scope of work detailed in the attachment to the landlord's 4 Month Notice. NG stated that they have not been provided additional documentary evidence and have not reviewed the Hazardous Materials Survey or other reports submitted into evidence.

The landlord contested the admissibility of the expert evidence. The landlord acknowledged that pursuant to section 75 of the Act an arbitrator is not bound by strict common law rules as to the admissibility of evidence. Nevertheless, I find that it is appropriate that these rules not simply be ignored but referenced in determining whether the tenant's evidence is appropriate.

The common law principles to be considered regarding the admission of expert opinion evidence are:

- Relevance;
- Necessity; and
- The qualifications of the expert.

In the present case the tenant's witness articulated their experience in the construction industry and having undertaken numerous renovation projects of similar size and scope. I accept the testimonial evidence that the witness is qualified to provide opinions about the proposed work to the rental property.

The witness limited their testimony to their opinion based on the limited information they had regarding the scope of intended work. I find that the witness gave evidence on the principle matter considered and their testimony was relevant to the proceeding.

On the issue of necessity, as the onus shifts to the landlord to establish on a balance of probabilities the basis for a notice to end tenancy when a tenant applies to dispute a notice, it is not strictly necessary for the tenant to submit any evidence. Nevertheless, I find that the submission of the tenant's expert providing opinion as to whether vacant possession is necessary, has some probative value.

Exercising my discretion pursuant to section 75 of the Act, I find that the inclusion of the tenant's expert witness to be admissible. I find that the probative value of the evidence and assistance it provides in making a finding outweighs any potential prejudice to the parties and that there is no contraventions of the principles of procedural fairness or natural justice by its inclusion.

I note, however that the witness' opinion evidence, based on their limited understanding of the work proposed by the landlord, has limited weight.

Analysis

When a tenant applies to dispute a Notice to End Tenancy issued under section 49(6)(b) of the Act, the burden of proof is on the landlord. The landlord must show, on a balance of probabilities, that the tenancy should end for the reason stated on the Notice.

Section 49(6) of the Act provides that:

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

The landlord issued the 4 Month Notice indicating that they have all necessary permits and approvals and that they will be performing renovations and repairs that are so extensive that the rental unit must be vacant.

Residential Tenancy Policy Guideline number 2 contemplates the elements necessary for a landlord to end a tenancy for renovations or repairs and states:

> In *Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257 (see also *Baumann v. Aarti Investments Ltd.,* 2018 BCSC 636), the BC Supreme Court found there were three requirements to end a tenancy for renovations or repairs:
> 1. The landlord must have the necessary permits;
> 2. The landlord must intend, in good faith, to renovate the rental unit; and

3. The renovations or repairs require the rental unit to be vacant.

The Policy Guideline continues to say that:

> If repairs or renovations require the unit to be empty and the tenant is willing to vacate the suite temporarily and remove belongings if necessary, ending the tenancy may not be required.
>
> In other words, section 49 (6) does not allow a landlord to end a tenancy for the purpose of renovations or repairs if any of the following circumstances apply:
> • the landlord does not have all necessary permits and approvals required by law;
> • the landlord is not acting in good faith;
> • the renovations or repairs do not require the unit to be empty (regardless of whether it would be easier or more economical to conduct the renovations or repairs if the unit were empty); or
> • it is possible to carry out the renovations or repairs without ending the tenancy (i.e. if the tenant is willing to temporarily empty and vacate the unit during the renovations or repairs, and then move back in once they are complete).

I accept the evidence of the landlord that they have obtained all necessary permits to carry out the scope of work contemplated. The landlord has provided a description of the proposed project and permits issued by the municipality showing that the plans have been approved. Based on the evidence I find that the landlord has met their onus to demonstrate they have all necessary permits to perform the planned renovations and repairs.

Residential Tenancy Branch Policy Guideline number 2 notes that good faith is an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage. A claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the Notice to End the Tenancy.

This Guideline reads in part as follows:

> *If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy. If the good faith intent of the landlord is called into question, the burden*

> *is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy.*

I find that it is undisputed that the landlord intends to perform the renovations and repairs proposed. The tenants question the good faith motive of the landlord in seeking to terminate the tenancies to perform the proposed work. The landlord denies the allegations of an ulterior motive and submits that there has been no previous disputes with the tenants to whom the 4 Month Notices were issued. The landlord further submits that they have not issued a Notice of Rent Increase for any of the rental units since February 2017 and there is little evidence that the landlord intends to perform the major renovations for financial motivations.

I find that I am satisfied with the landlord's explanation of their good faith intentions. I find that the landlord has provided sufficient evidence to demonstrate that the issuance of the 4 Month Notices was not motivated or contributed to by ulterior motives. I find that the magnitude of the renovations and repair work contemplated and the long-term loss of rental income is sufficient to determine that there is little evidence that financial motivations is a factor in the landlord seeking to end the tenancies.

It is not disputed that the work contemplated by the landlord is a significant undertaking and that there is the possibility that the work may take longer than proposed. The landlord has set out some of the details of the work intended in their 4 Month Notice and have provided a Hazardous Material Survey prepared by a third-party environmental assessment firm. The landlord provided testimonial evidence that they have been informed that the work will pose a significant health risk to any occupants of the building. The landlord also gave evidence that they believe that there will be a significant period of time when the rental building will be without heat, electricity or running water. The landlord submits that the nature of the work they will perform is so significant and potentially hazardous to any occupants of the rental building that it is necessary to terminate the tenancies.

I accept the landlord's evidence that they intend to perform the work as listed on the details of work accompanying the 4 Month Notices. I find, however, that there is insufficient evidence that the work contemplated requires termination of the tenancies.

The Hazardous Materials Survey submitted by the landlord identifies the types and extent of hazardous materials that may be encountered in the performance of the proposed renovations. While the report identifies some hazardous materials that may be found in the rental building, the recommendations found within the report do not specify that vacant possession of the building is required. The recommendations included in the report is that certain activities affecting the hazardous materials will require monitoring and testing. The repot is limited in scope and does not state that occupancy during the work is not possible.

The landlord gave evidence that the initial estimate for the work including hazardous material remediation to be at least 4 months with the possibility of lasting twice that time. The landlord further gave evidence that during the repair and renovation work the rental building will have periods without water, electricity or heat. I find the landlord's evidence on this point to be vague and not supported in the documentary materials. While I accept, as a general principle, that major renovations of the type contemplated by the landlord may be time consuming, I find little basis for the figure of 4 months given by the landlord.

The landlord's primary witness on the subject of the proposed work and the need to end the tenancies was their architect JB. The witness testified as to the dangerous nature of the work, the likelihood of airborne hazardous materials and the fact that some of the work would require shutting down essential services such as water and electricity. The witness characterized the possibility of allowing the tenancies to continue to be "very difficult" and "risky to accommodate". The witness also stated in their written correspondence with representatives of the municipality that "keeping tenants in the building would be very challenging". I find a plain reading of this description of the work to be more in line with a project where displacement is the more efficient option but not the only manner in which work could be done.

Furthermore, while the landlord gave some evidence about the loss of services to the rental unit, they provided little details as to the expected duration or timing of the disruption. I find that there is little documentary evidence to support the landlord's conclusion that vacant possession of the rental suites is necessary. I find that the documentary evidence of the landlord prepared by industry professionals does not articulate that the building must be vacant to carry out the proposed work. The landlord's own witness gave testimony that the continued presence of tenants would be challenging and that they would be exposed to risk but did not state that vacancy was necessary.

I accept the landlord's evidence that they have been informed that vacant possession is advisable but find insufficient evidence that it is necessary for the work to be performed. I find that the absence of clear direction from a construction industry professional or documentary evidence stating unequivocally that the rental units must be vacated that there is insufficient evidence in support of the landlord's position.

I find that there is insufficient evidence provided by the landlord to meet their burden of showing on a balance of probabilities that vacant possession of the rental units is necessary for the renovations and repairs to take place.

While I accept that the proposed work has challenges and are intrusive on the inhabitants of the rental building, I find that the evidence of the landlord, including their documentary materials and testimony of their own witness, shows that vacant possession is not necessary. Expediency and convenience is not sufficient to allow a landlord to end a tenancy for renovations and repairs. It is not enough to state that construction work will expose the building to hazardous materials and danger. Any major repair or renovation work will have its attendant risks. Therefore, I find that there is insufficient evidence to support the landlord's position that vacant possession of the rental units is necessary to conduct the proposed renovations.

Consequently, I find that the landlord has not adequately met their evidentiary onus on a balance of probabilities. As a result I find in favour of the tenants and order that the landlord's 4 Month Notices to End Tenancy for Demolition, Renovation, Repair or Conversion of Rental Unit dated October 23, 2019 cancelled and of no further force or effect.

As the tenants were successful in their application they may recover the filing fees for their application. As the tenancy is continuing, each of the successful tenants may satisfy this monetary award by making a one-time deduction of $100.00 from their next scheduled rent payment.

Conclusion

The applications for units 603 and 1001 are withdrawn.

The tenants' applications are granted. I Order that the *Four (4) Month Notices to End Tenancy* dated October 23, 2019 within this JOINER application are **cancelled and of no further force or effect.**

Each of the applicable tenants of this joiner matter, are authorized to make a one-time deduction from a future rent payment equivalent to their respective filing fee for their application of **$100.00.**

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: January 23, 2020

Residential Tenancy Branch