Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1875 YEW STREET NOMINEE LIMITED and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNETC FFT

Introduction

The tenant seeks compensation pursuant to section 51.3(1) of the *Residential Tenancy Act* (the "Act"). In addition, the tenant seeks to recover the cost of the application filing fee under section 72 of the Act.

Attending the arbitration hearing were the tenant, her counsel, and a representative for the corporate landlord. No service issues were raised, the parties (other than counsel) were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

Issue

Whether the tenant is entitled to compensation under section 51.3(1) of the Act.

Background, Evidence, and Facts

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the issues of this dispute, and to explain the decision, is reproduced. Copies of notices, tenancy agreements, and emails referred to in this decision were submitted into evidence, except where noted. It is noted that where portions of any communication are cited in this decision, the communication is reproduced as written, including any grammatical or spelling errors.

The tenancy began in May 2010 and ended on June 15, 2020 after the received a *Four Month Notice to End Tenancy for Renovation* (the "Notice to End Tenancy"). Monthly rent at the time the tenancy ended was $1,095.00. It is noted that neither party submitted a copy of the Notice to End Tenancy. However, it must be assumed that the Notice to End Tenancy was served on the tenant in February 2020.

On April 23, 2020, the tenant signed and dated a *Tenant Notice: Exercising Right of First Refusal* (the "NFR"). The NFR appears to be completed in its entirety, and indicates that, as the language in the notice is written, the tenant is "giving you [the landlord] this notice because I want the first opportunity to enter into a new tenancy agreement in respect of the following rental unit where I/we currently reside once the repairs or renovations are complete."

According to information contained on page two of the NFR the notice was served in person on the landlord. A copy of an email dated June 29, 2020 between an office administrator and the tenant confirms that the landlord received the NFR.

On December 2, 2020, there is an email from the landlord's representative T.H. to the tenant in which he writes that the landlord is "in process of offering tenants from this building their right of first refusal which needs to be finalized by dec 14, 2020." There is no immediate response to the landlord's email, so the landlord sends a follow-up email on December 9. The tenant responds, "This is the first [I] have ever heard of this. You must give me more time that this!"

The landlord replies later that same day, saying that an email was sent on December 2, and that "If you would like to come back to the building please contact me to discuss this week as we will need to get it finalized by Monday with a security deposit and signed tenancy agreement."

On December 9, 2020, the tenant was given a *45 Day Notice of Availability of an Extensively Repaired or Renovated Rental Unit* (the "first NOA"). There is no date recorded in the section of the first NOA indicating when the rental unit would be made available to rent. The first NOA was served on the tenant by email.

The tenant was also provided at the time, along with the first NOA, a *Residential Tenancy Agreement* (the "first tenancy agreement"). On page two of the first tenancy agreement the tenancy start date is indicated to be February 1, 2021. Rent was to be $2,450.00, and a security deposit in the amount of $1,225.00 would have to be paid by December 14, 2020. The first tenancy agreement was signed by the landlord's representative.

The above-noted documents were given to the tenant by email on December 9. There is then some back and forth between the parties about the rent, and about the availability of two-bedroom units.

On December 11, 2020, in an email from the landlord to the tenant, the tenant is given a second *45 Day Notice of Availability of an Extensively Repaired or Renovated Rental Unit* (the "second NOA"). On the second NOA it is indicated that the rental unit would be made available to rent on March 1, 2021.

The tenant was also given, along with the second NOA, a *Residential Tenancy Agreement* (the "second tenancy agreement"). The second tenancy agreement indicated on page two that the tenancy start date would be March 1, 2021. Rent would be $2,450.00. On page three there is but a line drawn through the box where the dollar amount of a security deposit would be recorded; no dollar amount is indicated.

The second tenancy agreement is signed by the landlord's representative and dated December 11, 2020.

The tenant later that afternoon asks the landlord to confirm that the landlord would be renting the rental unit out for $3,250.00 should the tenant forfeit her right of first refusal. On December 15 the tenant follows up on the email and the landlord responds: "If you do not accept the first right of refusal we will be asking $3250 for the unit."

On March 3, 2021, the landlord's representative emailed the tenant, and includes a tenancy agreement and an application to rent. The representative asks the tenant to complete both documents and send them to one S.G. for processing. He further states that "You will need to give her the security deposit by march 10, payable to prospero also to hold the unit."

On March 8, 2021 at 1:10 PM, the landlord's property manager sends a follow up email (regarding the email sent five days earlier on March 3) asking the tenant to "Kindly advise on when you will be able to drop off the deposit cheque and signed attached lease agreement."

An hour later the tenant emails the municipality's bylaw compliance and administration office. She asked the municipality "if the developers will require occupancy permits before their tenants move in?"

Two days later the municipality responds, and assuming that the tenant refers to the property in which the rental unit is located, stating that "I can confirm occupancy permit issuance is required prior to moving in and it will only be issued when all required permits and requirements are completed."

The tenant's correspondence with the municipality continues into April, in which she asks for updates about whether any permits had been issued. On April 27, the municipality writes, "At the moment all permit's [*sic*] still outstanding and we have no updates from contractors.

Two days later, the tenant responds to the landlord's property manager's email of March 8. She thanks the property manager for checking in and then says, "I will certainly let you know when I will be by to sign a lease agreement and deposit." (This exchange is forwarded to one T.R. on August 6, 2021, likely as internal landlord correspondence relating to this dispute.)

The tenant had a brief text message exchange on March 13 with an individual that is identified as V.F. The parties discuss an unfinished rental unit, "Suite A." There is no further information contained in the text conversation specifically referencing, or about, the rental unit that is the subject of this application.

Six weeks later, on April 19, the tenant forwards her email communication with the landlord's property manager (the last email being dated March 8, 2021) to the landlord's representative T.H. About an hour later, the landlord's representative writes to the tenant and says the following:

> Here is the last correspondence we had with you. We had arranged with you to meet our property manager to finalize that you would take the unit. As we had done on a few previous occasions beginning as far back as December 2020, we had sent you tenancy agreements that you had ignored. So far we have tried three times and sent the appropriate forms to confirm your rofr [right of first refusal]. On the last time which we have enclosed you didn't show up or call that you couldn't make it to finalize the paperwork. We had informed you that we needed the security deposit to hold the unit. On march 10 you ignored our meeting to confirm the unit for you. I am sorry but your rights to return have now been extinguished. If you have any further questions please feel free to contact myself

Twenty minutes later, the tenant answers, "Hello [T.H.], So what you are saying is that you have rented my unit to a different tenant?" The representative responds as follows:

> What I am saying is that we made repeated requests and many attempts to allow you to exercise the rofr. At no me did you sign any forms, give any damage deposit or confirm that you were going to come back by agreeing to the multiple

> tenancy agreements we sent. Our last discussion was for you to come by give a damage deposit and sign a form for tenancy, you didn't show up to that meeting and we haven't heard from you since. Your rofr was extinguished months ago as we offered you to rent the unit in April and were willing to give it to you then or in May but no response from you.

On April 26, 2021, the tenant contacts the municipality's bylaw compliance and administration office and again inquires as to whether an occupancy permit had been issued for the address of the building in which the rental unit was located. The next day, the municipality answers the tenant's email, indicating that "At the moment all permit's still outstanding and we have no updates from contractors."

There is also a *Residential Tenancy Agreement* in evidence that includes a tenancy start date of May 1, 2021 (the "third tenancy agreement"). Rent is $2,450.00 and the security deposit of $1,225.00 would have to be paid by March 10, 2021. No signatures appear on page six of the third tenancy agreement.

Tenant's Position

It is the tenant's position that they communicated their interest in exercising their right of first refusal, but that the landlord did not give them the opportunity. Second, it is the tenant's position that the rental unit would not have been ready for occupancy even if the tenant had agreed to sign the first or second tenancy agreement. The tenant added that she hesitated to put down a security deposit on a rental unit that she had not seen.

Tenant's counsel referred to the relevant sections of the Act, which will be addressed below. He noted that the landlord gave two notices of availability and three tenancy agreements, which different occupancy dates thereupon. This, counsel argued, suggests that the rental unit would not have been ready on those dates. Tenant's counsel further argued that the lack of occupancy permits from the municipality supports their position that, despite the availability or tenancy start dates on the various tenancy agreements, the rental unit would not have been ready.

Counsel argued that it is not incumbent upon a tenant to accept an offer if the rental unit is uninhabitable or otherwise ready for occupancy. It was argued that given the rental unit was not ready for occupancy, that the notice of availability was in error and thus not in compliance with the Act. The landlord's errors were, he argued, improper and in violation of the law. The landlord was thus in breach of sections 51.2 and 51.3.

Landlord's Position

It is the landlord's position that the tenant had an appointment with the landlord to attend to signing the documents. The tenant denied this. The landlord testified that the tenant expressed a need for more time, and the landlord accordingly extended the availability. They gave her the appropriate forms.

The landlord argued that the tenant never took the landlord up on the opportunity, never paid a security deposit, and never said anything other than expressing an interest in taking the rental unit, without following up. Despite the tenant's assertion that she never had an opportunity to view the rental unit, the landlord's position is that they gave her ample opportunity to do so at any time. There is, the landlord added, no evidence to support the tenant's claim that she was there on multiple times. He also discounted the third party's text communication and photographs of an unidentified rental unit being in a state of renovations and inhabitability.

It is the landlord's position that they went "over and above" what they were required to do. They fulfilled their obligations under the Act. From their perspective, the tenant's right of first refusal had expired. They gave her notices of availability and did everything they needed to, but the tenant never provided evidence that she intended to come back. Moreover, they gave the tenant more time when she asked for more time. "We tried to work with the tenant and now she's punishing us," the landlord submitted.

In respect of the availability of the rental unit, while the occupancy permits were not in place until July, the rental unit was ready for occupancy on March 1. The landlord explained that they could have completed the renovations at any time and that if the tenant had wanted to take occupancy on February 1 that "we would've made it ready." Last, the landlord explained that it is up to a landlord to say when a rental unit is ready for occupancy; it is not up to a tenant to say when it is ready. "We have met our obligations" under the Act.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

As a starting point, it is worth citing the relevant sections of the Act as they were at the time the landlord issued the notice to end tenancy.

Sections 51.2 and 51.3 of the Act (as they appeared when in force between May 30, 2020 and February 28, 2021; version at https://canlii.ca/t/54bx3) read as follows:

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.

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).

The logic of whether compensation is awarded is thus: if a tenant gave a notice under section 51.2(1), and if a landlord does not comply with section 51.2(2), then the landlord must pay the tenant compensation.

There is no dispute that the rental unit was in a residential property containing five or more rental units. Nor is there any dispute that the tenant received a notice to end tenancy under section 49(6)(b) (that is, the Notice to End Tenancy). And there is no dispute that the tenant gave a notice that she wished to exercise her right to enter into a new tenancy agreement respecting the rental unit upon completion of the renovation; this is the NFR referred to above. The tenant gave this notice on April 23, 2020, before she vacated the rental unit.

Thus, it is my finding that the tenant gave a notice under section 51.2(2) of the Act. Next, I must turn my mind to whether the landlord complied with section 51.2(2) of the Act. It is my conclusion that they complied.

In this dispute, the landlord gave the tenant a notice of the availability date of the rental unit (the first NOA) and a tenancy agreement (the first tenancy agreement) to commence “on that availability date.” The tenancy agreement included a tenancy start date indicated to be February 1, 2021, but the NOA omits any actual availability date. For this reason, it is my finding that the landlord’s first NOA and the first tenancy agreement do not fulfill the strict requirements under section 51.2(2) of the Act.

However, two days later, and purportedly because the tenant needed more time to consider her options, the landlord gave the tenant another notice of the availability date of the rental unit (the second NOA) which indicated a March 1st availability. The landlord also gave the tenant the second tenancy agreement which mirrored the March 1st date as the start of the tenancy. The second NOA and the second tenancy agreement were given on December 11, 2020, which was more than 45 days before the completion of renovations.

Given the above, it is my finding that the landlord, in giving the tenant the second NOA and the second tenancy agreement, complied with section 51.2(2) of the Act.

The issuing of the first NOA and tenancy agreement is, for all intents and purposes, moot. The issuing of the third tenancy agreement is, I find, superfluous to the landlord’s issuing of the second NOA and tenancy agreement.

I turn now to the tenant's argument that the rental unit would not have been ready for occupancy on any of the availability dates, or tenancy start dates, and that the landlord was in breach of the Act by not, in fact, being able to provide an occupancy-ready rental unit. With respect, I am not persuaded by the evidence that this was the case.

The photograph taken of an unidentified rental unit, and one taken by a third party who did not give evidence under oath at the hearing, is of little evidentiary weight. The photograph, and the third party's comments about a rental unit not being move-in ready do not persuade me to make a conclusionary jump in finding, or inferring, that the rental unit would somehow not have been ready for occupancy.

In respect of the occupancy permits for which the tenant made a few queries to the municipality, the absence of an occupancy permit does not, I conclude, lead to a finding that the rental unit would not have been ready for occupancy on February 1 or March 1. Indeed, there are untold numbers of rental units throughout the province for which no occupancy permit is ever given (either resulting in what is known as an "illegal suite" or for which such a permit is simply not required). Yet, not having an occupancy permit does not mean that a rental unit is not ready for occupancy.

Therefore, it is my finding that the landlord's lack of an occupancy permit does not lead to a conclusion that the rental unit would not have been ready for occupancy had the tenant signed a tenancy agreement.

If the tenant had entered into a tenancy agreement (pursuant to section 51.2(3) of the Act) and had the rental unit in fact turned out to not be ready for occupancy, then the tenant might have had a claim for compensation. However, the tenant's argument that the landlord was in breach of section 51.2(2) of the Act on the basis that the rental unit would not have been ready for occupancy is speculative, and I am therefore unable to find that the landlord breached the Act.

For the above-noted reasons, and in taking into careful consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the tenant has not discharged her onus of proving a claim for compensation under section 51.3(1) of the Act. Accordingly, the tenant's claim for compensation is dismissed, without leave to reapply.

Section 72 of the Act permits me to order compensation for the cost of the filing fee to a successful applicant. As the tenant did not succeed in her application, I must decline to grant any compensation to pay for the cost of the filing fee. This claim is dismissed.

Conclusion

The application is dismissed, without leave to reapply.

This decision is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal the decision is limited to grounds provided under section 79 of the Act or by way of an application for judicial review under the *Judicial Review Procedure Act,* RSBC 1996, c. 241.

Dated: February 8, 2022

Residential Tenancy Branch