Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNETC, FFT**

Introduction

This hearing was convened by way of conference call in response to the Tenants' application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act") in which the Tenants seek:

- compensation from the Landlords related to a Notice to End Tenancy for Landlord's Use of Property dated April 8, 2021 (the "2 Month Notice") pursuant to sections 51.4 and 67; and
- authorization to recover the filing fee of the Application from the Landlords pursuant to section 72.

The two Tenants ("SN" and LL"), one of the two Landlords ("MK") and the Landlords' legal counsel ("DM") appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they are not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure* ("RoP"). The parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

LL stated the Tenants served the Notice of Dispute Resolution Proceeding and their evidence ("NDRP Package") by Express Post on each of the Landlords on November 18, 2021. DM acknowledged the Landlords received the NDRP Package. I find the NDRP Package was served by the Tenants on each of the Landlords in accordance with the requirements of sections 88 and 89 of the Act.

DM stated the Landlords served their evidence on the Tenants by email and that he received a return email on April 9, 2022, confirming the Tenants received his email. LL acknowledged the Tenants received the email and the Landlords' evidence. I find the

Tenants were served with the Landlords' evidence in accordance with the provisions of section 88 of the Act.

Issues to be Decided

Are the Tenants entitled to:

- compensation from the Landlords in relation to the 2 Month Notice?
- recover the filing fee of the Application?

Background and Evidence

LL submitted into evidence copies of the tenancy agreement dated June 30, 2015 and the most recent tenancy agreement dated March 18, 2019. The tenancy commenced on August 1, 2014. The parties agreed the Tenants were paying rent of $2,444.00 on the 1st day of each month at the time the tenancy ended.

The parties agreed the former landlord served the 2 Month Notice on the Tenants' door on May 19, 2021. The effective date of the 2 Month Notice was August 1, 2021. The parties agreed the Tenants vacated the rental unit on July 31, 2021.

MK testified the rental property consisted of approximately 2 ½ acres of land ("Property") on which the rental unit, built in the 1960s, was situated. The rental unit was two levels and was built on a sloping lot on which the lower floor had a walk-out to ground level. MK stated that, at the time the Landlords viewed the rental unit, there was a lot of sensitivity to COVID-19 and, as a result, the Landlords only had about 20 minutes to view the rental unit before. MK stated the Landlords decided to purchase it. MK submitted into evidence a copy of the purchase and sale agreement ("Agreement") between the former owner and the Landlords. The completion and possession date of the Agreement was September 1, 2021. MK stated the Agreement provided the Landlords could view the rental unit two occasions before completion of the purchase and sale. MK stated the Landlords went to view the rental unit with a representative of a construction company ("OBC"). MK stated the Landlords were planning to renovate the kitchen and recarpet the rental unit. MK stated that on closer examination, the Landlords found water stains on the wood panelling and OBC found mould on the lower floor.

MK stated that, after the site visit, the Landlords decided to commission the preparation of a report by an environmental group to locate and identify hazardous materials in the rental unit. The Landlord submitted a copy of the hazardous material survey report

("Survey Report") dated August 11, 2021. The Survey Report states the site investigation was conducted on August 3, 2021. MK stated the Landlords were very concerned regarding the levels of asbestos and lead disclosed in the Survey Report. MK stated the Landlords consulted with OBC and were advised that remediation would be very extensive. MK also submitted a subsequent report ("Subsequent Report") from AEG dated October 7, 2021 which served as an assessment of the conditional pre-demolition asbestos abatement of the rental unit. MK stated the Subsequent Report was submitted to the municipality in support of an application for a demolition permit. MK submitted into evidence copies of the Survey Report and Subsequent Report.

MK stated that, when the Landlords purchased the property, it was their intention in good faith to occupy the rental unit, However, MK stated, as a result of the findings in the Survey Report, their circumstances had changed and the Landlords decided to demolish the rental unit and rebuild. MK stated the rental unit was demolished in November 2021. MK stated the permits to build a replacement residence on the property were obtained and construction of the new house has commenced.

When I asked, MK admitted the Landlords did not consult with legal counsel to obtain advice on the potential consequences if the Landlords did not accomplish, within a reasonable period of time, the stated purpose for ending the tenancy. DM submitted I should excuse the Landlords from paying compensation to the Tenants on the basis that extenuating circumstances prevented the Landlords from accomplishing the stated purpose.

LL testified the Survey Report stated the asbestos and other hazardous materials were not an issue if those materials were not disturbed. LL stated the Tenants lived in the rental unit for 7 ½ years. LL stated the Tenants were unable to locate suitable accommodations within the two-month period they had after they were served with the 2 Month Notice. LL stated that they are living in temporary accommodations, while their furniture remains in storage, because they have not found alternative housing. LL stated that, although the former landlord replaced the windows in the rental unit, it was obvious the rental unit required extensive modifications. LL submitted the Landlords were not acting in good faith when they requested the former landlord serve the 2 Month Notice on the Tenants and that they do not believe there are extenuating circumstances that would excuse the Landlords from paying them compensation for not moving into the rental unit. LL submitted the Landlords should have purchased the rental unit and then given the Tenants a 4 Month Notice to demolish the house.

Analysis

Rule 6.6 of the *Residential Tenancy Brule of Procedure* states 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 Tenants seek $29,328.00 in compensation pursuant to section 51(2) of the Act based on their assertion the Landlord failed to use the rental unit for the stated purpose in the 2 Month Notice. The 2 Month Notice was issued pursuant to section 49(3) of the Act which states:

> (3) A landlord who is an individual may end a tenancy in respect of a rental unit ifthe landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

Subsections 51(2) and 51(3) of the Act state:

> 51(2) Subject to subsection (3), the landlord…must pay the tenant…an amount thatis the equivalent of 12 times the monthly rent payable under the tenancy agreement *if the landlord…does not establish that*
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> (a) the stated purpose for ending the tenancy was accomplished within areasonable period after the effective date of the notice, and
> (b) the rental unit, except in respect of the purpose specified in section 49(6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date ofthe notice.
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> (3) The director may excuse the landlord…from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord…from
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> (a) accomplishing, within a reasonable period after the effective date of thenotice, the stated purpose for ending the tenancy, and
>
> (b) using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration,beginning within a reasonable period after the effective date of the notice.

[emphasis in italics added]

Pursuant to rule 6.6 of the Rules, the standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed. When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the standard of proof. In these circumstances, subsection 51(2) of the Act requires the Landlord establish the rental unit has been used by the Landlords for at least 6 months' duration, beginning within a reasonable period after the effective date of the 2 Month Notice. The effective date of the 2 Month Notice was August 1, 2021. The parties agreed the Tenants moved out of the rental unit on July 31, 2021. The parties agreed the Landlords demolished the rental unit in November 2021.

MK stated the rental unit was built in the 1960s. MK stated that it was not evident to the Landlords, at the time of purchase, that there were hazardous materials in the rental unit. MK stated that, when they viewed the rental unit in August with OBC, they were contemplating renovating the kitchen and replacing the carpets. MK stated that, after viewing the rental unit with OBC, the Landlords decided to have the Survey Report prepared. MK stated the Survey Report indicated high levels of asbestos and lead. DM stated the Landlords were also concerned about the mould discovered by OBC in the lower level of the rental unit. DM stated that, as a result of this new information, the Landlords decided to demolish the rental unit and rebuilt a new house rather than incur the expense of remediating the hazardous materials. DM submitted that, as a result of the discovery of hazardous materials in the home, they landlords should be excused from paying compensation to the Tenants pursuant to section 51(3) on the basis of extenuating circumstances.

I have reviewed the Survey Report and Subsequent Report. The first paragraph of the Survey Report states:

> [AEG] has completed a *pre-demolition survey of the rental unit* located at [civic address of rental unit]. The purpose of this survey was to document the presence of hazardous materials, including asbestos, silica, hantavirus, lead, or other heavy metal or toxic, flammable or explosive materials that may be handled, disturbed or removed throughout the building *for the purpose of future demolition*, as required per WorkSafeBC OHS Regulation Part 20.
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> [emphasis in italics added]

The Survey Report does indicate the presence of elevated asbestos and lead based pain. Under the heading “Asbestos” on page 2 of the Survey Report, it states a total of 24 bulk samples suspected of containing asbestos were collected and analyzed in a testing laboratory. A table then provides a summary of asbestos containing materials (“ACM”) by location in the rental unit. A note appears after the table which states:

> *The ACM materials listed above are in good condition and are not considered hazardous in their current state. The client may wish to leave these materials in place.* It is only if these materials will be disturbed by renovation, demolition or similar actions which can cause the asbestos fibers to become airborne where there is a concern for health and safety.
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> [emphasis in italics added]

Under the heading “Lead Paint” on page 5 of the Survey Report, it is stated that “a total of two (2) paint samples suspected of containing lead were collected by scraping the indicated surfaces. The first same taken from interior walls and trim of the rental unit had 0.063 percentage by weight of lead and the exterior siding and trim of the rental unit had 2.1 percentage by weight of lead. The Report states that, in Canada under the Hazardous Products Act, a paint or similar material that dries to a solid film and contains greater than 90 mg/kg or 0.009% dry weight of lead is considered to be a lead-containing surfacing coating material.

The Survey Report stated that both of the paint samples contain enough lead to be considered lead-based surface coatings. The Survey Report states:

> Most rental units and buildings built before 1950 have had lead-based paint applied to the interior or exterior surfaces. In most cases, lead paint of this era contained up to 40% lead by weight. *Paints made between 1950 and 1978 typically contained smaller quantities of lead.*
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> [emphasis in italics added]

The 2 Month Notice stated the Landlords (as purchasers at the time of service) intended in good faith to occupy the rental unit. Section 51(3)(b) states the Landlords must pay the Tenants compensation that is equivalent to 12 months rent if the Landlords to not use the rental unit for the purpose stated in the 2 Month Notice. The parties agreed that Landlords did not occupy the rental unit.

Residential Tenancy Policy Guideline 50 ("PG 50") addresses the requirements for a landlord to pay compensation to a tenant under the Act when a landlord or purchaser, as applicable, has not accomplished the stated purpose for ending the tenancy within a reasonable period or fails to use the rental unit for the purpose for which the notice was given. Part E of PG 50 addresses when a landlord may be excused from paying compensation in extenuating circumstances and it states:

> **E. EXTENUATING CIRCUMSTANCES**
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> An arbitrator may excuse a landlord from paying additional compensation if there were extenuating circumstances that stopped the landlord from accomplishing the stated purpose within a reasonable period, from using the rental unit for at least 6 months, or from complying with the right of first refusal requirements. *These are circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically because of matters that could not be anticipated or were outside a reasonable owner's control.* Some examples are:
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> - A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies one month after moving in.
> - A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
> - A tenant exercised their right of first refusal, but did not notify the landlord of a further change of address after they moved out so they did not receive the notice and new tenancy agreement. The following are probably not extenuating circumstances:
> - A landlord ends a tenancy to occupy the rental unit and then changes their mind.
> - A landlord ends a tenancy to renovate the rental unit but did not adequately budget for the renovations and cannot complete them because they run out of funds.
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> [emphasis in italics added]

The Landlords submit they should be excused from paying compensation to the Tenants pursuant to section 5(3) because the discovery of hazardous materials in the rental unit was an extenuating circumstance. I disagree. The fallacy of the Landlords' argument is they purchased a rental unit built in the 1960s and, as such. they knew or ought to have known there was potential for the rental unit to contain asbestos and

other hazardous materials. MK stated it was the Landlords' original intention to recarpet the rental unit and to remodel the kitchen. It would have been reasonable to have an assessment performed on the areas of the rental unit MK stated the Landlords intended to remodel, namely the carpeting and kitchen. However, instead of a limited survey, the Landlords engaged AEC to perform a "pre-demolition survey" on the rental unit. The samplings were taken by AEC merely three days after the Tenants vacated the rental unit. Furthermore, it should come as no surprise to the Landlords that a hazardous materials survey performed on a home built in the 1960s would report there were elevated levels of hazardous materials.

The issue I must address to determine if the Landlords are excused from paying compensation is whether the hazardous materials identified in the Survey Report prevented the Landlords from occupying the rental unit for six months within a reasonable period of time after the effective date of the 2 Month Notice. The Survey Report stated the "materials identified in the report are in good condition and are not considered hazardous in their current state" and that the client "may wish to leave these materials in place.". The rental unit was occupied by the Tenant since August 2014, being 7 ½ years. In the present case, I find the presence of elevated levels of hazardous materials in the rental unit should have been anticipated by the Landlords. In addition, nowhere in the Survey Report was it stated that the rental unit should not be occupied as a residence as a result of the elevated levels of hazardous materials identified in the Survey Report. As such, it was within the control of the Landlords to decide to whether they would (i) never occupy the rental unit and have it demolished and assume the potential liability they may be required to pay the Tenants the equivalent of 12 months' rent; or (ii) move into the rental unit within a reasonable period of time, occupy it for a minimum of six months and then move out so that the rental unit could be demolished. I find there was nothing that prevented the Landlords from accomplishing the purpose stated in the 2 Month Notice. I find it was a personal choice of the Landlords not to move into the rental unit and to have it demolished instead so as to enable them to build a new residence.

Based o the foregoing, I find that there were no extenuating circumstances under section 51(3)(a) that prevented the Landlords from accomplishing the purpose stated in the 2 Month Notice, namely to use the rental unit for at least six months duration, beginning within a reasonable period after the effective date of the 2 Month Notice. Based on the above, I Order the Landlords to pay the Tenants compensation equivalent to 12 times the monthly rent of $2,444.00, being $29,328.00.

As the Tenants have been successful in the Application, I order the Landlords to pay the Tenants $100.00 for reimbursement of their filing fee for the Application pursuant to section 72 of the Act.

Conclusion

I Tenants are granted a Monetary Order for $29,528.00 calculated as follows:

Item	Amount
Compensation equal to 12 Months' Rent at $1,1444.00 per month	$29,328.00
Reimbursement of Filing Fee for Application	$100.00
TOTAL	**$29, 428.00**

The Tenants are provided with this Order on the above terms and the Landlords must be served with this Order as soon as possible. Should the Landlords fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court as an Order of that Court.

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: May 14, 2022

Residential Tenancy Branch