Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNETC, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- a monetary order for $24,000 representing 12 times the amount of monthly rent, pursuant to sections 51(2) and 62 of the Act; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

All parties attended the hearing. The landlords were represented by counsel ("**RP**") and were assisted by their realtor ("**MM**") and their daughter ("**JM**"). RP inadvertently double-booked herself and was also scheduled to appear in court at the same time as the hearing. She obtained a brief adjournment of the court proceeding to attend this hearing but was not able to stay on the line for the duration. The landlords did not seek an adjournment of this hearing.

This matter was reconvened from a prior hearing on August 29, 2022. I issued an interim decision setting out the reasons for the adjournment that same date (the "**Interim Decision**"). This decision should be read in conjunction with Interim Decision.

In the Interim Decision I made several orders regarding procedural matters, including:

1) no later than **September 5, 2022,** the tenants must serve the landlords (via RP's email listed on the cover of this decision) copies of all documents previously uploaded to the RTB evidence portal (including the photographs and documents uploaded two days prior to the hearing);
2) no later than **September 16, 2022**, the landlords may serve the RTB and the tenants (via CS's email listed on the cover of this decision) any new documentary evidence not previously served on the tenants or provided to the RTB that the landlords intend to rely on at the reconvened hearing;

[emphasis original]

I also made these orders orally at the August hearing.

The tenants submitted and served their evidence in accordance with the Interim Decision.

The landlords did not. RP sent CS additional evidence (an affidavit of landlord CM) on September 19, 2022. Despite the late service, the tenants stated that they had sufficient time to review the affidavit.

RP stated that she did not receive a copy of the Interim Decision so she could not confirm the terms of the order I made orally at the hearing. Additionally, she stated that she was confused by Rule of Procedure 3.15, which requires that a respondent serve its documents “as soon as possible” and “not less than seven days before the hearing”.

Rule 3.15 applies to initial hearings, and not reconvened hearings, for which the ability for parties to submit new evidence is entirely at the presiding arbitrator’s discretion (see Rule 3.19).

At this hearing, I confirmed that the RTB sent RP a copy of the Interim Decision to the email address she provided. I cannot say why she did not receive it. I am troubled that RP did not make inquiries of the RTB about the whereabouts of the Interim Decision that she knew to expect, especially in light of the fact that she knew it would contain orders that her clients were required to follow. I do not find that her failure to have received the Interim Decision to be a reasonable excuse for submitting her client’s evidence late. She heard my verbal order at the August hearing, and she could have contacted the RTB seeking a copy of the Interim Decision.

Despite this, as the tenants have had sufficient time to review the affidavit, I will admit it into evidence. However, in recognition of the fact the landlords failed to comply with my order, I advised the parties at the hearing that, regardless of the outcome of the hearing, I would be ordering that landlords reimburse the tenants their filing fee pursuant to section 72 of the Act. However, as the tenants have been successful in their application (for the reasons set out below), which entitles them to the return of the filing fee in the usual course, this order is now moot.

Issues to be Decided

Are the tenants entitled to:

1) a monetary order for $24,000; and
2) authorization to recover the filing fee for this application from the landlords?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties’ claims and my findings are set out below.

The rental unit is a single detached house built in 1974 (according the the MLS listing entered into evidence). The tenants and the prior owner of the rental unit entered into a

written tenancy agreement starting May 15, 2016. Monthly rent was $2,000 per month. The tenant paid the prior owner a security deposit of $1,000. On April 28, 2022, the prior owners entered into a contract of purchase and sale with the respondent landlords. They would take possession of the rental unit on July 31, 2021.

On April 29, 2022, the landlords gave the prior owner written notice that they would occupy the rental unit and requested the prior owner to give the tenants written notice to vacate.

On April 30, 2021, the prior owner served the tenants with a Two Month Notice to End Tenancy (the "**Notice**") listing the reason for ending the tenancy as:

> All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this notice because the purchaser or close family member intends in good faith to occupy the rental unit.

The Notice specified an effective date of June 30, 2021. The tenants vacated the rental unit on that date.

The landlords never took up residence in the rental unit.

In his affidavit, landlord CM stated that the listing for the rental unit did not include photographs of the inside of the house, as the tenants did not allow a photographer or realtor to do a walkthrough. He also wrote that neither his, nor the prior owners, realtors were able to make an appointment to conduct a walkthrough of the rental unit and that no pictures of the interior of the rental unit were made available. He wrote that nothing was shared with the landlords or posted on the listing other than an exterior shot of the front of the house.

Despite this, the landlords purchased the rental unit. CM wrote that after the landlords took possession of the rental unit, they entered it and found that the tenants left it in an "unlivable" condition. He wrote that it needed major renovation.

Before undertaking these renovations, the landlords commissioned a "pre occupancy and asbestos report". CM wrote that this report was provided to them on July 25, 2021. The landlords entered a copy of Renovation Hazardous Material Inspection report (the "**Inspection Report**") dated July 16, 2022 into evidence. I am unsure if this is the report to which CM was referring in his affidavit.

In the Inspection Report, the inspector indicated they had taken 24 samples from throughout the rental unit and wrote:

> The following areas in the house were found to contain asbestos:
> 1. Top floor drywall joint compound only
> 2. All ceiling texture

3. Mastic along chimney flashing is assumed to contain asbestos
4. Although the insulation in the attic was found to be fiberglass, if any vermiculite insulation is found in hidden areas of the attic it is the sole responsibility of the owner slash contractor to stop work and consult [the inspector] with the findings.
5. Although no asbestos taping was found on furnace or the furnace duct joints during the survey, during drywall removal if any asbestos taping is found on the furnace or the furnace duct joints it must be assumed to contain asbestos.
6. During inspection no cast iron bell and spigot was observed but during drywall removal if this spigot is observed the joint gasket must be assumed to contain asbestos, unless proven otherwise.

The inspection report recommended "during the removal of the contaminated material, moderate slash high risk asbestos safe work procedures must be followed as per under compliance with the WorksafeBC Occupational Health & Safety Regulation."

The inspection report contained photographs of the rental unit. These photographs show a rental unit empty of furniture and mostly clean. There is some discoloration on the floor and floorboards.

CM wrote that the landlords' son has respiratory issues and the presence of asbestos was a major concern to the landlords. The landlords obtained two quotes to remediate the asbestos and to undertake significant renovations in the rental unit. The scope of work on the quotes included: asbestos cleanup; drywall; framing; plumbing; rough in; fixtures; electrical rewiring; security system installation; insulation; flooring; ceramic flooring and shower walls; cabinets; lighting fixtures; staircasing guardrail; baseboard; casing; molding; and painting. The first quote was for $299,250 and the second one was for $341,250.

The quotes did not provider a breakdown of the costs of each of the items in the scope of work. At the hearing, landlord CM estimated that it would cost roughly $12,000 to remove the asbestos, but that additional costs would need to be incurred to repair the damage caused by the remediation and to replace elements of the rental unit that were removed. The landlords stated that the remediation of the asbestos would "open a whole can of worms".

At the hearing, the landlords also characterized the rental unit as "unlivable" and that it was "very dirty", that "everything was broken" and needed to be fixed. They also claimed that the rental unit had a bad smell. The landlords did not submit any evidence to corroborate these claims.

The landlord started that they did their due diligence *after* acquiring the property, and that this led them to conclude that they could not live in the rental unit. They testified that the cost of the renovation and asbestos remediation was more than they budgeted for. Accordingly, they decided the course of action that made the most sense for them

would be to demolish the rental unit and build a new house. They applied for demolition permits in October 2021. The rental unit has now been torn down and a new, larger house is under construction of the residential property.

The landlords argued that the tenants denied them, their realtor, or the prior owner of the rental unit access to the rental unit prior to their purchasing it. As such, the landlords say they were denied the ability to discover the true condition of the rental unit before purchasing it and that they could not have determined that they would not have been able to reside in it prior to purchasing the rental unit.

The tenants denied that they prevent the landlords from inspecting the rental unit. They testified that the prior owner advised them in March 2020 that the rental unit would be sold. On April 14, 2020 the prior owner scheduled viewings of the rental unit which went ahead. These viewings did not include the landlords. They testified that prior owner's realtor and all the perspective purchasers did not follow the COVID-19 protocols when conducting the viewing. Accordingly, they testified that they had to re sanitize the entire rental unit following the viewings.

The tenants submitted a text message chain dated April 27, 2021.It shows that the tenants received request from the prior owner's realtor at 9:13 pm for a viewing the following day at 2:00 PM (this was the landlords' request for a viewing). Tenant CZ replied to the prior owner's realtor that they would need more notice and offered the day after as an option. The realtor replied "OK can they look outside only today?" The tenants testified that they agreed that they could look outside.

The tenants testified that no viewing of the inside of the rental unit was requested or scheduled for April 29, 2021. They stated that they were adhering to their rights under the Act which granted them 24 hours notice of entry.

The tenants denied that they left the rental unit in poor condition, or that it smelled. They testified that in the first week of May, shortly after the landlords purchased the rental unit, surveyors attended the residential property. The tenants were not sure of the reason for this. They speculated that the survey was done in anticipation of the landlords tearing down the rental unit and building a new house. The landlords testified that the surveyor attended the property in order to determine the lot size, as the lot had not been professionally measured before, to the prior owner's knowledge.

The tenants argued that the landlords could reasonably have anticipated that the house contained asbestos as it was built during a time when asbestos usage in residential construction was common (the 1970s).

Analysis

Sections 51(2) and (3) of the Act govern this application. They state:

Tenant's compensation: section 49 notice

51(2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord or purchaser, as applicable, does not establish that

(a) the stated purpose for ending the tenancy was accomplished within a reasonable 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 of the notice.

(3) The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as applicable, from

(a) accomplishing, within a reasonable period after the effective date of the notice, 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.

In this case, the landlords do not dispute that they have not used the rental unit in the manner specified on the Notice. Rather, they argue that extenuating circumstances exist which prevented them from using the rental unit for that purpose.

Residential Tenancy Branch (the "**RTB**") Policy Guideline 50 considers "extenuating circumstances". It states:

G. EXTENUATING CIRCUMSTANCES

The director may excuse a landlord from paying additional compensation if there were extenuating circumstances that prevented the landlord from accomplishing the stated purpose for ending a tenancy within a reasonable period after the tenancy ended, from using the rental unit for the stated purpose for at least 6 months, or from complying with the right of first refusal requirement.

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:

- 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.
> • A landlord entered into a fixed term tenancy agreement before section 51.1 and amendments to the Residential Tenancy Regulation came into force and, at the time they entered into the fixed term tenancy agreement, they had only intended to occupy the rental unit for 3 months and they do occupy it for this period of time.
>
> 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.
> • A landlord entered into a fixed term tenancy agreement before section 51.1 came into force and they never intended, in good faith, to occupy the rental unit because they did not believe there would be financial consequences for doing so.
>
> [emphasis added]

As such, the landlords bear the onus to prove that the circumstances which caused them to be unable to move into the rental unit were beyond their reasonable control or could not have been anticipated. Based on the evidence presented, I cannot conclude that the circumstances meet this standard.

I must first note that I am not satisfied that the landlords were prevented from inspecting the rental unit prior to purchasing it. Based on the text messages submitted into evidence, it is clear that their initial request was refused, but this refusal did not amount to an outright denial. The tenants proposed an alternate date for a viewing, and the landlords failed to avail themselves of this opportunity. The proceeded to enter into the contract of purchase and sale the next day.

In any event, even if the tenants had prevented the landlords from viewing the property, I would not find that this amounts to an extenuating circumstance. The landlords were not forced to purchase the rental unit. They could have chosen not to purchase it on the basis that they did not have an opportunity to see its interior.

In *Mawani v Dobbs*, 2022 BCSC 185, the court judicially reviewed a decision of an arbitrator of the RTB awarding the tenants $46,740 representing 12 months' rent, as a result of the Mawanis (the landlords) giving the tenants a two months' notice to end the tenancy indicating they would move into the rental unit, and then declining to do so.

In *Mawani*, prior to purchasing the rental unit, the landlords had asked the listing realtor multiple times to view the inside of the unit, but the Tenants were adamant that they

would not grant access to the home in order to protect themselves from COVID-19. The Mawanis only had access to view the home from the outside. They stated that out of respect for the Tenants, they abided their wishes and only viewed the outside of the home. They purchased the rental unit and asked the seller to issue a two month notice to end tenancy. The tenants vacated the rental unit. After the landlords took possession of the rental unit they discovered it was “not what [they] had hoped for” and chose not to occupy it.

The presiding arbitrator found that this did not amount to an extenuating circumstance. The court upheld this finding, stating:

> [47] I do not find any patent unreasonableness in the Decision and the conclusion that no extenuating circumstances were established. The arbitrator addressed the central issue and concern of the Mawanis. There was evidence before the arbitrator that the Mawanis chose to purchase the Premises not only without having seen the inside of the home, but that they also chose to give notice to the Tenants for the stated purpose that they or a close family member were going to reside on the Premises, knowing that they had not been able to see the inside of the home. The arbitrator referred to Guideline 50, which gives examples of circumstances that may or may not be extenuating. The arbitrator’s reasoning is consistent with that guideline. While the pandemic was not something within the control of the Mawanis, as pointed out in the Decision, what they chose to do in the face of it was. The Decision is consistent with the objective of the RTA and specifically s. 51 which is to protect tenants, and prevent landlords from terminating a tenancy except in certain circumstances. I am unable to see any patently unreasonable application of that Guideline or s. 51 of the RTA. The rationale of the arbitrator was transparent, clear and reasonable.

The facts of the present case are similar to those in *Mawani.* In both, the landlords purchased the rental unit without seeing the interior, had the seller evict the tenants, and then declined to move into the rental unit after gaining access to the interior.

In the present case, the landlords go beyond stating the reason for not moving was simply because the interior was not what they hoped for. Rather, they argued that the condition of the interior and the presence of asbestos in the rental unit caused them to change their mind about residing in the rental unit and should be considered extenuating circumstances.

I must first note that beyond their testimony and CM’s sworn affidavit, the landlords have provided little evidence as to the condition of the rental unit once they took possession of it. What little they have provided (the photographs attached to the asbestos report) show the rental unit to be reasonably clean and undamaged. Their unsupported assertions, on their own, are sufficient to prove it is more likely than not that the rental unit was in an “unlivable” condition.

In any event, even if the rental unit was in such a condition, I do not find that this would constitute an extenuating circumstance. The purpose of viewing the interior of a property a person is considering buying is, at least in part, to assess the property's condition. Therefore, I find that a reasonable purchaser having not conducted a viewing of the interior of the building they were buying could have reasonably anticipated that the condition of the interior might not suitable for living.

Accordingly, I find that the purported condition of the rental unit does not amount to an extenuating circumstance that would absolve the landlords of their obligation to use the rental unit for the stated purpose on the Notice.

Additionally, I do not find the presence of asbestos in the rental unit to be an extenuating circumstance. It is common knowledge that building materials of the era the rental unit was constructed in often contain asbestos. Given the landlords' son's medical issues, I would have expected the landlords especially aware of the possibility of airborne health risks such as asbestos. Accordingly, I find that a reasonable purchase could have anticipated that the rental unit might have contained asbestos and acted accordingly.

As the neither the presence of asbestos nor the alleged condition of the rental unit amount to "extenuating circumstances", it is not necessary for me to determine what portion of the quotes submitted into evidence related to fixing these issues and which portions related more general renovations. However, based on the evidence before me, I do not find it likely that the entirety or even the majority of either of the quotes related to remediating the asbestos or to bringing the rental unit up to minimal living standards.

Policy Guideline 50 considers whether a budget overrun for renovation amounts to an extenuating circumstance. It states that a failure to properly budget for renovations, causing the renovations to be left incomplete is not an extenuating circumstance. I find that the if the cost of renovations (the need for which could have been reasonably anticipated) exceeded what was budgeted, and a landlord determines that renovations no longer make financial sense, and the landlord elects not to use the rental unit for the stated purpose, these circumstances could not be considered "extenuating".

In brief, the landlords reasonably ought to have known that asbestos could be present in the rental unit and, by failing to inspect the interior of the rental unit prior to purchasing it, they reasonably ought to have known that they assumed additional risk as to the condition of the interior. As such, the presence of asbestos in the rental unit and the condition of the rental unit and the associated cost to remediate them are not "extenuating circumstances".

As such, I find that the landlords cannot rely on section 51(3) of the Act to avoid paying the penalty set out in section 52(2) of the Act.

Accordingly, as the landlords failed to use the rental unit for the purpose stated on the Notice within a reasonable period of time after the effective date of the Notice, or at all, they must pay the tenants an amount equal to 12 times the tenants' monthly rent. I therefore order the landlords to pay the tenants $24,000.

Pursuant to section 72(1) of the Act, as the tenants have been successful in the application, they may recover the filing fee from the landlords.

Conclusion

I grant the tenants' application.

Pursuant to sections 62 and 72 of the Act, I order that the landlords pay the tenants $24,100, representing the repayment of the filing fee plus an amount equal to 12 time the monthly rent.

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 28, 2022

Residential Tenancy Branch