Dispute Resolution Services
Residential Tenancy Branch
Ministry of Housing and Municipal Affairs

DECISION

Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution under the *Residential Tenancy Act* (the Act) for:

- An order requiring the Landlord to comply with the Act, regulation or tenancy agreement under section 62 of the Act
- Authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

This hearing also dealt with the Tenant's second Application for Dispute Resolution under the *Residential Tenancy Act* (the Act) for:

- Cancellation of the Landlord's One Month Notice to End Tenancy for Cause (One Month Notice) under section 47 of the Act
- An order requiring the Landlord to comply with the Act, regulation or tenancy agreement under section 62 of the Act
- Authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

The application was previously set for facilitation and then it was adjourned for an arbitration hearing. The RTB served the Proceeding Package on both parties.

Service of Evidence

Based on the submissions before me, I find that the Tenant's evidence was served to the Landlord in accordance with section 88 of the Act.

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Preliminary Issue

The following issue is dismissed with leave to reapply from the application of the Tenant:

- An order requiring the Landlord to comply with the Act, regulation or tenancy agreement under section 62 of the Act

Residential Tenancy Branch Rules of Procedure, Rule 6.2, states that if, in the course of the dispute resolution proceeding the Arbitrator determines that it is appropriate to do so, the Arbitrator may sever or dismiss the unrelated disputes contained in a single application with or without leave to apply. The Tenant advised that they are not ready to address the 2nd application to have the Landlord comply with the Act. The Landlord also argued the 2nd application is not related to the main issue of frustration and the One Month Notice for Cause.

Aside from the application to cancel the Notice to End Tenancy and the 1st application to have the Landlord comply with the Act, Regulation and/or tenancy agreement, I am exercising my discretion to dismiss the issue identified in the Tenant's application with leave to reapply as these matters are not related. Leave to reapply is not an extension of any applicable time limit.

Issues to be Decided

Should the Landlord's One Month Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?

Is the Tenant entitled to an order requiring the Landlord to comply with the Act, regulation or tenancy agreement?

Is the Tenant entitled to a Monetary Order for damage or loss under the Act, regulation or tenancy agreement?

is the Tenant entitled to recover the filing fee for these applications from the Landlord?

Background and Evidence

I have reviewed all evidence, including the testimony of the parties, but will refer only to what I find relevant for my decision.

Evidence was provided showing that this tenancy began May 24, 2024, with a monthly rent of $1,700.00, due on the first of the month, with a security deposit of $900.00 and a pet damage deposit of $900.00.

The Landlord served a One Month Notice for Cause on September 24, 2024, and selected the rental unit must be vacated to comply with a government order (the One Month Notice). The Tenant applied to have the Landlord comply with the Act, regulation and/or tenancy agreement, and then applied to dispute the One Month Notice.

Background

The Landlord purchased the property, which was previously a motel, around April 2024 with the intention to develop the property into a mixed residential and commercial development. The previous owners discontinued use as a motel prior to the completion of the sale and the Landlord decided to operate the property for residential tenancy purposes until the redevelopment process began. The Landlord applied to the Town of Sydney (the Town) for a Business License around May 2024.

The Landlord entered into a tenancy agreement with the Tenant on the basis that the tenancy would last around a year, but could end earlier upon 30 day notice, when the development was ready to proceed.

The Town issued a letter to the Landlord on July 2, 2024 (July 2nd Letter). A copy of the July 2nd Letter was submitted into evidence. The Landlord's counsel S.M. (the Landlord's Counsel) advised the July 2nd Letter required the Landlord make substantive upgrades to the property, involving applications for a zoning amendment, an official community plan amendment and permits before they could operate for residential tenancy purposes. On July 10, 2024, the Town conducted an inspection and posted a Do Not Occupy notice on the property (the DNO Notice). A copy of the DNO Notice was provided as evidence.

The DNO Notice stated "The occupancy of these premises is hereby prohibited under the provisions of the Building Regulations 2016, Business License 2119 Bylaws. Reason: Building Bylaw 2016 Section 6.3.1 No Occupancy permit issued. Any persons occupying or permitting occupancy of these premises is subject to penalties and fines as provided under Municipal Bylaws". Additionally, the Landlord's Agent advised they also received an email from the Town on July 10, 2024, which stated, "the building on the property be vacated immediately" and outlined an option for the Landlord to apply for a new business license to operate for motel use again. The Town provided another email on August 8, 2024, clarifying that the DNO Notice was posted because of "clear evidence of long term residential rentals on the property without a valid Occupancy Permit".

The Landlord's Agent advised they decided to change status to motel occupancy as this would allow tenants to become motel occupants and remain until the development process began.

The Landlord sought further clarification from the Town on what was required to have the DNO Notice removed and operate as a motel. Counsel for the Town sent an email on August 12, 2024, advising the Landlord to provide a redacted tenancy agreement with a letter confirming the tenancy agreements were terminated due to frustration.

The Landlord advised they provided the Tenant with a letter on August 13, 2024, that the tenancy was ending due to frustration but that the Tenant could continue living at the property as a motel guest. The Landlord's Agent advised another letter was sent

August 22, 2024 and August 31, 2024. Copies of those letters were provided as evidence.

The Landlord's Agent advised they sent a redacted tenancy agreement and notice of frustration to the Town and on August 14, 2024, the Town advised the Landlord "the Do Not Occupy Notice will be revoked today, as there are no longer any long-term occupancies on the property". The Landlord's Agent argued they were proceeding on the understanding that all the long term tenancies were ending as the Tenant had not communicated otherwise.

The Landlord's Agent advised they did not get a response from the Tenant until August 31, 2024, then the Landlord became the Tenant was enforcing their tenancy agreement.

The Landlord's Agent then advised on September 6, 2024, the Landlord received a letter from the Town referencing an advertisement found on a website offering rooms at a monthly rent and reiterated that "residential use is prohibited" (the Cease and Desist Letter). The Cease and Desist Letter stated "your client must immediately cease using the Property for residential use. If such use continues or resumes at any time in the future, we will seek instructions to enforce the Zoning Bylaw". A copy of the Cease and Desist Letter was provided as evidence. The Landlord then issued the One Month Notice on the Tenant.

One Month Notice

The Landlord's position is that the Landlord has received 2 orders from the Town. The 1st order was the DNO Notice issued on July 10, 2024, along with the subsequent correspondence with the Town. The Landlord argued the DNO Notice was only conditionally revoked by the Town on the premise that there were no more residential tenancies.

The 2nd order is the Cease and Desist Letter issued September 6, 2024.

The Landlord's Counsel argued that while it does not say order, BC Supreme Court decisions have found that it is the nature and effect that is considered when determining what qualifies as an order. The Landlord's Counsel pointed to *Allan v Connellan,* 1997 CanLII 2000 (BCSC), where an arbitrator found that a letter issued by the Town that the landlord was in violation of a zoning bylaw and had to remove the tenant's manufactured home from the property constituted an order and the BC Supreme Court and BC Court of Appeal upheld the arbitrators interpretation that the letter constituted an order under the Act. The court went on to state that the interpretation of the review panel that that letter did not constitute an order was patently unreasonably as it would require a landlord to ignore a lawful demand.

The Landlord's Counsel argued a similar interpretation should apply to the Cease and Desist Letter. The Landlord's Counsel argued the Cease and Desist Letter is an order from the Town to stop all residential tenancies and to find that it is not an order would

put the Landlord in a situation where the Landlord would be in breach of a lawful requirement and have to defend it, which is not an obligation of the Landlord under the Act.

The Tenant's position is that the One Month Notice is not valid because it was issued after the Tenant filed their dispute and it has the incorrect city and postal code on it. Additionally, the Tenant argued the DNO Notice was posted because of the use of hot plates and not because of the residential tenancies.

Comply

The Tenant's position is that tenancy agreement was not frustrated as the rental unit can still be occupied. The Tenant also argued the frustration was the result of the Landlord's actions. The Tenant also argued that the frustration letters are not valid because they are not on an RTB form and are not signed or dated.

The Landlord's position is that the tenancy ended due to frustration as the Town has issued 2 orders which are incompatible with the tenancy agreement. The Landlord's position is that the tenancy was frustrated on July 10, 2024, by the DNO Notice and subsequently on September 6, 2024, by the Cease and Desist Letter. The Landlord's Counsel argued the Landlord cannot provide a rental unit through a residential tenancy agreement as residential tenancies are prohibited under the bylaws and there is no prospect of a continued tenancy.

The Landlord referenced *Crown Point Hotel (1981) Ltd v B.C. (Public Safety and Solicitor General),* 2007 BCSC 1048 (*Crown Point*) to support their position that the DNO notice is a frustrating event. In *Crown Point*, the Fire Marshall issued an order requiring the landlord to make safety upgrades to the property, which the landlord ignored for months and continued to rent the property. The Fire Marshall then issued an order requiring tenants on certain floors to vacate for the upgrades to be completed. The court found that "the forced foreclosure of the residential facility by a valid order of the Fire Commissioner constitutes "frustration" of the residential tenancy agreement". The court went on to state "if the Landlord is faced with an order from the Fire Commissioner that is incompatible with his obligation under his residential tenancy agreements, this surely constitutes a "radical change in obligation" unforeseen by the parties to the agreement".

The Landlord's Counsel argued a similar situation has arisen in this case, as the Town issued an order incompatible with the Landlord's obligations under the Tenant's residential tenancy agreement, by issuing the DNO Notice that required the end of all residential tenancies on the property.

Analysis

Is the Tenant entitled to an order requiring the Landlord to comply with the Act, regulation or tenancy agreement?

Frustration occurs when a contract becomes incapable of being performed because of an unforeseeable event that has so radically changed the circumstances that fulfillment as originally intended is now impossible.

The Landlord argued the issuance of the DNO Notice was a frustrating event.

The Landlord pointed to the *Crown Point* Case; however, the court in *Crown Point* did not explicitly mention or analyze the concept of fault, which is included as part of the test for frustration throughout the case law. Policy Guideline #34 states a party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission. As such, I find that the issue of fault must be considered as part of the frustration analysis. In this case the Landlord entered into this tenancy agreement prior to having the proper authorization and necessary approvals. Therefore, I find the Landlord cannot be found to be faultless.

Furthermore, I find that fulfillment is not impossible, given that the Town provided steps the Landlord could take to receive the necessary approvals. The Landlord choose not to take those steps given the amount of money and time it would take; however, fulfillment of the contract as originally intended is not impossible, as the tenancies could have continued once the Landlord took the necessary steps.

Based on the above, I find that the tenancy agreement has not been frustrated, and the tenancy continues until it is ended in accordance with the Act.

Should the Landlord's One Month Notice be cancelled? If not, is the Landlord entitled to an Order of Possession?

Section 47 of the Act states that a landlord may issue a Notice to End Tenancy for Cause to a tenant if the landlord has grounds to do so. Section 47 of the Act states that upon receipt of a Notice to End Tenancy for Cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files an application to dispute the notice, the landlord bears the burden to prove the grounds for the One Month Notice.

As the Tenant disputed this notice on September 30, 2024, and since I have found that the One Month Notice was served to the Tenant on September 24, 2024, I find that the Tenant has applied to dispute the One Month Notice within the time frame allowed by section 47 of the Act. I find that the Landlord has the burden to prove that they have sufficient grounds to issue the One Month Notice.

The reason to end the tenancy is: “Rental unit/site must be vacated to comply with a government order”. The Landlord argued 2 government orders exist, the DNO Notice and the Cease and Desist Letter.

Based on the email from the Town on August 14, 2024, the DNO Notice was revoked. The Landlord argued it was conditionally revoked; however, there is no evidence that the DNO was revoked on a conditional basis or that if residential tenancies continued the DNO Notice was still in effect. This finding is further reinforced by the fact that when the Town later discovered the Landlord may have resumed entering into residential tenancies, the Town did not consider the DNO Notice revived but instead took new and separate action by sending the Cease and Desist Letter.

In this case, I find that the Cease and Desist Letter is a warning letter letting the Landlord know the Town is aware there are still residential tenancies on the property and seeking voluntary compliance rather than an order. If it is voluntary compliance that is being requested, then nothing is being “ordered” at this point.

The Cease and Desist Letter warned the Landlord to cease all residential tenancies, or further action would be taken to enforce the bylaws. I find that the further action would be the issuance of an order. Also, the Town did not state it would take further action to enforce the Cease and Desist Letter but rather the bylaws, which further suggests the Cease and Desist Letter is not an enforceable order. Additionally, the Landlord’s evidence and submissions support that the Town accepts that this Tenant could continue occupying the rental unit even if the residential tenancies are ended. As such, I am not satisfied that the Cease and Desist Letter is considered an order.

Based on the above, I find the Landlord failed to prove, on a balance of probabilities, the ground of the One Month Notice. Therefore, the Tenant’s application is granted for cancellation of One Month Notice under section 47 of the Act.

The Landlord is free to issue another One Month Notice for Cause, should the local government issue an order which requires the rental unit be vacant.

Is the Tenant entitled to recover the filing fee for this application from the Landlord?

As the Tenant was successful in these applications, the Tenant’s application for authorization to recover the filing fee for these applications from the Landlord under section 72 of the Act is granted. The Tenant is authorized to deduct $200.00 from one future rent payment to recover the filing fee.

Conclusion

The One Month Notice dated September 24, 2024, is cancelled and of no force or effect. This tenancy will continue until it is ended in accordance with the Act.

I find that the tenancy agreement was not frustrated and continues until it is ended in accordance with the Act.

The Tenant is authorized to deduct $200.00 from one future rent payment to recover the filing fees.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: February 2, 2025

Residential Tenancy Branch