DECISION

Introduction

This hearing dealt with two Applications for Dispute Resolution from two groups of tenants under the *Residential Tenancy Act* (the Act), each for:

- an Order of Possession of the rental unit under section 54 of the Act
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

Tenants VB, SB, MA, FM, HZ, DK, LS, SK, LK, MM and HC attended the hearing, along with witnesses VK, KB and VK2.

TJ, LH and AB attended the hearing for the Landlord.

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

I find that the Landlord was served for application 910182032 on January 24, 2024, in person in accordance with section 89(1) of the Act. The Landlord acknowledged such service.

I find that the Landlord was served for application 910181256 by registered mail on January 28th, 2024. Although such service is not permitted under the standing director's order regarding expedited hearings, the Landlord acknowledged such service and consented to the application being heard.

Preliminary Matters

One of the original applicants on application 910182032, SK2, submitted in evidence a letter evincing his intention to withdraw from the application. I have accordingly amended the application to remove him.

LK indicated that she had been named twice on application 910181256, and provided the spelling of her legal name. I have accordingly amended the application to remove the duplication and correct her name.

Issues to be Decided

Are the Tenants entitled to an Order for access the rental units?

Are the Tenants entitled to recover the filing fee for this application 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 on January 10, 2021, with a monthly rent of $1,390.00, due on first day of the month, with a security deposit in the amount of $650.00.

On December 6th, a fire burned part of the residential property, which is a three-storey building with 51 units. AB testified that the fire started in unit 107, and went up through unit 207 to unit 307. The Landlord submitted that the tenancy has been frustrated.

Following the fire, AB testified that the fire department issued an order preventing the tenants from accessing their units. The Landlord placed in evidence an email dated December 12th, 2024, from DZ, a "Fire Prevention Officer and Public Educator" with the City of Coquitlam. She wrote "The building suffered significant damage and remains uninhabitable. Entry to the building is restricted and occupancy is prohibited."

The Landlord also submitted a letter dated December 18th from FOS, the Landlord's remediation contractor. The letter gave FOS's assessment of the property as "deemed unfit for entrance or occupancy from persons who are not deemed qualified or competent." The letter also cited Worksafe regulations and stated that only certain emergency items would be available to tenants at that time.

The Landlord submitted a December 20th email from a forensic engineering firm including a summary of test results of combustion by-products samples taken from various locations in the rental property. The Landlord also submitted a diagram of the rental property showing the locations sampled. 38 samples were tested, including samples from 17 rental units.

The Landlord submitted a Hazardous Materials Report dated December 23rd from a forensic engineering firm. The Report indicates that materials containing asbestos were found in the rental property, notably in vinyl flooring tiles and a ceiling stipple coat. Lead was also found in some paint samples. Among the recommendations made in the Report is to "Handle the settled dust and debris from damaged friable asbestos-containing texture coat, including content cleaning and processing, following moderate-risk asbestos abatement procedures, as prescribed by the OHSR and the WorkSafeBC Asbestos Guideline."

The Landlord testified that it is operating under an approved Notice of Project at the rental property, which includes the Tenant Content Remediation Scope of Work, a document produced by the Landlord's forensic engineering firm.

In a cover letter to the Hazardous Materials Report, the Landlord's insurance adjuster concludes that contaminated combustion by-products had pervaded the building, and that all access would have to be with full personal protective equipment.

The Tenants testified that they have been prevented from accessing their belongings since the fire. Although the Landlord has offered to permit the Tenants to either hire their own certified firm to retrieve their goods, or hire the Landlords' remediation firm FOS to do so, in both cases the Tenants are required to pay a share of the Landlord's costs incurred through FOS in facilitating access to the rental units.

Analysis

Are the Tenants entitled to an Order for access to the rental units?

The Tenants applied under the heading of a request for an Order of Possession, but the Tenants in fact request an order in respect of access to the rental unit. I find that the manner in which the Tenants applied was appropriate given the nature of the request and the urgency of the applications.

The Landlord contended that the tenancy is frustrated. I find that it is neither necessary nor appropriate to determine whether the tenancy is frustrated, ended in some other manner, or continues.

If the tenancy ended by frustration, it ended with the Tenants' goods in the possession of the Landlord. Section 62(3) of the Act authorizes "any order necessary to give effect to the rights, obligations and prohibitions under this Act". Sections 26(3)(b) and 30(1) protect the tenants from restrictions on access to their belongings and rental unit. Given the current state of affairs, and the Tenants' inability to exercise their access rights prior to the frustration of the tenancy, I find that the Tenants have a prima facie entitlement to an order under section 62(3) to allow them to access and remove their belongings from the rental unit.

If the tenancy is ongoing, then the Tenants' rights of access are ongoing, and the Tenants have a prima facie entitlement to an order vindicating their right to access and remove their belongings from the rental unit.

As the considerations for an issuance of an order are similar in either situation, I decline to make a determination as to whether the tenancy has been frustrated.

Does the Fire Department Order or Worksafe BC Regulations Prevent the Tenants from Retrieving Their Belongings?

The Landlord contended that a fire department order and Worksafe BC regulations militate against the Tenants' applications. The only documentary evidence of the fire department order was a December 12th email from a fire prevention officer who stated that "entry to the building is restricted and occupancy is prohibited." The Landlord did

not provide any additional evidence that the restrictions on entry would encompass Tenants attempting to access their goods, or what conditions the fire department order would place on such an entry. I find that the Landlord has not demonstrated that the fire department order would prevent the Tenants from accessing their units for the purpose of removing their belongings.

Ordinarily, Worksafe BC regulations apply to workers, not to tenants or former tenants. The Landlord did not provide any evidence showing that any Worksafe BC regulation or related statutory provision would apply to the Tenant. I have reviewed the definition of worker in the *Workers Compensation Act*, RSBC 2019, c 1, and no aspect of that definition would extend to the Tenants, or anyone assisting them without pay.

I have reviewed the Tenant Content Remediation Scope of Work. The document defines the work to be carried out by the contractors and other workers employed on the rental property. It does not, on its own terms, apply to the former tenants. I find it would, apply to anyone employed by the Tenants to remove their belongings from their units.

More fundamentally, a Notice of Project extends to "work activity" and applies to the employer or prime contractor on a construction project. Although "work activity" is not defined in the *Workers Compensation Act* or the *Occupational Health and Safety Regulation*, BC Reg 296/97, the entire structure of the Act is such that it applies to workers. It would be contrary to the structure and intent of the Act to interpret "work activities as applying to non-workers.

Do the Tenancy Agreements Restrict the Tenants' Rights to Retrieve Their Belongings?

The Landlord submitted that the Tenants were all bound by section 28 of their tenancy agreements. That section requires the Tenants to maintain insurance to cover their property against loss or damage, holds that the Landlord will not be responsible for loss or damage to their property, and states that the Tenants may not do that which would void the Landlord's insurance covering the rental property.

The Landlord submitted that by permitting the Tenants to retrieve their belongings they would be voiding their insurance agreement.

The Landlord did not submit any evidence that by permitting the Tenants to retrieve their belongings they would void their coverage. Such a conclusion is a legal determination, and the Landlord's insurance policy was not provided in evidence. No correspondence from the insurer making such a claim was in evidence. I find the Landlord has not demonstrated that the Tenants would be violating section 28 of the tenancy agreements by retrieving their belongings, either with or without an order allowing them to do so.

Even if the insurance contract did prevent the Landlord from permitting the Tenants to retrieve their belongings, I am dubious that such a term should be valid. Section 5 of the Act forbids landlords and tenants from contracting out or avoiding the Act. The right to

access a rental unit is, of course, a core right of a tenant. To contractually prevent tenants from exercising that right or obtaining an order after the end of the tenancy under section 62(3) of the Act in respect of that right, seems likely to amount to an avoidance of the Act, in contravention of section 5.

Do Safety Considerations Prevent the Tenants from Obtaining an Order?

The Landlord contends that the safety risks in the rental property due to the fire prevent the Tenants from accessing his goods, and that only properly certified workers may do so.

The Landlord submitted a Hazardous Materials Report from a forensics engineering firm. That report determined that asbestos was present in some of the building materials, most notably in a coating on some ceilings. The report's recommendations included dealing with "settled dust and debris" with asbestos abatement procedures.

The Landlord produced testing results showing that combustion by-products were found in most – but not all – locations tested in the rental property. The testing only included 17 of the 48 rental units not directly part of the fire. Most, but not all locations showed high or moderate levels of combustion by-products. Of the 17 rental units tested, five only showed low levels of combustion by-products, and one showed no detectable combustion by-products.

The Landlord or the Landlord's agents do not appear to have tested any combustion by-products for the presence or concentration of asbestos or other health threats, or tested the ambient air in the rental property for asbestos fibres. While it is a reasonable inference that the fire disturbed asbestos-containing materials, if the Landlord wished to establish that the conditions in the rental property are so unsafe that the Tenants cannot assume that risk, it would be incumbent on the Landlord to show that the level of contamination is in fact at a level where the Tenants must be excluded. Further, given the varying levels of combustion by-products found in different rental units, it is difficult to infer that any particular rental unit not tested has a concentration of asbestos or other health hazards sufficient to justify exclusion of the Tenants.

I take judicial notice of the fact that, while no level of asbestos exposure is without risk, sustained and repeated exposure creates the greatest level of risk, while short-term exposure is associated with a lower risk. In this instance, we are considering whether the Tenants can consent to a risk of short-term exposure to asbestos.

Given the apparent level of risk, I see no reason why the Tenants cannot consent to such a risk. The Landlord has clearly indicated its safety concerns. In my view, the Tenants are entitled to choose whether to hire someone to retrieve their belongings or to undertake those task themselves.

This is not to say that the Landlord does not have an interest in ensuring safety on its property. It does, and that interest must be weighed against the Tenants' interest in

retrieving their belongings. I find that the Landlord's interest in ensuring safety on its property can be adequately protected by allowing the Landlord to require the Tenants and the Tenants' agents to wear PPE and be instructed in its proper use.

Other Considerations

There appears to me to be no adequate reason for the Landlord to restrict which of the Tenants' goods the Tenants may recover. The Tenants are entitled to retrieve whatever of their own property they see fit.

If the tenancy is ongoing, the Tenants' access to retrieve his belongings is part of his right as a Tenants: the Landlord may not charge fees apart from rent. If the tenancy has been frustrated, then the question is whether, in an order under section 62(3), the Landlord should be permitted to charge the Tenants a fee to defray his costs in facilitating the removal of the Tenants' goods.

The Landlord has not acted expeditiously to enable the Tenants to recover their goods, necessitating the Tenants' applications. Moreover, while both the Tenants and the Landlord have suffered disruption and loss due to the fire, the disruption to the Landlord is monetary and commercial in nature; the disruption to the Tenants strike at where they live and their day-to-day lives. In these circumstances, I find that it would be inappropriate to permit the Landlord to require the Tenants to defray its costs in facilitating access to the rental unit.

The Landlord has not proven that the Tenants' goods are contaminated to a degree that it would be equitable to require the Tenants to have them cleaned as a condition for permitting the Tenants to retrieve those goods. This is a risk that the Tenants must be permitted to assume.

Orders

Therefore, I find that the Tenants are entitled to an Order for access to the rental unit under section 54 or, alternatively, section 62(3) of the Act.

I order that the Tenants and the Tenants' agents be permitted to access his rental unit and retrieve any or all of his belongings.

I further order that the Landlord allow the Tenants such access during weekdays, excepting holidays, between 10:00 AM and 4:00 PM, commencing no later than February 18th, 2025.

I further order that the Landlord may require the Tenants to use PPE supplied by the Landlord, and to be instructed in its proper use prior to the Tenants accessing his rental unit. Such instruction must be made available at least twice a day. The Landlord may not place any other restriction on the Tenants' access to retrieve his belongings.

I further order that the Landlord may not require the Tenants to contribute to or defray the Landlord's costs in facilitating the retrieval of the Tenants' property. Each Tenant must bear the costs of any contractor or agent he or she decides to employ, and the cost of any cleaning performed. If a Tenant elects to employ FOS to retrieve his or her belongings, the Tenant shall bear the particular costs of FOS for that work, but the Landlord may not charge any amount in respect of the general facilitation of such a removal.

I further order that if any Tenant has already paid any fees to the Landlord or FOS with respect to the Landlord's costs of facilitating the removal of that Tenant's property, the Landlord must return the same to that Tenant.

Are the Tenants entitled to recover the filing fee for this application from the Landlord?

As both groups of Tenants were successful in their applications, I find that each group of Tenants is entitled to recover the $100.00 filing fee paid for their applications under section 72 of the Act.

Conclusion

The Tenants' applications are granted on the terms provided herein.

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 14, 2025

Residential Tenancy Branch