Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, O

Introduction

This hearing was convened by conference call in response to the Tenant's Application for Dispute Resolution (the "Application") to cancel a 2 Month Notice to End Tenancy for Landlord's Use of Property dated June 26, 2017, which is referred to in this Decision as the "second 2 Month Notice". The Tenant also applied for "Other" issues, namely a request for compensation for alleged harassment by the Landlord.

The Tenant, the Landlord, and legal counsel for the Landlord appeared for the hearing. All testimony was taken under affirmation. The Landlord confirmed receipt of the Tenant's Application. The Tenant confirmed receipt of the Landlord's 11 pages of documentary evidence and confirmed that she had not provided any evidence in advance of the hearing.

The hearing that took place on September 13, 2017 was adjourned to reconvene on October 5, 2017. The full reasons for the adjournment are detailed in my Interim Decision which should be read in conjunction with this Decision. The parties were given instructions to serve and provide documentary evidence pertaining to a building permit the Landlord was relying on to prove the 2 Month Notice.

At the reconvened hearing, the Tenant confirmed receipt of the Landlord's 13 and 3 pages of additional evidence and the Landlord confirmed receipt of the Tenant's 62 and 6 pages of rebuttal evidence.

The hearing process was explained to the parties and no questions were asked as to how the proceedings would be conducted. The parties were given a full opportunity to present evidence, make submissions to me, and to cross examine the other party on the evidence provided. While both parties provided extensive testimony and submissions, I have only documented the relevant evidence in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to cancel the second 2 Month Notice?
- Has the Tenant proved the Landlord has caused harassment?

Background and Evidence

The parties confirmed they were before me in a previous hearing that took place on June 12, 2017 to determine a 2 Month Notice dated April 25, 2017, herein referred to as the first 2 Month Notice. The file number for that hearing is detailed on the front page of this Decision. The first 2 Month Notice was cancelled in my Decision of June 13, 2017.

Both parties confirmed this tenancy started at some point in 2007 under an oral agreement. Rent of $500.00 was payable by the Tenant on the first day of each month. The current rent as of May 2017 is $531.00 per month.

The Landlord testified the Tenant was served with the second 2 Month Notice by posting it to the Tenant's door on June 26, 2017. The Tenant confirmed receipt of the 2 Month Notice when she got back from hospital on June 29, 2017.

The 2 Month Notice was provided into evidence and shows a vacancy date of August 31, 2017. The reason on the 2 Month Notice for ending the tenancy is because the Landlord has all the necessary approvals and permits required by law to renovate or repair the rental unit in a manner that requires the rental unit to be vacant.

Legal counsel explained the rental building comprises of four separate rental units within one commercial building, one of which is rented by the Tenant. Legal counsel explained that the Landlord was unable to financially sustain the rental building which was then turned over to a private lender. However, the rental building eventually went into foreclosure and during this time no renovations or repairs were undertaken by the Landlord. Eventually, the Landlord was able to regain financial control and ownership of the building and now intends to undertake renovations and repairs to the rental unit.

The Landlord provided a copy of a building permit dated May 23, 2017 into evidence for the planned work to the rental unit. The Tenant took issue with an error on the building permit and questioned its validity. The Landlord provided a copy of the corrected building permit into evidence for the reconvened hearing. This comprised of a corrected permit detailing the correct rental unit address as well as email evidence with city

officials confirming the permit related to the rental unit. As a result, the Tenant was satisfied with the validity of the building permit and took no further issue with it.

The Landlord also provided details of what work has been authorized to the rental unit as it appears on the building permit which states: "*THIS BUILDING PERMIT IS FOR REPAIRS TO UNIT 1 – APPLIES ONLY TO PAINTING, FLOORING AND WINDOWS; This building permit expires on May 24, 2020*".

Legal counsel stated that the Landlord intends to replace three large windows in the rental unit as well as replace all the flooring. Legal counsel explained that pursuant to a statement provided by the Landlord into evidence from a flooring contractor, the existing wooden floors which are old have to be pulled out and a new sub floor has to be laid in order to accept the new floors. Legal counsel suggested that this would likely have to be done through a concrete leveling compound. The statement provided by the flooring contractor reads in part, "*I will be responsible for pulling out the existing floors and replacing them, as well as renovating the kitchen and the cabinets, painting and getting it prepared for other trades*".

Legal counsel explained that the planned renovations are not just limited to the replacement of the flooring and three windows, but also includes repainting the rental unit and replacing bathroom fixtures such as faucets, toilets, sinks and cabinetry. Legal counsel explained that the Landlord was originally planning to do plumbing and electrical work but the Landlord does not intend to do this at this moment in time.

The Landlord was asked to explain why the rental unit was required to be vacant for this work. Legal counsel stated that the planned work is extensive in nature and has to be done over the course of six to eight months. For some of this time, the Tenant will be without essential services such as a working kitchen, bathroom facilities, and flooring. Legal counsel explained the rental unit has to be emptied so that all the flooring can be lifted up and then the subfloor has to then be constructed for which they have a permit to do so.

Legal counsel stated that before the flooring is lifted up, the toilets, sinks and kitchen cabinetry also have to be removed. Then the painting and the windows will be replaced, after which time new toilets, sinks, cabinetry and faucets will be installed.

Legal counsel submitted that it would be impossible for all of this work to take place while the Tenant was occupying the rental unit and that it would not be possible to

house the Tenant due to the lengthy time over which all the renovations will take place. Therefore, the Landlord requires vacant possession of the rental unit.

Legal counsel also explained that the Landlord would be relying on a licensed professional plumber to dismantle and hook up the new plumbing fixtures. Legal counsel confirmed that while no actual changes to the plumbing was going to be undertaken, as the rental unit sits on a commercial level in which all the plumbing and electrical wires are interconnected, the Landlord is required to have a certified plumber to come to the rental unit to hook up the plumbing fixtures. Legal counsel stated that it was difficult to get licensed plumbers who would need to come at different points in the renovation process because they are in high demand. Therefore, it is unknown how long plumbing fixtures will not be available in the rental unit.

The Landlord pointed me to four signed statements dated June 26, 2017 from contractors who verify the work that is going to be undertaken to the: flooring, cabinetry work; painting; electrical work to wire in smoke alarms; plumbing work to install kitchen and bathroom; and the ordering of custom windows. The statements appear to all be in the same format and indicate that the respective work for each trade has to be undertaken and coordinated with other trades over a period of six to eight months.

Legal counsel submitted that it was impossible to know the exact time and schedule of the intended work that is to take place because the Landlord is not able to determine this until the tenancy has been ended and the Landlord is able to commit to the work.

Legal counsel explained that because the Landlord intends to rely on several contractors to do the work in phases, there will inevitable delays in the process and will likely result in long period of times where the rental unit is not habitable until each phase of the work is completed.

The Tenant responded alleging the Landlord owes her compensation because this is the second 2 Month Notice issued by the Landlord, the first one of which was cancelled through my June 13, 2017 Decision. The Tenant submits that this amounts to an abuse of process.

The Tenant argued that the principle of *res judicata* applied in this case because the Landlord had not been successful in ending the tenancy and has now re-issued the same 2 Month Notice.

Legal counsel rejected the Tenant's assertion stating that while the previous 2 Month Notice had been cancelled, the Act does not prevent a landlord from issuing a new notice to end tenancy. Legal counsel argued that this was a new 2 Month Notice issued on the basis that the building permit was now before me and was not submitted for the June 12, 2017 hearing. In addition, legal counsel argued that in the interim time after the first 2 Month Notice was cancelled, the Landlord was in a position to obtain evidence from contractors which was not in existence at the time of June 12, 2017 hearing.

Legal counsel also argued that when the Landlord served the first 2 Month Notice, the Landlord was not aware she was required to have licensed plumber and electrician to do this work.

Legal counsel argued that the second 2 Month Notice was being issued on the basis that the Landlord had a building permit to do painting, window and flooring replacement work. Legal counsel submitted that the scope of work had since changed to remove the electrical and plumbing work.

The Tenant disputed the 2 Month Notice stating that it had been issued in bad faith. The Tenant explained that the Landlord had previously attempted to increase her rent and provided 62 pages of evidence that had been submitted for a hearing that took place in January 2017 to determine the Landlord's application for an additional rent increase; that application was withdrawn and the Tenant was given a rent increase in the allowable amount.

The Tenant acknowledged the flooring in the rental unit and windows were old and did require replacement. However, the Tenant explained that since the issuing of the 2 Month Notices, no contractor had come to visit the rental unit or perform any analysis or scope out the work required. The Tenant therefore questioned the validity and accuracy of the Landlord's contractor evidence of the work required.

The Tenant submitted several times that the Landlord had already replaced the toilet and the bathroom and kitchen fixtures in 2007 and that the windows need to be replaced on an emergency basis, not by ending the tenancy.

The Tenant submitted that if Landlord removes the flooring then this will likely result in structural work that would have to be done to the entire rental building, which is not permitted. The Tenant submitted that the Landlord's permit runs to 2020 and suggested that the work can be done in stages.

Legal counsel rebutted stating that the work cannot be done in stages because the rental unit would be inhabitable for unknown periods of time. Legal counsel stated that the Tenant's own testimony verifies that the floor and windows need to be replaced.

Analysis

Section 49(6) (b) of the Act states that a landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to renovate or repair the rental unit in a manner that requires the rental unit to be vacant. Section 49.1(5) of the Act provides that a tenant may dispute a 2 Month Notice within 15 days after receiving it.

The Tenant confirmed receipt of the 2 Month Notice on June 29, 2017 and applied to dispute it on July 1, 2017. Therefore, I find the Tenant made the Application within the 15 day time limit provided for by the Act. I also find the contents and the approved form used by the Landlord complied with the requirements of Section 52 of the Act.

Before, I turn my mind to the 2 Month Notice, I must first address the Tenant's argument that the legal principle of *res judicata* applies in this matter.

In text entitled Practice and Procedure Before Administrative Tribunals by Macaulay and Sprague, *res judicata* is an equitable principle that, when its criteria are met, precludes litigation of a matter. There are a number of preconditions that must be met before this principle will operate:

1. the same question has been decided in earlier proceedings;
2. the earlier judicial decision was final; and
3. the parties to that decision (or their privies) are the same in both the proceedings.

However, if the moving party successfully establishes these preconditions, a decision-maker must still determine whether, as a matter of discretion, the principle should be applied.

The Supreme Court of Canada (in 2001 in *Danyluk* and later in 2013 in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19) explained that "The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case." Further, this discretion exists to ensure that "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

It is my view based on the evidence before me, that *res judicata* does not apply in this case. This is because the Landlord has issued the Tenant with a new 2 Month Notice, which is a remedy available to the Landlord under the Act. Therefore, the circumstances surrounding the second 2 Month Notice must now be determined on their own merits. I find the Landlord has submitted new and relevant evidence before me that was not presented at the previous hearing and therefore the previous decision was not made on the facts being relied upon in this case. In this case, I find the Act does not seek to indefinitely bar a landlord from using relief through a notice to end tenancy, even if a previous one served has been cancelled.

In determining the second 2 Month Notice, Section 49(6) of the Act sets out three requirements a landlord must follow in order to satisfy the burden to prove the tenancy must end:

- the landlord has the necessary permits and approvals required by law;
- the landlord is acting in good faith with respect to the intention to renovate; and
- the renovations are to be undertaken in a manner that requires the rental unit to be vacant.

Accordingly I consider the evidence of both parties in determining whether the Landlord has proved the above requirements as follows.

With respect to the Landlord's requirement to have the necessary permits or approvals required by law, I am satisfied the Landlord does have the required building permit to undertake the intended renovations. The hearing had been adjourned to address the Tenant's concern, who rightly pointed out an error on the permit provided for this hearing. The Landlord subsequently provided sufficient evidence that satisfied me and the Tenant that the building permit submitted into evidence does relate to the rental unit and does demonstrate that it is for the work the Landlord intends to undertake.

With respect to the good faith component of the second 2 Month Notice, a claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the reason to end the tenancy. If evidence shows that, in addition to using the rental unit for the purpose shown on a 2 Month Notice, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the issue of motive must be determined on whether to uphold a 2 Month Notice.

Based on the evidence before me, I am satisfied the Landlord does have a bona fide intention to undertake major renovations to the rental unit. I rely on the Landlord's contractor statements as sufficient evidence of the Landlord's intent to renovate the rental unit. In addition, I find the Tenant's own testimony confirms that the flooring is old and that at least one of the windows requires to be replaced. I find there is insufficient evidence before me to suggest that recent work has been done in the rental unit that would qualify as major renovations and repairs.

More importantly, I find the existence of the undisputed building permit, further corroborates the Landlord's intention to carry out major renovations to the rental unit. While I accept the Landlord attempted to increase the rent of the Tenant at the start of 2017, I find this remedy was pursued as relief available to the Landlord under the Act, which the Landlord eventually withdrew. Having considered, the Landlord's contractor and building permit evidence provided for this hearing, I reject the Tenant's claim that the Landlord's previous application for additional rent increase is sufficient evidence of an ulterior motive to end this tenancy.

While I find the Tenant is frustrated in the face of a second 2 Month Notice, which she feels is causing her harassment, I do not find this is sufficient evidence of an ulterior motive to end the tenancy. This is because the Landlord has used the same remedy (a 2 Month Notice) rather than relying on another type of notice or reason to end the tenancy, which would have otherwise pointed to an ulterior motive.

With respect to the last portion of the requirement established by Section 49(6) of the Act, I refer to findings I made in my June 19, 2017 Decision on the first 2 Month Notice as follows:

> *"With respect to the Landlord's claim for painting, changing bathroom fixtures, and replacing windows, I am not satisfied that for these reasons, the rental unit needs to be vacated. The Landlord relied on oral evidence and submissions with respect to proving that these renovations were so extensive that they could not be done over a short period of time or while the Tenant was still residing in the rental unit. The Landlord provided insufficient evidence of the extent and impact of these renovations that would allow me to conclusively determine that they were so extensive and severe in nature that it warrants vacant possession of the rental unit.*
>
> *Furthermore, I am not satisfied that these renovations cannot be carried out in stages and there is insufficient evidence to show that the renovations must all be completed together by one contractor alone as I find that each part of the renovations require different disciplines and trades.*

The Landlord provided no contractor evidence, such as a schedule of works which prove the renovations would (a) take several months to complete and (b) that the planned renovations actually require the rental unit to be vacant as a practical matter rather than being more easily and economically undertaken if the rental unit was empty.

With respect to the flooring, I have no doubt that the flooring needs to be replaced as this was undisputed by the parties. However, I find the Landlord's oral evidence and submissions as to what work is required to be done to the flooring is speculative and only seeks to contemplate potential extensive work that may be required which is undetermined at the time of this hearing. The Landlord provided insufficient corroboration, such as contractor reports or a scope of work, which would have otherwise provided information of the work involved. This may then have enabled me to rule on whether this was sufficient to have the rental unit vacated for work done to the flooring.

Finally, I am not convinced that a contractor is not able to conduct any preliminary tests or initial analysis that would suggest or point to a scope and/or extent of work involved to remedy the flooring. I find this evidence is germane to the 2 Month Notice. Without such evidence and proof of any permits, I am not willing to accept disputed oral evidence alone to meet this burden of proof."

[Reproduced as written]

In addition, I have considered the Supreme Court of B.C. decision *Berry and Kloet V. British Columbia (Residential Tenancy Act, Arbitrator) 2007 BCSC 257*. That decision further assesses the need to evict a tenant for the purpose of renovation and the factors that may be considered when assessing the need for the tenancy to end. It states in part:

"[20] The third requirement, namely, that the renovations are to be undertaken in a manner that requires the rental unit to be vacant, has two dimensions to it.

[21] First, the renovations by their nature must be so extensive as to require that the unit be vacant in order for them to be carried out. In this sense, I use "vacant" to mean "empty". Thus, the arbitrator must determine whether "as a practical matter" the unit needs to be empty for the renovations to take place. In some cases, the renovations might be more easily or economically undertaken if the unit were empty, but they will not require, as a practical matter, that the unit be empty. That was the case in Allman. In other cases, renovations would only be possible if the unit was unfurnished and uninhabited.
[22] Second, it must be the case that the only manner in which to achieve the necessary vacancy, or emptiness, is by terminating the tenancy. I say this based upon the purpose of s. 49(6). The purpose of s. 49(6) is not to give landlords a

means for evicting tenants; rather, it is to ensure that landlords are able carry out renovations. Therefore, where it is possible to carry out renovations without ending the tenancy, there is no need to apply s. 49(6). On the other hand, where the only way in which the landlord would be able to obtain an empty unit is through termination of the tenancy, s. 49(6) will apply.

[23] This interpretation of s. 49(6) is consistent with the instruction in Abrahams and Henricks to resolve ambiguities in drafting in favour of the benefited group, in this case, tenants. Practically speaking, if the tenant is willing to empty the unit for the duration of the renovations, then an end to the tenancy is not required. It is irrational to think that s. 49(6) could be used by a landlord to evict tenants because a very brief period was required for a renovation in circumstances where the tenant agreed to vacate the premises for that period of time. It could not have been the intent of the legislature to provide such a "loophole" for landlords"

[Reproduced as written]

Based on the foregoing, I am not satisfied that the painting work or the installation of the windows requires the rental unit to be vacated and the tenancy be ended. I find the measurement and ordering of custom windows has no impact or requirement for this tenancy to be ended. In addition, I find it reasonable to conclude that three windows can be quickly removed and replaced on the same day with little impact on a tenancy.

In this respect, the Landlord failed to provide sufficient evidence that the installation of windows and painting of the rental unit requires vacant possession. I conclude this work can be easily undertaken while the Tenant is residing in the rental unit.

With respect to the Landlord's evidence of flooring replacement, in my previous June 18, 2017 Decision reproduced in part above, I noted the lack of evidence provided by the Landlord to show the rental unit required vacant possession for the planned work. In particular, I had noted the lack of contractor evidence that would point to a scope of work or provide details on the extent of the renovation work required.

However, I find the Landlord has again failed to provide sufficient evidence with respect to the flooring and that this work requires the rental unit to be permanently vacated. The Landlord relied solely on one contractor invoice which only states that the existing flooring will be pulled out and replaced. I found that statement to be overly broad. No further information is provided about what work is required on the sub floor, such as the laying of a concrete subfloor as suggested by the Landlord's legal counsel, and how long this work would take.

I note the Landlord provided what appears to be pre-prepared statements which were signed by four contractors who all state that the total renovations will take place over a period of six to eight months. However, I accept the Tenant's evidence that no contractor has visited the rental unit to undertake any examination of the floor. Neither is there any evidence from the Landlord before me that each of the contractors have undertaken an in depth investigation of the proposed work. The contractors provide no detail, such as a schedule of work or the amount of time each of them will take to complete their respective jobs in order to justify the estimated period of six to eight months. Therefore, I place little evidentiary value on these statements.

I accept the Landlord will have difficulty in obtaining and scheduling various contractors to perform the entire work, but the Landlord has a building permit that does not expire until 2020. Therefore, there is no limitation on the Landlord with respect to the expiration of the building permit.

Instead, I find the Landlord's evidence points to the work being completed piecemeal over a period of six to eight months. The evidence does not show how long in that period the unit will be inhabitable and devoid of essential services. While I appreciate that plumbing may have to be temporarily disconnected to change the cabinetry and install a new toilet, sinks, and replace flooring, without sufficient evidence to the contrary, I am of the view that this could be accomplished with a rather brief disruption to the water and sewer services.

I find there to be insufficient evidence that work on the flooring and changing of cabinetry would impact the tenancy so severely that the rental unit must be vacant and, if so, for what period of time that might be required. It may be more convenient to have the Tenant vacate, but there was insufficient evidence before me that would support the need for vacancy. I find that to end a tenancy on the basis of the "likely" need for vacancy due to the timing of trades or speculation on the amount of work that maybe required, is not supported by the intention of Section 49(6) of the Act.

Without such evidence, I am not able to determine the issue of vacancy and whether the tenancy has to end. Had the Landlord provided sufficient evidence, which I would have expected to have had before me based on my previous Decision, I would have been able to better assess the time period the rental unit would have been inhabitable and then make findings on the requirement for this tenancy to end. However, without that evidence, I am not able to make this determination. Neither was I able to explore with the Tenant whether she would be willing to move out of the rental unit for a period of time(s) to allow the total renovation work to be completed.

I find the Landlord has failed to provide compelling evidence that the intended renovation work requires the rental unit to be vacant for an extended period of time and/or requires the tenancy to be ended. Therefore, I grant the Tenant's request to cancel the second 2 Month Notice which is of no force or effect. However, the Landlord may still continue with the planned renovations and repairs during this tenancy.

I dismiss the Tenant's claim for "Other" issues, namely a request for compensation for the Landlord serving a 2 Month Notice twice in a short period of time. This is because I find that the serving of two notices to end tenancy is not sufficient to constitute harassment. The Landlord has correctly utilized a remedy available to her under the Act to end the tenancy. The Tenant's remedy is to apply to dispute the ending of the tenancy, which she has exercised and has now been successful in doing so. In this case both parties used remedies under the Act and I find the Tenant has disclosed no basis for a claim of monetary compensation.

Conclusion

For the reasons set out above, I hereby cancel the 2 Month Notice dated June 26, 2017. The tenancy will resume until it is ended in accordance with the Act. The Tenant's claim for monetary compensation is dismissed.

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: September 10, 2017

Residential Tenancy Branch