Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT
OPL, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenants (the "Tenant's Application") under the *Residential Tenancy Act* (the "*Act*"), seeking cancellation of a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") and recovery of the filing fee. The matter was originally set for hearing on December 13, 2017, with a different arbitrator, who, without being seized of the matter, adjourned the Tenant's Application to be heard at the same time as the Landlord's Application, which was set for hearing before me on February 20, 2018, at 11:00 A.M.

As a result, this hearing also dealt with a cross-application filed by the Landlord (the Landlord's Application") under the *Residential Tenancy Act* (the "*Act*"), seeking an Order of Possession based on the Two Month Notice and recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Landlord and the Tenant D.K, both of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. Neither party raised any concerns regarding the service of the Applications, Notice of Hearing, or documentary evidence.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"). However, I refer only to the relevant facts and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be e-mailed to them at the e-mail addresses provided in the hearing.

Issue(s) to be Decided

Are the Tenants entitled to an order cancelling the Two Month Notice?

Is the Landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Is either party entitled to recovery of the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

Both parties provided significant testimony and documentary evidence for my review, which I have thoroughly considered in rendering my decision. However, for the sake of clarity and brevity, I have only summarized below the testimony and evidence fundamental to my decision and necessary findings of fact.

The Landlord testified that he has all the necessary permits and approvals required by law to renovate the rental unit in a manner that requires the rental unit to be vacant, and that he intends, in good faith, to complete these renovations. As a result, the Landlord stated that he sent the Tenant's a Two Month Notice by registered mail on September 25, 2017, which D.K. testified she received on September 27, 2018.

The Two Month Notice in the documentary evidence before me, dated September 24, 2017, has an effective vacancy date of December 1, 2017, and states the reason for the Two Month Notice is because the landlord has all the necessary permits and approvals required by law to demolish the rental unit, or renovate or repair the rental unit in a manner that requires the rental unit to be vacant.

There was no dispute between the parties that the Landlord intends to complete the proposed renovations or that the rental unit is part of a rental covenant whereby it cannot be owner occupied and must remain in the rental market. However, the Tenant argued that vacant possession is not required for the renovations to be completed and therefore there is no reason to end the tenancy under section 49(6) of the *Act*. Further to this, the Tenant argued that even if the Landlord intends to complete the renovations and vacant possession of the rental unit is in fact required, there is evidence of bad faith which negates the Landlord's honesty of intention with regards to the Two Month Notice.

The Landlord testified that he intends to complete a full-gut renovation in which the bathrooms and kitchen will be removed and replaced, the floors will be removed, levelled with mortar and replaced, the ceiling will be scraped and refinished, and non-structural walls will be removed to reconfigure the apartment to allow for three bedrooms instead of two, and the creation of an open concept kitchen and living area. The Landlord testified that nothing will remain of the original unit except for structural elements and that plumbing and electrical will also be changed and upgraded. The Landlord stated that the renovations are not merely cosmetic and that vacant possession of the rental unit is required, as a practical matter, due to the nature, scope, and length of the renovations.

In support of his testimony the Landlord submitted significant documentation including but not limited to a building permit for the renovations, e-mail quotes and correspondence from various contractors confirming that vacant possession is required for this type of renovation, a material safety data sheet for the mortar to be used during the renovation, WorkSafe BC information, a contract for the completion of the renovation, and verification that he has the funds required to complete the renovation. The Landlord also submitted photographs of other similar renovations he has completed in the past, in order to establish the inhabitability of the apartment during such renovations. Further to this the Landlord testified that it will not be safe or practical for the Tenants to remain in the rental unit during the renovation due to the noise, massive amounts of drywall dust, carcinogenic dust from the mortar, exposed wires, and the lack of water, heat, and electricity in the rental unit.

The Tenants submitted significant documentation, including but not limited to e-mail correspondence between themselves and various contractors regarding the proposed renovations which indicate that given the information conveyed by the Tenants, it would be possible to complete the renovations while they occupied the rental unit. The Tenants submitted documentation from a friend who states that they were not required to vacate their own home during extensive kitchen and bathroom renovations. The Tenant’s argued that vacant possession is not required as they are willing to move most of their possessions into storage and accommodate the renovations while remaining in the rental unit by using the bathroom in the building gym and eating out in the absence of a kitchen. Further to this the Tenants proposed that they could reside in one bedroom while the renovations took place and move their remaining belongings throughout the unit as necessary.

The Tenant pointed to *Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator), 2007 BCSC 257*, which she states is the leading authority in this area and provided me with excerpts from the case and copies of several decisions from the Branch which referenced or relied on this case. The Tenant stated that *Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator), 2007 BCSC 257* means that section 49(6) of the *Act* is not intended to give landlords a means for evicting tenants and that where it is possible to carry out renovations without ending the tenancy, there is no need to apply section 49(6) of the *Act*.

Although the Tenant argued that the Landlord does not have strata approval for the renovations, she did not provide any documentary evidence to corroborate this testimony and the Landlord testified that he does have strata approval as it was required to obtain the building permit.

Despite the foregoing, the Tenants also raised concerns regarding the Landlord's honesty of intention. In the hearing the Tenant testified that they were advised by the Landlord when he viewed the apartment prior to purchasing it that he wants them to vacate the rental unit as he intends to renovate and sell the apartment. The Tenants also testified that they had a previous hearing about a different Two Month Notice served by the same Landlord for the same purpose in which the arbitrator in that matter concluded that the Landlord had acted in bad faith as there was evidence he intended to re-rent the unit at a higher rate after the renovations. In support of her testimony, the Tenant provided a copy of the decision for my review. The Landlord denied these allegations stating that he does not currently intend to sell the condo and that the Tenants can return to the unit at the same rental rate after the renovations are complete.

Analysis

I have reviewed all relevant documentary evidence and oral testimony and I find that the Tenants were served with the Two Month Notice on September 27, 2017, the date they acknowledge receiving it.

Section 49(6) 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.

As previously stated there is no dispute between the parties that the Landlord intends to complete the renovations and has the necessary means to do so. Although the Tenant argued that the Landlord does not have strata approval for the renovations, she did not provide any documentary evidence to corroborate this testimony and the Landlord testified that he does have strata approval as it was required to obtain the building permit, which he provided for my review. Based on the above, I find that the Landlord has all the necessary permits and approvals required by law, and intends in good faith, to renovate or repair the rental unit.

The Tenants provided several excerpts from *Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator), 2007 BCSC 257* which I am familiar with and of which I find helpful in deciding whether vacant possession of the rental unit is required. In these excerpts the Honourable Mr. Justice Williamson stated that the purpose of section 49(6) of the *Act* is not to give landlords a means for evicting tenants but rather to ensure that landlords are able to carry out renovations. The Honourable Mr. Justice Williamson also stated that arbitrators must therefore determine whether "as a practical matter" the unit needs to be empty for the renovations to take place and that where the only way in which the landlord would be able to obtain an empty unit is through termination of the tenancy, section 49(6) would apply.

Based on the above, I find that I must now decide if vacant possession of the rental unit is required. Although one of the contractors for the Landlord indicated that it was theoretically possible to complete the renovations without vacant possession, he raised significant concerns about the hazardous living conditions due to the significant and persistent particle dust in the air, toxic compounds, exposed wires, and the general lack of lighting, electricity and running water that would be necessary for habitable living conditions. The contractor also indicated that they would require the Tenants to sign an indemnity/hold harmless clause prior to undertaking any work during their occupation of the unit due to these serious safety concerns. Although the contractor also indicated that additional time and money would be required to work around the Tenant's, his main concern was the inhabitability of the unit and the safety risks to the Tenants. Further to this, the Landlord also submitted a revised quote from one of the contractors contacted by the Tenant wherein the contractor stated that having been advised by the Landlord of the full extent of the renovations required, he has changed his opinion and now believes the renovations cannot be completed without vacant possession.

A full-gut renovation requiring the removal of all non-structural walls, the scraping and refinishing of ceilings, the replacement of plumbing and electrical systems and fixtures, the levelling of floors with mortar, the reconfiguration and addition of bedrooms, and the

complete remodelling of the kitchen and bathrooms is a project of significantly larger in scope and duration than a project where only the kitchen and bathroom are to be remodelled. As a result, I do not find the evidence presented from the Tenant's regarding their friend's kitchen and bathroom renovation helpful in determining whether vacant possession is required in this case. I also find the e-mails from the Tenants to the contractors do not disclose the full nature and extent of the renovations to be undertaken by the Landlord. As a result, I do not find them helpful in determining whether vacant possession of the rental unit is required.

Although the Tenants proposed that they could reside in one bedroom during the entire renovations and move themselves and their few remaining possessions around the apartment as required, the Landlord will be removing all non-structural walls to reconfigure the layout of the apartment as well as removing and levelling the floors with mortar. Given the nature of these renovations, I am not satisfied that it would possible, let alone practical, for the Tenant's to remain in the rental unit. While I understand and appreciate the position of the Tenant's, given the nature and scope of the renovations, I find that as a practical matter, vacant possession of the rental unit is required.

Having made the above finding, I must now turn my mind to whether termination of the tenancy is the only manner in which to achieve vacant possession of the rental unit. While the Tenant's offered to move some items to storage, they refused to vacate the rental unit entirely, even when the Landlord offered during the hearing to have them move back in at the same rental rate and under the same tenancy agreement at the conclusion of the renovations. Given the Tenants refusal to provide the Landlord with vacant possession during the renovations, I find that the only way in which the Landlord would be able to obtain an empty unit is through termination of the tenancy. As a result, I find that section 49(6) of the *Act* applies.

However, the Tenant's also raised concerns regarding the Landlord's honesty of intention with regards to the purpose for the renovations. Residential Tenancy Policy Guideline (the "Policy Guideline") #2 states that if evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord has another purpose or motive, then that evidence raises a question as to whether the landlord has a dishonest purpose. Policy Guideline #2 also states that if the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy and that they do not have another purpose that negates their honesty of intent or an ulterior motive for ending the tenancy.

There was no disagreement between the parties that the Landlord intends to complete the renovations. Instead, the Tenant's argued that the Landlord has an ulterior motive for ending the tenancy under the Two Month Notice. The Tenant's argued that the Landlord intends to sell the rental unit or re-rent it at a higher cost after the completion of the renovations and therefore he is acting in bad faith.

Although the Tenant pointed to a previous decision regarding the rental unit and the Landlord's honesty of intent, section 64(2) of the *Act* states that I am not bound by the decisions of other arbitrators. Further to this, I was not the trier of fact in that matter and therefore I do not have before me all of the evidence and testimony that the arbitrator in that matter had before them in rendering their decision. As a result, I have given little weight or consideration to the Tenant's argument that I should find the Landlord is acting in bad faith on the basis of this previous decision.

During the hearing the Landlord offered the Tenant's the opportunity to move back into the rental unit at their current rental rate once the renovations are complete but the Tenant's refused. As a result, I do not give any weight to the Tenants' argument that the reason for ending the tenancy is because the Landlord wants to re-rent the unit at a higher rental rate. Although the Tenants argued that the Landlord intends to sell the unit, the Landlord denied these allegations. While the Tenants submitted some evidence to indicate that several other units purchased by the Landlord have been renovated and sold, they did not submit any evidence to corroborate their testimony that the rental unit in which they reside will be sold after renovations. As a result, I find that this argument by the Tenants is speculative in nature and I give it little weight.

Based on the above and on a balance of probabilities, I find that the Landlord has satisfied me that they intend to do what they say on the Two Month Notice and that they do not have an ulterior motive for ending the tenancy. As a result, the Tenants' application seeking to cancel the Two Month Notice is dismissed without leave to reapply. As the Tenants were unsuccessful in their Application, I decline to grant them recovery of the filing fee.

I note that section 55 of the *Act* requires that when a tenant submits an Application seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with section 52 of the *Act*.

As the Two Month Notice is signed and dated by the Landlord, gives the address of the rental unit, states the effective date of the Two Month Notice and the grounds for ending

the tenancy, and is in the approved form, I find that it complies with section 52 of the *Act*. Given the above, and pursuant to section 55 of the *Act*, the Landlord is therefore entitled to an Order of Possession. As the effective date of the Two Month Notice has passed, the Order of Possession will be effective at 1:00 P.M. on April 30, 2018, pursuant to section 68(2) of the *Act*.

As the Landlord was successful in his Application, I find that he is entitled to a Monetary Order in the amount of $100.00 for the recovery filing fee pursuant to sections 67 and 72 of the *Act*.

Conclusion

The Tenants' Application is dismissed without leave to reapply.

Pursuant to section 55 of the *Act*, I grant an Order of Possession to the Landlord effective **1:00 P.M. on April 30, 2018,** after service on the Tenants. The Landlord is provided with this Order in the above terms and the Tenants must be served with **this Order** as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia and enforced as an Order of that Court.

Pursuant to section 67 of the *Act*, I grant the Landlord a Monetary Order in the amount of $100.00. The Landlord is provided with this Order in the above terms and the Tenants must be served with **this Order** as soon as possible. Should the Tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced 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: March 19, 2018

Residential Tenancy Branch