Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **RP, CNL-4M, FFT**

Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- An order requiring the landlord to carry out repairs pursuant to section 32;
- Cancellation of a Four Month Notice to End Tenancy for Demolition, Renovation, Repair or Conversion of Rental Unit ("4 Month Notice") pursuant to section 49;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

ML attended as agent for the landlord ("the landlord"). The tenant attended. As both parties were present service was confirmed. The parties each confirmed receipt of the other's materials. Based on the testimonies, I find that each party was sufficiently served with the respective materials in accordance with sections 71, 88 and 89 of the Act.

All parties attended the hearing and had opportunity to provide affirmed testimony, present evidence and make submissions. The hearing process was explained.

During the hearing, the landlord called as a witness the renovator DA who provided affirmed testimony.

Preliminary Issue

At the commencement of the hearing, I advised the parties that Rule 2.3 of the Residential Tenancy Branch Rules of Procedure states that claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

The tenant's application included an unrelated claim in addition to the tenant's application to dispute the landlord's Notice. I find that the tenant's primary application pertains to disputing a notice to end tenancy; therefore, I find that the additional claim is not related to whether the tenancy continues.

Thus, all the tenant's claims, except for the tenant's application to dispute the landlord's Notice and obtain reimbursement of the filing fee, are dismissed with leave to reapply. I make no findings with respect to these claims. I grant the tenant liberty to reapply for these claims subject to any applicable limits set out in the *Act*, should the tenancy continue.

Issue(s) to be Decided

Is the tenant entitled to a cancellation of the 4 Month Notice and reimbursement of the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below. The parties submitted many documents and photographs as well as considerable disputed testimony in a 96-minute hearing.

The rental building is a multi-unit building built in in the 1970's containing 42 individual rental suites. The tenancy began May 1, 1994. Current monthly rent is $1,049.00. At the beginning of the tenancy, the tenant provided a security deposit of $287.50 which the landlord holds. There are no arrears of rent.

The landlord issued the tenant a 4 Month Notice dated September 14, 2020 effective January 31, 2021. The reason provided on the notice is that the landlord intends to "perform renovations or repairs that are so extensive that the rental unit must be vacant".

The Notice is in the standard RTB form. The landlord provided details of the planned work in their notice as follows:

> Complete demo and renovation of the unit;
> All kitchen and bathroom counters, cabinets, appliances, sinks, faucets, toilet, bathtub, flooring etc to be removed and replaced.

The Notice has a section with a box for the landlord to check stating that “no permits or approvals are required”. This box was not checked.

The landlord and the witness DA testified that no permits and approvals are required by law to do this work. No supporting documentary evidence from the municipality was submitted.

The form also stated, “Indicate how many anticipated weeks/month (please circle one) the unit is required to be vacant”. This part of the form was not completed.

The landlord’s witness DA testified as follows.

1. He is a self-employed commercial and residential renovator with 40 years’ experience who has renovated 30 units in the building in the past six years.
2. This is the first time a tenant has been issued a Notice as previous renovations have taken place when occupants gave notice and moved out.
3. In all previous 30 renovations, the same work planned for the current unit was carried out. In all those renovations, there was black toxic mold, building materials containing asbestos, and paint contained lead.
4. The rental building, due to its age, contains hazardous materials which will become airborne while work is being performed.
5. The pipes leaked throughout the building over the years impregnating the drywall and rotting the wooden structure which make repairs difficult or impossible.
6. The unit is in the original condition except for some repairs which have taken place over the years such as replacement of copper piping in the building during which the occupants remained in their units.
7. The unit is irreparable because of these factors and must be gutted and renovated “from the ground up”.
8. Water will be cut off during work estimated to take 6-12 weeks.
9. For this work to take place, vacant possession is necessary.
10. DA has not tried to repair the tenant’s unit as requested by her and based his conclusion that the unit was “irreparable” on the conditions in the other units.

The landlord submitted no documentary evidence supporting the assertion there are hazardous materials in the unit requiring it to be vacant for the work to take place. Similarly, there was no evidence of the presence of toxic black mold.

The witness testified that they believe that the hazardous materials will permeate throughout the unit requiring special renovation safety procedures; it was not clear how the material could be contained within the unit in order not to negatively affect other occupied units.

The tenant submitted considerable evidence including photographs in support of her position that vacant possession was not necessary to allow required repairs to take place. The tenant outlined several repairs which she has requested the landlord to perform over the years. Key among these are replacement of the kitchen cupboards and the countertop as well as repair of the kitchen faucet. The tenant submitted documentary evidence of her correspondence with the Municipality and the resultant direction from the City to the landlord to carry out these repairs by a certain upcoming date. The tenant claimed the landlord's position that the unit must be demolished and rebuilt is wrong; the assessment is based on the tenant's and the City's observations and findings. Copies of correspondence from the City directing that repairs take place were submitted as evidence.

The landlord submitted that because of the mold, rotting and hazardous materials as testified by DA, no such repairs as requested by the tenant and City are possible. However, the landlord and DA acknowledged they have not attempted the repairs or investigated to see if such repairs are possible.

The tenant claimed that the landlord's intentions are to renovate the unit and rent it at a significantly higher rent which she cannot afford. The landlord acknowledged that the the unit may rent for about $1,600.00. No discussions between the parties have taken place about the tenant re-occupying the unit post-renovation. The tenant testified she would be unable to afford the proposed rent.

In summary, the tenant disputed that there is a need to demolish and renovate the unit; repairs would bring the unit into compliance with the City and the Act's obligations for the landlord. The tenant gave evidence that they have offered to the landlord that they will vacate the rental building when necessary on a temporary basis to allow the repairs to proceed.

The landlord requested an Order of Possession further to the 4 Month Notice.

Analysis

When a tenant applies to dispute a Notice to End Tenancy issued under section 49(6)(b) of the Act, the burden of proof is on the landlord. The landlord must show, on a balance of probabilities, that the tenancy should end for the reason stated on the Notice.

Section 49(6) of the Act provides that:

> 49 (6) 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 do any of the following:
>
> …
>
> (b) **renovate or repair the rental unit in a manner that requires the rental unit to be vacant;**
> [emphasis added]

The landlord issued the 4 Month Notice which is incomplete in that it fails to indicate that no permits or approvals are necessary.

Residential Tenancy Policy Guideline 2B: Ending a Tenancy to Demolish, Renovate, or Convert a Rental Unit to a Permitted Use states as follows:

> **B. PERMITS AND APPROVALS REQUIRED BY LAW**
>
> When ending a tenancy under section 49(6) of the RTA or 42(1) of the MHPTA, a landlord must have all necessary permits and approvals that are required by law before they can give the tenant notice. **If a notice is disputed by the tenant, the landlord is required to provide evidence of the required permits or approvals.**
>
> The permits or approvals in place at the time the Notice to End Tenancy is issued must cover an extent and nature of work that objectively requires vacancy of the rental unit. The onus is on the landlord to establish evidence that the planned work which requires ending the tenancy is allowed by all relevant statutes or policies at the time that the Notice to End Tenancy is issued.
>
> [emphasis added]

The landlord asserted no permits were necessary and relied solely upon the evidence of the witness DA who stated he had renovated 30 previous units in the building without a permit. Although the City has been involved in the tenant's efforts to have repairs carried out, no documentary evidence from the City was submitted stating whether the limited scope of repairs requested by the tenant was possible or that the demolition/renovation of the unit was necessary.

The Guideline contemplates the elements necessary for a landlord to end a tenancy for renovations or repairs and states:

> In *Berry and Kloet v British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257 (see also *Baumann v. Aarti Investments Ltd.,* 2018 BCSC 636), the BC Supreme Court found there were three requirements to end a tenancy for renovations or repairs:
>
> 1. The landlord must have the necessary permits;
> 2. The landlord must intend, in good faith, to renovate the rental unit; and
> 3. The renovations or repairs require the rental unit to be vacant.

The Policy Guideline continues to say that:

> If repairs or renovations require the unit to be empty and the tenant is willing to vacate the suite temporarily and remove belongings if necessary, ending the tenancy may not be required.

In other words, section 49 (6) does not allow a landlord to end a tenancy for the purpose of renovations or repairs if any of the following circumstances apply:

1. the landlord does not have all necessary permits and approvals required by law;
2. the landlord is not acting in good faith;
3. the renovations or repairs do not require the unit to be empty (regardless of whether it would be easier or more economical to conduct the renovations or repairs if the unit were empty); or
4. it is possible to carry out the renovations or repairs without ending the tenancy (i.e. if the tenant is willing to temporarily empty and vacate the unit during the renovations or repairs, and then move back in once they are complete).

Each of the four elements are considered.

With respect to the first element above, I find the landlord has not established that they have obtained all necessary permits and approvals to carry out the scope of work contemplated or that they are not necessary. Based on the evidence including the incomplete Notice, I find that the landlord has not met their onus to demonstrate they have all necessary permits to perform the planned renovations or that no such permission is required.

The second element, as noted in the Guideline, is that the landlord is acting in good faith. The Guideline states that good faith is an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage. 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 purposes stated on the Notice to End the Tenancy.

This Guideline reads in part as follows:

> If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, 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 Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy. 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.
>
> The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy.

I find that it is undisputed that the landlord intended to perform the renovations proposed and planned a significantly higher rent upon completion. The tenant questioned the good faith motive of the landlord in seeking to terminate the tenancies to perform the proposed work. The tenant submitted documentary evidence to show mainly futile efforts to get repairs done to the unit. The tenant perceived the renovation plans are retaliatory and an excessive response to straight forward repair requests which she described in detail during the hearing. The tenant speculated that the

landlord does not want to invest in repairs in order to obtain greater rent from proposed new tenants after the renovation.

The landlord denied the allegations of an ulterior motive. However, the landlord acknowledged they had only been property managers for two years and stated they were unaware of many of the tenant's requests for repairs. The landlord acknowledged that the unit will rent after the renovations for a significantly higher rent but testified the motive is to update an old, unrepairable unit containing hazardous materials.

As acknowledged by the landlord, the tenant is the first occupant of the building to whom a 4 Month Notice has been issued. The landlord asserted that this is coincidental and has nothing to do with the tenant's requests for repairs.

I find that I am not satisfied with the landlord's explanation of their good faith intentions. I find that the landlord has not provided sufficient evidence to demonstrate that the issuance of the 4 Month Notice was not motivated or contributed to by ulterior motives or a plan to avoid repairs requested by the tenant and required by the Act and the City. I find that there is some evidence that financial motivation and retribution to ordinary repair requests are factors in the landlord seeking to end the tenancy.

The fourth element from the Guideline is whether it is possible to carry out the renovations or repairs without ending the tenancy (i.e. if the tenant is willing to temporarily empty and vacate the unit during the renovations or repairs, and then move back in once they are complete).

It is not disputed that the work contemplated by the landlord is a significant undertaking. The landlord, however, did not provide a clear estimation of the time involved even though 30 previous units have undergone identical renovations. As noted, the Notice does not provide this information.

The landlord submitted testimony from the renovator DA that the nature of the work they will perform is so significant and potentially hazardous to any occupant of the unit that it is necessary to terminate the tenancy. The landlord provided testimonial evidence that they believe that the work will pose a significant health risk to tenant and it would be impossible for her to remain living in the unit. The landlord also gave evidence that they believe that there will be a significant period when the unit will be without running water without stating how long this will be.

The landlord has set out some of the details of the work intended in their 4 Month Notice but has not provided any survey or documentation with respect to the existence of hazardous materials or whether the work can be carried out without vacating the unit, or, indeed, the building.

The landlord gave evidence that the initial estimate for the work including hazardous material remediation to be at least 6-12 weeks. The landlord further gave evidence that during the repair and renovation work the unit will have periods without water. I find the landlord's evidence on this point to be vague and not supported in the documentary materials. While I accept, as a general principle, that major renovations of the type contemplated by the landlord may be time consuming, I find little basis for the figure of 6-12 weeks given by the landlord.

The tenant claimed she is willing to leave the unit to allow repairs to take place. The landlord's own witness did not give testimony about how long the tenant could not be in the unit and whether vacancy was necessary for any longer than a brief time which the tenant was prepared to accommodate. The landlord has not provided any evidence that the repairs are impossible to perform without the tenant vacating the unit except on a temporary, ad hoc basis which she is prepared to do. The landlord did not submit any third-party assessment in support of their position that vacant possession is required for many weeks as claimed.

The landlord's primary witness about the proposed work and the need to end the tenancies was the renovator DA. The witness testified as to the presence of hazardous materials and the "almost certainty" of toxic black mold in the walls. I find a plain understanding of this description of the work to be more in line with a project where displacement is the more efficient option but not the only way work could be done.

I accept the landlord's evidence that they intend to perform the work as listed on the details of work accompanying the 4 Month Notice. I accept the landlord's evidence that they have been informed that vacant possession is advisable. However, expediency and convenience are not sufficient to allow a landlord to end a tenancy for renovations and repairs.

I find insufficient evidence, such clear direction from an independent construction industry professional or similar documentary evidence, that vacant position for many weeks it is necessary for the work to be performed. I find that the landlord has not provided independent, supporting documentary evidence articulating that the unit must be vacant to carry out the proposed work or the repairs requested by the tenant.

Consequently, I find that the landlord has not adequately met their evidentiary onus of showing on a balance of probabilities that vacant possession of the rental unit is necessary for the renovations and repairs to take place.

As a result, I find in favour of the tenant and order that the landlord's 4 Month Notice to End Tenancy for Demolition, Renovation, Repair or Conversion of Rental Unit dated September 14, 2020 is cancelled and of no further force or effect.

As the tenant was successful in their application, they may recover the filing fees for their application. As the tenancy is continuing, the tenant may satisfy this monetary award by making a one-time deduction of $100.00 from their next scheduled rent payment.

Conclusion

The tenant's applications is granted. I Order that the *Four (4) Month Notice to End Tenancy* dated September 14, 2020 is **cancelled and of no further force or effect.**

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: November 17, 2020

Residential Tenancy Branch