Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNETC FFT

Introduction

The applicants seek $60,000.00 in compensation under section 51(2) of the *Residential Tenancy Act* ("Act"). In addition, they seek to recover the cost of the filing fee under section 72 of the Act. The applicants are "tenants" under the Act.

Attending the dispute resolution hearing were one of the tenants, a representative of the corporate respondent (hereafter the purchaser), the respondent's legal counsel, and an interpreter for the purchaser. The applicant tenant and the purchaser were affirmed, and no service issues were raised.

Issues

1. Are the applicants entitled to compensation under section 51(2) of the Act?
2. Are the applicants entitled to compensation under section 72 of the Act?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the issues of this dispute, and to explain the decision, is reproduced below.

The written description of the tenants' claim, as it appears in their Application for Dispute Resolution, reads as follows:

> Terms of Notice to End Tenancy were not followed through by landlord. Tenancy ended February 28, 2021, and new landlord began renting the property as a bed and breakfast business in August, 2021. They registered a domain for the bed and breakfast on July 18, 2021 (www.suitesmartvancouver.com). According to their own website, they opened their doors as a bed and breakfast on August 1 "after extensive renovations." The amount above is equal to 12 months rent compensation (12 x $5000).

The tenancy began June 1, 2017 and ended February 28, 2021. Monthly rent was $5,000.00, payable on the first day of the month. There was a written tenancy agreement between the tenants and their (now former) landlord. As for the rental unit, it is a large, 6-to-8-bedroom character residential home in Vancouver's Shaughnessy neighbourhood. The tenants resided on the upper two main floors while they sublet a basement suite.

On or about December 3, 2020 the landlord served the tenants with a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice"). A copy of this four-page notice was submitted into evidence. On page 2 of the Notice is a checked box indicating the reason for the Notice, namely, "All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit."

Below the reason for the Notice, the purchaser information section of the Notice includes the name of the respondent's name—Sovita Smart Home Inc.—in this dispute. And below that is a filled-in circle indicating that a copy of the contract of purchase was attached to the notice.

The seven-page Contract of Purchase and Sale (the "Contract") and a single-page Contract of Purchase and Sale Addendum (the "Addendum") were in evidence. The Addendum noted that the buyer and the seller both agreed to change the buyer's name from the plural Sovita Smart Homes Inc. to the singular Sovita Smart Home Inc. The purchase price of the property was $6,180,000.00.

Page 3 of the Contract includes a six-paragraph terms and conditions clause, which starts on the previous page. The last paragraph of this clause states (rather awkwardly):

> The Buyer is aware that there is the tenant (month to month) and the Seller agree and warrant to inform the tenant and vacant [*sic*] this property by possession date.

The buyer and the seller initialed the bottom of each page of the Contract on which the terms and conditions appeared. Next, on page 4 of the Contract (the bottom of which the parties again initialed), clause 5 states:

> POSSESSION: The Buyer will have vacant possession of the Property at 2:00 p.m. on March 19, yr.2021 (Possession Date) OR, subject to the following existing tenancies, if any: _____

Shortly after the time the tenants received the Notice, they had a theory or suspicion that the owner had no intention of occupying the rental unit. The house was not in the best condition and it "seemed odd" to the tenants that someone would want to move into the house at that time. Nevertheless, the tenants vacated the property on February 28, 2021, the effective end date of the tenancy as indicated on the Notice.

In keeping with their theory about the owner's intention, the tenants began monitoring the property online, whereupon it soon became apparent that someone other than the landlord was occupying the property. In addition, the person occupying the house had turned it into a bed and breakfast business. An internet listing for the B&B (www.suitesmartvancouver.com) announced that it was open for business as of August 1, 2021. The listing further indicated that extensive renovations had been completed: "'Suite Smart Shaughnessy' After extensive renovations suite smart Shaughnessy opened it's [*sic*] door August 1, 2021." It is the tenants' position that the new owner "never occupied the home at all."

The tenants submitted into evidence copies of a screenshot from a www.booking.com page indicating that the property was listed as a bed and breakfast on August 5, 2021. Also included were several screenshots of guest reviews of the property throughout the month of August 2021. From the limited reviews online, the tenants surmised that at least 8 groups of travellers or guests had visited the B&B in August.

From what the tenants determined, the B&B was later shuttered, with several one-star reviews from September 2021 indicating that hopeful guests had been unable to contact the business about their reservations.

Under cross-examination by respondent's counsel, the tenant testified that they never met the purchaser—that is, the respondent—and that it was their landlord (the seller) who served them with the Notice. Counsel asked the tenant whether he had received $5,000.00 in compensation to terminate the tenancy. In response, the tenant said that what he received was not having to pay the last month's rent, as permitted under the Act when being served a notice to end tenancy for landlord's use of property.

Respondent's counsel submitted that most of the facts are not disputed. He confirmed that the tenancy was between the tenants and "the old landlord." That is, the previous landlord and the seller of the property. He referred to the Contract in which the purchaser clearly stated that they needed vacant possession of the property by the closing date of March 19, 2021 as one of the conditions of the sale.

Counsel noted that the purchaser was made aware of the tenants in the property, and that the seller had warrantied that the tenants would vacate the property before the closing date. He acknowledged that the former landlord served the Notice on the tenants on December 3, 2020. However, counsel submitted, the old landlord never sought authorization or consent from the purchaser to end the tenancy. Moreover, counsel argued that the purchaser never advised the seller that they, the purchaser, would be using the rental unit as a residence. He reiterated that the seller issued the Notice without the purchaser's consent.

It was further submitted that the tenants vacated the rental unit on February 28 and that they did not pay the last month of rent—a condition to move out, he noted.

It was, counsel argued, the purchaser's original intent to demolish the property. However, after exploring this option with the municipality, it was determined that obtaining a permit (to demolish the house) could take as long as three years. After learning about this potentially lengthy wait the purchaser (at this point the owner) decided to "lease out" the property to avoid having to pay a vacant owner tax. And so, a new tenant occupied the property. As for the bed and breakfast, however, the new tenant was operating this business without the purchaser's consent or permission.

Upon completing his submissions, respondent's counsel direct examined the respondent. Under direct examination the respondent testified (through her interpreter) that when she signed the Contract, she was aware that there were tenants residing in the property. Counsel asked the respondent what her intention was regarding the property. The respondent testified that she has a son in Seattle who had desired to move to Vancouver and into the property. However, this move was delayed due to the pandemic, and ultimately never occurred. As for the respondent's intentions in this regard, she testified that she never stated her intentions to her realtor.

Counsel asked the respondent about the condition of the property. She answered that it was "pretty bad [and] needed repairs." "What did you do?" counsel asked. The respondent explained that she did some repairs and maintenance and tried to find a "designer" (perhaps meaning a contractor) to explore the process for demolishing the house.

"What was the result?" of the exploration process, counsel inquired. The respondent testified that the municipality told her it would take 3 to 4 years to obtain the necessary permit and approval. At that point, because of the pandemic and the vacant home tax, the respondent decided to rent out the property. She hired an agent to rent it out, and it was rented out sometime in June or July 2021.

As to the bed and breakfast business that her new tenant was operating, the landlord had no knowledge of this operation until she received the Notice of Dispute Resolution Proceeding from the tenants.

In final submissions, respondent's counsel argued that the doctrine of privity of contract applies in this case, such that the tenant applicants have no legal relationship with the current owner (that is, the respondent). And, while the tenants' landlord gave the tenants the Notice, the purchaser did not grant consent to the landlord to issue the Notice.

If anything, the tenants should sue their previous landlord instead of the purchaser, because the legal relationship was with their landlord, added respondent's counsel. Leaving aside this issue, counsel repeated his submission that the tenants were compensated to the tune of $5,000.

In the alternative, counsel argued that if the legal or contractual relationship extends to the respondent then any compensation sought ought to be limited to $35,000, the monetary limit for claims under the *Small Claims Act* (referenced in section 58(2) of the Act), and not $60,000.

In his brief final submission, the tenant recapped the fact that there is a clause in the Contract which says that the buyer was aware of tenants in the property. He stressed that this clause was initialed by the buyer and seller. As for the amount claimed, the tenant argued that the small claims limit does not apply to a claim for compensation made under section 51(2) of the Act.

The tenant contended that it's "the buyer's responsibility to know what their [legal] responsibilities are" when involved in a real estate transaction. Last, the tenant argued that there is no evidence to support the purchaser's assertion that her son was moving back to Vancouver from Seattle. Nor, he argued, was there any evidence of any plans to demolish the property.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

In this dispute, the tenants seek compensation pursuant to section 51(2) of the Act. The version of this section of the Act as it was on December 3, 2020—the date on which the landlord issued the Notice accompanied by the Contract—reads as follows:

> Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if
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> (a) steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or
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> (b) the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

(Note: this version of section 51(2) of the Act was in force between May 30, 2020 and February 28, 2021. Available at https://canlii.ca/t/54bx3.)

The Notice indicated that the reason for the Notice is that "All of the conditions for the sale of the rental unit have been satisfied and the purchaser has asked the landlord, in writing, to give this Notice because the purchaser or a close family member intends in good faith to occupy the rental unit."

This reason as stated in the Notice essentially mirrors subsection 49(5) of the Act (which has remained unchanged since December 3, 2020) which states that

> A landlord may end a tenancy in respect of a rental unit if
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> (a) the landlord enters into an agreement in good faith to sell the rental unit,
> (b) all the conditions on which the sale depends have been satisfied, and
> (c) the purchaser asks the landlord, in writing, to give notice to end the tenancy on one of the following grounds:
> (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit;

In this dispute, the respondent and respondent's counsel acknowledged that the landlord gave the Notice to end the tenancy. But they argued that the landlord "never sought authorization or consent" to end the tenancy from the purchaser. Further, the respondent stated that they never advised the landlord that they would be using the property to occupy. Nor, for that matter, did the respondent ever advise the realtor as to her intentions. In short, it is the respondent's position that the landlord gave the Notice without the consent of the respondent.

With respect, the respondent's testimony, and explanation strains credibility. The respondent variously testified that she intended for her Seattle-based son to move into the property and (or) intended to demolish the property. Either or both scenarios would have required a notice to end the tenancy to be served on the tenants. I must also consider that the respondent provided no evidence to support her claim that her son intended to move to Vancouver. Nor is there any evidence to support the claim about demolition being a three-to-four-year process. (I will return to these two scenarios.)

To summarize: if the respondent had truly intended for her son to move in or for the house to be demolished then—if she is a reasonable and prudent individual—a notice to end tenancy would have had to be given. She claims that the landlord gave the Notice without her consent or authorization.

Most importantly, it cannot be disputed that the Contract, of which the respondent was a party, includes a crucial term. This term is worth repeating:

> The Buyer is aware that there is the tenant (month to month) and the Seller agree and warrant to inform the tenant and vacant [*sic*] this property by possession date.

Certainly, while the term does not contain the word "ask" or "asks" or the phrase "the purchaser asks the landlord" (as it is written in the Act), a plain language reading of this term of the contract leads to the inexorable conclusion that the respondent asked the landlord to end the tenancy by the date of possession.

It is my finding that the landlord (seller) agreed implicitly to the respondent's condition of vacant possession to end the tenancy. The landlord "informed" the tenant to vacate the rental unit by way of the Notice. This is all entirely consistent with the intended purpose of section 49(5) of the Act. Further, the respondent's argument that they never gave consent or permission to the landlord to end the tenancy is rendered nonsensical given that the landlord promises to have the tenants out of the property by possession date.

For these reasons, it is my finding that the respondent asked the landlord, in writing, to give notice to end the tenancy.

What is missing from the Contract, however, is any indication of *why* the tenancy would be ending. That is, the language contained in subsections 49(5)(c)(i) or (ii) of the Act is absent. Under the Act, a purchaser of a rental unit intending to end a tenancy must ask the landlord to give notice to end the tenancy because (i) the purchaser is an individual and the purchaser, or a close family member of the purchaser, intends in good faith to occupy the rental unit, or (ii) the purchaser is a family corporation and a person owning voting shares in the corporation, or a close family member of that person, intends in good faith to occupy the rental unit.

Yet, it is my finding that this omission from the Contract is not fatal to the Notice. There is, in fact, no mechanism under the Act by which a purchaser can direct a selling landlord to end a tenancy other than through the issuing a notice under section 49(5).[1] Having asked, even if by implication, the landlord to end the tenancy for vacant possession, the only reason for ending the tenancy would be under section 49(5) of the Act.

(Whether the respondent was an individual or a family corporation—and given that the legal name of the purchaser was Sovita Smart Home Inc., it was perhaps the latter—is ultimately immaterial to the reason the tenancy was ending.)

While a landlord issuing a notice to end a tenancy at the direction of a seller bears responsibility for ensuring that the notice meets the requirements of the Act, a corresponding responsibility lay with the purchaser who directs a seller to end the tenancy. The absence of any language in the Contract about why the tenancy would be ended (under the requirements of the Act), either through negligence or choice, cannot serve to allow the purchaser a way to circumvent the Act. And it cannot be forgotten that the Act provides a protective purpose to tenants (see *Senft v. Society For Christian Care of the Elderly*, 2022 BSCS 755 at para. 38).

Having found that the Notice was given at the respondent's direction, I now turn to section 51(2) of the Act. The paragraph of this section begins with the phrase "the landlord or, if applicable, the purchaser who asked the landlord to give the notice [. . .]". In this case, it was the respondent who ask the landlord to give the Notice to the tenants, and therefore the respondent (as purchaser) is captured by their statutory obligations in the Act.

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[1] Indirectly, though, a purchaser could request that a seller-landlord ask a tenant to sign a *Mutual Agreement to End a Tenancy* under section 44(1)(c) of the Act.

Respondent's counsel argued that privity of contract estops the tenants from making a claim against the respondent. The tenants had no contractual relationship with the respondent. "Privity of contract" is trite law but is worth mentioning. It is the legal principle that the relationship between parties to a contract is such that each is allowed to sue each other but preventing a third party from doing so.

However, the tenants have not made an application for dispute resolution against the respondent for not fulfilling its contractual obligations under the Contract. Rather, the tenants are claiming compensation against the respondent for not meeting its statutory obligations as a purchaser under the Act. The principle of privity of contract does not play a role in this type of legal action, insofar as a claim under section 51(2) of the Act goes.

As to what happened after the tenants vacated the rental unit, one fact is incontrovertible: neither the respondent nor any close family member of the respondent ever occupied the rental unit. No steps were taken within a reasonable period after February 28, 2021 for the respondent or a close family member of the respondent to occupy the rental unit, nor did the respondent or a close family member of the respondent ever occupy the rental unit for at least six months after the effective date of the Notice, (excluding whatever reasonable period may have existed).

There is, as previously noted, no evidence to support the respondent's claim that her son tried to move back from Seattle. Nor, for that matter, any cogent explanation for the apparent delay in him returning, other than a vague reference to the delay being caused by the pandemic.

What happened was, seemingly because of the respondent's finding out about how long a demolition might take, the respondent re-rented the rental unit out to a new tenant. The new tenant then began running a bed and breakfast business. All of this took place within four-and-a-half months of the tenants vacating the property.

Regarding the respondent's additional explanation regarding the demolition option, this is largely irrelevant to determining whether the tenants are entitled to compensation—the notice to end tenancy was not issued under section 49(6)(a), which states that a landlord may end a tenancy "if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following: (a) demolish the rental unit".

Not only was the Notice not issued under this section of the Act, but the respondent submitted no evidence of any kind to support her testimony about the demolition.

Taking into careful consideration all the oral and documentary evidence before me, it is my finding that the tenants have proven on a balance of probabilities that steps were not taken by the respondent, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy. Nor was the rental unit used for the stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

Having found that the respondent breached section 51(2) for the reasons set out, I must consider whether there existed extenuating circumstances that prevented the respondent from meeting her obligations under the Act. Section 51(3) of the Act states that

> The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from
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> (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or
> (b) using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

The only possible, but in my opinion unproven, extenuating circumstance in this dispute might be the son's apparent delay in returning to Canada to reside in the home. However, as the tenant noted, there is no evidence to support this assertion by the respondent. Consequently, there is no evidence for me to find, on a balance of probabilities, that the respondent has established this as an extenuating circumstance.

Therefore, it is my opinion that there were no extenuating circumstances that prevented the purchaser from fulfilling their obligation under subsections 51(3)(a) or (b) of the Act. (Given that the respondent's intentions regarding demolition of the house is outside the reason given for ending the tenancy, I need not address this further in respect of extenuating circumstances.)

Having found that section 51(3) does not excuse the respondent from paying the amount required under subsection 51(2) of the Act, it is my finding and order that the respondent must pay the tenants an amount that is the equivalent of twelve times the monthly rent payable under the tenancy agreement, which in this dispute is $60,000.00. Further, pursuant to section 72(1) of the Act the respondent is ordered to pay to the applicants $100.00 to cover the cost of the applicants' application filing fee.

It is noted that the tenants were entitled to an amount equivalent to one month's rent pursuant to section 51(1) of the Act, and in fact received this amount by not having to pay rent for February 2021. This compensation is separate and apart from any compensation awarded under section 51(2) of the act.

As for the compensation amount, counsel argued that compensation ought to be limited to $35,000.00, as set out in the *Small Claims Act* and referenced in subsection 58(2)(a) of the Act. However, it is worth reading this section in its entirety, as there is a specific exclusion for amounts claimed under section 51:

> Except as provided in subsection (4)(a), the director must not determine a dispute if any of the following applies:
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> (a) the amount claimed, excluding any amount claimed under section 51 (1) or (2) *[tenant's compensation: section 49 notice]*, 51.1 *[tenant's compensation: requirement to vacate]* or 51.3 *[tenant's compensation: no right of first refusal]*, for debt or damages is more than the monetary limit for claims under the *Small Claims Act*;

Conclusion

IT IS HEREBY ORDERED that:

1. The application is granted.

2. Pursuant to sections 51(2) and 72(1) of the Act, the respondent must pay to the applicants a total of $60,100.00.

This decision is made on delegated authority under section 9.1(1) of the Act.

Dated: June 23, 2022

Residential Tenancy Branch