

Decision

Dispute Codes: CNC, FF

Introduction

This hearing dealt with an application by the tenant for cancellation of the landlords' 1 month notice to end tenancy for cause, in addition to recovery of the filing fee. Both parties and their respective witnesses participated in the hearing and gave affirmed testimony. All of the evidence was carefully considered.

Issues to be decided

- Whether the tenant is entitled to either or both of the above under the Act

Background and Evidence

Pursuant to a written residential tenancy agreement, the tenancy began on December 1, 1998. The tenant's portion of subsidized rent is \$595.00 per month. A security deposit of \$422.50 was collected on or about December 1, 1998.

The landlord issued a 1 month notice to end tenancy for cause dated January 8, 2010. The notice was served in person on the tenant on that same date. A copy of the notice was submitted into evidence. Reasons shown on the notice for its issuance are as follows:

Tenant or a person permitted on the property by the tenant has:

significantly interfered with or unreasonably disturbed another occupant or the landlord

seriously jeopardized the health or safety or lawful right of another occupant or the landlord

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so

The tenant filed an application to dispute the notice on January 11, 2010. A summary of events giving rise to issuance of the notice are set out below.

Resident "MD" and her son "AD," rent the unit located immediately beneath the tenant, and are understood to have resided there for approximately eighteen months since August 2008. By letter to the landlord dated January 5, 2009, "MD" set out her concerns about noise coming from the tenant's unit. In part, "MD's" letter reads:

There is no time limitation to this tenant, the noise is stemming from, jumping, running, dropping stuff on the floor in odd hours of the day and night.

In response to "MD's" complaint, the landlord corresponded with the tenant by letter dated January 27, 2009, informing her of the complaint and stating in part, as follows:

We ask you to please keep in mind that our buildings are comprised mainly of wood frame structures and shared inner walls. There is noise transference more apparent than exists in single family homes or concrete structures. Please remember that all residents are entitled to "peace and quiet enjoyment."

"MD" sent a second letter of complaint to the landlord related to noise dated October 5, 2009. In her letter, "MD" states in part:

We continue to have the same noise issues with the tenant above us [unit #] during the last few months.

"MD" sets out details in her letter which culminate in this second formal noise complaint.

By way of response, the landlord corresponded once again with the tenant by letter dated October 9, 2009, setting out the concerns identified by "MD" and again reminding the tenant that "our buildings are comprised mainly of wood frame structures and shared inner walls. There is noise transference more apparent than exists in single family homes or concrete structures."

Thereafter, in a letter to the landlord dated January 4, 2010, "DM" describes details of an "Assault Complaint" involving "AD" and the tenant's husband. It is understood that the tenant's husband does not reside in the unit but was visiting his family on the occasion of the incident which occurred on January 1, 2010. Related witness testimony was given by "AD," as well as by the tenant's daughter, "DG."

In short, in response to continuous noises from the tenant's unit, "AD" went to the tenant's unit and knocked heavily on the door. The tenant's husband opened the door and drew "AD" into the unit. A physical altercation and heated verbal exchange ensued between the two. Very shortly thereafter, "MD" arrived at the tenant's unit, and heated verbal exchanges took place between her and the tenant's husband before "MD" escorted "AD" away from the tenant's unit. Police were later called and there is no evidence that charges are pending. The tenant's agent takes the position that the behavior of the tenant's husband was a direct response to aggressive provocation from both "AD" and "MD."

In "MD's" letter to the landlord dated January 4, 2010, she states in part as follows:

I have approached you verbally and in writing of the structural problem that is obviously causing this noise annoyance between the two suites. I am compelled to move but it is not fair to pay more money in our situation when the only reason why we are moving is because of the noise issues on our suite. We did not cause the problem, otherwise we will not be moving. This noise problem has affected our sleep, rest and our livelihood. We don't feel that the Landlord provided us enough assistance; otherwise this issue would not have escalated into an assault problem. This noise issue has escalated into an animosity between the two tenants.

Thereafter, the landlord corresponded with the tenant by letter dated January 8, 2010. In this letter the landlord informs the tenant of "MD's" letter dated January 4, 2010, as above, and states in part:

The above noted complaint is in the opinion of the Landlord considered to be a serious breach of your Tenancy Agreement. [The landlord] has twice given you written notification about the noise coming from your unit. With this last incident even though you did not attack the tenant you are however, responsible for the actions of your guests, and as such [we] are serving you a one month Termination Notice to End Tenancy.

Analysis

Section 28 of the Act addresses **Protection of tenant's right to quiet enjoyment**, and provides as follows:

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline # 6 speaks to "Right to Quiet Enjoyment," and provides in part:

Every tenancy agreement contains an implied covenant of quiet enjoyment. A covenant for quiet enjoyment may be spelled out in the tenancy agreement; however, a written provision setting out the terms in the tenancy agreement pertaining to the provision of quiet enjoyment cannot be used to remove any of the rights of a tenant established under the Legislation. If no written provision

exists, common law protects the renter from substantial interference with the enjoyment of the premises for all usual purposes.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it.

Based on the documentary evidence and testimony of the parties, I find that the landlord's formal notification to the tenant about noise complaints is limited to two letters which are eight months apart and dated, respectively, January 27 and October 9, 2009.

Further to the above letters, there is no evidence that the landlord explored options for minimizing the impact of noise from the tenant's unit on the unit below. Additionally, there is no evidence of noise related complaints about the tenant from any other resident during a tenancy that has been ongoing for more than 11 years.

I find that a heated verbal exchange and physical altercation took place in the tenant's unit on January 1, 2010 between "AD" and the tenant's husband. The landlord's agent testified that this is the critical incident giving rise to issuance of the 1 month notice.

Clearly, the above incident was upsetting for all concerned. I find that it was fuelled by feelings of anger and animosity on the part of both parties. There were no independent third party witnesses to the event. On a balance of probabilities, I find that evidence in support of ending the tenancy is insufficient for me to grant an order of possession in favour of the landlord(s). Accordingly, I set aside the landlord(s)' notice, with the effect that the tenancy presently continues in full force and effect.

Finally, however, the attention of both parties is drawn to the provisions set out in section 56 of the Act which speaks to **Application for order ending tenancy early**, *the full text of which is attached for reference*. Specifically, section 56(2)(b) & (3) state:

56(2) The director may make an order specifying an earlier date on which a tenancy ends and the effective date of the order of possession only if satisfied, in the case of a landlord's application,

(b) it would be unreasonable, or unfair to the landlord or other occupants of the residential property, to wait for a notice to end the tenancy under section 47 [*landlord's notice: cause*] to take effect.

(3) If an order is made under this section, it is unnecessary for the landlord to give the tenant a notice to end the tenancy.

As the tenant has succeeded in the application to have the landlord's notice set aside, I hereby order that the tenant may withhold \$50.00 from the next regular payment of monthly rent in order to recover the filing fee in the same amount.

Conclusion

The notice to end tenancy is hereby cancelled, and the tenancy continues in full force and effect. I order that the tenant may recover the filing fee by way of withholding **\$50.00** from the next regular payment of monthly rent.

DATE: February 19, 2010

Dispute Resolution Officer