

DECISION

Dispute Codes CNC, OPC, MT, FF

Introduction

This hearing dealt with cross applications. The tenant applied to cancel a Notice to End Tenancy for Cause and for more time to file the dispute. The landlord applied for an Order of Possession for Cause and recovery of the filing fee. Both parties appeared at the hearing and were provided the opportunity to be heard and to respond to the submissions of the other party.

As a preliminary issue, I determined that the tenant applied for dispute resolution within 10 days of receiving the Notice to End Tenancy for Cause and that she was within the time limit to dispute such a Notice. Accordingly, I did not need to consider the tenant's request for more time to file the dispute.

The tenant asserted that she had not been served with the landlord's hearing package. The landlord provided evidence that the landlord's application and evidence were served upon the tenant via registered mail sent to the tenant's address on April 12, 2010. A search of the tracking number showed that a notification card was left by the post office but that the tenant did not pick up the mail. I was satisfied the landlord sufficiently served the tenant in a manner that complies with the Act and I accepted and considered the landlord's application and evidence. The landlord's application was described to the tenant verbally during the hearing.

Issues(s) to be Decided

1. Has the landlord established a basis to end the tenancy for the reason indicated on the Notice to End Tenancy for Cause issued March 2, 2010?
2. Has the tenant established there are grounds to cancel the Notice to End Tenancy?

Background and Evidence

The parties provided undisputed testimony and evidence that the tenant and a former landlord entered into a tenancy agreement in September 1995 for a tenancy set to commence October 1, 1995. The tenancy agreement is currently on a month-to-month basis. It was undisputed that the rental unit is a house with five bedrooms and also includes a family room. For the past several years, the tenant has permitted her sons and 2 or 3 other occupants to reside in the rental unit with the tenant. The other occupants pay the tenant rent for use of a bedroom and shared access to the living areas and kitchen. In October 2009 management of the rental unit changed to the agent identified in these applications. On March 2, 2010 the landlord issued a *1 Month Notice to End Tenancy for Cause* (the Notice) indicating the tenant has assigned or sublet the rental unit without the landlord's consent. The Notice was served upon the tenant via registered mail sent to the tenant at the rental unit address on March 3, 2010.

The landlord submitted that the tenant has been subletting part of the rental unit without the landlord's written consent. The landlord pointed to section 34 of the Act which provides that a tenant requires a landlord's written consent to sublet a rental unit. It was the landlord's position that subletting refers to collecting rent from other occupants. The landlord was of the position that the tenant had breached the spirit of the tenancy agreement by using the property to generate income and not strictly for residential use.

The tenant submitted that several years ago she obtained borders when her grandchildren no longer resided with her and that the former agent for the landlord was aware of this and did not object to the tenant renting out rooms.

Analysis

Section 1 of the Act defines a tenancy as a tenant's right to possession of a rental unit under a tenancy agreement. Based upon the evidence before me, I am satisfied the tenant and landlord have a tenancy agreement for the rental unit that is comprised of the single family dwelling with five bedrooms and a family room, along with other rooms. Accordingly, under the tenancy agreement, the tenant has the right to possession of the entire rental unit.

Based upon the evidence before me, I find that the occupants of the rental unit, other than the tenant, are entitled to possess a bedroom, have shared access to common living areas and restricted access to other rooms (such as bedrooms occupied by others).

Section 34 of the Act prohibits a tenant from assigning or subletting a rental unit without the landlord's written consent. Where a tenant violates section 34, the landlord may end the tenancy under section 47(1)(i) of the Act. The landlord is of the position the tenant has breached section 34 of the Act and issued a Notice to End Tenancy under section 47 of the Act. The burden to prove the tenant has breached the Act is that of the landlord. I have considered whether renting out rooms in a rental unit meets the definition of subletting.

Residential Tenancy Policy Guideline 19 provides for the policy intent of the legislation and has been developed in the context of common law and the rules of statutory interpretation to assist parties to understand the issues related to residential tenancies. The policy guideline provides that a sublease (also referred to as a sublet) conveys substantially the same interest in the land as is held by the original lessee, however such a sublease must be for a shorter period of time than the original lease so that the original lessee retains a reversionary interest in the property.

Black's Law Dictionary, sixth edition, defines sublease as "a lease executed by the lessee of land or premises to a third person, conveying the same interest which the lessee enjoys, but for a shorter term than that for the lessee holds (as compared to assigned where the lessee transfers the entire unexpired term of the leasehold to a third party.)"

I find that both the policy guideline and the definition of sublease in Black's Law Dictionary are consistent in that a sublease refers to the conveyance of the same interest in land held by the original lessee except for a shorter period of time.

I find that the tenant's borders or other occupants do not enjoy the same interest in the land that is held by the tenant. Rather, the occupants' interest in land is limited to possession of a bedroom, shared access to common living areas and restricted access to other bedrooms; whereas, the tenant's right to the land, under the tenancy agreement, consists of the right to possess the entire rental unit.

Based upon the above findings and analysis, I do not find the tenant is subleasing or subletting the rental unit since the tenant continues to be an occupant of the rental unit and has not conveyed an interest in the rental unit to another party that is the same as her interest. Therefore, the landlord has not established that the tenant has violated section 34 of the Act.

In light of the above, I do not find the landlord had the landlord had a basis to issue the Notice to End Tenancy under section 47(1)(i) of the Act and I set aside the Notice to End Tenancy with the effect that this tenancy continues.

Conclusion

The tenant was successful in this dispute and the Notice to End Tenancy for Cause, issued March 2, 2010, has been cancelled and set aside with the effect that this tenancy continues.

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: April 30, 2010.

Dispute Resolution Officer