

DECISION

Dispute Codes CNC, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution to cancel a notice to end tenancy.

The hearing was conducted via teleconference and was attended by the tenant, the landlord and a witness for the landlord.

Issues(s) to be Decided

The issue to be decided is whether the tenant is entitled to cancel a 1 Month Notice to End Tenancy for Cause and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to sections 47, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The tenant has submitted the following documents into evidence:

- A copy of a "Caution Notice to Tenant" dated March 9, 2010 advising the tenant that she has significantly interfered with or unreasonably disturbed another occupant or the landlord. The notice does not include a date of occurrence or a specific incident;
- A copy of a "Caution Notice to Tenant" dated March 9, 2010 advising the tenant that on March 9, 2010 she had had an additional occupant for more than 14 days and provided the tenant with 7 days to rectify this situation or an "eviction notice will be served" citing the tenant had failed to comply with a material term;
- A copy of a 1 Month Notice to End Tenancy for Cause dated March 16, 2010 with an effective date of April 16, 2010 citing the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord and the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;
- A letter from the tenant's Social Worker dated March 25, 2010 confirming the tenant's baby moved in with her in September, 2009; and
- A summary of the tenant's case.

The landlord has submitted the following documents:

- A copy of a tenancy agreement signed by the parties on June 4, 2009 for a 1 year fixed term tenancy beginning on July 1, 2009 for a monthly rent in the amount of \$800.00 due on the 1st of the month with security deposit of \$400.00 paid on June 5, 2009;

- A typewritten letter of complaint dated January 22, 2010 from a tenant directly above the applicant tenant complaining of a baby crying in the morning and noting that he believed this was an adult only building;
- A copy of a "Caution Notice to Tenant" dated March 9, 2010 advising the tenant that she has significantly interfered with or unreasonably disturbed another occupant or the landlord. Unlike the notice the tenant submitted this notice does include a date of occurrence or a specific incident (noise complaints);
- A copy of a "Caution Notice to Tenant" dated March 9, 2010 advising the tenant that on March 9, 2010 she had had an additional occupant for more than 14 days and provided the tenant with 7 days to rectify this situation or an "eviction notice will be served" citing the tenant had failed to comply with a material term. This notice is also different than the one submitted by the tenant but it does contain the same information;
- A copy of a 1 Month Notice to End Tenancy for Cause dated March 16, 2010 with an effective date of April 16, 2010 citing the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord and the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;
- A typewritten letter of complaint dated March 10, 2010 from a tenant directly above the applicant tenant complaining of a baby crying in the morning; and
- A typewritten letter of complaint dated March 10, 2010 from a tenant directly below the applicant tenant complaining of a baby crying in the morning.

The landlord testified that when she rented the rental unit to the tenant there was no indication that she had a child and so the tenancy agreement stipulated the tenant as the only occupant. The landlord testified that despite the complaint letter from the tenant above the applicant tenant, the building does not have an adults only policy.

The landlord confirmed that Section 13 of the tenancy agreement stipulates that only those people listed at the top of the agreement are allowed to occupy the rental unit but that if someone stays there in excess of 14 days in any calendar year and a tenant fails to obtain the landlord's written permission the tenant is in breach of a material term.

The landlord stated that she had undocumented complaints about baby noises in December 2009 and when she spoke with the tenant the tenant indicated that the baby was not hers but that she was babysitting. The landlord stated she found out later the baby was the tenants and was staying with her permanently.

The tenant testified that it was more likely July or August 2009 that the tenant indicated to the landlord the baby wasn't hers. The tenant testified this resulted from confidential involvement with an outside agency, she could not tell the landlord. The tenant confirmed the baby moved into the rental unit in September 2009.

The landlord's witness indicated that he started to be disturbed in October or November of 2009 although he could not pinpoint it exactly. The noise consisted of a baby screaming and running around at all hours. He also noted that the noise problems are no longer as extreme.

The tenant testified that in an attempt to be less disturbing to the other occupants of the building, she moved her bed into the dining room to try to lessen any impacts of noise for the other occupants while they may be in their bedrooms.

The landlord testified that when tenants sign the tenancy agreement she does not go through the tenancy agreement to point material terms in the agreement but rather that she expects the tenant to read the tenancy agreement. She also stated that she would not automatically insist on ending a tenancy if they had a guest for 15 days vs. 14 days allowed in the tenancy agreement.

The landlord stated that by the time the tenant asked to have the baby put on the tenancy agreement it was too late because there was also the noise complaints that she had to deal with.

The landlord requested an order of possession and consideration that she not be held responsible for the tenant's filing fee at the end of the hearing.

Analysis

Residential Tenancy Policy Guideline #8 states that a material term is a term that both parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

Although the tenancy agreement calls Section 13 of the tenancy agreement a material term, the landlord testified that if a tenant had a person there for 15 days she would not automatically evict the tenant but in this case it was too late because of the noise complaints.

If the ability for the tenant to add her child to the tenancy can be impacted by a different issue, such as a noise complaint, then I do not see how the term can be material to the agreement. If it were material the breach of it alone would be sufficient for the landlord to end the tenancy.

The same Guideline defines an unconscionable term as being oppressive or grossly unfair. From the testimony provided the landlord had the sole power and authority to add the tenant's child to the tenancy agreement and would not do so, as such I find the tenant had no ability influence whether she was in breach of the agreement.

For the reasons above, I find the tenant has not breached a material term of the tenancy agreement.

In an attempt to be compliant with the Section 47 (1)(h) of the *Act* the landlord allowed the tenant time to correct the situation by stating she had "7 days to rectify this situation". Section 47 requires the tenant be given *reasonable* time to correct the situation, I find that 7 days for a mother to have her baby move out of the home as very unreasonable.

In relation to the noise issues, as per the testimony of both parties the building itself is old and not adequately sound proofed between floors. Section 28 of the *Act* states a tenant is entitled

to quiet enjoyment of their rental unit, including a freedom of unreasonable disturbance, this responsibility falls to the landlord to ensure.

Section 47 allows a landlord to end a tenancy if the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.

Babies or toddlers make noise as part of their nature and the landlord has failed to show how the noise of a baby could be considered to be an unreasonable disturbance on others. The tenant cannot be held responsible because the structure of the building does not allow for better sound insulation.

Having said that, I also find the tenant has taken reasonable steps to lessen the impact of the noise resulting from having a baby living with her by moving her bedroom into the dining room.

Conclusion

Finding the landlord has failed to establish cause, I order the tenant is entitled to cancel the 1 Month Notice to End Tenancy for Cause issued on March 16, 2010 and find the tenancy in full force and effect.

As the tenant was successful in her obligation I find that the tenant is entitled to monetary compensation pursuant to Section 67 in the amount of the \$50.00 fee paid by the tenant for this application.

I order that the tenant may deduct this amount from one future rent payment, pursuant to Section 72(2)(a) of the *Act*.

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: May 03, 2010.

Dispute Resolution Officer