Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes CNC, FF

Introduction

This hearing dealt with the tenants' application to cancel a Notice to End Tenancy for Cause and recover the filing fee paid for this application. Both parties appeared at the hearing and confirmed service of documents upon them. Both parties were provided the opportunity to make submissions, in writing and orally, and to respond to the submissions of the other party.

Issues(s) to be Decided

Should the Notice to End Tenancy for Cause be upheld or cancelled?

Background and Evidence

I heard the following undisputed testimony. The rental unit is one of three rental units located on the residential property. The tenants have been residing in the rental unit for approximately four years. The most recent tenancy agreement was signed by the tenants and the former landlord in October 2008. In July 2010 the tenants installed an above-ground swimming pool without the permission of the landlord. On September 1, 2010 the current landlords became the owners of the residential property. On September 1, 2010 the current landlord verbally requested the tenants remove the pool as soon as possible. On September 3, 2010 the landlord gave the tenants a letter requiring the pool to be removed by "Monday, August 6, 2010". On September 7, 2010 the landlord personally served the tenants with a *1 Month Notice to End Tenancy for*

Cause (the Notice) with an effective date of October 31, 2010. The Notice indicates the reasons for ending the tenancy are:

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

- seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and,
- put the landlord's property at significant risk.

The landlords made the following submissions. The tenancy agreement does not include use of the backyard by the tenants. The letter of September 3, 2010 erroneously refers to August 6, 2010 as the deadline for removing the pool; however, the landlord sent text messages to the tenant in an attempt to clarify the deadline but the tenant did not respond to the texts. The tenants did not obtain a permit for installation of the pool putting the landlord in breach of the municipal by-law. The backyard is adjacent to a well used pathway and there is no fence around the backyard thus putting the landlords at risk of liability if an accident were to occur with the pool. The pool caused damage to the lawn and had potential to cause other more significant damage to the property.

While the landlords acknowledged the pool was removed by the tenants in early October 2010 the landlords do not wish to continue the tenancy due to circumstances that occurred after the issuance of the Notice.

The tenant made the following submissions. The former landlord was aware of the pool in the backyard and did not say anything to the tenants about it. As a result of the landlord's verbal request of September 1, 2010 the tenant agreed to take the pool down and understood that he was not to put it up again next summer. The landlords did not allow sufficient time to remove the pool as draining all of the water takes time. The tenant did not receive the landlords' text messages as he shares his cell phone.

The tenant took steps to look into liability issues related to the pool and enquire with the municipality about requirements for pools. The tenants removed the stairs to the pool as required by the municipality but did not know a permit was required. The tenant has enquired with a landscaper to determine how to repair the lawn and will repair the lawn.

Provided as evidence by the tenants is an excerpt of the municipal bylaw concerning swimming pools, the landlord's letter of September 3, 2010 and the Notice with its covering letter dated September 7, 2010.

Provided as evidence by the landlords are photographs of the pool in the backyard and the lawn after the pool was removed; copies of text messages to and from the tenant to demonstrate the parties have communicated via text message; a copy of the tenancy agreement and addendum to the tenancy agreement, the municipal bylaw concerning swimming pools, information about occupier's liability and a recording of a conversation between the landlord and tenant on October 15, 2010.

Analysis

From the testimony before me and the covering letter that accompanies the Notice, it is clear that the landlord issued the Notice with respect the installation of the pool and the tenants' failure to remove the pool by September 6, 2010. The parties were informed during the hearing that any issues unrelated to the pool would not be considered in this decision. The issue before me is to determine whether the tenants' failure to remove the pool by September 6, 2010 is grounds for ending this tenancy.

The first point raised by the landlord was that the tenants are not entitled to use of the backyard is this was not specifically included in the tenancy agreement. I find the landlord's position is not supported by the Act. "Residential property" is defined by the Act and means a parcel of land on

which a building with a rental unit or units and the common areas are located. Common areas are defined as any part of residential property shared by tenants or a landlord and tenants. Section 28 of the Act provides that a tenant is entitled to use of common areas for reasonable and lawful purposes and section 30 prohibits a landlord from unreasonably restricting access to the residential property, which includes common areas, by the tenant or persons permitted on the property by the tenant. Since the Act provides a tenant the right to use the common areas, a tenancy agreement does not need to provide for inclusion of common areas in order for the tenant to use such areas.

A landlord may make rules pertaining to a tenant's reasonable use of the common areas; however, I do not find any such rules in this tenancy agreement. I do note that the addendum of the tenancy agreement requires the tenants to cut the lawn on the property which would require the tenants to access the backyard. Therefore, since there is no term in the tenancy agreement restricting the tenants' use of the backyard, I find the common area of the residential property includes the backyard and the tenants are entitled to use it under the Act for reasonable and lawful purposes.

Since common areas are shared by other tenants I find that having a large pool in the backyard is not a reasonable use of the common area by the one set of tenants and I accept that the pool posed an increased risk to the landlords' property and landlords' interest in the property.

Although I have found that the installation of the pool increased the risk to the landlords' property and the landlords' interest in the property, the difficulty in this case arises since the tenants had the pool in place nearly two months and the former landlord did not express any concern over its installation. While a warning or breach letter is not always required before a Notice to End Tenancy for Cause is issued I must be satisfied that a reasonable person would have known or ought to have known that their actions were in

violation of the Act, regulations or tenancy agreement. Having heard the former landlord did not communicate any dissatisfaction with the installation of the pool I find it reasonably likely the tenants were not aware that the installation of the pool was grounds for the tenancy to end. Therefore, I find it appropriate in such a situation that the landlord would issue a warning letter to the tenants and provide the tenants with a reasonable amount of time to correct the violation.

In this case the landlord did communicate to the tenants that the pool must be removed; however, the communication was not sufficiently clear. The first communication was verbal and I accept that the landlord communicated to the tenants that the pool must be removed as soon as possible; however, such a vague deadline is open to interpretation and not sufficiently clear. The landlord followed up the verbal communication with a written letter; however, the landlord's deadline of August 6, 2010 was impossible since the letter was given September 3, 2010. While I appreciate the landlord may have attempted to communicate with the tenant via text message to correct the deadline, text messages are not recognized as an acceptable form of communication under the Act. Rather, I find it reasonable to expect that upon discovering the error in the September 3, 2010 letter the landlord would have issued another letter to correct the error if the landlord intended to rely upon the communication to end the tenancy.

In light of the above, I find the tenants were not provided a clear deadline with respect to removing the pool and I set aside Notice to End Tenancy issued on September 7, 2010. As a result this tenancy shall continue until such time it legally ends.

The tenants must repair the damage to the grass in the backyard and I order that the tenants take sufficient steps to remedy the damaged lawn within two weeks of receiving this decision.

I find both parties contributed to the need for this hearing and I order the parties to share in the cost of the filing fee. The tenants are authorized to deduct $25.00, being one-half of the filing fee, from a subsequent month's rent.

Conclusion

The Notice to End Tenancy issued September 7, 2010 has been cancelled with the effect that this tenancy continues. The tenants must take steps to repair the damaged lawn within two weeks of receiving this decision. The parties shall share in the cost of making this application and the tenant are authorized to deduct $25.00 from a subsequent month's rent.

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: October 26, 2010.

Dispute Resolution Officer