



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

CNC

Introduction

This Application for Dispute Resolution by the tenant was seeking to cancel a One-Month Notice to End Tenancy for Cause dated July 28, 2011 effective August 31, 2011. Both parties appeared and gave testimony in turn.

The One-Month Notice to Notice to End Tenancy for Cause, a copy of which was submitted into evidence, indicated that the tenant had breached a material term of the tenancy that was not corrected within a reasonable amount of time after written notice to do so.

Issue(s) to be Decided

The tenant is disputing the basis for the notice and the issues to be determined based on the testimony and the evidence is whether the criteria to support a One-Month Notice to End Tenancy under section 47 of the *Act*, has been met, or whether the notice should be cancelled on the basis that the evidence does not support the cause shown.

Burden of Proof: The burden of proof is on the landlord to establish that the notice was justified.

Background and Evidence

The tenancy began on March 1, 2011 with rent of \$750.00. A security deposit of \$375.00 and pet damage deposit of \$375.00 were paid.

The landlord testified that there was a material term in the tenancy agreement stating that the tenant could not smoke in the unit and another material term in the agreement stating that any additional occupant who resided in the unit must apply for and receive approval by the landlord. The landlord testified that there was a report from one of the co-tenants that the other was smoking in her room and the landlord cautioned the tenant that this was a violation of the agreement. The landlord testified that the tenant was required to cease smoking and wash down the walls, which she did. On July 12, 2011, according to the landlord, the tenant was cautioned about the fact that an

additional occupant was apparently residing in the unit and that this individual was required to make an application for approval by the landlord. On July 16, 2011, an application for tenancy was received and two days later the new occupant was denied tenant status. The landlord testified that on August 5, 2011, the landlord issued a One Month Notice to End Tenancy for Cause because the tenant had breached a material term of the tenancy and failed to correct the situation within a reasonable time after a written warning to do so.

The tenant argued that the fact that the smoking ceased immediately after the caution and the fact that the additional occupant was permanently barred from residing in the unit as of August 5, 2011, should be considered as a valid measure to correct the situation within a reasonable amount of time. The tenant stated that they complied with all of the landlord's requests as quickly as they could possibly manage.

Analysis

Section 6 of the Act states that the rights, obligations and prohibitions established under the Act are enforceable and also that the terms agreed to in a tenancy agreement are enforceable through dispute resolution. Section 58 of the Act states that, except as restricted under the Act, a person may make an application for dispute resolution in relation to disputes over ; (a) rights, obligations and prohibitions under this Act; and (b) rights and obligations under the terms of a tenancy agreement that (i) are required or prohibited under this Act, or (ii) relate to the tenant's use, occupation or maintenance of the rental unit, or common areas or services or facilities.

In order to end a tenancy under section 47 for cause a landlord would need to prove that the tenant was in violation of either the Act or the tenancy agreement.

I find that the landlord had entered into a written tenancy agreement that contained a term prohibiting smoking in the unit and a term requiring new occupants to be approved by the landlord. I further find that the tenant violated these terms.

With respect to the issue of whether or not either one, or both, of the violations of these terms could be considered as a breach of a "material term", I find that this would require the landlord to satisfy the Dispute Resolution Officer that the following three components exist:

- There must be a clear term contained in the tenancy agreement
- This term must fit the definition of being "*material*"
- There must be a genuine breach of the material term.

Determining the materiality of a term, requires a focus upon the importance of the term in the overall scheme of the tenancy agreement and it falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term.

A material term is a term in the contract, which the parties had both agreed from the start, was so important that the most trivial breach of that term would give the other party the right to end the agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the tenancy agreement in question. In fact, it is entirely possible that the same term may be material in one agreement and not material in another. It is the true intention of the parties that was clearly established at the outset which will determine whether or not the clause is material.

In the situation before me, both parties have testified that there was a clear term in the tenancy agreement against smoking and prohibiting a new occupant without approval. I am satisfied that the term requiring the landlord's approval of the additional occupant was a material term in this tenancy.

Having found that these particular terms were both material terms and were both violated by the tenant, it must be determined whether or not the tenant corrected the situations within a reasonable time after being requested in writing to do so.

I find that the tenant did correct both of the transgressions within a reasonable time and the material terms are no longer being compromised.

Based on the evidence, I find that the One-Month Notice to End Tenancy for Cause dated July 28, 2011, will not function to end this tenancy and I find that the tenant's application requesting that the Notice be cancelled must be granted.

Conclusion

I hereby order that the landlord's One-Month Notice to End Tenancy for Cause dated July 28, 2011 be permanently cancelled and of no force nor effect.

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: September 01, 2011.

Residential Tenancy Branch