Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC OLC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to obtain Orders to cancel a Notice to End Tenancy for Cause, to have the Landlord comply with the Act, regulation, or tenancy agreement, and to recover the cost of the filing fee from the Landlord for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Has a valid 1 Month Notice to End Tenancy for Cause (the Notice) been issued and served in accordance with section 47 of the *Residential Tenancy Act?*
2. If so, have the Landlords met the burden of proof to establish cause to end this tenancy?

Background and Evidence

The parties entered into a fixed term tenancy agreement that began on May 1, 2011, and is set to switch to a month to month tenancy after May 1, 2012. Rent is payable on the first of each month in the amount of $1,000.00. On May 1, 2011 the Tenants paid a $500.00 security deposit and a $500.00 pet deposit.

The Landlord's PM affirmed that no evidence was submitted by the Landlord as they felt the Tenants had provided sufficient evidence to support their reasons for issuing the Notice.

The Landlord's PM and RM began their testimony saying the RM used to be friends with the Tenants until one of the Tenants threatened him a couple of months ago. They

attempted to end this tenancy based on those threats and attended dispute resolution on September 9, 2011 when that first Notice to end the tenancy was overturned.

The Landlords confirmed a second Notice was issued and served personally to the male Tenant on September 17, 2011 with the following reason checked off:

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

The Landlords advised that the Tenants have allowed a guest to stay at the rental unit more than 14 times which is in breach of item # 13 of their tenancy agreement which states:

> ***"**ADDITIONAL OCCUPANTS**.** No person, other than those listed in paragraphs 1 and 2 above, may occupy the rental unit or the residential property. A person not listed in paragraph 1 or 2 above who resides in the rental unit for a period in excess of fourteen cumulative days in any calendar year will be considered to be occupying the rental unit contrary to this Agreement and without right or permission of the landlord. This person will be considered a trespasser. A tenant anticipating an additional person to occupy the rental unit must promptly apply in writing for permission from the landlord for such person to become an approved occupant. Failure to apply for and obtain the necessary approval of the landlord in writing is a breach of a material term of this Agreement, giving the landlord the right to end the tenancy after proper notice."*

The Landlord's RM stated that he has seen this guest's car parked on the public roadway in the evenings more than fourteen times which indicates that she has stayed overnight in the Tenants' rental unit in breach of their tenancy agreement. Furthermore the RM sees the guest leave the rental complex early in the morning each day. The RM confirmed he has not seen the guest move possessions into the rental unit but has seen her arrive with a "hand bag". The Landlords noted that the Tenant's evidence included a list of days the guest has been at the rental unit which proves she has been there more than fourteen times.

The Landlords issued a breach letter to the Tenants on September 11, 2011 advising the Tenants there are an unreasonable number of occupants in the rental unit and a second breach letter on September 13, 2011 informing the Tenants they have breached a material term of their tenancy agreement. The Tenants failed to contact the Landlords to discuss this matter or the breach letters and simply continued to allow the guest to

stay over. The PM stated that they believe this guest is residing in the unit which is now an unreasonable number of people living in this three bedroom unit.

The RM advised that they do not care if friends are there every day all day long and in fact there are several tenants who have guests who come “everyday and stay all day long but they don’t stay overnight”.

The Tenant affirmed that their guest is a girlfriend of the male Tenant and she began visiting at the rental unit as of August 28, 2011 as indicated on the list of dates she attended the rental unit provided in their evidence. She confirmed this list of dates is every day the guest attended the rental unit either for a day visit or to stay overnight. She noted that as of the dates the two breach letters were issued the guest had not visited more than 14 days yet. At the time the first notice was issued she had visited only 8 times and as of the second notice she had visited 10 times.

The Tenant advised that she believes this new Notice was issued in retaliation because the Landlords were not successful in ending their tenancy in the previous dispute resolution. She noted how they, the Tenants, had provided evidence to prove their guest pays rent and resides at a different location along with their guest’s written statement about when the RM approached her and attempted to intimidate her for being the cause of them getting evicted. The Tenant confirmed their guest has never moved in any possessions and has never brought luggage with her.

In closing the RM disputed the guest’s statement and advised that he met her in the stairwell as he was walking back to his unit and while he did say good morning to her and confirmed they received the Notice he at no time accused her of being the reason they were getting evicted. He said that he spoke with her because he knows her because she works with his wife.

The PM’s summation was the Tenants failed to respond to the breach letters and continue to breach a material term of their tenancy agreement. He confirmed that they use the exact same formatted tenancy agreement for all of their tenancies.

Analysis

Upon review of the 1 Month Notice to End Tenancy I find that it was served upon the Tenants in a manner that complies with the *Act.*

The Landlords pointed to clause 13 of their tenancy agreement as the material term that the Tenants have breached leading to the issuance of the Notice. Clause 13 of the

tenancy agreement stipulates that anyone who resides in the rental unit for a period in excess of fourteen cumulative days in any calendar year will be considered to be occupying the unit and the Tenant would be required to apply to the landlord for permission to have this person become an approved occupant. If the tenant fails to comply they would be in breach of a material term of the tenancy agreement which would give the landlord the right to end the tenancy.

The *Act* provides that a landlord may end a tenancy for a breach of a material term of the tenancy agreement under section 47(h). In order to end the tenancy under section 47(h) the landlord must meet the following two part test:

(i) The tenant has failed to comply with a material term, and
(ii) The tenant has not corrected the situation within a reasonable time after the landlord gives written notice to do so

The first test is that that the term that was breached was a material term. A material term is a term that is so significant that it goes to the root of the tenancy agreement and that even the slightest breach would be grounds for ending the tenancy.

When questioning whether or not a term is material and goes to the root of the contract it is not enough to simply name the term as being a material term.

In *Worth and Murray v. Tennenbaum*, an unreported decision of the B.C. Supreme Court, August 18, 1980, Vancouver Registry A801884, His Honour Judge Spencer considered a decision of a Rentalsman's Officer finding that a clause allowing only one occupant was a reasonable material term of the agreement, the breach of which gave rise to termination of the agreement. Judge Spencer found that the term was not "material" and set aside the decision. He states, at page 3:

> The word "material" is defined in the Oxford English Dictionary (3rd) at page 1289 as meaning, inter alia, "of much consequence, important, of such significance as to be likely to influence the determination of a cause, to alter the character of an instrument". A determination of whether or not a breached covenant was reasonable and material under Section 23(2)(o) [now section 47(1)(h)] of the Residential Tenancy Act is comparable to the determination of whether or not a breached clause in a contract was fundamental to it, thus justifying the remedy of repudiation, or only a warranty, thus requiring nothing more than the payment of damages. ...

And at page 5:

> As a matter of law the various terms of the tenancy agreement may or may not be material to it in the sense that they justify repudiation in case of a breach. It is wrong to say that simply because the covenant was there it must have been material.

The evidence supports the Landlords are not concerned with guests who attend the rental unit "everyday all day long" for more than 14 days in any given year and are only concerned about those who stay overnight, regardless of the time they arrive or leave, even though the term does not differentiate between daytime guests or overnight guests. Therefore I find the Landlords are selectively enforcing the term against these Tenants and not others, even though they include this term in all of their tenancy agreements.

Madam Justice Lynn Smith also considered the issue of materiality in *Al Stober Construction Ltd. v. Charles Henry Long*, Kelowna Registry, 52219, 20010525. She notes in paragraph 35 of her reasons:

> "*If the term was "fundamental" to the agreement, the landlord would have rigorously enforced it."*

After careful consideration of the aforementioned, I find there is insufficient evidence to establish that term # 13 of the tenancy agreement is a material term and therefore there is insufficient evidence to prove the Tenants breached a material term. Accordingly I hereby cancel the 1 Month Notice to End Tenancy for cause that was issued September 17, 2011.

There is insignificant evidence to prove the Landlords breached the Act, regulation or tenancy agreement, therefore I decline to issue an Order to have them comply.

The Tenants have been successful with their application to cancel the Notice, therefore I award them recovery of the **$50.00** filing fee.

Conclusion

The 1 Month Notice to End Tenancy issued September 17, 2011, is HEREBY CANCELLED and is of no force or effect.

The Tenants may reduce their next rent payment by the 1 time award of **$50.00**.

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 06, 2011.

Residential Tenancy Branch