



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FF

Introduction

This hearing dealt with the tenant's application to cancel a 1 Month Notice to End Tenancy for Cause. Both parties appeared at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Neither party provided a copy of the Notice to End Tenancy that is the subject of this dispute; however, both parties agreed that the Notice under dispute was issued November 4, 2011 with a stated effective date of December 4, 2011 and the reason indicated on the Notice is: breach of a material term of the tenancy agreement that was not corrected with a reasonable time after written notice to do so. Both parties indicated a willingness to proceed with this matter and based upon the agreed upon content of the Notice to End Tenancy I proceeded to hear this matter.

Issue(s) to be Decided

Has the landlord established that the tenant has breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so?

Background and Evidence

The following facts were undisputed by the parties:

- The tenancy commenced in May 2006 and the tenant is currently required to pay rent of \$890.00 on the 1st day of every month.
- In 2008 the tenant acquired a cat and then a dog.
- In 2010 the cat went missing and the dog had to be given to a new home after biting the tenant's child.
- In July 2011 the tenant agreed to adopt a soon-to-be born puppy and brought it home September 20, 2011.
- Under previous management several tenants living at the property acquired pets, including the tenant, and the manager had knowledge of these pets.

- In the swimming pool area hangs a sign that indicates no dogs are permitted in the pool.
- The current building manager replaced the former manager starting August 2011.
- After the new manager took over he distributed notices to tenants with respect to issues he wished to bring to the tenants' attention. The notices distributed pertained to garbage on the balconies and use of parking spaces; but did not comment on pets in the building.
- On September 29, 2011 the building manager observed the tenant walking with her newly acquired puppy in the common area of the property. A discussion ensued whereby the manager informed the tenant that no new pets would be permitted.
- On October 4, 2011 the landlord issued a breach letter addressed to the tenant's minor son, advising the son that it had come to the landlord's attention that there was a pet in the rental unit, that keeping a pet in the unit was a material breach of the tenancy agreement, and if the pet was still in the unit in 30 days a 1 Month Notice to End Tenancy would be issued.
- On November 4, 2011 the building manager personally served 1 Month Notice to End Tenancy for Cause (the Notice) upon the male tenant, the applicant's husband. The Notice has a stated effective date of December 4, 2011 and indicates the reason for ending the tenancy is due to a breach of a material term of the tenancy agreement that was not corrected with a reasonable time after written notice to do so.

The landlord submitted that the tenancy agreement provides for two clauses with respect to pets, which I have reproduced based on the portions highlighted by the landlord:

18. **PETS.** Unless specifically permitted in writing in advance by the landlord, the tenant must not keep or allow on the residential property, any pet, including a dog, cat,... This is a material term of this Agreement. Further, if the landlord gives notice to the tenant to correct any breach, and the tenant fails to comply within a reasonable time, the landlord has a right to end the tenancy along with making the appropriate claims against the tenant.
42. **OTHER.** No cats or dogs or other furry animals without special written permission from the landlord.

The building manager submitted that in taking over management of this property, it is his obligation to enforce the terms of the tenancy agreements and that no new pets will

be permitted without prior written consent, as required in the tenancy agreement. Tenants with pets acquired during the previous management are “grandfathered” from enforcement but because the tenant acquired the puppy after new management was in place the tenant is not grandfathered from enforcement of the pet clauses. The landlord submitted that a 1½ year time lapse between dogs is too long to consider the new dog a replacement for the tenant’s former dog.

The tenant submitted that when the rental unit was shown to them by the former manager the tenant became aware that the former tenant of the unit had two cats and that the previous manager was aware of this fact. The tenant acquired a cat after her tenancy commenced without written consent of the previous manager and the previous manager was aware there was a cat in the unit. The tenant explained that during repair work in the rental unit the manager had put the cat in the bathroom so that it would not escape the rental unit. In addition, when the tenant acquired the former dog the tenant did not seek written permission and the previous manager saw the tenant walking the dog and playing with other dogs on the property. The previous manager never gave any indication to the tenant that the pet clauses would be enforced; rather, the former manager appeared accepting of the tenant having pets.

The tenant explained that there was a lapse of 1 ½ years between dogs because her son had to overcome the trauma of being bitten and because the tenant wanted to research breeds before acquiring another dog. The tenant submitted that had she been more irresponsible and acquired a second dog sooner the tenant would not be facing eviction now.

Analysis

Where a Notice to End Tenancy comes under dispute, the landlord bears the burden to prove that the tenancy should end for the reason indicated on the Notice.

The reason indicated on the Notice is provided by section 47(h) of the Act. Section 47(h) requires the following two criteria be met:

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

Upon consideration of all of the evidence before me I find the Notice to End Tenancy issued November 4, 2011 should be cancelled as the landlord has failed to meet the two criteria required under section 47(h). I provide the reasons for my finding below.

I will deal with section 47(h)(ii) first as it can be dealt with summarily. The breach letter dated October 4, 2011 is addressed to the tenant's 6 year old child. Accordingly, I find the landlord has not provided a valid notification to the tenant concerning a breach.

Although a failure to provide valid written notice is sufficient in itself to cancel the Notice, I find it reasonably likely the landlord will issue another breach letter and I find it equally likely the tenant will not give away the puppy. Therefore, I have proceeded to consider the arguments raised by both parties as to whether there has been a breach of a material term of the tenancy agreement with respect to the pet clauses.

Residential Tenancy Policy Guideline 8 deals with material terms. Policy Guidelines provide statements of the policy intent of the legislation, and have been developed in the context of the common law and the rules of statutory interpretation, where appropriate. Policy Guidelines are also intended to help the parties to an application understand issues that are likely to be relevant. Residential Tenancy Policy Guideline 8 provides, in part, with my emphasis underlined:

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

It is undisputed that several tenants in the building, including the tenant, had acquired pets under the former management of the property. I accept the tenant's evidence that

the building's former manager knew the tenant had pets and had permitted the tenant to keep the pets without obtaining the landlord's written permission. Clearly, the former building manager was not concerned with enforcing the pet clauses as provided in the tenancy agreement.

As indicated in the Policy Guideline, in order to find a term is a material term, the facts and circumstances must indicate that both parties agreed that the term was a material one. Agreements are reduced to writing by way of the tenancy agreement. Since the previous management entered into the tenancy agreement and allowed the tenant to breach the pet clause of their agreement over the course of several years I find the actions of the previous management are consistent with implied waiver of enforcement of the pet clauses.

I accept the evidence of the tenant that the tenant did not try to conceal the current pet or the former pets from the management of the property and I find the tenant's actions consistent with her understanding the management did not enforce the pet clauses of the tenancy agreement.

When the current manager took over duties at the property in August 2011, the manager distributed various notices to tenants of the property with respect to issues the manager wished to draw to the tenants' attention. The notices distributed to the tenants did not make any reference to pets; it did, however, make reference to such items as garbage on balconies and use of parking spaces. From the landlord's testimony during the hearing, the landlord was aware of pets in the building, yet did not raise it as an issue in the notices distributed shortly after his duties commenced.

I find the current manager is relying upon the wording of the tenancy agreement in submitting that the pet clauses are material terms; however, as provided previously, the wording of the tenancy agreement is not in itself decisive. Considering the facts and circumstances during this entire tenancy I find that the pet clauses in the tenancy agreement were not considered material terms by either the tenant or the previous management. I do not accept that a change in building management is a sufficient basis to find that both parties have agreed that the pet clauses are now material terms. Therefore, I conclude that the pet clauses in the tenancy agreement are not material terms and the landlord has not met the criteria of section 47(h)(i).

In light of the above, the Notice to End Tenancy is cancelled because the landlord has not established that the requirements of section 47(h)(i) and (ii) have been met and the tenancy shall continue. As the tenant was successful in the application the tenant is authorized to recover the filing fee by deducting \$50.00 from a subsequent month's rent.

Conclusion

The Notice to End Tenancy has been cancelled with the effect the tenancy continues. The tenant is authorized to deduct \$50.00 from a subsequent month's rent in order to recover the filing fee paid for this application.

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: November 29, 2011.

Residential Tenancy Branch