

## **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 April 27, 2012 effective May 31, 2012. 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 10, 2010 with rent of \$595.00. A security deposit of \$297.50 and pet damage deposit of \$297.50 were paid.

The landlord testified that there was a material term in the tenancy agreement requiring the tenant to cooperate with realty showings and not to interfere with the agents when they were presenting the unit for sale. The landlord testified that the realtor had reported several occasions when the tenant had failed to permit access, despite having verbally agreed to the time. The landlord gave two examples of this and also stated that one of the co-tenants had provided negative commentary to a potential purchaser.

The landlord stated that a warning letter was issued dated April 23, 2012 and referred to evidence submitted in the form of emails and correspondence.

The tenant disputed that they had violated any material term in the agreement . The tenant testified that they were not even notified that the home was up for sale prior to suddenly being approached by the landlord's agents to show the unit. The tenant testified that they had been very accommodating with respect to the showings and even permitted the agent to enter on short notice. However, the tenant admitted that they had to cancel showings that were scheduled and decline verbal requests due to personal circumstances that arose.

### **Analysis**

In this instance the landlord has alleged a "Breach of a Material Term" of the tenancy agreement.

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.

With respect to the issue of whether or not a breach of a tenancy term 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 clear term in the contract, which the parties had both agreed to 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, I find that the landlord's evidence has not proven that there was a clear term in this tenancy agreement with respect to specific arrangements for showing the home that was highlighted as a material term at the signing of the agreement.

I find that, even if there was a material term that required the tenant to make the home available for showing, it would need to be tempered to the extent that it the term, as defined in the tenancy agreement, did not impinge on the tenant's right to quiet enjoyment under section 28 of the Act. This section of the Act states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

That being said, a tenant must not intentionally undermine the landlord's efforts to sell the home, or the tenant's conduct could be seen as significantly interfering with the landlord, which may result in the landlord issuing a One-Month Notice to End Tenancy for Cause on that basis.

In any case, the Act does anticipate a landlord's need to access the unit for valid purposes. Section 29 of the Act states that a landlord must not enter a rental unit for any purpose unless the tenant gives permission at the time of the entry, or at least 24 before the entry, the landlord gives the tenant written notice that includes the following information:

- (i) the purpose for entering, which must be reasonable;
  - (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
- or an emergency exists and the entry is necessary to protect life or property.

Section 29 (2) states that a landlord may inspect a rental unit monthly in accordance with the Act.

With a verbal request for access, the tenant is well within their right to decline.

However, I find that, if the landlord notifies the tenant properly in accordance with the Act, then the tenant must also comply with the Act by permitting entry, whether the tenant was home or not. Of course this is presuming that the showings are not so frequent and disruptive as to interfere with the tenant's right to quiet enjoyment.

In some instances where the tenant's rights to privacy have been significantly compromised, the tenant may choose to make a claim for compensation for loss of value to the tenancy.

In this case, both parties have expressed an intention to comply with their respective responsibilities and obligations under the Act and the agreement in regard to showing the unit.

Given the above and based on the evidence, I find that the One-Month Notice to End Tenancy for Cause dated April 27, 2012, will not end this tenancy and the tenant's application requesting that the Notice be cancelled will be granted.

### **Conclusion**

I hereby order that the landlord's One-Month Notice to End Tenancy for Cause dated April 27, 2012 be permanently cancelled and is now 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: May 23, 2012.

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Residential Tenancy Branch