



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes CNC, CNR, DRI, OLC, O

Introduction

This matter dealt with an application by the Tenant to cancel a One Month Notice to End Tenancy for Cause dated July 18, 2012, to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated August 2, 2012, to dispute a rent increase and for an Order that the Landlord comply with the Act or tenancy agreement.

RTB Rule of Procedure 2.3 states that “if in the course of the dispute resolution proceeding, the Dispute Resolution Officer determines that it is appropriate to do so, the Dispute Resolution Officer may dismiss unrelated disputes contained in a single application with or without leave to reapply.” I find that the Tenant’s application for an Order that the Landlord comply with the Act or tenancy agreement (ie. with respect to the Landlord’s alleged non-compliance with s. 29 of the Act or rules regarding sufficiency of notice of entry) is not substantially related to her application to cancel a Notice to End Tenancy for Cause (for breach of a material term that there be no other person occupying the rental unit) or her application to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. Consequently, the Tenant’s application for an Order that the Landlord comply with the Act or tenancy agreement is dismissed with leave to reapply.

Issue(s) to be Decided

1. Do the Landlords have grounds to end the tenancy?
2. Are the Landlords entitled to increase the rent?

Background and Evidence

This tenancy started on April 15, 1999. The Landlords’ agent said economic rent for the rental unit is \$845.00 per month however when the Tenant is eligible for a rent subsidy, her rent contribution is \$380.00. The Landlords’ agent said the Landlord is a non-profit society that offers housing to low income people over 50 years of age and which raises funds privately. The Landlords’ agent said the Landlord receives a property tax exemption through the municipality for so long as it operates according to its mandate and that the property tax exemption can be revoked at any time.

The Landlords' agent said she received complaints from other residents of the rental property that the Tenant's adult son was living with her. The Landlords' agent said that the Tenant had a number of years prior been told that her son could not live there and he voluntarily vacated. However, the Landlords' agent said that during an inspection for bed bugs in June 2012, the building manager discovered that the Tenant's suite had two double beds and two televisions which confirmed her belief that the Tenant's son was again living there. The Landlords' agent said a review of the security camera tapes of the building also showed the Tenant's son came and went from the rental unit on a daily basis and that on at least one occasion, he left the building at 9 p.m. and returned at 3 a.m. Consequently, the Landlords' agent said she served the Tenant with a letter dated June 14, 2012 advising her that she was in breach of her tenancy agreement and that if her son did not vacate by June 22, 2012, her subsidy would be revoked and she would be served with a One Month Notice. The Landlords' agent said she also gave the Tenant a letter on July 18, 2012 and asked to provide her with evidence that her son had his own residence in order to prove that he wasn't living in the rental and that if she did not her rent subsidy would be revoked effective August 1, 2012.

The Landlords' agent said the Tenant's son did not move out and the Tenant did not provide her with any evidence that her son had his own residence. As a result, on July 18, 2012, the Landlords also served the Tenant with a One Month Notice to End Tenancy for Cause which alleged that the Tenant had breached a material term of her tenancy agreement and had failed to correct it within a reasonable time after receiving written notice to do so. The Landlord said Schedule A to the tenancy agreement contains terms as follows:

"A.2 Occupants: The Landlord chose the tenant because of the family size and the total gross household income and assets. Any change in the family size is important. The tenant agrees to tell the landlord promptly if there is a change in the tenant's family size. If the tenant's family size changes, the landlord has the right to terminate this tenancy agreement.

A.4 Tenant's Rent Contribution: The Landlord will change the Tenant Rent Contribution if there is a change in the tenant's household income and assets. The landlord will give the tenant 30 days notice in writing of these changes.....The income of any person occupying the premises as his or her principal residence, even if that person is not named in the tenancy agreement, will be included in the tenant's income."

The Landlord's agent said that when the Tenant entered the tenancy agreement, the rental property included family housing but later changed so that only persons 50 years or older could reside there. The Landlord said it is a material term of the tenancy agreement that no one over 50 years of age may reside in the rental property because the Landlords would then risk losing their property tax exemption and rents would increase significantly. The Landlord's agent said the Tenant was also served with a 10

Day Notice to End Tenancy for Unpaid Rent or Utilities dated August 2, 2012 when she failed to pay the market rent for the rental unit.

The Tenant argued that her son does not live with her in the rental unit but instead resides with her daughter in the same city. The Tenant admitted that for the past two years her son has visited her from Monday to Friday between 6 and 10 p.m. and during the day on weekends. The Tenant claimed that her son rarely stays overnight and in particular, only once in the past year. However, the Tenant later admitted that her son had also stayed the night on some occasions when he remained too long watching a movie and as a result missed his bus home.

The Tenant's daughter gave evidence that the Tenant's son (her brother) has resided with her for the past two years. The Tenant's daughter said she tried to contact the Landlord, M.O., to discuss the matter but he would not return her calls (which the Landlords' agent denied). The Tenant's daughter said her brother has a mental illness and finds it comforting to be around family members while her mother has physical issues and needs assistance which her brother can provide on a daily basis. The Tenant's daughter claimed that she provided the Tenant's advocate with documentation such as rent receipts that show her brother resides with her but she could not account for why they were not submitted to the Landlords or as evidence at the hearing. The Tenant's daughter also claimed that she had been willing to allow an agent of the Landlords' to inspect her residence to verify that her brother resides there but now did not feel comfortable doing so and was unavailable for an inspection in any event.

The Tenant's advocate argued that the Landlord was not an organization that was exempt from the rent increase provisions of the Act under s. 2 of the Regulations to the Act. Consequently, the Tenant's advocate argued that the Landlord was not entitled to increase the Tenant's rent as it had and that the 10 Day Notice served on the Tenant was invalid.

The Tenant's advocate also argued that the material terms relied on by the Landlords were not terms of the Tenant's tenancy agreement. In particular, the Tenant's advocate claimed that the copy of the tenancy agreement produced by the Landlord at the hearing had been altered since the Tenant signed it to add Schedule A (which is not referred to in the tenancy agreement). The Tenant's Advocate pointed out that clause 9 of the tenancy agreement refers to termination for breaches of the "Rules of Occupancy" which the Tenant had never received. The Tenant's advocate also pointed out that clause 5 of the Tenant's copy of the tenancy agreement provides (in part) that, "the Landlord may increase the rent payable from time to time by notice in writing to the Tenant (subject to the Act)." However, in clause 5 of the Landlords' copy of the tenancy agreement the words, "(subject to the Act)" have been removed. Consequently, the Tenant's advocate argued that there was no material term or any term or the tenancy agreement preventing the Tenant's son from residing with her.

Analysis

I make no finding as to whether the non-profit Landlord is an organization that falls under s. 2 of the Regulations to the Act and that would for that reason be exempt from the rent increase provisions of the Act. The Tenant's advocate claimed that this issue is currently before the Supreme Court of British Columbia. However, in this matter, I find that this issue is irrelevant because the Landlord has not complied with the Act even if it did fall under s. 2 of the Regulations to the Act. In other words, even if the Landlord was entitled to revoke the Tenant's rent subsidy, it was not entitled to do so by way of a letter and a subsequent 10 Day Notice. Instead, the Act requires a Landlord in that case to provide a Tenant with a 2 Month Notice. In the alternative, if the Landlord is not an organization that falls under s. 2 of the Regulations to the Act, then the Landlord would have to comply with s. 43 of the Act and observe the applicable notice periods. For all of these reasons, I find that the 10 Day Notice is of no force and effect and it is cancelled.

Furthermore, until such time as the Landlord serves the Tenant with a 2 Month Notice, I find that the Tenant's application to dispute a rent increase is moot and for that reason, it is dismissed with leave to reapply.

RTB Policy Guideline #8 (Unconscionable and Material Terms) at p. 1 states as follows:

"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."

In this matter, the Landlords have the burden of proof and must show (on a balance of probabilities) that grounds exist (as set out on the Notice to End Tenancy) to end the tenancy. Consequently, the Landlords must show that the tenancy agreement contains a term prohibiting other occupants (under the age of 50) from residing in the rental unit and also show that the Tenant's son has in breach of that term, been residing with the Tenant. I find for the following reasons however, that the Landlords have not proven these things.

Firstly, I find that there is insufficient evidence that it is a material term of the tenancy agreement that any other occupants are not permitted in the rental unit. In particular, I am not convinced that the terms set out under Schedule A to the Landlords' copy of the tenancy agreement were included as terms of the tenancy agreement when the Tenant signed it. Furthermore, I find that there is no evidence of any Rules of Occupancy referred to under clause 9 of both Parties' copies of the tenancy agreement. I find that

the only clause of the tenancy agreement that could apply in this case is clause 11 which states (in part) as follows:

“Guests: If the number of permanent occupants is unreasonable, the Landlord may discuss the issue with the tenant and may serve a Notice to End a Residential Tenancy.”

Secondly, I find that there is insufficient evidence to conclude that the Tenant’s son is using the rental unit as his residence. The Landlord claimed that it was unreasonable for the Tenant to have 2 television sets and two double beds in a small, bachelor suite unless her son was also residing there. However, the Tenant argued that she kept a second bed for guests. The Landlords’ agent also claimed that security cameras in the rental property showed the Tenant’s son coming and going from the rental unit at all hours of the day which contradicted her evidence that her son only stayed a few hours each day and rarely overnight. However, I find that this evidence is hearsay and unreliable; the Landlords provided no security camera footage and there was no evidence for example, on how many occasions he was alleged to have stayed overnight. Consequently, I find that the Landlords have not provided sufficient evidence to show that the Tenant is in breach of a material term of the tenancy agreement and accordingly the One Month Notice to End Tenancy for Cause dated July 18, 2012 is cancelled.

Conclusion

The Tenant’s applications to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated August 2, 2012 and to cancel a One Month Notice to End Tenancy for Cause dated July 18, 2012 are granted. The Tenant’s applications to dispute a rent increase and for an Order that the Landlords comply with the Act or tenancy agreement are dismissed with leave to reapply.

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: August 17, 2012.

Residential Tenancy Branch