Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Norton Holdings Inc. and Windsor Place Apartments
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes For the tenant: CNC, MNDC, FF
For the landlord: OPC, OPB, FF

Introduction

This was the reconvened hearing dealing with the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the "Act"). The original hearing was adjourned due to the length of the parties' testimony and presentation of their other evidence.

The tenant applied for an order cancelling the landlord's 1 Month Notice to End Tenancy for Cause (the "Notice"), a monetary order for money owed or compensation for damage or loss, and for recovery of the filing fee.

The landlord applied for an order of possession for the rental unit due to alleged cause, an order of possession due to an alleged breach by the tenant of an agreement with the landlord, and for recovery of the filing fee.

The hearing process was explained to the parties, reconfirmed at the reconvened hearing, and an opportunity was given to ask questions about the hearing process. Thereafter the parties were provided the opportunity to present their evidence orally and refer to documentary evidence submitted prior to the hearing.

At the outset of the hearing neither party raised any issues regarding service of the application or the evidence.

I have reviewed the oral and written evidence before me that met the requirements of the Residential Tenancy Branch Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Preliminary issue-As a preliminary issue, I have determined that the portion of the tenant's application dealing with a request for a monetary order for money owed or compensation for damage or loss is unrelated to the primary issue of disputing the Notice. As a result, pursuant to section 2.3 of the Residential Tenancy Branch Rules of Procedure, I have severed the tenant's Application and dismissed that portion of the tenant's request for that order, with leave to reapply.

The hearing proceeded only upon the tenant's application to cancel a Notice to End Tenancy for Cause, the landlord's application seeking an order of possession for the rental unit, and their respective requests to recover the filing fee.

Issue(s) to be Decided

Is the tenant entitled to an order cancelling a 1 Month Notice to End Tenancy for Cause and to recover the filing fee?

Is the landlord entitled to an order of possession for the rental unit due to alleged cause and for an alleged breach by the tenant of an agreement with the landlord, and to recover the filing fee?

Background and Evidence

The parties were previously in dispute resolution at least two times on the same issue as in the present case, that is, whether there is cause to end this tenancy based upon the tenant's alleged breach of a material term of the tenancy agreement. The term referred to deals with the parking afforded the tenant.

Additionally in their present application, the landlord is also seeking an order of possession for the rental unit due to an alleged breach of an agreement with the landlord by the tenant.

Although the tenant stated that the parties have been in dispute resolution on 4-5 occasions, in the first known to me hearing on July 6, 2012, the Arbitrator cancelled the landlord's 1 Month Notice to End Tenancy for Cause (the "Notice"), due to the landlord's failure to submit sufficient evidence supporting that parking was a material term of the tenancy agreement. In further explanation, as neither party submitted the tenancy agreement into evidence, the Arbitrator asked the landlord to read from the tenancy agreement the specific wording relating to the parking, to which the landlord's agent, the one attending the present hearing, stated that the only reference to parking was, "0.00 for parking." The agent also confirmed during the July 6, 2012, hearing that the tenancy

agreement did not indicate restrictions on parking, or the maximum parking stalls allowed each tenant.

The tenant said that he did not have a copy of the tenancy agreement.

A second hearing was held on November 27, 2012, on the cross applications of the parties. The landlord applied for an order of possession for the rental unit due to alleged cause, for the same reason as dealt with at the July 6, 2012, hearing, and the tenant applied to cancel the Notice.

That hearing resulted in a settlement by the parties, with the tenant agreeing to remove all items from the "garage" by December 21, 2012, and to occupy a single stall for his personal vehicle only. The agreement also stated that the tenant understood that if he did not comply with the terms of this agreement, the landlord would serve him with another notice to end the tenancy for alleged cause.

In that decision, the Arbitrator also cautioned the tenant that if he failed to comply with the terms of the agreement, the "record of these events would form part of the landlord's case should it again come before an Arbitrator, for consideration."

I note that the Arbitrator said that the tenant was entitled to one parking stall for a vehicle, but failed to mention upon which this term was based as it was not part of the agreement of the parties.

In the present case, the parties agreed that this tenancy began in 1996, beginning monthly rent was $520.00 and that current monthly rent is $916.00.

The landlord explained that the rental unit is one in a 36 unit apartment building with secured, underground parking.

The landlord said that he issued the tenant another 1 Month Notice to End Tenancy for Cause, alleging 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.

I note that the Notice is undated by the landlord; however the landlord testified that the Notice was issued on January 1, 2013, via registered mail. It was not made clear as to whether the landlord was able to use registered mail services on a national statutory holiday.

The landlord argued that the tenant is in continued violation of clauses 6 and 10 of the tenancy agreement. The landlord further argued that the tenant is also violating the November 27, 2012, agreed decision as he has failed to remove all items of personal property from his parking stall by December 21, 2012. The landlord said that as of the date of the hearing on February 5, 2013, the tenant was still occupying one cell, which is apparently two adjoining stalls, not one stall, in the underground parking garage. The landlord also submitted that not only did the tenant have many personal items remaining in the parking stall, he also had a vehicle other than a personal vehicle in the stall, as allowed. The vehicle in the stall was not operable and had a cover over it, which the landlord contended rendered the vehicle to be other than a personal vehicle.

The landlord's relevant evidence included a copy of the Notice, a copy of a 2 page tenancy agreement, the November 27, 2012, decision, and black and white copies of photographs of the parking stall.

I note that the tenancy agreement is a document from 1996, originally entitled "Application for Rent of Suite," which was stricken, to be replaced with the handwritten notation, "Rental Agreement."

In response to the landlord's submissions, the tenant disagreed that he has items of personal property left in the stall or that he has not complied with the November 27, 2012, agreed decision.

At the time of the first hearing on the present applications, the tenant said that he had only one vehicle in his parking stall, a 1985 classic automobile, owned by the tenant. The tenant contended that whether the vehicle was operable or not, this car was his personal vehicle.

The tenant said that after the November 27, 2012, hearing, he took time off from work, 5 days, in order to remove all items from the parking stall. The tenant said he made a monumental effort to comply with the terms of the agreement and that the present property manager has been on a vendetta to evict him since 2005.

The tenant also argued that although there may have been personal property around his stall, those items were not his, possibly belonging to the landlord.

In support of his position, the tenant's relevant evidence included "before" and "after" photos, depicting his parking stall before he began removing items and after he finished, the July 6, 2012, decision, the Notice, and a written submission.

On the day of the reconvened hearing, the landlord agreed that the classic car had been removed, replaced by an operable vehicle; however the tenant still had other items of personal property remaining in the stall, including a blue box, a dolly, a ladder, a bicycle

Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

Landlord's application-

In common practice, once the tenant makes an application to dispute a Notice to end a tenancy, the onus is on the landlord to prove the Notice is valid.

In the case before me, I must also take into consideration the two decisions previously mentioned issued by the Residential Tenancy Branch ("RTB") prior to this hearing. Those two decisions, as mentioned previously, dealt with the landlord's contention that the tenant was in violation of a material term of the tenancy agreement, more specifically, that the tenant was in violation of the clauses surrounding the tenant's parking in the underground garage.

The reason I must take into consideration these two decisions is due to the legal principle of *res judicata.* In other words, if an issue has previously been decided upon by another Arbitrator, I cannot re-decide that issue.

In reviewing the July 6, 2012, decision, the agent for the landlord read from the tenancy agreement at the hearing, informing the Arbitrator that the only reference to parking was that the cost was nothing as well as confirming that the tenancy agreement did not indicate restrictions on parking, or the maximum parking stalls allowed for each tenant.

The Arbitrator, as a result of the landlord's oral evidence, cancelled the Notice due to the landlord failing to provide supporting evidence that parking was a material term.

In the November 27, 2012, the parties agreed that the tenant was to remove all items from the "garage" by December 21, 2012 and to occupy a single stall for his personal vehicle only and his failure to do so would result in the landlord serving the tenant another Notice to end the tenancy for cause.

The Arbitrator made no findings on the merits of the parties' respective applications or the Notice. As such, I therefore concluded that the November 27, 2012, decision of the RTB did not make a finding that the tenant had breached a material term of the tenancy agreement and I was not compelled to find that the issue of parking was a material term of the tenancy agreement.

As a result, I found that I would now consider the landlord's notice to determine whether or not the tenant had breached a material term of the tenancy agreement which was not corrected after a reasonable time to do so.

After reviewing the evidence, I find the landlord has provided insufficient evidence to support their Notice. In reaching this conclusion, I reviewed the tenancy agreement, specifically clauses 6 and 10 of the "Conditions of Tenancy," to which the landlord cited as the terms the tenant had violated.

Clause 6 restricts vehicles other than a passenger car from being parked on the property, further stating that no vehicle shall be repaired unless authorized by the owner or agent. No restriction was placed on the vehicle having to be parked in the tenant's parking stall.

I accept the submission of the tenant, that on the day the undated Notice was issued, only one car was parked in the tenant's parking stall. I do not accept the landlord's argument that the car did not meet the definition of being a passenger car as it was not operable. I find the car was registered to the tenant and was a car for his use, whether it worked or not, and therefore a personal vehicle.

I therefore find the landlord submitted insufficient evidence that the tenant violated clause 6 of the tenancy agreement.

As to clause 10, the tenant was prohibited from having rubbish or boxes in corridors or parking areas or elsewhere on the property.

The items complained of by the landlord, included among other things, a dolly, ladder and bicycle, although the landlord did not contend that these items were rubbish or were in boxes.

I find these items were not rubbish and were not stored in boxes and as such, I find the

landlord submitted insufficient evidence that the tenant violated clause 10 of the tenancy agreement.

I also find that the tenant complied with the agreed settlement as I find the tenant occupied only one parking stall. I find no restriction in the tenancy agreement prohibiting the tenant from having his bicycle or other items not rubbish or in boxes to be placed in the tenant's stall.

Although I have found that the landlord provided insufficient evidence that the tenant violated the tenancy agreement, I must now also address whether the terms surrounding parking, or rather the clauses, 6 and 10, claimed by the landlord to address parking, are material terms.

In considering this issue, I must note that I was influenced by the landlord's evidence for the hearing of July 6, 2012. On that day the landlord specifically stated when reading the tenancy agreement that parking restrictions were not included in the original tenancy agreement. Therefore I could find no plausible explanation as to how the landlord was subsequently able to locate a tenancy agreement containing some restrictions on parking for future dispute resolution hearings, and I therefore found the landlord's credibility and reliability were called into question.

The landlord was not able to provide evidence at the July 6, 2012 dispute resolution hearing of a term so important that the most trivial breach of that term gives the other party the right to end the tenancy, as decided by an Arbitrator. I find the landlord also failed to submit sufficient evidence at the present hearing as to how this term was such a material term that the most trivial breach gave the landlord the right to end the tenancy.

I therefore determined and so find that the issue of parking for this tenancy is not a material term of the tenancy agreement.

Due to the above, I therefore find that the landlord has submitted insufficient evidence to prove the cause listed on the Notice as I find that the tenant has not violated a material term or any term of the tenancy agreement.

As a result, I find the landlord's 1 Month Notice to End Tenancy for Cause, undated and said to be issued by the landlord on January 1, 2013, listing an effective end of tenancy of February 28, 2013, is not valid and not supported by the evidence, and therefore has no force and effect. I order that the Notice be cancelled, with the effect that the tenancy will continue until ended in accordance with the *Act*.

I must also note that although under other circumstances I would cancel the landlord's Notice for failure to include a date, as required under section 52 of the Act, I made the choice to proceed on the respective applications due to my belief that the parties would again quickly be in dispute resolution on the same issues had I cancelled the Notice for that reason. I believe it in the interests of both parties and procedural fairness to have proceeded.

I must also note that although the landlord asked for an order of possession for the rental unit due to an alleged breach of an agreement with the tenant, I find that this reason is allowed under section 55(2) of the Act, when the parties have reached an agreement to end the tenancy. I do not find that to be the case here and I therefore decline to consider this request listed on the landlord's application.

As I have cancelled the landlord's Notice, I also decline to award the landlord recovery of the filing fee.

Tenant's application-

As I have cancelled the landlord's Notice, I grant the tenant's application seeking cancellation of that Notice.

As I have granted the tenant's application, I grant the tenant's request to recover the filing fee. I allow the tenant to deduct $50.00 from his next or a future month's rent payment in satisfaction of his monetary award.

Conclusion

The landlord's application is dismissed, without leave to reapply.

The tenant's application seeking cancellation of the Notice is granted and he is authorized to deduct $50.00 from his next or a future month's payment of rent for recovery of the filing fee.

The portion of the tenant's application requesting a monetary order is 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* and is being mailed to both the applicant/tenant and the applicant/landlord.

Dated: March 12, 2013

Residential Tenancy Branch