



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL CNC

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to cancel notices to end tenancy issued for cause and for landlord's use of the property.

The parties appeared at the teleconference hearing and gave affirmed testimony. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Should the 2 Month Notice to end tenancy issued January 28, 2013 be cancelled?
2. Should the 1 Month Notice to end tenancy issued February 24, 2013 be cancelled?

Background and Evidence

The Tenants submitted documentary evidence which included, among other things, copies of: a 2 Month Notice to end tenancy; a 1 Month Notice to end tenancy; the tenancy agreement; copies of text messages between the parties; Canada Post

receipts; their written submission; and a letter received from the Landlord dated February 24, 2013.

The Landlord submitted 40 pages of late evidence to the *Residential Tenancy Branch* and confirmed he did not send this evidence to the Tenants.

The parties confirmed they entered into a written fixed term tenancy agreement that began on August 1, 2012 which ends as of July 1, 2013. Rent is payable on the first of each month in the amount of \$1,200.00 and on August 1, 2012 the Tenants paid \$600.00 as the security deposit.

Upon review of the tenancy agreement both parties confirmed they negotiated a tenancy that would run for a period of one year from when they entered into the agreement and would end before the summer season. This time frame would give the Landlord the opportunity to explore options for either continuing the tenancy or looking at summer or family rentals. The parties settled on an end date of July 1, 2013 and initialed the tenancy agreement accordingly. The Tenants requested a review of the end date as the tenancy agreement stipulates for a period of 1 year but is only for 11 months if it ends on July 1, 2013. The Tenants were the party that entered this information into the tenancy agreement for the Landlord's approval.

The Landlord advised that he had rented out his home as he was working out of town. His employment has since ended and he is seeking to end the tenancy so he can occupy his home again. He called the Tenants to advise them in advance that he would be serving them a 2 Month Notice to end their tenancy. Then on February 3, 2013 he personally served the male Tenant with the 2 Month Notice listing an effective date of March 31, 2013. Upon review of the effective date the Landlord stated that he was of the opinion that the Notice was completed correctly. At this time the Landlord denied every being told that the effective date was incorrect. He did however, confirm the Tenants wanted to negotiate a cash settlement before agreeing to vacate before the end of the tenancy.

On February 24, 2013, the Landlord served the Tenants a 1 Month Notice to end tenancy for cause when he taped it to their door. When asked why he felt the need to serve a second Notice with the same effective date as the first Notice the Landlord stated that the Tenants breached a material term of the tenancy agreement by having pets. After further discussion the Landlord confirmed that shortly after serving the first Notice, and about a week before serving the second Notice, the Tenants informed him of the *Residential Tenancy Act* that states he could not end the tenancy for landlord's use prior to the end of the fixed term.

To support issuance of the Notice for cause the Landlord pointed to page three of the tenancy agreement where it indicates that a pet deposit was not applicable. He stated that he was of the opinion that this was a material term of the tenancy that indicates pets were not allowed. He confirmed he had attended the rental unit on approximately three occasions during this tenancy and he has only ever seen a cat outside. Then, when he attended on February 3, 2013 to serve the two month Notice he noticed the Tenants had a dog which he claims he did not give permission for them to have. He served the Tenants the warning letter to have the pets removed within four days at the same time he served the 1 Month Notice.

The Tenant confirmed they received both Notices as described by the Landlord. He also confirmed they have an outdoor cat and a small puppy. He stated that they have not paid a pet deposit and noted that they were never requested to do so. He pointed to their evidence which included text messages where they arranged a time for the Landlord to attend the rental unit in November 2012. He said that it was during that November 2012 visit when the Landlord first met their puppy as he greeted the Landlord at the door.

The Tenant stated that the first time the Landlord came to the house his wife had taken the puppy for a walk and the Landlord did not see him. However, the Landlord definitely met the puppy on his next visit on November 3, 2012. The Landlord had told them something along the lines like it was a great place to raise a dog or that he had loved raising his dog there.

The Tenant advised that they were not against working towards settling this matter however they would need to be compensated for having to move before the end of the lease. The parties were given the opportunity to work towards a mediated settlement however they were too far apart and resorted back to an arbitrated decision.

In closing, each party was given the opportunity to provide closing remarks. The Tenant had nothing further to add.

The Landlord also stated he had nothing further to add at which point I asked him if he wished to respond to the Tenant's submission that indicated he had met their pet(s) back in November 2012. The Landlord declined to respond.

Analysis

The Landlord confirmed that he did not provide the Tenants with copies of his evidence which is a contravention of section 4.1 of the *Residential Tenancy Branch Rules of Procedure*. Considering evidence that has not been served on the other party would create prejudice and constitute a breach of the principles of natural justice. Therefore as the applicant Tenants have not received copies of the Landlord's evidence I find that the Landlord's evidence cannot be considered in my decision. I did however consider the Landlord's testimony.

Upon review of the testimony relating to the creation of the tenancy agreement I find each party made a conscious decision to enter into a fixed term tenancy that ends on July 1, 2013. Accordingly, as per the tenancy agreement this tenancy ends on **July 1, 2013**.

Section 49(2)(c) of the *Act* stipulates that if a tenancy agreement is a fixed term tenancy agreement then a landlord may end the tenancy for landlord's use by giving notice to end the tenancy effective on a date that must **not** be earlier than the date specified as the end of the tenancy.

Section 53 of the *Act* stipulates that if a landlord gives notice to end a tenancy effective on a date that does not comply with the *Act*, the notice is deemed to be changed to be the earliest date in accordance with the *Act*.

Based on the foregoing, I find the effective date of the 2 Month Notice to end tenancy issued January 28, 2013, to be automatically corrected to **July 1, 2013**.

Upon review of the 2 Month Notice to End Tenancy issued January 28, 2013, I find the Notice to be completed in accordance with the requirements of the *Act*, (with the corrected effective date), and I find that it was served upon the Tenants in a manner that complies with the *Act*. Upon consideration of all the evidence presented to me, I find the Landlord had valid reasons for issuing the Notice. Accordingly, this tenancy will end effective **July 1, 2013**.

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 a two part test. The first part is that that the term that was breached was a material term of the tenancy and the second part is that the tenant has

not corrected the situation within a reasonable time after the landlord gives written notice to do so.

Case law provides that a material term is a term written into the tenancy agreement that both parties agree is so important or so significant that the most trivial breach of that term gives the other party the right to end the agreement.

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 found at page 5 of his decision:

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.

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.

Therefore, as the Landlord did not rigorously enforce or include a “no pet” clause in the tenancy agreement they cannot consider the presence of a pet(s) as a breach of a material term for the purpose of ending the tenancy. Accordingly, the 1 Month Notice to end tenancy issued February 24, 2013 is hereby cancelled.

I accept the Tenant’s testimony that when the Landlord attended the rental unit in November 2012, he saw that the Tenants had a dog. The Landlord admitted to seeing the cat outside the rental house. Therefore, as the Landlord took no action regarding the presence of pets in November 2012, and there is no clause in the tenancy preventing pets, I find the option to have pets to be grandfathered into the tenancy agreement.

The Tenants have been successful with their application; therefore, I award recovery of their **\$50.00** filing fee.

Conclusion

The 2 Month Notice to end tenancy issued January 28, 2013 is **HEREBY CANCELLED** and is of no force or effect.

The 1 Month Notice to end tenancy issued February 24, 2013, is **HEREBY CANCELLED** and is of no force or effect.

This tenancy will remain in effect until **July 1, 2013**, or until it is ended in accordance with the *Residential Tenancy Act*.

The Tenants may deduct the one time award of **\$50.00** off of their next rent payment. For clarity, the Tenants' may pay \$1,150.00 (\$1,200.00 - \$50.00) as payment in full for their April 1, 2013 rent.

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: March 12, 2013

Residential Tenancy Branch

