Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LTE VENTURES INC.
and [tenant name suppressed to protect privacy]

Decision

Dispute Codes:

CNC, FF

Introduction

This Application for Dispute Resolution by the tenant was seeking to cancel a One-Month Notice to End Tenancy for Cause dated March 1, 2013, which purported to be effective April 30, 2013.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the affirmed testimony and relevant evidence that was properly served.

The One-Month Notice to Notice to End Tenancy for Cause, a copy of which was submitted into evidence, indicated that the tenant had assigned or sublet the rental unit/site without the landlord's written consent.

Issue(s) to be Decided

Should the One-Month Notice to End Tenancy be cancelled?

Background and Evidence

The tenancy began in 1980 and the rent is $844.00. The tenancy is based on a written tenancy agreement signed by the tenant and a former co-tenant who vacated around the year 1985.

Submitted into evidence is a copy of the One Month Notice to End Tenancy for Cause, a copy of the tenancy agreement, copies of communications, written testimony and proof of service.

The landlord testified that the tenant allowed another occupant to share the rental unit and the landlord considered that this was prohibited under the terms of the tenancy agreement. On this basis the landlord issued a One Month Notice to End Tenancy for Cause, alleging that the tenant had breached a material term of the agreement that was not corrected within a reasonable time after written demand to do so.

In support of the Notice, the landlord is relying on Item #3- paragraph1of the tenancy agreement signed by the parties on May 14, 1980, which states in part:

> *THE RESIDENT FURTHER CONVENANTS AND AGREES TO THE FOLLOWING……;*
>
> 1. *Not to assign or sublet or part with possession of all or part of the premises during the term of the agreement, and further shall not permit or allow visitors unto the premises for more than three (3) days each month nonaccumulative, without first obtaining the Owner/Agents permission; the new Resident signing the Agreement herein, and pay for each additional Resident $_____dollars, and in any event a minimum of $50.00 dollars per month, in addition to the regular monthly rent herein provided."*
>
> (Reproduced as written)

The landlord stated that the above term must be interpreted to mean that any additional resident living in the rental unit, must first get the landlord's approval to become a legal co-tenant, otherwise the tenant is in breach of a material term of the tenancy. In this case, the landlord believes that, before the tenant can add another resident, that being her son and caregiver, the additional occupant must first be approved by the landlord as a co-tenant and must be added to the tenancy agreement.

The landlord testified that the words "*each additional Resident*", in the excerpt above, does not merely refer to the number of occupants. The landlord's position is that the term restricts the occupancy strictly to the specific persons who are named and identified in the tenancy agreement. The persons named in the tenancy agreement are the existing female tenant who has lived in the unit for 33 years and her previous co-tenant, who moved away approximately 28 years ago.

The landlord pointed out that the restriction in Item #3-1 of the tenancy agreement, limiting the number of days that visitors can stay to 3 days each month, unless they obtain the landlord's permission, supports their interpretation of this term.

The landlord also made reference to Item #2 in the agreement, which states, under the heading, "*OCCUPANT*":

> *"The resident convenants and agrees that the premises shall be occupied by not exceeding 2 adults only (19 years and over) as identified in the agreement herein.*" (Reproduced as written)

The landlord pointed out that the words, "*as identified in the agreement*" further supports their interpretation of Item # 3-1 as it appears to confirm that no resident is permitted to live in the rental unit without first becoming a co-tenant, contingent upon approval of the landlord. According to the landlord, Item #3-1 as they interpret it, constitutes a *"material term*" of the tenancy agreement.

The landlord testified that the tenant's son, who has apparently shared the rental unit with the tenant for a substantial period of time, has also caused the landlord to be concerned due to his smoking in the unit. The landlord acknowledged that there is no specific term in the tenancy agreement prohibiting smoking in the unit. However, the landlord is worried about the excessive wear and tear and damage to the rental unit caused by long-term exposure to cigarette smoke.

The landlord is requesting that the tenant's application be dismissed and that an Order of Possession be issued to the landlord based on the breach of a material term.

The tenant's interpretation of the tenancy terms in the agreement, shown as Item #2 and Item #3-1, are in conflict with that described by the landlord.

The tenant clarified that she never considered Item #3-1 to be a material term at the time she signed the agreement in 1980 nor since that time.

The tenant testified that there were technically no "*additional*" residents occupying the rental unit. As far as the tenant is concerned, Item # 2, in the tenancy agreement only functions to restrict the number of adult occupants to a maximum of 2 adults. The tenant pointed out that they have not exceeded this limit with respect to the number of occupants, which continues to be 2 adults at present.

The tenant's position is that there is no specific term in the tenancy agreement that requires all occupants or residents to become legal co-tenants before they can share the premises with the original tenant. The tenant testified that Item # 3-1 only requires that *visitors* who stay longer than 3 days must be approved by the landlord. The tenants stated that the tenant's son is not a visitor.

The tenant testified that there is no intention on the part of the tenant to allow her son to become her co-tenant and she will not be relinquishing any of her rights or responsibilities as the legal tenant who signed the original tenancy agreement. The tenant stated that she is aware that, under the Act, she is accountable for any noncompliant conduct of individuals she permits on the premises. The tenant stated that

her son had moved in to provide support and care for the tenant who is elderly. The tenant stated that she signed the original agreement and she, alone, will remain solely responsible for all aspects of the tenancy.

The tenant also pointed out that permitting her son to share the unit could not in any way be considered to be a sublet or assignment of the rental unit either. The tenant stated that the tenant has never moved out of the unit nor did she turn over the tenancy to any third party. The tenant testified that the tenant's son did not have the right of possession of any portion of the rental unit.

The tenant's position is that the One Month Notice to End Tenancy for Cause issued by the landlord has no merit and the tenant is is requesting that it be cancelled.

Analysis

Burden of Proof: The burden of proof is on the landlord to establish that the notice was justified.

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.

Section 47(1) of the Act states that a landlord may end a tenancy for cause when a tenant breaches a material term of the tenancy and fails to correct the breach, after written notice to do so.

On the question of whether or not the tenants violated a material term of the tenancy agreement, I find that in order to establish that a breach of a material term in the tenancy has occurred entails satisfying the Dispute Resolution Officer that the following three components exist:

There must be a clear term contained in the tenancy agreement, and

This term must fit the definition of being *"material*", and

There must be a genuine breach of the material term.

The question of whether or not a term is “material” is determined by proving that this was the understanding of both parties at the time the agreement was signed. 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.

During a dispute resolution proceeding, the arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof.

In this instance, being relied upon as a material term by the landlord is disputed by the tenant, who has even challenged the interpretation and meaning of the term.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if

(a) the term is inconsistent with this Act or the regulations,

(b) the term is unconscionable, or

(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it. (My emphasis)

I find that the term in this tenancy agreement shown as Item #3-1 is not sufficiently clear. This finding is based on the fact that the two parties have vastly different interpretations of the term. I find that it is possible that each party’s understanding of this term was likely in conflict from the date the agreement was signed.

Given the above, I find that I am not able to enforce that particular term of the tenancy agreement pursuant to section 6(3)(c) of the Act.

I also find that the portion of Item #3-1 in the agreement, purporting to restrict the tenant’s visitors can not be enforced pursuant to section 6(3)(a) of the Act, excerpted above. The restriction of visitors does not comply with section 30 of the Act, which states that a landlord must not unreasonably restrict access to residential property by:

(a) the tenant of a rental unit that is part of the residential property, or

(b) a person permitted on the residential property by that tenant.

(My emphasis)

I find that the agreement between these two parties clearly does anticipate occupancy by up to 2 persons. That being said, it does not follow that the second resident must be considered as a co-tenant.

I accept the tenant's position that there is no clear term in this tenancy agreement that requires an additional resident, who is merely sharing the rental unit with the tenant, to successfully qualify for tenancy and sign a tenancy agreement with the landlord as a co-tenant.

With respect to the landlord's efforts to impose a new tenancy agreement onto the tenant, I find that, once a tenancy agreement is made, the Act does not permit a landlord or a tenant to unilaterally impose additional terms or changes to an agreement. However, section 14 of the Act does allow a tenancy agreement to be amended to add, remove or change a term, other than a standard term, if both the landlord and tenant both agree to the amendment.

Based on the evidence and the testimony above, I find that the One-Month Notice to End Tenancy for Cause, dated March 1, 2013, has no merit and will not be enforced.

I hereby order that the landlord's One-Month Notice to End Tenancy for Cause dated March 1, 2013 be permanently cancelled and of no force nor effect.

The tenant is entitled to be reimbursed for the $50.00 cost of this application and is ordered to reduce the next payment of rent owed to the landlord by $50.00 as a one-time abatement

Conclusion

The tenant is successful in the application and the One-Month Notice to End Tenancy for Cause is cancelled.

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: April 04, 2013

Residential Tenancy Branch