Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Nacel Properties Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OPC, FF

Introduction

This hearing dealt with an application by the tenants for an order setting aside a notice to end this tenancy and a cross-application by the landlord for an order of possession. Both parties seek to recover the filing fees paid to bring their claims.

At the hearing, the tenants testified that they had not been served with the second page of the landlord's application for dispute resolution, so they had no notice of what the landlord was applying for. I advised the tenants that the landlords were applying for an order of possession and because the Act permits landlords to make an oral request at the hearing when a tenant disputes a notice, the fact that they were not served with the second page of the application did not impact the landlord's claim.

Issue to be Decided

Should the notice to end tenancy be set aside?
Is the landlord entitled to an order of possession?

Background and Evidence

The parties agreed that the tenancy began in 2004 and that the tenants were employed by the landlord until November 2009. The rental unit is a main floor unit of a low rise building which houses a number of other units. The parties agreed that on June 24, 2013, the landlord served on the tenants a one month notice to end tenancy for cause which alleged that the tenants had breached a material term of the tenancy agreement and had not corrected the breach within a reasonable period of time after having received written notice.

On May 27, 2013, the landlord served on the tenants a breach letter identifying 6 breaches of their tenancy agreement and giving a time by which the breaches should be rectified. The tenants acknowledged having received the breach letter. The parties

agreed that the tenants corrected just one of the items listed on the breach letter, the use of a compost bin.

The landlord testified that the tenants have been parking in two parking spaces in the secured lot without paying a fee or having entered into a parking agreement as is required by the landlord. As proof that the tenants were not allowed to park in the lot, the landlord pointed to the tenancy agreement which has a space to indicate a parking fee but is left blank. The landlord took issue with the tenants parking their vehicle at an angle across two spaces. The tenants testified that when they began renting in April 2004, the manager at that time was not charging tenants for parking. The tenants further testified that because they drive a ¾ ton long box truck, they are unable to manoeuvre the vehicle into a single parking space as they end up not being able to leave the space when it is surrounded by other vehicles and therefore they need to park at an angle to drive the vehicle in and out of the parking area.

The parties agreed that the tenants have used a storage area in the parking lot (the "Storage Area") for their own personal use. The landlord alleged that the use of this area "goes against the building plans" as there was no storage area in the original plans and cited safety concerns as they cannot see what is in the Storage Area and they fear that the tenants may be storing flammable or otherwise harmful materials. The tenants testified that early in the tenancy, an area manager asked them to transport cabinets to other buildings and were told that they could use this area for storage in return for that labour. The landlord strenuously denied that such an arrangement ever would have been made.

The parties agreed that at the time the breach letter was issued on May 27, the landlord did not have a key to the rental unit and they further agreed that the tenants did not provide the landlord with a key after having received the breach letter. The parties further agreed that in mid-July, the locks in the entire building were changed as part of a building wide renovation, that the landlord now has a key to the rental unit and that the tenants did not interfere with the installation of the new locks.

The parties agreed that the tenants have had 2 cats in the rental unit for a number of years. The tenants produced a tenancy agreement in which it is written, "Cat OK" with initials beside which the tenants claim are the initials of a previous manager. The landlord submitted a copy of the tenancy agreement which does not have the initials and insisted that the previous manager would not have given permission. In the alternative, the landlord argued that the agreement identifies "cat" in its singular form and therefore because the tenants have 2 cats, they are in breach of the agreement. The landlord acknowledged that she has always known that the tenants had cats, but had been told by the tenants that they had permission so did not pursue the issue.

The landlord also claimed that there is often a dog in the rental unit. The tenants explained that the dog belongs to a friend and accompanies the friend when she visits but is not a permanent resident.

The landlord testified that the tenants have an enclosed patio area outside the rental unit, but have appropriated for themselves an area adjacent to the rental unit (the "Barbecue Area") into which they have moved patio furniture and a barbecue, without permission. The landlord claimed that the tenants are altering the building's design as this area was not meant to be used as a seating or barbecue area and raised concerns that they will not be insured if something happens to cause damage to the building in that area as a result of the tenants' use. The tenants testified that when they moved into the unit, they asked the landlord's agent if they could use that space and were told that they could if they cleaned it up. The tenants testified that the area had been used by local cats as a litterbox and was as a result filled with cat excrement. They stated that they cleaned the area and put down wooden pallets to discourage cats from using the area in the future. The tenants pointed out that other residents of the building were using similar areas for their own use.

Both parties seek to recover the filing fees paid to bring their application.

Analysis

In order to end the tenancy on the grounds stated on the notice to end tenancy, the landlords must prove that the tenants have breached a term or terms of the tenancy agreement *and* that those terms are material terms. A material term is a term which is considered so important, that the slightest breach will give the other party the right to terminate the agreement. Generally, these terms are considered so important that a party would not have considered entering into the tenancy agreement without that term. Most terms of an agreement are not material.

For reasons explained below, I have found that just one of the terms of the tenancy agreement which the landlord has alleged were breached was a material term and I have found that in the circumstances, this particular breach did not give rise to a right to end the agreement. When addressing each of the alleged breaches, I have made a finding of fact as to whether the tenants are indeed breaching a term of the agreement or whether they are permitted to do what they are currently doing.

While all legal terms of a tenancy agreement are enforceable, only a breach of a material term allows the landlord to end the tenancy without taking further steps. Because I have found that no material breaches occurred, the landlord's option to

ensure compliance with the other non-material terms of the agreement requires the landlord to apply for an order that the tenants comply with the tenancy agreement. If the landlord is successful in obtaining such an order, the landlord may then serve a one month notice to end tenancy for cause on the basis that the tenants have failed to comply with the order of an arbitrator.

Several of the findings which follow are predicated on the common law doctrine of acquiescence which states that when a party to a contract breaches a term of that contract and the innocent party is aware of the breach but fails to act within a reasonable time to demand compliance, the innocent party has agreed to the breach. In most cases, the innocent party can give a notice in writing to the offending party and state that the breach will no longer be tolerated and specify the date on which the term must be observed. However, during the period of acquiescence the innocent party is barred from ending the contract because of the breach or claiming money for losses that result. In this case, where I have found that the tenants have breached a term of the tenancy agreement and I have identified that the landlord has acquiesced to that breach, the landlord is free to require future compliance and should do so in writing.

Beginning with the issue of parking, there is nothing in the tenancy agreement which prevents the tenants from parking in the parking lot without having paid a parking fee. While the standard form tenancy agreement used by the landlord includes a space in which to insert a charge for parking or other charge, I find that the absence of a fee does not indicate that parking in the secured area is prohibited. The landlord was aware or through the exercise of due diligence should have been aware that the tenants were parking in the lot for the past 9 years and chose to take no action. I find it more likely than not that the landlord was not expecting revenue from those two parking spaces and that they were given to the tenants free of charge at the outset of the tenancy. I therefore find that as there is no term in the tenancy agreement prohibiting parking in the parking lot, the tenants have not breached a material term of the tenancy and this does not form a basis on which to end the tenancy. The tenants are permitted to use the 2 parking spaces. I find that if the tenants choose to use both spaces to park one vehicle, they may do so as long as they are not obstructing traffic or preventing other tenants from accessing their own parking spaces.

With respect to the use of the Storage Area, the landlord's agent who appeared at the hearing was not privy to any discussions which may have taken place between the tenants and a former area manager. I found the tenants to be credible throughout the hearing and I have no reason to disbelieve their testimony. I accept that the area was given to the tenants for their use in exchange for transportation services during the time they were employed by the landlord. The difficulty now is that the tenants are no longer

employed by the landlord and I am not prepared to accept that the former area manager would have given the tenants use of that area had he or she known that they would continue to use the area after their employment was terminated. I find it more likely than not that the Storage Area was given to them for their use during the course of their employment and was not intended to be a gift which outlived their employment. For that reason and because there is nothing in the tenancy agreement which gives the tenants a contractual right to use the area, I find that since their employment has ended, the tenants may not continue to use this area without the permission of the landlord. As outlined above, the landlord has acquiesced to this use for the last 4 years and thereby silently given permission, but may revoke that permission in writing. As there is nothing in the tenancy agreement prohibiting use of the Storage Area, I find that the use of the Storage Area is not a material term of the tenancy and therefore cannot form a basis on which to end the tenancy.

I find that giving the landlord a key to the rental unit is an implied material term of every tenancy agreement as it is vital that a landlord have access in the event of an emergency. Under normal circumstances the tenants' failure to provide a key to the landlord would constitute a breach of a material term of the tenancy and would support a notice to end tenancy for that reason. However, the problem has been rectified and the tenants did not block the landlord's access to the unit for the purpose of installing new locks. I am not willing to end a 9 year tenancy on the basis of a breach which has been resolved to everyone's satisfaction and therefore find that this breach is not of sufficient significance to warrant the ending of the tenancy.

Addressing the issue of pets, I find that the visiting dog is not a pet. The tenancy agreement does not prohibit animals from the building and I find it reasonable that the tenants have allowed their guest to bring her dog when visiting. The parties agreed that the tenant have had cats in the unit for a number of years and that the landlord has always been aware of this fact. The landlord at the hearing was not privy to any conversations between the tenants and the previous manager and as I have no reason to doubt the credibility of the tenants, I find it more likely than not that the previous manager agreed in writing to the tenants having a single cat. Although the tenants now have more than one cat which appears to be a breach of the permission to own a single cat, I find that the landlord has acquiesced to the tenants having 2 cats. As explained above, usually a party who has acquiesced to a breach of a term of a contract can demand strict compliance by giving the offending party written notice that compliance will be required in the future. However, having a pet is unlike most other issues as pets become like members of one's family and are not easily disposed of as would be a piece of furniture. For that reason, I find that the landlord may not give the tenants notice that they must strictly adhere to this term during the lifetime of the cats. When

just one of the cats remains alive, the tenants will again be limited to just one pet until the landlord gives written permission to obtain more than one pet. Due to the landlord's acquiescence, I find that this cannot form a basis on which to end the tenancy.

Turning to the question of the tenants' exclusive use of the Barbecue Area, I find it more likely than not that the manager with whom the tenants entered into the tenancy agreement promised them that they could use this area if they cleaned it up. I find this promise to be different from the promise respecting the Storage Area for a number of reasons. The Barbecue Area abuts the rental unit and is an area which is very unlikely to be used by the landlord whereas the Storage Area is not near the rental unit and is beside the landlord's maintenance area. The Storage Area was not promised to the tenants at the outset of the tenancy, but only when the tenants requested it at a time when they were employed by the landlord. The Barbecue Area, however, was discussed at the outset of the tenancy and does not appear to be in any way connected to the tenants' employment. I do not accept the landlord's argument that the use of the Barbecue Area presents some kind of insurance risk to the landlord as no evidence other than the landlord's verbal speculation has been offered to support such a claim. I find that although the use of the Barbecue Area is not indicated in the written tenancy agreement, because the landlord's agent promised the tenants that they could use the area at the beginning of the tenancy, the Barbecue Area is an area over which the tenants have exclusive use. I therefore find that the use of this area cannot be considered a breach of the term of the tenancy.

I find that the landlord has failed to prove that it has grounds to end the tenancy and I therefore dismiss the landlord's claim in its entirety. The notice to end tenancy dated June 24, 2013 is set aside and of no force or effect.

As the tenants have been successful in their claim, I find that they should recover the $50.00 filing fee paid to bring their application. The tenants may deduct $50.00 from a future rental payment owed to the landlord.

Conclusion

The landlord's claim is dismissed and the tenants' claim is successful. The notice to end tenancy dated June 24, 2013 is set aside. The tenants may deduct $50.00 from a future rental payment to recover their filing fee.

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 12, 2013

Residential Tenancy Branch