



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

CNC, OLC, O

Introduction

This Application for Dispute Resolution by the tenant was seeking to cancel a One-Month Notice to End Tenancy for Cause.

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.

Issue(s) to be Decided

Should the One Month Notice to End Tenancy for Cause be cancelled?

Background and Evidence

The tenant is disputing the reasons given for issuing the One Month Notice to End Tenancy for Cause.

The tenant had submitted into evidence a copy of the One-Month Notice to End Tenancy for Cause dated November 3, 2013 and effective December 1, 2013. The One-Month Notice indicated that the tenant had engaged in illegal activity that has, or is likely to, damage the landlord's property and also that the tenant breached a material term of the tenancy agreement and failed to correct the breach within a reasonable time after written notice to do so.

Evidence submitted by the tenant included written testimony and a copy of a warning letter from the landlord, dated November 2, 2013, discussing garbage placed on the balcony. The tenant also submitted written testimony from the tenant disputing

allegations made by the landlord that they smoked marijuana in their suite and that one of the co-tenants had removed property of another resident from an unlocked storage area.

The landlord testified that the tenants did not remove items stored on the balcony after being warned. The tenant testified that they were never warned about items on their balcony until November 2, 2013 and removed the items immediately. The tenant testified that the next day the landlord issued a One-Month Notice to End Tenancy for Cause. The tenants feel that this was not adequate warning.

The landlord testified that they have received complaints about the odour of marijuana and about an alleged theft perpetrated by one of the co-tenants. According to the landlord, the tenants admitted to the transgressions. The landlord acknowledged that the tenancy agreement did not contain a term prohibiting smoking.

The tenants testified that they never admitted to committing thefts or smoking marijuana and stated that the landlord's testimony was fabricated. The tenant testified that they intend on moving in any case and will be giving their written notice before the end of this month to vacate at the end of December 2013.

Analysis:

Breach Of A Material Term

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

In this instance, I find that the landlord was holding the tenant accountable for not complying with an alleged material term that prohibited storing garbage on the balcony. However, the burden of proving the existence of this material term is on the landlord.

To establish that a breach of a material term in the tenancy has occurred, entails satisfying the arbitrator that the following three components exist:

There must be a clear term contained in the tenancy agreement

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

There must be a genuine breach of the 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. A *material*

term is a term that the parties had both agreed 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 arbitrator must focus upon the importance of the term in the overall scheme of the tenancy agreement at the time it was signed, as opposed to the consequences of the breach. It is possible that the same term may be material in one agreement and not material in another.

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

I find that the landlord was not able to establish that the agreement signed by both parties was materially breached by the tenant. In addition to the above, I find that the landlord's warning about items on the balcony, served one day prior to issuing the eviction Notice did not afford the tenants reasonable time to correct the problem.

Based on the evidence before me, I find that the stated cause for ending the tenancy that the tenant had breached a material term of the tenancy agreement and failed to correct it after written notification by the landlord has no merit.

Illegal Activities Placing the Property at Risk

With respect to the issue of whether or not the tenant had engaged in an illegal activity that allegedly placed the landlord's property at risk, I find that, even if I accept that these tenants had smoked marijuana in the privacy of their own home, there is insufficient evidence that the tenancy agreement contained a no smoking term in the tenancy agreement. Nor is there sufficient evidence to prove that this activity would place the landlord's property at risk. I also find that, the conduct in question, even if true, would not fit the category of "illegal activity" that would impact a tenancy.

Residential Tenancy Guideline provides some guidance with respect to what criteria must be proven to support a claim that the activity is illegal.

Guideline # 32 states:

The term "illegal activity" would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw

which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw. (My emphasis)

In considering whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy, consideration would be given to such matters as the extent of interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects other occupants or the landlord.

In this instance, I find that the police were not contacted and no charges were laid. I find that the conduct in question, if it did occur, was not proven to be harmful to others or to the building. I also find that this is not the sort of “illegal activity” contemplated by the Act.

In regard to the allegations that one of the co-tenants committed a theft of property of another resident in the complex, I find that the affected individual who apparently made this allegation was not present at the hearing to give testimony and the only evidence consisted of verbal accusations by the landlord which were disputed by the tenant.

In light of the fact that the landlord has failed to sufficiently prove that any of the criteria listed under section 47 of the Act has been satisfied, I find that I must cancel the One-Month Notice to End Tenancy for Cause .

That being said, I accept the tenant’s testimony that the tenant is planning on moving. I also accept that the tenant is now aware that if they store items on the balcony or if they ever do take other people’s property from the lockers in future, these actions will jeopardize the continuation of the tenancy.

Based on the above, I hereby order that the One-Month Notice to End Tenancy of November 30, 2013 is cancelled and of no force nor effect.

Conclusion

The tenant is successful in the application and the One-Month Notice to End Tenancy 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: November 25, 2013

Residential Tenancy Branch

