



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding B.C. HOUSING
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 April 28, 2014 purporting to be effective May 31, 2014.

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 matter was originally scheduled to be heard on June 23, 2014, but was rescheduled on consent for August 19, 2014.

The One-Month Notice to Notice to End Tenancy for Cause, a copy of which was submitted into evidence, indicated that the tenant had breached a material term of the tenancy that was not corrected within a reasonable amount of time after written notice to do so.

Issue(s) to be Decided

Should the One Month Notice to End Tenancy for Cause be cancelled as requested by the tenant.

Background and Evidence

The tenancy began on November 1, 2009 and current rent is \$290.00. No security deposit was paid.

The landlord testified that the unit's monthly rental rate is geared-to-income and the tenant qualified to reside in the unit on this basis. The landlord testified that they

received confirmation that the tenant was hospitalized on June 10, 2013 and was subsequently moved to a long term facility in December 2013. .

According to the landlord, this was re-confirmed in writing on June 4, 2014 and on this basis, the landlord issued a One Month Notice to End Tenancy for Cause based on breach of a material term.

The landlord testified that they were advised that the tenant was not a candidate to return to living independently. The landlord submitted documentary evidence in support of this testimony.

The landlord pointed out that it is a material term of the tenancy agreement that the tenant would no longer qualify for the unit if the tenant has not resided in the rental unit for longer than 3 months. A copy of the tenancy agreement was submitted into evidence. Paragraph 18 of the agreement signed by the parties states:

“Extended Absence from Rental Unit

As the rent for the rental agreement is geared to income, if the tenant is absent from the rental unit for three consecutive months or longer without the prior written consent of the landlord, the landlord may end the tenancy, even if the rent is paid for that period.”

The landlord pointed out that this tenant has not been living in the unit for over a year and is not expected to be discharged in the near future. The landlord stated that, should the tenant be released, she would be given due consideration for a new rent-geared-to-income tenancy.

The agent pointed out that the tenant has paid her rent for the entire period she has been in care.

The tenant’s agent testified that it is the tenant’s intention to return to the unit and she will be assessed in the near future for release. The tenant’s agent made reference to a letter from Vancouver Coastal Health dated June 4, 2014 stating that the tenant is flourishing in several ways and has improved.

The landlord pointed out that the June 4, 2014 letter from Vancouver Coastal Health also states,

“She requires assistance for both personal and instrumental tasks. She has limited understanding of the risks she would face living in the community. The consensus among her care team and Substitute Decision-Makers is that (the tenant) continues to require facility care. She is not a candidate for living independently, even with the commitment offered by her POA. The supports

through Community Health programs are not adequate to sustain her current care needs. We do not anticipate any changes in the months or years ahead.”

The agent stated that the tenant feels it would be grossly unfair to deprive her of her home. The tenant asks that the One Month Notice to End Tenancy for Cause be cancelled.

The landlord's position is that the One Month Notice to End Tenancy for Cause is fully supported by the circumstances and requests and Order of Possession based on the Notice.

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.

In order to end a tenancy under section 47 for cause a landlord would need to prove that the tenant was in violation of either the Act or the tenancy agreement.

I find that the landlord had entered into a written tenancy agreement with this tenant that contained a clear term that failure to reside in the unit for more than 3 months warrants the end of the tenancy.

With respect to the question of whether or not this term would be considered a material term, I find that this requires the landlord to satisfy the Dispute Resolution Officer that the following three components exist: 1) There must be a clear term contained in the tenancy agreement, 2) This term must fit the definition of being “*material*”, 3) There must be a genuine breach of the material term.

The question of whether or not a term is material goes to the root of the contract and to determine the materiality of a term we must focus upon the importance of the term in the overall scheme of the tenancy agreement. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term which the parties had both agreed from the start was

of such importance that the breach of that term could give the other party a right to end the agreement.

I find that the tenant was required to fill out legal forms attesting to her income in order to qualify for the rental unit. I find that this fact clearly highlights that the tenant must meet the residency criteria to qualify remaining in the rental unit. I find that it is a material term that the tenant has an obligation to actually reside in the unit without more than a 3-month absence or the tenancy will be terminated.

Given the above, I find that the tenant's violation of the term, and failure to correct the situation within a reasonable time after written notice to do so, is sufficient to support a One Month Notice to End Tenancy for Cause and I find there is not sufficient support to cancel the Notice. Therefore, I find that the One-Month Notice to End Tenancy for Cause was justified and the tenant's Application requesting that the One-Month Notice to End Tenancy for Cause be cancelled, is not supported by the facts.

For this reason, I find that the tenant's application must be dismissed.

During the hearing the Landlord made a request for an order of possession. Under the provisions of section 55(1)(a), upon the request of a Landlord, I must issue an order of possession when I have upheld a Notice to End Tenancy.

Accordingly I find that the landlord is entitled to an Order of Possession effective September 30, 2014. The tenant must be served with the order of possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

Conclusion

The tenant is not successful in the application and the request to cancel the One Month Notice to End Tenancy for Cause is dismissed without leave. The landlord is granted an Order of Possession based on the Notice.

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 28, 2014

Residential Tenancy Branch

