



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNC, OLC, FF

Introduction

The tenant applied to cancel a 1 Month Notice ending tenancy for cause issued on August 19, 2014, an order the landlord comply with the Act and to recover the filing fee costs from the landlord.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Issue(s) to be Decided

Should the 1 month Notice ending tenancy for cause issued on August 19, 2014 be cancelled?

Background and Evidence

The current tenancy commenced in March 2011; the tenant had a previous tenancy in the same unit that had started in 2005. Rent is currently \$985.00 per month, due on the 1st day of each month. The building has 23 units.

On August 19, 2014 the tenant received a 1 month Notice to end tenancy for cause with 1 reason provided:

"the tenant has breached a material term of the tenancy that was not corrected within a reasonable time after written notice to do so."

The Notice was accompanied by a letter dated August 19, 2014 issued by the landlord. The letter indicated that the tenant was in violation of clause 13 of the tenancy agreement as she had an unauthorized person living in her unit. The landlord had not authorized this occupant under section 1 or 2 of the tenancy agreement; therefore the tenant was required to evict the occupant. No date for compliance was given.

Clause 1 and 2 of the tenancy agreement supplied as evidence did not include the names of any other occupant.

Clause 13 of the tenancy agreement stated:

“ Only those persons listed in clauses 1 or 2 above may occupy the rental unit or residential property. A person not listed in 1 or 2 above who, without the landlord’s prior written consent, resides in the unit or on the residential property in excess of fourteen cumulative days in a calendar year will be considered to be occupy the rental unit or residential property contrary to this Agreement. If the tenant anticipates an additional occupant, the tenant must apply in writing for approval from the landlord for such person to become an authorized occupant. Failure to obtain the landlord’s written approval is a breach of a material term of the Agreement; giving the landlord the right to end the tenancy on proper notice.”

On August 5th and 6th, 2014 the ownership of the residential property was transferred to the current landlord. The landlord met with the previous property manager, who provided them with all documentation related to the tenancies in the building; no written permission or authorization for an additional occupant was provided for this tenancy.

Shortly after the purchase had been completed the landlord was in the lobby of the building and noticed a male loitering. The landlord determined that the male entered unit #7. A check of the documents for that unit revealed the absence of any paperwork allowing an additional occupant.

In the absence of any indication that the tenant had been provided approval for another occupant, as set out in the terms of the tenancy agreement, the landlord issued the Notice ending tenancy and the letter requesting compliance with a material term of the tenancy. The landlord said that if the tenant had then taken steps to submit an application requesting acceptance of her occupant the landlord would have assessed his suitability and possibly approved him as an occupant. If the proposed occupant was approved the landlord would have withdrawn the Notice ending tenancy. The landlord said that the term of the tenancy agreement allows the landlord to properly check references and the background of proposed occupants; just as they would check anyone who wishes to be a tenant.

The landlord stated that the tenant has breached a material term of the tenancy and that this on-going breach, since December 2012, resulted in the Notice to end tenancy issued on August 19, 2014.

The landlord raised the concept of estoppel and provided a quote from a previous decision issued by a Residential Tenancy Branch (RTB) arbitrator. The landlord submitted that estoppel does not now prevent the landlord from strictly enforcing the clause of the tenancy agreement. The landlord indicated that while the previous landlord had not enforced the legal right under clause 13, now that the tenant has been given notice of their breach, the conduct must change and the right previously waived or not enforced will now be enforced. The landlord also questioned the length of time the tenant’s husband had been living in the unit.

The advocate responded that estoppel is not intended to allow a party to go back in time to enforce a right; that right can only be enforced, going forward.

The tenant’s advocate stated that clause 13 of the tenancy agreement does not constitute a material term, as the previous landlord did not consider it to be a material term. From December 2012, onward, the building manager was aware of the presence

of the tenant's husband, but did not issue an eviction notice or any other warning notice. The manager was living in the building and did not see the presence of the occupant as a problem.

The tenant submits that the building manager had provided consent for the occupant through his knowledge of the presence of the occupant and the absence of any indication, such as written notice of breach or notice ending tenancy, that she had breached a material term of the tenancy agreement. The fact that the previous building manager did not pursue the issue indicates that he had accepted the occupant's presence.

The tenant said that the occupant is her husband; they were married in 2010. The previous building manager lived in the building and on at least 3 occasions since December 2012 the tenants and manager had social gatherings in the manager's unit. The tenant said that in all of the time her husband has lived in the building there have not been any problems caused by his presence.

The tenant submitted that the written notice given by the landlord was not reasonable. RTB policy requires the landlord to inform the tenant of the problem; with a fixed deadline, by which time the tenant must rectify the breach. The notice must then warn the tenant that the tenancy can end. The landlord did not give the tenant any prior warning, but issued the warning letter with the Notice ending tenancy.

The tenant supplied a copy of a letter dated August 20, 2014; sent to the landlord in response to the Notice ending tenancy. The tenant pointed out that since the landlord had recently purchased the residential property they were bound by the terms of the current tenancy agreement. The tenant indicated that she believed the attempt to evict her was frivolous.

The tenant supplied copies of posts from a popular social networking page that included conversations between the tenant and the past building manager. The past building manager had worked in the building for fourteen years and now lives in Thailand. He posted a message indicating:

"I confirm that I indeed gave permission for (the occupant) to be included in the tenancy agreement. If he was not added on the original leases, then it was not an intentional omission. But I hereby confirm that I, as the agent for the owner did give concentrate (sp) for his inclusions in the lease agreement."

(Reproduced as written)

A person included on the social media posts who is assisting the tenant (P.K.) indicated that a letter from the building manager would assist as proof, as posts to the social media site would not suffice. P.K. issued an August 22, 2014 letter, submitted as evidence, indicating that he works for a tenant resource service and that he has been offering support to the tenant. P.K. confirms that the previous building manager had sent the social media message confirming his permission for the additional occupant.

The landlord said that as the tenant has allowed the unauthorized occupant to reside in the unit since December 2012 that continued breach of the term of the tenancy causes the landlord to insist on a new tenancy agreement, at the same rent. If the occupant meets with the landlord's approval the tenant would be required to sign a new tenancy

agreement for a 1 year fixed term and require the tenant to vacate at the end of that year.

Analysis

After considering all of the written and oral evidence submitted at this hearing, I find that the landlord has provided insufficient evidence to show that the tenant has breached a material term of the tenancy agreement.

I gave some weight to the social media evidence; there was no suggestion that evidence was produced fraudulently. However, it is my assessment of the landlord's actions since December, 2012, that led me to cancel the Notice.

I have based this decision, on the failure of the landlord to take any steps to enforce clause 13 of the tenancy agreement since the tenant's husband began to live with her in December 2012. It took the landlord over 1.5 years to issue a letter of warning, informing the tenant that she was in breach of the clause of her tenancy agreement.

I find, on the balance of probabilities that the previous building manager was well aware of the fact that the tenant's spouse was living with her. This is a small building of only 23 units and it is easy to accept that he knew who was living in the building. I have rejected any suggestion that somehow the tenant's husband lived in the rental unit; undetected, for over 1.5 years.

RTB policy suggests that a material term of the tenancy is a term that is so critical that the most trivial breach of the term gives the other party a right to end the agreement. I considered the importance of the term in relation to the importance of clause 13. The landlord has the right to enforce a clause such as clause 13; but in this case for over 1.5 years the landlord accepted the occupant's presence and essentially gave tacit agreement for the occupant; thus waiving their right to enforce that term in an attempt to evict the tenant. The absence of any steps taken by the landlord, to warn the tenant that the occupant required written approval; leads me to find, pursuant to section 62(3) of the Act, that the landlord fully intended to allow the occupant to reside in the rental unit with the tenant and decided not to rely upon clause 13.

In order to end a tenancy agreement for breach of a material term a landlord must inform the tenant, in writing of:

- the alleged breach;
- that the landlord believes there is a breach of a material term; and
- provide a date by which the breach must be rectified, or the tenancy will end.

The landlord chose to issue a warning letter to the tenant on the same date a Notice ending tenancy was issued; providing the tenant with no time to respond to the warning. Further, this warning was issued after the landlord had failed to enforce the term for a considerable period of time.

I have considered the concept of estoppel; a legal principle which prevents a person from insisting on their strict legal rights; given the past dealings that have taken place between the parties. I have referred to the definition of estoppel contained in the landlord's written submissions:

Estoppel is a legal doctrine which holds that one party may be prevented from strictly enforcing a legal right to the detriment of the other party, if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly. In order to return to a strict enforcement of their right, the first party must give the second party notice (in writing) that they are changing their conduct and are now going to strictly enforce the right previously waived and not enforced.

(Emphasis added)

From the evidence before me I find, on the balance of probabilities, that the landlord did establish a pattern of accepting the occupant, through the failure of the landlord to enforce clause 13 of the tenancy agreement. This failure to enforce occurred for over a period of 1.5 years. The landlord now wishes to enforce their right, in relation to clause 13 and is within their right to return to a strict enforcement of the term. Written notice has now been given to the tenant; which, effective August 19, 2014, informed the tenant the landlord would now rely upon clause 13. The matter continued to be in dispute until the time of this hearing.

I find that the landlord is not entitled to go back in time to retroactively enforce clause 13 of the tenancy agreement. I find, pursuant to section 62(3) of the Act; that from the time of receipt of this decision by the parties, that the tenant will be bound by clause 13 and must adhere to that term if she wishes to have any additional occupant; outside of her husband, reside in the rental unit.

Therefore, I find that the 1 month Notice to end tenancy issued on August 19, 2014 is of no force or effect. The tenancy will continue until it is ended in accordance with the legislation.

Conclusion

The 1 month Notice ending tenancy for cause issued on August 19, 2014 is cancelled.

The tenant's husband is an occupant of the rental unit.

This decision is final and binding and 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: September 19, 2014

Residential Tenancy Branch

