



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VERNON NATIVE HOUSING SOCIETY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

CNC FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenant on January 28, 2015, to obtain an Order to cancel a 1 Month Notice to end tenancy issued for cause and to recover the cost of the filing fee from the Landlord for this application.

The hearing was conducted via teleconference and was attended by the Landlord, the Tenant and the Tenant's advocate. Each party gave affirmed testimony and confirmed receipt of evidence served by each other. The Landlord confirmed that she had not provided the Tenant with page 17 of her evidence package in order to protect the identity of the writer. Although a party may vet or block out private information from a document, they must not prevent the other party from viewing the remaining contents of a document. To prevent viewing the remaining contents of a document would create a breach of the principals of natural justice. As such, I declined to consider the written statement submitted at page 17 of the Landlord's evidence and I informed the parties that I would consider the Landlord's oral submissions as they related to that specific document. I did however, consider the remaining documentary evidence.

At the outset of the hearing I explained how the hearing would proceed and confirmed who was in attendance at the hearing. I asked each party if anyone else was in attendance or expected to be in attendance on their behalf and both the Landlord and the Tenant stated that no one else was in attendance. I then explained the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

The Rules of Procedure # 11.10 provides that at the start of a dispute resolution proceeding, a party may request that his or her witness(es) be permitted to provide evidence.

As noted above, neither party made mention of having anyone else attend the hearing on their behalf nor did they mention that they would like to call witnesses during the hearing. The Landlord presented her evidence first and prior to switching over to the Tenant for her response, I asked the Landlord if she had anything further to add to her submission; to which the Landlord responded she had nothing further to add. I heard closing remarks and I announced that I was ending the hearing. Then I proceeded to explain the timelines for issuing my decision in writing, confirmed mailing addresses, and was about to disconnect the teleconference at which time the Landlord requested to have submissions from her two witnesses.

I declined the Landlord's request to have witnesses submit evidence for various reasons. First, after I considered the evidence that had already been presented I felt the witness testimony

would not change the outcome of the issues presented to me. Secondly, the hearing had already ended and I noted that the Landlord failed to request permission to have her witnesses attend, at the beginning of the hearing, as required by the #11.10 of the Rules of Procedure.

Issue(s) to be Decided

Should the 1 Month Notice to end tenancy issued for cause on January 23, 2015, be upheld or cancelled?

Background and Evidence

Following is a summary of the testimony and evidence presented during the hearing and includes only that which is relevant to the matters before me.

The undisputed evidence was that the Tenant had occupied four different rental units at this property over a period of just over ten years. Each rental unit was occupied under a separate written tenancy agreement. The Tenant moved into her current two bedroom rental unit effective September 15, 2014, after signing a new fixed term tenancy agreement and four addendums on August 29, 2014. The tenancy agreement stipulates that the tenancy will end on July 31, 2015 at which time the tenancy will end and the Tenant is required to vacate the rental unit.

Market value rent is \$861.00 and the Tenant's current rent payable based on her most recent annual subsidy application is \$209.00. On or around September 15, 2014 the Tenant paid \$430.50 as the security deposit.

The Landlord testified that on January 23, 2015 they posted a letter and a 1 Month Notice for cause to the Tenant's door. The Notice was issued pursuant to Section 47(1) of the Act listing an effective date of February 28, 2015 for the following reason:

- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so

In support of her position for issuing the 1 Month Notice, the Landlord provided documentary evidence which included, among other things, copies of: the 1 Month Notice and Letter dated January 23, 2015; tenancy agreement and 4 addendums; complaints from neighbors in 2014; and breach letters issued to the Tenant between July 2010 and March 2014 relating to different rental units.

The Tenancy agreement stipulated as follows:

2. a/v **THE TENANT SHALL IMMEDIATELY** report to the Landlord in writing, any and all of the following:
 - i any change of marital status
 - ii any increase or decrease in the number of dependents of the Tenant or other persons residing in the premises from time to time
 - iii any change in the family income of the Tenant and his/her dependents residing in the premises from time to time

***** The Tenant agrees not to permit guests staying longer than two weeks, nor to leave the premises in the care of guests except with the written consent of the Society.**

...the Tenant hereby acknowledges and consents to the fact that the Landlord is entitled to and is hereby authorized to fix and determine rental amounts at any time during the term of this Agreement, in the event that the personal circumstances or financial situation of the Tenant change from time to time.

The last two paragraphs on one of the tenancy addendums signed by both parties on August 29, 2014, and found at page 4 of the Landlords evidence, included the following:

I understand that the society has agreed to transfer me to another unit as I am still in need of affordable housing with the understanding that only myself and my two daughters will be residing at the property.

I therefore agree that I will strictly adhere to the tenancy agreement that I have read and signed on August 29, 2014 and that if I willing breach the tenancy agreement I agree to vacated the unit. [Reproduced exactly as written on the addendum]

The Landlord argued that the Tenant has had a long standing history of allowing guests visit her for periods longer than what is provided for in her tenancy agreement. She submitted that the Tenant's subsidized rent is based on the number of persons residing in the rental unit and all of their income. As a result, their tenancy agreement provides that anyone who stays longer than the allowable number of days will be considered an occupant and must be added to the tenancy agreement and their income considered in determining the subsidized rent amount.

The Landlord indicated that shortly after the Tenant moved into the current rental unit she started to receive complaints from neighbors that the Tenant's boyfriend had been spending many days and nights at the Tenant's rental unit. The neighbors indicated that they determined this by seeing the Tenant's boyfriend's vehicles parked in the parking lot. The Landlord stated that despite receiving the neighbors' complaints, she has not given the Tenant any written warnings about her guests, since the Tenant began this new tenancy in September 2014. Rather, the only warning letter was issued the same date as the 1 Month Notice because the Tenant breached her tenancy agreement and the tenancy addendum.

The Landlord asserted that during the Tenant's previous tenancy, her boyfriend agreed to be added to the tenancy agreement. However, when he submitted his earning statements to calculate the rent amount, they determined that they would have to pay rent of just under \$3,000.00 per month. As a result, the Tenant's boyfriend decided not to be added to the former tenancy agreement.

The Tenant disputed the Landlord's submissions and argued that the person in question was no longer her boyfriend. She confirmed that he is still a very close friend of hers and that he has been assisting the Tenant during periods of her illness which requires him to be at her rental unit for times during the day. The Tenant confirmed that her friend has spent a few nights at her current unit but that amounted to only a few nights with one being Christmas day. She asserted that she often borrows her friend's truck which is why the neighbors often see it parked in the parking lot.

Upon review of the tenancy agreement and addendums the Tenant submitted that she was forced into signing those documents. She argued that she is low income and needed to stay living at this complex because she has two children. She stated that the Landlord told her she would not get the rental unit if she did not sign the papers so she said she had no choice but to sign the papers.

The Tenant stated that she fully understood that she was living in subsidized housing and that her rent was determined based on the income of all occupants of her rental unit. She acknowledged that it would not be reasonable to allow other income earners to reside in the rental unit without properly declaring their earnings, as that may prevent another low income tenant from accessing a subsidized rental unit.

In closing, the Landlord clarified that the Tenant was being evicted due to “unauthorized guests” exceeding the number of allowable visitation days.

Analysis

Section 9 of the Schedule provided in the Regulations stipulates that:

- 9 (1) The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit.
- (2) The landlord must not impose restrictions on guests and must not require or accept any extra charge for daytime visits or overnight accommodation of guests.
- (3) If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end a tenancy. Disputes regarding the notice may be resolved by applying for dispute resolution under the *Residential Tenancy Act*.

In the case of subsidized housing, as is the case with this tenancy, I accept that it would be reasonable to monitor the presence of any long term guests in order that they may determine if the number of occupants or household income has changed. I also accept that given the shortage of affordable housing, it is important that the Landlord conduct timely reviews of any rental subsidies. Although I do not necessarily agree with the tenancy agreement wording or method in which the Landlord monitors the number of occupants, I accept that the Landlord needs to incorporate some method to determine the number of occupants and household income in order to limit abuse that is often seen with subsidized housing.

Section 5(2) of the Act stipulates that any attempt to avoid or contract out of this Act or the regulations is of no effect.

The Act stipulates how and when a landlord may end a tenancy. Therefore, after careful review of the additional addendum found at page four of the Landlord's evidence, I find that it is an attempt on the part of the Landlord to contract out of the Act by having the Tenant agree to move out of the tenancy, without the Landlord having to give proper notice of eviction. Based on the foregoing, I find the additional addendum, found at page 4 of the Landlord's evidence, to be of no force or effect.

Upon review of the 1 Month Notice to End Tenancy issued January 23, 2015, I find the Notice to be completed in accordance with the requirements of section 52 of the Act and I find that it was served upon the Tenant in a manner that complied with section 89 of the Act.

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove the tenancy should end for the reason(s) indicated on the Notice. Where more than one reason is indicated on the Notice the landlord need only prove one of the reasons. In this case the Notice was issued for the reason that the Tenant was in breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so

Case law provides that a material term is a term written into the tenancy agreement that both parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

In *Worth and Murray v. Tennenbaum*, an unreported decision of the B.C. Supreme Court, August 18, 1980, Vancouver Registry A801884, His Honour Judge Spencer found at page 5 of his decision:

*As a matter of law the various terms of the tenancy agreement may or may not be material to it in the sense that they justify repudiation in case of a breach. **It is wrong to say that simply because the covenant was there it must have been material*** [emphasis added]

Madam Justice Lynn Smith also considered the issue of materiality in *Al Stober Construction Ltd. v. Charles Henry Long*, Kelowna Registry, 52219, 20010525. She notes in paragraph 35 of her reasons:

If the term was “fundamental” to the agreement, the landlord would have rigorously enforced it.

Estoppel is a legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial. The rationale behind estoppel is to prevent injustice owing to inconsistency.

Notwithstanding the Landlord demanding the Tenant sign the additional addendum, and despite the Landlord receiving complaints about the Tenant's guest's constant attendance at the rental unit, the Landlord failed to take immediate action. The Landlord also failed to issue the Tenant a written warning which informed the Tenant she would be evicted if her guest continued to be at the rental unit for this current tenancy. Based on the forgoing inconsistencies, I find the Landlord is estopped from evicting the Tenant at this time. Accordingly, I uphold the Tenant's application and the 1 Month Notice issued January 23, 2015, is hereby cancelled.

As noted above, the Tenant confirmed that she fully understood that because her rent was subsidized and based on her earnings, it would not be reasonable to allow other occupants to reside in the rental unit without properly declaring their earnings. Therefore, if in the future the Landlord can prove they acted in a consistent manner and is able to prove the Tenant breached the Act, regulation, or tenancy agreement, by allowing additional occupants in the rental unit without properly declaring their earnings, the Landlord would be at liberty to submit a copy of this decision as evidence to support their position.

Conclusion

The Tenant's application has been successful and I HEREBY ORDER the 1 Month Notice to end tenancy issued for cause on January 23, 2015, cancelled and is of no force or effect. This tenancy shall continue until such time as it is ended in accordance with the Act.

I hereby award the Tenant recovery of the **\$50.00** filing fee. This one time award may be deducted from the Tenant's next rent payment as full satisfaction of recovery of the 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: February 27, 2015

Residential Tenancy Branch

