



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Notice to End Tenancy was personally served on the Tenant on February 15, 2015. Further I find that the Application for Dispute Resolution/Notice of Hearing was sufficiently served by mailing, by registered mail to where the landlord resides on March 6, 2015. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided:

The issues to be decided are as follows:

- a. Whether the tenant is entitled to an order cancelling the one month Notice to End Tenancy dated February 15, 2015 and setting the end of tenancy for March 18, 2015?
- b. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

The parties signed a 5 year fixed term tenancy began on February 15, 2010 and end on March 1, 2015 and become month to month after that.. The present rent is \$932 per

month payable in advance on the first day of each month. The tenant(s) paid a security deposit of \$437.50 at the start of the tenancy.

Preliminary Matter:

Both parties made many allegations and submitted a large number of documents. I advised the party at the start of the hearing that I would not be considering any allegation made or document presented in their materials unless it was referred to in the oral hearing. I determined this to be appropriate as the written allegations and documents are not under oath. Secondly, it puts the respondent in an impossible position of responding to a many allegations which the landlord has not testified to at the hearing. To hold otherwise would amount to a denial of natural justice as the tenant has not been sufficiently notified of the case she has to meet.

The tenant requested an adjournment. She testified that she had submitted a 63 page response to the landlord's material two days ago. The materials had not reached the arbitrator. She had sent the materials to the landlord but they had not reached the landlord's agent. The landlord objected to the adjournment. I ruled that an adjournment was not appropriate in this case as the tenant had received the landlord's material in approximately 2 weeks ago and she failed to provide a sufficient explanation as to how the materials were relevant and why there was a delay.

Grounds for Termination

The Notice to End Tenancy relies on section 47(1)(d), (f) and (h) of the Residential Tenancy Act. That section provides as follows:

Landlord's notice: cause

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

...

(d) the tenant or a person permitted on the residential property by the tenant has

...

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or

(iii) put the landlord's property at significant risk;

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

Landlord's Testimony:

The landlord seeks to end the tenancy based on the following evidence:

- a. The tenant has failed to properly maintain the backyard and it is an unsightly cluttered mess. The landlord produced photographs which show the backyard prior to the tenant moving in. The photographs show an empty yard of grass. He also took produced photographs taken shortly after the notice was served which show the backyard to be a cluttered mess. It is overrun by an excessive number of planters and the remnants of last years planting. The pathway leading through the backyard is crowded and dangerous. The upstairs tenant who is 6 month pregnant has complained as to the difficulty of negotiating walking through the backyard. The landlord obtained quotations which indicate the cost of the back yard clean up would be \$1850 plus GST, old lawn removal and installation of new soil would be \$2125 plus GST and Turf Installation would be \$1125 plus GST for a total of \$5100 plus GST. The landlord testified the tenant has refused to cooperate with the landlord to clean up the back yard.
- b. The landlord further testified the tenant has failed to cooperate with the upstairs tenant including demanding the heat be turned down, doing laundry at times not permitted and being difficult with the landlord.

Tenant's Testimony:

The tenant responded to the landlord's allegation as follows:

- a. The tenancy agreement entered into in February 2010 provided the tenant had the right to use the front and back yard for gardening.

- b. The tenant testified the landlord has not objected to her use of the planters in the backyard until February 2015.
- c. In 2013 the landlord orally agreed with the tenant that she had the exclusive use of the backyard.
- d. The tenant acknowledged the number of planters in the backyard is excessive and it has gotten away from her. She testified she has been will for much of the last 9 months and has not been able to properly deal with it. She also acknowledged the backyard is cluttered and unsightly.
- e. On December 31, 2014 the landlord served a Notice of Rent Increase that provided for a 2.5% increase commencing April 1, 2015.
- f. There is an exchange of e-mails between the tenant and the landlord where the tenant states "Of course I want my garden to be a thing of beauty and a joy to behold. I thing I should be able to transform it a lot by May 31, 2015..." The landlord responded "I hope you will clean up the backyard and remove your excessive plants to make it look like the picture below, by May 31, please! The picture was a photograph of the garden in the summer of 2013. It contained a large number of flowers in planters.

Analysis

I do not accept the submission of the tenant that she has exclusive possession of the backyard to the exclusion of the upstairs tenant. The written tenancy agreement permits her to use both yards for gardening. It does not give her the exclusive use of the yards. The tenant testified the landlord orally agreed to give in the exclusive use in 2013. The tenancy agreement provides that any change or addition to this tenancy agreement must be agreed to in writing and initialled by the landlord and the tenant. It also states that if a change is not agreed to in writing ...it is not enforceable. I determined that even if the landlord orally agreed with the tenant to give her the exclusive use it is not enforceable and the backyard is for the use both tenants.

After carefully considering all of the evidence I determined the landlord has not established sufficient grounds to end the tenancy for the following reasons.

- The landlord failed to prove the condition of the backyard has seriously jeopardized the health safety or other lawful right or interest of the landlord or another occupant.
- The tenant agrees she has to do significant work in removing many of the planters and other clutter. However, on February 8, 2015 the landlord and the tenant agreed that the tenant could be given to the end of May to remove the clutter to restore it to a condition of a couple of years ago. In my view the landlord is estopped from agreeing to given the tenant to end of May on February 8, 2015 and then serving a one month notice one week later.
- It is not possible to determine at this stage whether extraordinary damage has been caused. The tenant stated she wants to restore much of the grass the existed at the time her tenancy started and she intends to use earth and perhaps turf to accomplish this purpose.
- For purpose of this hearing I am prepared to assume that the tenant's failure to properly maintain the backyard amounts to a breach of a material term of the tenancy agreement. However, the parties have given the tenant until May 31, 2015 to rectify the situation. I determined landlord has failed to establish sufficient grounds under section 47(1)(h).
- The relationship between the tenant and upstairs tenant has not reached a stage of disharmony that is grounds to end the tenancy. I am satisfied based on the evidence presented that any disharmony that exist has been caused by both parties and is not limited to the conduct of the tenant. I determined the landlord failed to present sufficient cause under section 47(1)(d).

Determination and Orders

After carefully considering all of the evidence I determined that the landlord has failed to establish sufficient cause to end the tenancy. As a result I order that the Notice to End Tenancy dated February 15, 2015 be cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged. As the tenant has been

successful I order that the landlord pay to the tenant the sum of \$50 for the cost of the filing fee such sum may be applied to future rent.

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: April 13, 2015

Residential Tenancy Branch

