Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SKYLINE APARTMENTS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR, CNC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

Preliminary Issues- Service of Documents

The tenant confirmed that she was handed the 1 Month Notice by one of the landlord's representatives on August 1, 2015. The landlord's representative (the landlord) who was acting on behalf of both Respondents did not dispute the tenant's sworn testimony that she was handed the 10 Day Notice on August 4, 2015. I find that these Notices were served to the tenant on the above-noted dates in accordance with section 88 of the *Act*.

The landlord confirmed that the landlords were handed the tenant's dispute resolution hearing package including notice of this hearing on September 1, 2015. Although this package was not served in a timely fashion and in accordance with the Branch's Rules of Procedure, I am nevertheless satisfied that the landlords were provided with ample notice prior to this hearing to know the case against them and to present their written evidence and sworn testimony, and to produce witnesses. I find that the landlords were duly served with the dispute resolution hearing package in accordance with section 89 of the *Act*.

As the landlord confirmed that the landlords received copies of the tenant's written evidence packages, I find that these packages were duly served to the landlords in accordance with section 88 of the *Act*. As I noted at the hearing, the last 12 pages of the tenant's 24-page faxed evidence package was for the most part illegible. I have considered the other pages, which were legible, comprised chiefly of the copies of the Notices to End Tenancy.

The landlord testified that he tried on repeated occasions and in a variety of ways to either hand copies of the landlords' written evidence package to the tenant or to her advocates. The landlord testified that he eventually placed this written evidence package "in the tenant's door." He provided copies of this 25-page written evidence package to the Residential Tenancy Branch (the RTB). He said that one of the landlord's other staff witnessed him attach these documents to the tenant's door. The tenant denied having received any written evidence from the landlords.

During the course of this hearing, it became apparent that, with the exception of the copies of the two Notices to End Tenancy, almost all of the landlords' written evidence was dated well after the landlord issued the Notices to End Tenancy. I advised the parties that the issue properly before me was whether the landlords had sufficient evidence at the time they issued their Notices to End Tenancy to end this tenancy for either non-payment of rent or for cause. Events that occurred after these Notices were issued to the tenant could not be relied on in order to support the landlords' decisions made on August 1 and 2, 2015 to seek an end to this tenancy for the reasons cited in those Notices.

The only written evidence that existed at the time the landlords issued these Notices to End Tenancy was a copy of the Standard Residential Tenancy Agreement (the Agreement) created by the landlords, which was signed by the tenant on July 21, 2015. Although the landlords entered this document into written evidence, the landlord maintained that this was not a legal Agreement because only the tenant signed this Agreement and not the landlord(s).

At the hearing, I noted that although the landlords did not sign the Agreement, their preparation of that Agreement equated to their confirmation of the terms they had drafted for the tenant's signature. In this case, the draft Agreement they created identified a second tenant, the tenant's husband. The landlord gave undisputed sworn testimony that the tenant's husband was incarcerated at the beginning stages of this tenancy, thus explaining his failure to sign the Agreement. As the tenant's husband neither drafted the Agreement nor signed it, he is not a tenant for the purposes of that Agreement.

At the hearing, I confirmed the details of the Agreement. As all of the material relevant to the two Notices to End Tenancy before me and the Agreement were either entered into written evidence by the tenant or were the subject of sworn testimony, I find that there was no reason to make a determination regarding whether the landlords' written evidence was served to the tenant in accordance with section 88 of the Act. Other than the terms of the Agreement, confirmed by the parties at the hearing, the landlords' written evidence, even if considered, would have had no bearing on the state of the tenancy on August 1 and 2, 2015, the dates when the two Notices to End Tenancy were issued to the tenant. For these reasons, I have not taken the landlords' written evidence into account.

At the hearing, the landlord made an oral request to obtain whatever documentation was required in order to proceed with the eviction of the tenant. Although the landlord was initially unclear with respect to this request, I accept that the landlord was expressing a desire to end this tenancy and obtain an Order of Possession.

Issues(s) to be Decided

Should the landlord's 10 Day Notice and 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's application and my findings around each are set out below.

On July 21, 2015, the tenant signed a one-year fixed tenancy Agreement for a tenancy that is intended to cover the period from July 23, 2015 until July 30, 2016. Monthly rent is set at $865.00, payable in advance on the first of each month. The landlord continues to hold the tenant's $432.50 security deposit paid on or about July 20, 2015.

The landlord's 1 Month Notice identified August 31, 2015, as the effective date to end this tenancy. Since this Notice was not issued to the tenant until August 1, the 1 Month Notice to End Tenancy automatically corrects to September 30, 2015, the earliest possible date that such a Notice could have taken effect.

The landlord's 10 Day Notice was for $850.00 in rent which the landlord maintained was owing as of the date of its issuance on August 2, 2015. The effective date identified on this Notice was August 12, 2015, corrected to August 14, 2015. The tenant testified that the Ministry of Social Development (the Ministry) issued three shelter assistance cheques in the amounts of $375.00, $375.00 and $100.00, which she placed in the mail slot of the landlords' office in her rental building. Initially, the tenant could not recall when she placed these cheques in the mail slot; however, when it became apparent that the timing of her provision of these cheques would have a direct impact on the success of her application, she revised her sworn testimony to declare that she was certain that she made these payments on Friday, August 7, 2015.

The landlord testified initially that the three cheques in question were received by August 14, and listed as deposited in the landlords' bank account on August 15, 2015. He later revised this testimony to state that the three cheques were provided to the landlords between August 10 and August 14. Later still, when he could not locate the actual cheques, he said that he could not dispute the tenant's testimony that she dropped the three cheques in the mailbox by August 9. He testified that the tenant may be correct in this assertion, but observed that cheques of this nature are never left for days in the office in this rental property. He eventually said that he could not testify as to when the cheques were provided to the landlord, and could only confirm that they were actually paid and deposited.

The landlord also noted that the tenant has not paid rent for October. The tenant testified that the Ministry paid her shelter assistance of $375.00 on September 7, 2015. She claimed that the landlord had contacted the Ministry to advise that her tenancy was over and that there was no need to send any further cheques to the landlord on her behalf. The landlord steadfastly denied this allegation.

The landlords' 1 Month Notice requiring the tenant to end this tenancy by the corrected effective date of September 30, 2015, cited the following reasons for the issuance of the Notice:

> *Tenant or a person permitted on the property by the tenant has:…*
>
> - *seriously jeopardized the health or safety or lawful right of another occupant or the landlord;*
> - *put the landlord's property at significant risk.*
>
> *Tenant has engaged in illegal activity that has, or is likely to:…*
>
> - *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;…*

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

Tenant has assigned or sublet the rental unit/site without landlord's written consent.

Tenant knowingly gave false information to prospective tenant or purchaser of the rental unit/site or property/park.

Residential Tenancy Act only: security or pet damage deposit was no paid within 30 days as required by the tenancy agreement.

At the hearing and after being asked to clarify some of the reasons cited in the 1 Month Notice, the landlord said that he had erred in some of the reasons included in that Notice. The landlord did not dispute my observation that he had no valid reason to end the tenancy for any of the following reasons:

Tenant has engaged in illegal activity that has, or is likely to:…

- *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;…*

Tenant knowingly gave false information to prospective tenant or purchaser of the rental unit/site or property/park.

Residential Tenancy Act only: security or pet damage deposit was no paid within 30 days as required by the tenancy agreement.

At the hearing, the landlord explained his reasons for seeking an end to this tenancy for cause. He said that he would never have agreed to allow the tenant to enter into an Agreement to rent the premises had he known that the tenant intended to keep her large dog in the rental unit. He testified that there is a rigid policy whereby new tenants are not allowed to keep dogs in this rental complex. He testified that the tenant was told not to bring dogs into the building. He said that notices are prominently displayed throughout the common areas of the building advising that any new pets not approved by the landlords will be removed from the building. He said that existing tenants have been "grandfathered" into keeping their dogs, but that no new dogs are allowed. The tenant said that she was not told that she could not bring a dog to the building and was unaware of this policy until after she moved into the rental unit and was advised of the landlords' concerns about her dog. She confirmed that her dog is a large Rotweiler mix.

The landlord also sought an end to this tenancy because someone not listed on the original Agreement had occupied the rental unit from the beginning of this tenancy. The tenant confirmed that a roommate had moved into this one bedroom rental unit plus den. She said that she did not advise the landlord that the roommate was moving in because the landlord was away when this happened.

Analysis – Application to Cancel the 10 Day Notice

Section 26 of the Act requires a tenant to pay rent when it is due. There is undisputed written evidence and sworn testimony that the tenant did not pay all of the monthly rent that became owing on August 1, 2015, 11 days after she signed the Agreement. The landlord could not refute the tenant's sworn testimony that she was handed the 10 Day Notice on August 4, 2015. The five day period whereby the tenant had to pay all of the $850.00 in monthly rent identified as owing in the 10 Day Notice ended on August 9, 2015. Neither party gave convincing or consistent testimony regarding when the tenant actually paid all of the $850.00 of rent owing for August 2015.

In considering this matter, I have questions regarding the propriety of a tenant dropping three rent cheques into the mail slot of the landlord's rental office when a 10 Day Notice has been issued and a landlord representative is available by telephone 24 hours per day and 7 days per week. The tenant's shifting sworn testimony regarding when she provided these cheques to the landlord's rental office leaves even more questions as to her credibility. However, the landlord too had similar problems regarding the consistency of his sworn testimony regarding this matter.

In the absence of any better evidence, I accept the landlord's eventual sworn testimony in which he stated he was uncertain when the cheques were provided to the landlords by the tenant and that these cheques may have been provided to the landlord by August 9. As the landlord agreed that all of the August 2015 rent cheques were paid, and the landlord could not refute the tenant's claim that they were provided on August 7, 2015, and at least by August 9, I find that there is sufficient evidence to allow the tenant's application to cancel the 10 Day Notice. The 10 Day Notice is cancelled and of no force or effect.

Analysis- Application to Cancel the 1 Month Notice

Section 47(1) of the *Act* allows a landlord to end a tenancy for cause for any of the reasons cited in the landlords' 1 Month Notice.

A party may end a tenancy for the breach of a material term of the tenancy but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the breach. 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. As noted in RTB Policy Guideline #8, a material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the Agreement. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have stated in the agreement that one or more terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Policy Guideline #8 reads in part as follows:

> *To end a tenancy agreement for breach of a material term the party alleging a breach…must inform the other party in writing:*
> - *that there is a problem;*
> - *that they believe the problem is a breach of a material term of the tenancy agreement;*
> - *that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*
> - *that if the problem is not fixed by the deadline, the party will end the tenancy…*

In this case, the landlord has maintained that the tenant's failure to obtain approval from the landlords to allow a new occupant and a large dog to reside with her in the rental unit constituted a breach of a material term of the Agreement. The landlord produced nothing in writing before the 1 Month Notice was issued to demonstrate that written warnings were provided to the tenant as outlined above.

In considering this matter, I note that although the tenant was the only signatory to the Agreement, her husband was clearly identified as a second tenant in the draft Agreement provided to the tenant by the landlords. As this was a rental unit which could accommodate two tenants in a one bedroom unit with a den, I find that the landlord has not established that the replacement of one occupant in the rental unit with another constituted a breach of a material term of the Agreement. There is nothing in the standard Agreement prepared by the landlords that would suggest that a change in the tenancy substituting one tenant for a different occupant would constitute a breach of

a material term of the Agreement. Section 11.3) of the Agreement establishes that the tenancy could be ended if there were an unreasonable number of occupants in the rental unit. Even with this reduced test, I find no reason to find that an unreasonable number of occupants are residing in the rental unit. For the reasons outlined above, I find that the landlord has not established that the tenant's substitution of one occupant for a tenant listed on the Agreement constituted the breach of a material term of the Agreement.

I have also considered the landlords' claim that the tenant's keeping of a large dog in the rental unit is an ongoing breach of a material term of the Agreement. In this regard, I note that the landlord confirmed that no separate Addendum was created or signed by the parties for this tenancy. No warning letters were produced by the landlords prior to the landlords' issuance of the 1 Month Notice with respect to the alleged breach of the Agreement by keeping a large dog on the premises. I do not accept the landlords' assertion that the placement of signs throughout the building regarding the introduction of any new dogs to the rental building qualifies as a proper substitute for either a specific term in the Agreement or an Addendum to that Agreement. The tenant gave undisputed sworn testimony that others in the rental building keep pets, including dogs in their rental units. While these pets may very well have been "grandfathered" into existing Agreements between the landlords and tenants, I find that the landlord produced little confirmed evidence that the tenant was advised of the landlords' policy preventing any new dogs from residing in the rental building as of July 2015. I find that the landlord has failed to demonstrate that the tenant's keeping of a dog on the premises constitutes a breach of a material term of the Agreement.

I also find that the landlord has failed to demonstrate entitlement to end this tenancy because the tenant has taken in a different roommate. She has neither assigned nor sublet the rental unit to someone else, and remains residing there with a different occupant than originally stated on the Agreement.

Finally, I heard little if any sworn testimony from the landlord with respect to the landlords' attempt to end this tenancy because the tenant had:

- *seriously jeopardized the health or safety or lawful right of another occupant or the landlord; or*
- *put the landlord's property at significant risk.*

The landlord produced no witnesses or written evidence from those whose health or safety was allegedly seriously jeopardized. The landlord did not explain how the landlords' property had been placed at significant risk by the tenant.

For the reasons cited above, I allow the tenant's application to cancel the 1 Month Notice.

Conclusion

The tenant's application to cancel the 10 Day and 1 Month Notices is allowed. These Notices are of no continuing force or effect. This tenancy continues until ended in accordance with the *Act*.

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: October 16, 2015

Residential Tenancy Branch