Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

The tenants and landlord 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.

The parties admitted service of the evidence before me.

The landlord made an oral request for an order of possession in the event I find that the 1 Month Notice was validly issued.

Preliminary Issue - Landlord's Electronic Evidence

The landlord submitted two electronic storage devices containing digital evidence. One of the devices was identified as infected. I did not view any of the digital evidence contained on this device. The parties were advised of this at the hearing.

Preliminary Issue – Scope of Application

The landlord provided a monetary order worksheet and application with her evidence. These relate to the landlord's application filed 12 November 2015.

The landlord's application was not filed in time to be joined with this application. Further, the landlord's application is not related to the same issues as the tenants' application. On this basis, I declined to hear the matters at the same time.

The tenants amended their application on 1 October 2015 to include a request for compensation in the amount of $3,787.89 and again on 9 November 2015 to include an increased request for a monetary order in the amount of $8,652.92

Residential Rules of Procedure, Rule 2.3 states that, if, in the course of the dispute resolution proceeding , the dispute resolution officer determines that it is appropriate to do so, the officer may sever or dismiss the unrelated disputes contained in a single application with our without leave to apply.

As the tenants' amendments are in relation to matters unrelated to the issue of the 1 Month Notice and the continuation or end of tenancy, I dismiss these portions of the tenants' claim with leave to reapply.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an order of possession? Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and my findings around it are set out below.

This tenancy began 29 August 2015. Monthly rent of $1,450.00 is due on the first.

The parties entered into a tenancy agreement. I was provided with a copy of the addendum to the tenancy agreement. The landlord relies on specific subclauses of clauses 5 and 9 of the addendum.

Clause 5 of the addendum reads, in part:

> The tenant/s will not make or cause any structural alteration to the rental unit or residential property.

Clause 9 of the addendum reads, in part:

Driveway is shared for both units please allow accessibility especially during winter months.

I was provided with a letter dated 13 September 2015. In that letter the landlord advances various complaints. In particular, the landlord expresses her concern with the tenants' desire to add an additional pet to their home, the placement of the fence, and the movement of the dog house from under the tree to the deck.

I was provided with a letter dated 14 September 2015. In this letter the landlord states that it is a final warning for the tenants to comply or a "30 day notice of termination" would be issued. The letter sets out complaints regarding the following:

- placement of the fence;
- removal of boards under the stairs;
- cease using scrap wood pieces on the property; and
- parking in the driveway next to the shed.

The tenants responded on 16 September 2015.

On 17 September 2015 the landlord served the tenants with the 1 Month Notice by posting that notice to the tenants' door. The 1 Month Notice was dated 17 September 2015 and set out an effective date of 20 October 2015. The 1 Month Notice set out that it was given as the tenants were alleged to have a material term of the tenancy agreement that was not corrected within a reasonable time.

The landlord alleges the following breaches:

- parking in undesignated spots;
- installing temporary fencing around the yard; and
- altering the deck steps.

The landlord admits that there was a verbal agreement for the erection of a fence to allow for a dog run area at the side of the rental unit. The landlord testified that she did not agree to the installation of a construction fence. The landlord testified that the fence is impeding on the common use of the yard by obstructing a neighbours view. The landlord testified that the fence interferes with her access to trees for pruning. The landlord alleges that this fence is causing damage to the grass.

The driveway for the residential property is shared with an adjacent rental unit. The landlord submits that the tenants are parking in such a fashion that it is blocking the occupant's use of the shared driveway. The tenant testified that the driveway is

accessible from two different streets and that the occupant is not prevented from leaving by the tenants parking.

The tenant MA testified that the tenants placed the drywall under the steps to prevent cats from crawling under the stairs. The tenant MA testified that the drywall is affixed to the stairs.

The landlord submits that the alleged bad acts by the tenants are sufficient to end the tenancy because they are impeding the next door occupant's enjoyment of his rental unit. The landlord testified that the occupant has complained but did not want to be involved in this dispute.

I explained the definition of material term to the parties and asked for their submissions as to whether or not the terms relied on by the landlord constituted material terms. The landlord submitted that the terms were material terms because they were part of the agreement and the tenants agreed to the terms. The tenants submit that the terms are not material to the tenancy agreement. Further, the tenants submit that, even if the terms are material, they have not breached the terms.

The landlord provided me with a definition of "structure" from an online dictionary. The landlord submits that as the fence is a structure, it constitutes a structural alteration.

I was provided with photographs of the tenants' car parked in the shared driveway, pieces of drywall blocking the gaps under the rise of the stairs, temporary fencing enclosing the back yard, duct tape and adhesive residue on the frame of a window screen, plums under a tree, cigarette debris on the ground, burning leaves, a dog house, dog excrement, pruned branches, and others.

I was provided with various email and text correspondence. There is nothing relevant to the disposition of this matter in those messages.

Analysis

In an application to cancel a 1 Month Notice, the landlord has the onus of proving on a balance of probabilities that at the reason set out in the notice is met. Paragraph 47(1)(h) of the Act sets out that a landlord may end a tenancy where the tenant has failed to comply with a material term and the tenant has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

On 17 September 2015, the landlord served the tenants with the 1 Month Notice. The 1 Month Notice set out that it was being given as the tenants were alleged to have breached a material term of the tenancy agreement that was not corrected within a reasonable time.

Residential Tenancy Policy Guideline, "8. Unconscionable and Material Terms" (Guideline 8) provides guidance as to material terms:

> 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.
>
> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
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> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. ... Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.
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> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:
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> - 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.
>
> [emphasis added]

I reject the landlord's submissions that because the clauses are in the tenancy agreement and the tenants agreed to these terms that the terms are material. It is clear from Guideline 8 that this submission must fail: The materiality of a term must be decided based on the importance of the term in relation to the agreement and the intent of the parties.

There are two subclauses that are alleged to be material within clauses 5 and 9. These subclauses relate to structural alterations and parking.

With respect to clause 9, I disagree that this constitutes a material term. Where the tenants park their vehicle(s), is not so important and integral to the tenancy agreement as a whole that even a trivial breach of the term would be grounds to end the tenancy. Further, I find that the tenants did not at any time intend that this would be a material term of the tenancy. As this subclause of clause 9 of the agreement does not constitute a material term, irrespective of whether or not the tenants breached clause 9, a breach cannot form the basis for ending the tenancy.

With respect to clause 5, I agree that structural alterations are so important and integral to a tenancy agreement that even a trivial breach of this term would be grounds to end the tenancy. Like payment of rent, the structural integrity of the rental unit itself is important within the context of the agreement. I find that this subclause of clause 5 is a material term.

I must now determine whether or not the tenants have breached clause 5 of the addendum. Clause 5 of the addendum refers to structural alternations, not the addition of structures. The definition of structure provided by the landlord is irrelevant and wholly unhelpful. The landlord's interpretation would lead to the absurd situation where the tenants would be prevented from placing patio furniture on the yard as that constitutes a "structure" within the landlord's definition. Rather, "structural" within its ordinary meaning applies to those objects that make up the structure of the rental unit itself. The term in the addendum prevents alterations that change the fundamental structure of the rental unit. For example, this term would prevent the tenants from renovating the rental unit to remove walls or other fixtures. I find that the erection of temporary fencing and the temporary addition of drywall to block the area under the steps do not constitute a structural alteration as the structural integrity of the rental unit remains unchanged. As the tenants have not breached clause 5 of the addendum, the impugned behaviour cannot substantiate the 1 Month Notice.

On this basis, I find that the landlord's 1 Month Notice is without merit. The tenants' application to cancel the 1 Month Notice is granted. The landlord's oral request for an order of possession is refused. The tenancy will continue, uninterrupted, until it is ended in accordance with the Act

As the tenants have been successful in this application, they are entitled to recover their filing fee from the landlord.

Paragraph 72(2)(a) of the Act sets out:

> If the director orders a party to a dispute resolution proceeding to pay any amount to the other...the amount may be deducted...in the case of payment from a landlord to a tenant, from any rent due to the landlord...

The tenants may elect to enforce this order by deducting $50.00 from a future month's rent. Payment of the net amount of rent will satisfy the tenants' obligations pursuant to section 26 of the Act.

Conclusion

The 1 Month Notice is cancelled. The tenancy will continue uninterrupted.

The tenants are provided with a monetary order in the above terms and the landlord(s) must be served with this order as soon as possible. Should the landlord(s) fail to comply with this order, this order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: December 17, 2015

Residential Tenancy Branch