Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MAINSTREET EQUITY CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenant's application to cancel a 1 Month Notice to End Tenancy for Cause dated May 31, 2016. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Issue(s) to be Decided

Should the 1 Month Notice be upheld or cancelled?

Background and Evidence

The tenancy commenced February 1, 2014 and the tenancy is currently on a month to month basis. The tenants are currently paying rent of $975.63 that is due on the first day of every month. On May 31, 2016 the landlord personally served the male tenant with a 1 Month Notice to End Tenancy for Cause with a stated effective date of June 30, 2016 (the 1 Month Notice). The 1 Month Notice indicates the reason for ending the tenancy is: "Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so." The tenants filed to dispute the 1 Month Notice within the time limit for doing so.

The landlord submitted that the reason for ending the tenancy is because the tenants were found to have a washing machine in the rental unit on May 31, 2016 and that this is violation of term number 16 in the tenancy agreement.

Term 16 of the tenancy agreement provides the following, in part:

16. USE OF PREMISES…"The Tenant without written permission of the landlord MAY NOT INSTALL HEAVY APPLIANCES OR EQUIPMENT OF ANY KIND..."

The landlord submitted that on October 4, 2015 all residents of the building were issued a letter. The letter is addressed to "Resident" and provides the following, in part: "Please be reminded that nobody is allowed to have HEAVY APPLIANCES or EQUPMENT of any kind in the premises, this means nobody is allowed to have washing machine, dryers or dish washers. It has come to our attention that some of you have them even after signing the Tenancy Agreement that clearly states nobody is allowed." The letter goes on to say that all suites will be inspected on October 6, 2015 and "failure to comply will result in a one month Notice of Termination being served on yourself."

The landlord testified that the suites were not inspected on October 6, 2015 as indicated in the letter of October 4, 2015. Rather, the landlord testified that on October 26, 2015 all residents of the building were notified that an inspection would take place on October 29, 2016 by way of a letter dated October 29, 2015. The letter is address to "Resident" and advices that "we will be doing our follow up inspection regarding having NO HEAVY APPLIANCES or EQUIPMENT of any kind in the premise…" The letter also indicates that "if you are caught with any of the mentioned you will automatically be issued with one month Notice of Termination."

The landlord testified that on October 29, 2015 the landlord knocked on the door of the rental unit and asked the male tenant whether they had a dishwasher, washer or dryer in the rental unit to which the tenant replied that they did not. The landlord accepted the tenants' word and left without inspecting the unit. No other letters were issued to the tenants with respect to having a heavy appliance.

The landlord explained that the letters issued in October 2015 were issued as a result of a flood from a washing machine in another unit that caused significant water damage to the property. After this incident the landlord decided to enforce term 16 of the tenancy agreement for all tenants on the property.

The landlord testified that on May 29, 2016 a complaint was received from the adjacent rental unit that their sink and tub were backing up with water. A plumber was called to address the situation and the landlord suspected that the subject tenants had a washing machine or dishwasher in their unit. On May 31, 2016 the landlord approached the tenants and asked whether they were using such appliances in their unit and they stated that they were not. The landlord obtained the tenant's consent to enter the rental

unit and inspect the unit. The landlord observed a freezer in the unit and eventually found a washing machine in the hall closet of the rental unit. At the time the tenants explained to the landlord that they were merely storing the washing machine and had not been using it. However, the landlord testified that at a later time the female tenant acknowledged that she used it to wash baby clothes. The landlord proceeded to serve the tenants with the subject 1 Month Notice on the same day.

The tenants acknowledge that they have a freezer in their unit and stated they were storing a washing machine in the hall closet when the landlord inspected the unit on May 31, 2016. The tenants testified that they disposed of the washing machine two days after receiving the 1 Month Notice with a view to continuing their tenancy. The tenants submitted that the landlord did return to the rental unit to do an inspection a few days after that, on or about June 6, 2016, and confirmed that the washing machine was gone. The tenants explained that they do not understand English very well and did not understand the significance of storing a washing machine in their unit until they received the 1 Month Notice.

The landlord confirmed that an inspection did take place after the 1 Month Notice was served and that the washing machine was gone. The landlord pointed out that the tenants cannot rely upon their lack of understanding English as an excuse for breaching their tenancy agreement. The landlord also pointed out that a relative of the tenants was required to remove a washing machine from their unit, also located on the same property, and the tenants ought to have known that a washing machine was not permitted.

Discussion ensued as to what constitutes a “heavy appliance” since a weight or other description is not provided in term 16. The landlord responded by stating that an appliance that cannot be carried by one person would be considered a heavy appliance. The tenants pointed out that some televisions are very heavy and are a permitted appliance. The male tenant claims that he is able to carry the freezer. The landlord doubted that assertion and the tenant asserted that the ability to carry an object depends upon that person’s stature. The parties sought to have me determine whether the tenants’ freezer may remain in the rental unit. I declined to deal with that issue since it was apparent from the landlord’s submissions during the hearing and the letters issued in October 2015 that the reason for the landlord issuing the 1 month Notice was due to the tenants having a washing machine. Nor, did I have enough evidence before me to make a determination as to whether the freezer would be a prohibited appliance. I expressed concern as to the vagueness and enforceability of the wording in term 16 as it relates to “heavy appliances”. The landlord took the position that another dispute resolution proceeding with the same fact pattern resulted in an eviction. Each dispute

turns on its own merits and I am not bound by decision of other Arbitrators. As such, I encouraged the parties to work to find a resolution with respect to the freezer.

Analysis

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove, based on a balance of probabilities, that the tenancy should end for the reason(s) indicated on the Notice.

Much of this dispute revolved around term 16 in the tenancy agreement, as it relates to having a “heavy” appliance in the rental unit.

Section 6 of the Act provides that in order for a term of a tenancy agreement to be enforceable it must be “expressed in a manner that clearly communicates the rights and obligations under it”, among other things. Under the Act, the landlord bears the burden to draft the tenancy agreement and, in keeping with the principles of contract construction, where a term is ambiguous the drafter of the contract shall suffer the consequences of any ambiguity.

I find that prohibiting a tenant from having an appliance that is “heavy” is subject to interpretation as I accept that what one person may consider heavy may not be considered heavy by another. Further, as pointed out by the tenant, some televisions are very heavy and it would appear the landlord has not raised issues with respect to having a heavy television. Nor, did the landlord appear overly concerned about the freezer until this hearing. Nevertheless, I find that by way of the two letter issued to all residents in October 2015 that the landlord attempted to provide clarify its position that the landlord would consider having a washer, dryer or dishwasher in a rental unit to be a heavy appliance and in contravention of their tenancy agreement. Since these letters were issued prior to inspection or confirmation that the tenants had a washer, dryer or dishwasher I find they are not breach letters.

After issuing the two letters to all residents at the property in October 2015, on October 29, 2015 the landlord accepted the tenant’s verbal confirmation that they did not have a washer, dryer or dishwasher in the rental unit without verifying the accuracy of that statement. As such, the landlord did not issue a breach letter to the tenants to inform them that they were in breach of their tenancy agreement. Rather, from what I am able to ascertain, the next written communication from the landlord was the 1 Month Notice issued on May 31, 2016 under section 47(1)(h) of the Act.

Section 47(1)(h) of the Act provides that a landlord may end a tenancy where

> (h) the tenant
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> (i) has failed to comply with a material term, and
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> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

[Reproduced as written with my emphasis underlined]

Residential Tenancy Policy Guideline 8: *Unconscionable and Material Terms* also provides policy statements, based upon the rules of statutory interpretation and common law principles. With respect to material terms, the policy guideline provides the following:

> **Material Terms**
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> 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.
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> 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. It is possible that the same term may be material in one agreement and not material in another. 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.

> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.
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> [Reproduced as written with my emphasis underlined]

When the landlord discovered a washing machine in the rental unit on May 31, 2016, I find the landlord's recourse was to issue a breach letter to the tenants and set a deadline for them remove the washing machine. Only if the tenants failed to comply by the deadline would the landlord be in a position to issue the 1 Month Notice under section 47(1)(h). The landlord did not issue a breach letter to the tenants or set a deadline for removal of the washing machine but proceeded to issue the 1 Month Notice. Accordingly, I find the landlord's issuance of the 1 Month Notice on May 31, 2016 to be premature without first giving a breach letter with a deadline.

Considering I have found the landlord's issuance of the 1 Month Notice to be premature and the tenants removed the washing machine two days after the 1 Month Notice was served, I find the tenants took sufficient action within a reasonable amount of time after written notice. Therefore, I cancel the 1 Month Notice with the effect that the tenancy continues at this time.

To be clear, I have cancelled the 1 Month Notice as I was unsatisfied the landlord gave the tenants a breach letter and a reasonable amount of time to correct the breach which is one of the criteria that must be met in order to end a tenancy for the reason indicated on the Notice. Since this component was not met, I found it unnecessary and did not determine whether clause 16 is an enforceable term or a material term with respect to "heavy appliances'.

Under section 62 of the Act, I have the authority to issue any order "necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement…" Considering term 16 may be viewed as ambiguous but that I accept that the landlord has a legitimate concern that washers, dishwashers and dryers may create an increased risk of water or moisture damage, I find it necessary and appropriate to issue an order to the tenants. Having heard that there is a common laundry facility on the property for tenants to use I hereby issue the following order to the tenants:

I ORDER that the tenants must not have a clothes washer, clothes dryer, or dishwasher in the rental unit, whether a portable machine or permanently installed, whether in use or not.

The above order takes effect immediately upon receipt of this decision. Failure of the tenants to comply with the above order would be grounds for the landlord to end the tenancy due to breach of an order of the Direct under section 47(1)(l) of the Act.

Conclusion

The 1 Month Notice dated May 31, 2016 is cancelled with the effect that this tenancy continues.

I have issued an order to the tenants with this decision prohibiting them from having a clothes washer, clothes dryer, or dishwasher in the rental unit.

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: July 14, 2016

Residential Tenancy Branch