



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, AS, FF

Introduction

The applicant tenants seek to cancel a one month Notice to End Tenancy for cause. The tenants did not submit a copy of the disputed Notice. The copy submitted by the landlords, with which the attending tenant did not disagree, indicates that the grounds for the Notice are:

- The tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk,
- The tenant has engaged in illegal activity that has, or is likely to jeopardize a lawful right or interest of another occupant or the landlord, and
- The tenant has assigned or sublet the rental unit without the landlord's consent.

The essence of the matter is that without the landlords' knowledge, the tenants have been engaged in permitting short term occupants into the home, using the platform of Airbnb, an online service that matches people willing to share their homes with others looking for short term accommodation.

By an amendment to their application the tenants also seek an order that they be allowed to assign or sublet the rental unit because the landlords' permission has been unreasonably withheld.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing substantiate on a balance of probabilities any of the three grounds listed in the Notice? Should the tenants be allowed to assign the tenancy or sublet the premises without landlord permission?

Background and Evidence

The rental unit is a four bedroom house in a residential neighbourhood. The respondent landlords are the owners of the home.

It is agreed the tenancy started January 1, 2014.

The landlords produced a written tenancy agreement indicating that Mr. B.C. was the only tenant renting the premises on January 1, 2014. It indicates the tenancy was for a one year fixed term and then month to month unless otherwise agreed. The monthly rent was then \$2750.00, due on the first of each month, in advance. The written tenancy agreement shows that Mr. B.C. paid a \$775.00 security deposit and a \$600.00 pet damage deposit.

In an affidavit filed by the respondent Mr. R.K. he indicates that at that time the applicants Ms. R.C., Ms. N.S. and a third person, Ms. M.K., now living elsewhere, moved in with Mr. B.C. with the landlords' knowledge and consent.

In late December 2015, the landlords entered into another written tenancy agreement, this time with the applicant Mr. G.C. as the tenant. The agreement indicates that the landlords are the respondent landlords along with Mr. B.C. (the original tenant). By a handwritten notation, the tenancy agreement is indicated to be a "sublease" for a term commencing February 1, 2016 on a month to month basis. No rent is shown.

Mr. R.K. in his affidavit indicates that the original tenant Mr. B.C., as well as Ms. R.C. moved away and Mr. G.C. moved in to occupy the rental unit with Ms. N.S. and another, the applicant Mr. K.L., who had moved in earlier. That is why, he says in his affidavit, the "sublease" to Mr. G.C. was prepared and why it does not disclose a rent amount

Two of the four bedrooms in the home are part of a downstairs suite. The suite has its own bathroom. From the multitude of online comments about the suite submitted to the Airbnb website, as shown in the landlord Mr. R.K.'s affidavit, the suite also has its own kitchen. The suite has its own exterior door.

Each of the two lower bedrooms has a door entering onto the bottom of the stairs to the upper portion of the home. Those doors do not have locks.

On May 21 of this year, as the result of information passed on by their gardener, the landlords discovered that the rental unit was being used for Airbnb rentals.

The landlord Ms. C.N. contacted the tenant Ms. N.S. the same day and directed her to cease the rentals.

Ms. C.N. demanded details of past Airbnb rentals but the tenants have not provided those details.

The next day, May 22, the landlords served the tenants with the Notice in question.

It is the landlords' view that Airbnb rentals are illegal under the applicable zoning bylaw as they were rentals for less than one month.

They argue that the use of the premises for Airbnb rentals has invalidated their insurance, exposing them to significant personal financial risk in the event of a loss.

The landlords submit a copy of a coverage letter showing they have an insurance policy insuring them against property damage, general damage and against rental income loss.

Additionally, they submit a letter from their insurance agent dated June 1, 2016. The letter includes a copy of the insurance policy and states "[w]e do NOT insure or allow short term rentals such as AirBnB [*sic*] as this is high risk" and that "[i]f withholding information from the insurance company about the business of short term rentals, the coverage will be void."

The insurance agent's letter also attached an extract from an "Underwriting Manual" indicting risks the insurance "program" would not underwrite. Number 3 of the exclusions refers to "Short Term Rentals and Air B&B's – minimum requirement for rentals is six months."

The landlords point out that the Airbnb terms of service require of its "hosts" that if they are tenants then they are responsible for obtaining the landlord's permission in order to be a host.

The tenants' position can best be summed up in an extract from correspondence from Ms. N.S. which Mr. R.K. included in his affidavit as part of the landlords' evidence. In an email sent May 26, Ms. N.S. wrote, *inter alia*,

... we thought you had told us from the beginning that you trusted us to handle our own sublets so long as you receive rent on time. All [Mr. R.K.] said in response to this was "this is different, roommates are great but what you have done is highly illegal.

* * *

When we decided to use AirBnB [sic] it was because we were in between roommates and we had weighed the pros and cons of having to find roommates off craigslist or using AirBnB to fill those gaps in between being able to sublet to people we know well. In our minds, we did not want to get stuck with troublesome roommates that we may run into on Craigslist and as such thought AirBnB would be a great way to pick and choose who we allow into our home, as users of AirBnB come with reviews and recommendations from other hosts. It was certainly less anonymous than craigslist and we felt like we had much more control and knowledge of who would be living in our home. We figured that if they were noisy or messy, they would only be here for a few nights at most rather than getting stuck with a bad apple for months at a time. To date, we had never had a guest who caused us any problems.

Despite never having received an explanation as to why you disapproved of our AirBnb usage, we decided to terminate our account and bookings to respect your wishes.

The tenants cancelled their future Airbnb bookings, incurring a cost to do so.

The landlord Ms. N.C. responded to this email the next day saying; a) Airbnb is illegal, b) Airbnb requires that a tenant get a landlord's permission to host and no such permission was granted, c) the landlords' house insurance does not cover short term rentals and the landlords were thus exposed to great risk, d) the tenancy agreement requires the written consent of the landlord for the tenant to sublet and no such consent was given, and, e) the neighbours complained.

In her affidavit filed in this matter, the landlord Ms. C.N. states *inter alia*, in paragraph 7,

While my husband and I did discuss with [Mr. G.C.] and [[Ms. N.S.] (and[Mr. B.C.] and [Ms. R.C.] prior to them) the prospect of them having roommates and indicated to them that we would prefer that they select their own roommates to occupy to [sic] the Residence along with them, including the lower lever suite at the Residence, we did not agree to short term rentals by way of Airbnb or at all. During the aforementioned discussion in late December, 2015, my husband and I advised [Mr. G.C.] and [Ms. N.S.] that we would like to know the names of the roommates they selected to live with them. Accordingly, our understanding and expectations with respect to roommates were that my husband and I would be advised and have knowledge of who was and would be living at the Residence and that such roommates would remain at the Residence for months at a time as roommates normally do.

The tenant Mr. G.C. testifies that the tenants had been using Airbnb "on and off" for about a year.

He says the landlord Mr. R.K. told him the tenants might have to pay the landlords all the money they have received from Airbnb guests.

He says that the landlord Mr. R.K. told him from the start that they were "hands off" landlords regarding who else the tenants might have staying in the house.

Analysis

I find that the lower level area in question in this dispute was configured as an optional separate suite from the main house and that the tenants were using it as a separate suite, not as a part of a single dwelling unit.

The landlords refer to it as a suite. The Airbnb reviews from people who stayed there show it to be a self contained suite or “apartment” that came with its own keys.

I find that the tenants were granting others exclusive possession of the suite. They were renting out the suite and they were doing so on a short term basis; for a day or days at time. They were doing so without the landlords’ written consent required by s. 34 of the *Residential Tenancy Act* (the “RTA”).

In my view it makes little difference what “platform” the tenants used to secure subtenants; whether it was the Airbnb service, Craigslist, word of mouth or some other method.

Despite the able submissions of counsel for the landlord, the question of whether or not the tenants were complying with the terms of their Airbnb contract regarding the obtaining of their landlords’ permission is not pertinent to the questions here. In my view that is a matter between the tenants and Airbnb.

The Notice: Ground #1

The first ground for the Notice is that the tenants or a person permitted on the property by the tenants have put the landlord’s property at significant risk. It is a ground listed in s. 47 of the *RTA* as justifying termination of a tenancy.

While there was mention during the hearing of short term tenancies exposing the suite to an increased risk of physical damage, I find that was merely speculation. No evidence was tendered to support the allegation.

The landlords’ submission is that the insurance policy they had taken out for the premises was voided by the tenants’ Airbnb activities. They say the lack of coverage exposed them to the risk of significant personal financial loss.

I find that this claim has not been proved.

First, it must be noted that the ending of a tenancy is a very serious matter. While the standard of proof required to show justification for an eviction remains that of a balance of probabilities, cogent convincing evidence will be required.

Though the landlords have submitted a 63 page copy of the Airbnb Terms and Conditions, they have not submitted a copy of the insurance policy in question. They have not extracted and submitted nor referred to any provision in the policy itself that would show that the tenants' actions have put the landlords' coverage at risk.

The extract submitted from the "Underwriting Manual" and the cover letter opinion of the insurance agent are of some relevance but without reference to the actual insurance policy I can give them little weight.

In my view the claimed restrictions on short term rentals and Airbnbs would likely relate to the actions and conduct of the insured, namely, the landlords. It is the landlords' use of the premises for short term rentals or Airbnbs that would not be underwritten.

The landlords would need to show by clear wording that some conduct of a tenant, conduct unknown to and unauthorized by the landlords, would void the landlords' insurance coverage. They have not done so.

Additionally, there is no evidence that the tenants had ever been informed of the terms and restrictions in the landlords' insurance policy, either by a term in the tenancy agreement or in separate correspondence. If the landlords' insurance policy does in fact prohibit the landlords from renting the home to tenants who might then sublet to persons for less than a period of six months or who might use the platform Airbnb to secure tenants, these tenants did not know and cannot be taken to have known of those conditions.

This ground for the Notice must fail.

The Notice: Ground #2

The second ground for the Notice is that the tenants have engaged in illegal activity that has, or is likely to jeopardize a lawful right or interest of another occupant or the landlord. This ground is also one listed in s. 47 of the *RTA* as a justification for eviction.

There are two aspects to this ground: first, Illegality, and second, putting a lawful right or interest of the landlords' in jeopardy or the likelihood of jeopardy.

A. Illegality

The applicable zoning and development bylaw (the "Bylaw") classifies dwelling uses into three types; sleeping unit, housekeeping unit, and dwelling unit.

A sleeping unit "means one or more rooms equipped to be used for sleeping and sitting purposes."

A housekeeping unit is a sleeping unit with cooking facilities.

A dwelling unit is a "self contained" housekeeping unit. I does not appear that the words "self contained" are defined anywhere in the Bylaw. I conclude that a dwelling unit is a unit containing all the necessities for normal habitation, namely; a housekeeping unit with a bathroom.

I find that the basement suite in this matter is a dwelling unit within the meaning of the Bylaw.

The Bylaw permits one family dwelling on the property. With the permission of the local government, a family dwelling "with Secondary Suite" is permitted.

"Secondary Suite" is defined in the bylaw as "a smaller dwelling unit within a larger one-family dwelling or two family dwelling, which must have separate external access and may have shared internal access, but does not include a lock-off unit."

A "lock-off unit" is a smaller dwelling unit within a larger unit and which can be locked off from the larger dwelling unit. That is not the case here.

Counsel for the landlords considers that use the tenants were making of the basement suite should be considered as a bed and breakfast use; a use also regulated by the Bylaw. I find I cannot agree. Bed and breakfast use under the Bylaw must include breakfast served on the premises. There is no evidence that such a service was provided by these tenants to their Airbnb guests or anyone else staying at the home.

I find that the provisions of the Bylaw governing a one family dwelling with secondary suite are applicable in the circumstances.

It is not clear whether the landlords had obtained a permit for the use of their property as a “one-family dwelling unit with secondary suite”, as required by the Bylaw. That issue is not relevant to this dispute. It may well be that the current use is a lawful non-conforming one under the Bylaw, given the age of the home.

Section 10.21.6 of the Bylaw provides:

No person shall use or permit to be used any dwelling unit for a period of less than one month unless such unit forms part of a hotel or is used for bed and breakfast accommodation.

The evidence shows, and I find that the tenants were violating s. 10.21.6 of the Bylaw by renting out the basement suite for periods of less than one month and were therefore acting in contravention of the bylaw and illegally.

I have considered Residential Tenancy Policy Guideline 32, “Illegal Activities” before making this finding.

B. Jeopardizing the Landlords’ Lawful Right or Interest

“Jeopardy” has been defined (from the verb “jeopard”) to mean “to expose to loss, injury or death; to hazard, risk, imperil.” (Oxford English Dictionary, (2 ed.), (1989)).

For the reasons stated under Ground #1, I find that the illegal action of the tenants in permitting the suite to be used for a period of less than one month has not been shown to have jeopardized or likely to have jeopardized the landlords’ insurance coverage.

However, the Bylaw exposes those in violation of it to severe financial penalties (s. 8.2). Each day a violation occurs is considered to be a separate violation (s. 8.1). The Bylaw provides that the owner of a property is deemed to be guilty of such a violation and subject to those penalties (s. 6.5).

I find that the illegal activity of the tenants in renting out the basement suite in contravention of the Bylaw had the potential to put the landlords at significant exposure to financial loss as a result of penalties that might have been imposed by the local government for violation of its Bylaw.

I am satisfied that such exposure to financial loss was not yet present as of the date of the Notice.

Section 7, the “Enforcement” section of the Bylaw, directs that certain senior staff of the local government may issue notices or orders as may be necessary to inform the owner of a contravention of the Bylaw, ordering them to comply with the Bylaw within a specified time and/or to cease any use or occupancy in contravention of the Bylaw.

The power to issue the notices or orders is permissive, as the word “may” is used in s. 7. It is therefore possible that the local government staff might not invoke s. 7 but, rather, take the steps to charge a homeowner with an offence for violation of the Bylaw without any prior notice or warning.

I consider that almost invariably, local government warns those in violation of a zoning bylaw of the existence of the bylaw and of the violation and orders compliance before the violator is exposed to prosecution and penalty. In my view, s. 7 acknowledges a responsibility to inform an unknowing owner of a contravention before enforcement action is taken.

In this case, the local government was not yet even aware of the contravention by the tenants. The risk to the owners of prosecution and penalization by the local government under its Bylaw had not yet materialized.

I find that there was no likelihood that the landlords’ interests would be jeopardized. The tenants ceased the Airbnb activity immediately upon the request of the landlords and there is no reason to suspect that the local government is cognizant of the breach of its bylaw.

This ground for the Notice must fail.

The Notice; Ground #3

The third ground for the Notice is that the tenants have assigned or sublet the rental unit without the landlord’s consent.

Section s. 47(1)(i) of the *RTA* lists this as a ground for termination of a tenancy and describes the ground as “the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34.”

Section 34 of the *RTA* provides,

34 (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.

(2) If a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).

(3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

The tenancy agreements in this matter paraphrase s. 34.

In this case the tenants have sublet, given exclusive possession of, a portion of the rental unit; the basement suite, to their Airbnb guests and, possibly, to other “roommates” in the past, without the landlords’ written consent. They are in contravention of s. 34.

I find that the landlords were aware the tenants would be finding roommates for the house or subtenants for the basement suite and that they had given the tenants’ permission to do so without obtaining prior written consent from the landlords.

In the words of Ms. N.S.’s email of May 26, “we thought you had told us from the beginning that you trusted us to handle our own sublets so long as you received rent on time.”

According to the affidavit of the landlord Mr. R.K., paragraph 6, in December 2015 he discovered that Mr. K.L. had moved in only after the fact. No issue appears to have been raised then about any lack of prior written consent from the landlords.

According to Ms. C.N. in her affidavit, the parties had a discussion in December 2015 and Mr. G.C. and Ms. N.S. were told that the landlords would like to know the names of the roommates the tenants selected to live with them.

It is clear that it was the tenants who were selecting the roommates, not proposing them for the approval of the landlords and that the requirement for prior written consent from the landlords had been waived.

The concept of “waiver” is addressed in two Residential Tenancy Branch Policy Guidelines; # 28 “Pet Clauses” and #11 “Amendment and Withdrawal of Notices.”

In the latter the rule is set out;

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party

has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount *[sic]* to an estoppel.

I find that the landlords expressly waived their statutory right to require the tenants to obtain written consent before subletting and that the landlords cannot in fairness rely on a lack of prior written consent now, as a ground to end the tenancy. It may be that they can withdraw that waiver in the future but that is not a question fairly raised by this application.

The landlords cannot fairly claim this ground as a means to end the tenancy.

In result, the Notice to End Tenancy cannot be upheld.

The Tenants' Request for an Order to Assign or Sublet

Given what has been said about waiver, I decline to make an order permitting the tenants to assign or sublet the rental unit. Secondly, it is necessary to include with such a request the identity of the anticipated assignees or subtenants and the terms of the arrangement and that has not been provided here.

It should be noted that s.34 implies that in a tenancy for a term of less than six months, a landlord's consent to an assignment or subletting may be unreasonably withheld.

It should also be noted that the determination made in this proceeding is that the tenants have been *subletting* the basement suite, namely, passing on the right to exclusive possession of the suite for short periods of time. This decision is not to be taken to be a determination about the tenants granting a roommate a license to occupy a room; a living arrangement that is not a tenancy and that is not subject to s. 34. In that regard I would recommend to the parties Residential Tenancy Policy Guideline #9 "Tenancy Agreements and Licenses to Occupy."

Conclusion

The tenants' application to cancel the one month Notice to End Tenancy dated May 21, 2016 is allowed. The Notice is cancelled and the tenancy continues

The tenants' application for an order permitting them to assign or sublet the rental unit because the landlords' permission has been unreasonably withheld is dismissed.

As there has been divided success I grant the tenants recovery of \$50.00 of the \$100.00 filing fee and I authorize the tenants to reduce their next rent due by \$50.00 in full satisfaction of the fee.

Last, I wish to apologize to the parties for the delay in publishing this decision and for any inconvenience that delay might have caused.

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 08, 2016

Residential Tenancy Branch