Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OPC, FF

Introduction

This hearing dealt with a tenant's application, as amended, to cancel 1 Month Notices to End Tenancy for Cause and a landlord's application for an Order of Possession for cause. 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.

Both of the parties had requested other remedies in filing their respective applications, including monetary claims against the other. Rule 2.3 of the Rules of Procedure authorizes me to dismiss matters that are not sufficiently related but contained in a single application. Given the multiple issues identified on each application and limited amount of hearing time, I confirmed with the parties that the issue of most importance was to determine the fate of the tenancy. Accordingly, the other remedies sought by the parties were not considered further and dismissed with leave to reapply.

Issue(s) to be Decided

Should the 1 Month Notices to End Tenancy for Cause be upheld or cancelled? If upheld, is the landlord entitled to an Order of Possession?

Background and Evidence

The tenant and the former owner, the landlord's ex-husband, entered into a tenancy agreement that started June 1, 2010. The tenancy is currently in a month to month status. The tenant is currently paying rent of $1,178.00 on the first day of every month. The tenant paid a security deposit of $575.00 at the start of the tenancy. The tenancy agreement provided that the tenant was to pay a pet damage deposit of $575.00; however, in the absence of any record that it was paid at the start of the tenancy the tenant paid it to the current landlord in January 2016. The tenant raised the question as

to whether she may have paid the pet damage deposit twice; however, I did not explore that issue further as it was not the focus of this proceeding.

The landlord issued three 1 Month Notices to End Tenancy for Cause to the tenant between the dates of June 27, 2016 and July 7, 2016. The landlord explained that the reasons for issuing all three Notices are the same but that she issued the second Notice to correct an error on the first Notice and she issued the third Notice to correct an error on the second Notice. Discussion ensued as to correct effective dates of the Notices. The landlord accepted that the earliest the tenancy should end is August 31, 2016 given she issued a 1 Month Notice in July 2016 which extended the effective vacancy date to August 31, 2016 and the tenant has paid rent for the month of August 2016. Accordingly, the landlord was agreeable that the first two Notices were replaced by the July 7, 2016 Notice and the focus for this proceeding is the validity of the July 7, 2016 Notice. For the remainder of this decision the 1 Month Notice dated July 7, 2016 is referred to as the Notice.

The 1 Month Notice to End Tenancy for Cause issued on July 7, 2016 has a stated effective date of August 12, 2016 and indicates two reasons for ending the tenancy:

- Tenant has caused extraordinary damage to the unit or property
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The stated effective date of August 12, 2016 is incorrect and automatically changes to read August 31, 2016 pursuant to sections 47 and 53 of the Act.

Below, I have summarized the parties' respective positions regarding the reasons indicated on the Notice.

Extraordinary Damage

It was undisputed that on June 7, 2016 the landlord attended the property with a realtor and returned to the property with a friend on June 9, 2016 to have a closer inspection of the rental unit. At that time photographs were taken of the interior doors and the ceiling and the landlord provided those photographs as evidence for this proceeding.

The landlord described the extraordinary damage as being a scrape on the ceiling and pet scratches on several of the wooden interior doors. The landlord submitted that on June 16, 2016 she asked the tenant to get two quotes for drywall repair to the ceiling and contact a particular contractor about repairing the doors. The tenant responded by

stating that the repairs were already done. The landlord went to inspect and was not satisfied with the repair to the doors. As for the scrape to the ceiling the landlord suspects that it may been from swinging a hockey stick in the house and testified that a drywaller tried to sand out the scrape but that it was determined that it is still visible and the best remedy would be to re-paint the ceiling.

The tenant testified that after the landlord's inspection of June 9, 2016 she contacted a contractor referred to her by a friend. On June 11, 2016 the contractor viewed the doors and determined the scratches were superficial. The contractor removed the scratched doors from their hinges and proceeded to sand, fill and re-finish the doors in the carport before re-installing them. The cost of $341.00 was paid by the tenant. The tenant was of the view that the doors look as good as new after the repair and provided photographs as evidence. The tenant agreed that the most likely remedy for the ceiling scrape is painting but maintained that the scrape is not a basis for evicting her for extraordinary damage. The tenant provided photographs of the doors after they were repaired and of the ceiling after the scrape was sanded.

Breach of a material term

The landlord submits that the tenancy agreement provides that the tenant may have one dog and one cat at the residential property but in June 2016 the landlord learned that the tenant has one dog and two cats. On June 18, 2016 the landlord gave the tenant a letter advising her of this breach, along with another issue not raised during the hearing. The letter went on to state "please address these items as soon as you can". The tenant responded to the landlord's letter by way of a letter dated June 18, 2016 indicating that the former landlord was aware the tenant had two cats and that the tenancy agreement was incorrect in limiting her to one cat. Further letters were exchanged between the parties, and it was apparent that their relationship deteriorated further. The landlord took the positon that she can only rely upon the written tenancy agreement; however, the landlord also acknowledged that it was not until after the inspection was done in June 2016 that she asked her ex-husband what the tenancy agreement said about pets.

The tenant testified that when she met with the former landlord when the tenancy formed she enquired about being able to have two cats since she has had both cats for several years and the former landlord indicated that having two cats would not be an issue. Unfortunately, the tenancy agreement did not reflect two cats in error. The tenant also testified that the whenever the landlords were at the property during her tenancy she not hide or conceal the fact she had two cats. The tenant testified that she even

mentioned her two cats to the current landlord a couple of years ago when the landlord was working in the yard.

The landlord denied ever seeing two cats at the property or having knowledge of two cats prior to June 2016.

The landlord also testified that she recently obtained the tenancy application form completed before the tenancy formed from her ex-husband and it indicates “dog/cat” next to the question about pets.

I enquired with the landlord as to whether the former landlord, her ex-husband, was available to testify. She said he was not available.

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.

The landlord indicated two reasons for ending the tenancy on the 1 Month Notice. I have considered each reason and the evidence before me, and I provide the following findings and reasons.

Extraordinary damage

The extraordinary damage described by the landlord consisted of a scrape in the ceiling drywall and scratched doors. I accept that the ceiling scrape is damage; however, upon review of the photographs provided to me by both parties I do not consider the scrape to be extraordinary damage especially considering it will be rectified with paint. If drywall scrapes were extraordinary damage nearly every tenant would face eviction.

As to the scratches to the interior doors, I accept that damage occurred and the tenant was responsible for repairing the damage; however, upon review of the tenant’s photographs taken after the doors were repaired on June 11, 2016 I do not see evidence of extraordinary damage. The landlord did not present evidence such as her own photographic evidence taken after the repairs were made or evidence of a contractor who viewed the damage to demonstrate the doors were extraordinarily damaged.

In light of the above, I find I am not persuaded that when the 1 Month Notices were issued extraordinary damage was not present in the rental unit. Therefore, I find the landlord did not have a basis for ending the tenancy for extraordinary damage.

Breach of a Material Term

In order to end the tenancy under this provision, the landlord must demonstrate that a material term of the tenancy agreement has been breached and not merely a term.

Residential Tenancy Policy Guideline 8: *Unconscionable and Material Terms* provides policy statements, based upon the principles of statutory interpretation and common law, with respect to material terms. It provides, in part:

> **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.

[My emphasis underline]

It is undeniable that the tenancy agreement provides that the tenant may have one dog and one cat. Upon review of the entire agreement, I note that the tenancy agreement also provides that "The Tenant shall not keep or allow to be kept any pets such as dogs, cats…unless permitted by the landlord in writing." There is no indication that this term is a material term to the tenancy agreement and it would appear that multiple pets, may be kept on the property with the landlord's written consent, including more than one cat since the word cat is in its plural form. The tenant apparently did not obtain written consent to have more than one cat and one dog; however, the tenant testified that when the tenancy formed with the former landlord she asked about having two cats and the former landlord indicated that would not be a problem. The current landlord was not privy to that conversation and claimed that the former landlord, her ex-husband, was not available to testify. As such, I accept the tenant's undisputed submission as to the conversation at the formation of the tenancy and in that case, I find that the pet clause limited the tenant to one cat and one dog was a material term.

Since tenancy agreements run with the land, the current landlord is bound by the agreement entered into with the former landlord. Accordingly, if a term in not material to the former landlord is does not become a material term merely because the landlord changes.

Also of consideration is that the landlord had to contact the former landlord to determine what the agreement was with respect to pets only after the dispute arose between the parties. I would expect that a landlord would be aware of the material terms.

In light of the above, I find the landlord has not satisfied me that the pet clause is a material term of the tenancy agreement and I find there is not a basis to end the tenancy for breach of a material term.

Having found the landlord failed to meet her burden to prove the tenancy should end for the reasons indicated on the Notice I cancel all of the Notices issued to the tenant by the landlord between June 27, 2016 and July 7, 2016. Accordingly, the tenancy continues at this time.

Since I have granted the tenant's request to cancel the 1 Month Notices served upon her I award the tenant recovery of the filing fee she paid for her application. The tenant is provided a Monetary Order in the amount of $100.00. The tenant is authorized to satisfy this Monetary Order by withholding $100.00 from a subsequent month's rent.

The landlord's application for an Order of Possession is dismissed.

Although I have cancelled the Notices to End Tenancy the parties were clearly in conflict and I do not anticipate this decision will eliminate their conflict. Having heard the landlord intends to list the property for sale and the tenant indicated that she also views the ending of the tenancy as a way to end their conflict, the parties are informed that they remain at liberty to negotiate with each other with a view to ending the tenancy and if a mutual agreement to end the tenancy is reached the parties may execute a Mutual Agreement to End A Tenancy form which is available on the Residential Tenancy Branch website.

Conclusion

The 1 Month Notices issued between June 27, 2016 and July 7, 2016 are cancelled and the tenancy continues at this time. The tenant has been provided a Monetary Order in the amount of $100.00 to recover the filing fee from the landlord. The tenant may withhold $100.00 from a subsequent month's rent in satisfaction of this Order.

The landlord's request for an Order of Possession is dismissed.

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: August 12, 2016

Residential Tenancy Branch