



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      AS, CNC, LAT, FF

### Introduction

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

- an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld pursuant to section 65;
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the "1 Month Notice") pursuant to section 47;
- authorization to change the locks to the rental unit pursuant to section 70; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant and landlord's two agents (collectively the "landlord") attended the hearing. The landlord confirmed they were each agents of the landlord's company named in this application, and had authority to speak on its behalf.

At the outset of the hearing, the landlord confirmed receipt of the tenant's hearing package that included a copy of a 1 Month Notice, tenant's application and hearing notice. The tenant testified that she sent an email with attachments to the Residential Tenancy Branch ("RTB") on October 20, 2016, the day prior to the hearing. As Rule 3.14 of the RTB *Rules of Procedure* establishes that documentary evidence must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing and as I have not received this evidence to date, this evidence does not form any part of my decision.

The landlord testified that two evidence packages were sent via registered mail to the tenant. The first package was sent October 8, 2016, the second on October 11, 2016. The landlord provided a Canada Post receipt and tracking number as proof of service to the tenant for the first package only. The tenant confirmed receipt of the first package but testified she did not receive the second package. In the absence of a Canada Post receipt and tracking number as proof of service to the tenant for the second package, I

find this evidence package has not been served to the tenant and therefore will not rely on it to form any part of my decision.

Both parties were given full opportunity to provide affirmed testimony and present their evidence. I have reviewed all testimony and other evidence. However, in this decision I only describe the evidence relevant to the issues and findings in this matter.

During the hearing, the landlord verbally requested an order of possession.

#### Issue(s) to be Decided

Is the tenant entitled to an order allowing the tenant to assign or sublet because the landlord's permission has been unreasonably withheld?

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an order of possession?

Is the tenant authorized to change the locks to the rental unit?

Is the tenant authorized to recover the filing fee for this application from the landlord?

#### Background and Evidence

As per the submitted tenancy agreement and testimony of the parties, the tenancy began on March 1, 2009 on a fixed term until February 28, 2010, at which time the tenancy continued on a month-to-month basis. Rent in the amount of \$1,255.00 is payable on the first of each month. The tenant remitted a security deposit in the amount of \$530.00 at the start of the tenancy.

The tenant acknowledged receipt of the landlord's first 1 Month Notice dated August 17, 2016 by way of registered mail. The grounds to end the tenancy cited in that 1 Month Notice were;

- 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

The tenant acknowledged personal receipt of the landlord's second 1 Month Notice dated August 28, 2016. The grounds to end the tenancy cited in that 1 Month Notice were;

- 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

### *Landlord*

The landlord testified that the 1 Month Notices were issued on the basis that the tenant was subletting her rental unit through the home stay website AirBnB. The landlord observed what they believed to be the tenant vacating the rental unit in late July. The landlord conducted an inspection with the tenant on August 4, 2016 and noted minimal items were left in the rental unit. The landlord observed two unknown women leave the rental unit on August 10, 2016 and on August 11, 2016 the landlord served a letter of a breach of material term to one of the unidentified women at the rental unit. On August 15, 2016, a search of the home sharing website AirBnB revealed a listing for the rental unit.

On August 17, 2016, the landlord had an acquaintance initiate a conversation and successfully reserve the rental unit for August 28, 2016. It is at this time that the first 1 Month Notice was issued to the tenant via registered mail.

On August 28, 2016, the landlord in the company of the acquaintance that made the reservation, attended the rental unit and personally served the second 1 Month Notice.

### *Tenant*

The tenant testified that she did not vacate the rental unit. The tenant confirmed advertising through AirBnB and allowing guests to occupy the rental unit. She indicated that guests do not stay longer than 14 days as per her tenancy agreement. The tenant testified that she often stays in the rental unit while AirBnB guests occupy the rental unit. The tenant contests the 1 Month Notices because it is her position that these notices were issued in response to her request to have remediation of mold in her unit.

In relation to her application for the landlord's permission to assign or sublet, the tenant is seeking clarification on her right to sublet. She understands from the landlord that she is prohibited but she seeks approval.

The tenant also seeks to change the locks to the rental unit because the whereabouts of the key she was once issued for the deadbolt is unknown.

### Analysis

Under section 47 of the *Act*, a landlord may end the tenancy if the tenant has assigned or sublet the rental unit/site without landlord's written consent or for breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. The onus is on the landlord to prove the reasons listed on the 1 Month Notice took place by the tenant. The landlord provided evidence in the form of oral testimony and written documents.

Residential Tenancy Policy Guideline #19 Assignment and Sublet ("Policy Guideline #19"), establishes that a rental unit rented via AirBnB does not constitute a true sublet, unless the tenant has moved out of the rental unit or the tenant is acting as an agent of the landlord. Pursuant to Policy Guideline #19, if a tenant is allowing their rental unit or space within their rental unit to be used for a commercial venture, such as a vacation or travel accommodation, a landlord may issue a 1 Month Notice for a breach of this material term.

While in this situation it is evident that the tenant is not acting as an agent of the landlord, I find the landlord has provided insufficient evidence to establish the tenant has entirely moved out of the rental unit. On this basis, I find the landlord has not met his burden of proof that the tenant sublet as defined under the *Act*, and therefore find the landlord cannot end the tenancy based on this ground.

In order to end a tenancy for breach of a material term, the landlord must prove the breach and prove the tenant was provided with written notice of the breach that includes a timeline for the tenant to correct the breach. The landlord personally served written notice of the breach to an AirBnB guest. Section 88 of the *Act* establishes that when a landlord serves a written notice of a breach it must be served by leaving a copy with the tenant, ordinary mail or registered mail, leaving a copy with an adult who resides with the tenant, leaving a copy in the mailbox, attaching to the door, or by fax. The tenant did not dispute receiving the written notice. Although the landlord did not serve the written notice in accordance with the *Act*, I find pursuant to section 71 of the *Act*, that the written notice was sufficiently served on August 11, 2016, the day it was personally served to the AirBnB guest.

The landlord contends that the tenant breached clause 13 of the tenancy agreement which reads;

***ADDITIONAL OCCUPANTS.*** No person, other than those listed in paragraph 2 above, may occupy the rental unit. A person not listed in paragraph 2 above who resides in the rental unit for a period in excess of fourteen cumulative days in any calendar year will be considered to be occupying the rental unit contrary to this Agreement and without right or permission of the landlord. This person will be considered a trespasser. A tenant anticipating an additional person to occupy the rental unit must promptly apply in writing for permission from the landlord for such person to become an approved occupant. Failure to apply and obtain the necessary approval in writing is a breach of a material term of this Agreement, giving the landlord the right to end the tenancy after proper notice.

[Reproduced as written]

The landlord has provided insufficient evidence to show that any AirBnB guest has qualified as an additional occupant under clause 13. Specifically, the landlord has not established that any of the AirBnB guests have stayed in excess of 14 days. Accordingly, I find the landlord has not proven that the tenant has breached this material term.

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

The tenant's application for an order to allow subletting is dismissed without leave to reapply, as this order claim is in relation to the tenant using the rental unit as a commercial venture, not a true sublet.

In relation to the tenant's request to change the locks, I am not satisfied that the landlord is likely to enter the rental unit in contravention of the *Act* and therefore dismiss this portion of the tenant's application. Instead, I encourage the tenant to obtain a new key from the landlord for the deadbolt.

As the tenant was partially successful in this application, I find that the tenant is entitled to recover \$50.00 of the \$100.00 filing fee paid for the application.

Conclusion

The tenant's application for an order to allow assignment or subletting is dismissed without leave to reapply.

The tenant's application to cancel the 1 Month Notice is upheld. The tenancy will continue until it is ended in accordance with the *Act*.

The tenant's application to change the locks is dismissed without leave to reapply.

I order the tenant to retain \$50.00 for the filing fee from future rent.

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 24, 2016

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Residential Tenancy Branch