



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNC

Introduction

The tenant has applied to cancel a one month Notice to end tenancy for cause that was issued on August 22, 2016.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence provided.

Preliminary Matters

Two packages of evidence submitted to the Residential Tenancy Branch (RTB) by the tenant on October 14, and October 17 2016 were set aside as they were not served at least 14 days prior to the hearing. The tenant was at liberty to make oral submissions.

Issue(s) to be Decided

Should the one month Notice ending tenancy for cause issued on August 22, 2016 be cancelled or must the landlord be issued an Order of possession?

Background and Evidence

The tenancy commenced on July 15, 2016. Rent is due on the last day of each month.

The landlord and the tenant agree that a one month Notice to end tenancy for cause was served on the tenant indicating that the tenant was required to vacate the rental unit on September 30, 2016.

The reasons stated for the Notice to End Tenancy are that the tenant has:

- significantly interfered with or unreasonably disturbed another occupant or the landlord;

- seriously jeopardized the health or safety or lawful interest of another occupant or the landlord; and
- put the landlord's property at significant risk; and

That the tenant has engaged in illegal activity that has, or is likely to:

- Damage the landlord's property; and
- adversely affect the quiet enjoyment, security, safety or well-being of another occupant.

There was no dispute that on four occasions the tenants' four year old son has entered the neighbouring yard, through the fence. These entries occurred on July 16, August 2, 17 and 22, 2016.

The landlord said that the child would remove boards, enter the yard and then enter the neighbours' pool. The child was left unattended. On one occasion the neighbour unable to locate an adult after calling out for 20 minutes.

Both parties supplied evidence of a fence that is 10 years old. The fence is paneled, with wood slats that sit between supports that run along the ground. The tenant said that on the neighbours' side of the fence those ground-level supports had disintegrated; this was obvious in the photos supplied.

The landlord stated that as the tenant failed to properly supervise her child the landlords' lawful right was placed in jeopardy and at risk as the child cannot swim and was entering the pool in the absence of any adult supervision. The landlord who lives on the property felt he had to watch out for the child, thus causing him to be disturbed. The landlord said they did not contact child welfare authorities but they believe they should have done so.

The landlord said the tenant did not take steps to ensure her child would not go through the fence. The landlord did make attempts to screw in the loose boards so they could not be moved.

In late August the neighbours' pool was emptied. In early September the landlord replaced the fence. The child can no longer go through into the neighbouring yard. However, the neighbour reported seeing the child on top of the fence. The tenant said her son had climbed onto the top of a slide set and was not on the fence; that set has been moved.

The tenant did not dispute that the landlord spoke with her on three occasions. The tenant said that her child weighs 33 pounds and would not be able to go through a fence that was solid. The tenant was able to pop the pieces of fence back into place but they were not solid and could be removed.

The landlord said that the illegal activity was related to the trespass by the child on the neighbours' property.

The tenant said that she called the RCMP and that a four year old child cannot be charged with any offence.

Analysis

After considering all of the written and oral evidence submitted at this hearing, I find that the landlord has provided insufficient evidence in support of the reasons given on the Notice ending tenancy. I can find no support for the allegation of disturbance, jeopardy, health or safety of the landlord of the lawful right of the landlord.

RTB policy suggests that fences installed by a landlord must be maintained by a landlord. I find that the landlord did have a responsibility to ensure that the fence was repaired and that repair should have occurred as soon as the landlord became aware of the failure of the fence after July 16, 2016.

By any reasonable standard, if a four year old child can push the fence boards from the base of the fence; that fence would be found to be in need of repair. If the landlord was concerned about potential liability a reasonable step would have been fence repair. Further, if a neighbour has a pool, it would be reasonable that the neighbour would have that pool properly secured. From the evidence before me it appears that the fence was completely insufficient to provide the necessary security.

It was after the neighbours' pool was emptied and any potential risk to the child removed, that the landlord made the repair to the fence.

The tenant rented the unit with what I expect would have been a reasonable expectation that the fence could not be able to be dismantled by a four year old child. Whether the tenant responded in a responsible manner to the reports of her child entering the pool is beyond the scope of the Residential Tenancy Act.

Therefore, I find that any stress or disturbance experienced by the landlord was a result of the landlord failing to take decisive steps in July 2016 to have the fence fully repaired. If the fence had been repaired, entry to the neighbours' yard would not have been an issue. The landlord stated that supervision would have stopped the child from entering the yard and pool; however, I find that the first line of defense would have been to repair the fence. This would remove any concern of liability or risk on the part of the landlord and met the requirement to repair.

There was no evidence before me of any risk to the landlords' property; the 10 year old fence was in a state of disrepair which was not the fault of the tenant.

I accept that a child under the age of 12 years cannot face any charges and that the allegation of trespass does not support the end of a tenancy.

Therefore, I find the one month Notice to end tenancy for cause issued on August 22, 2016 is of no force and effect. The tenancy will continue until it is ended in accordance with the Act.

Conclusion

The one month Notice to end tenancy for cause issued on August 22, 2016 is of no force and effect.

This decision is final and binding and 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

Residential Tenancy Branch