



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

CNC FF

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution, received at the Residential Tenancy Branch on August 31, 2016 (the "Application").

The Tenant applied for the following relief pursuant to the *Residential Tenancy Act* (the "Act"):

- an order cancelling a 1 Month Notice to End Tenancy for Cause, dated August 29, 2016, which has an effective date of October 1, 2016 (the "1 Month Notice"); and
- an order granting recovery of the filing fee.

The Landlord and the Tenant each attended the hearing on their own behalf. Both provided a solemn affirmation.

The Tenant testified the Application and Notice of a Dispute Resolution Hearing, dated September 1, 2016, sent to the Landlord via registered mail. The Landlord acknowledged receipt.

The Tenant also testified she sent a further evidence package to the Residential Tenancy Branch and to the Landlord by regular mail on October 12, 2016. The Landlord denied receiving this documentary evidence. Residential Tenancy Branch Rule of Procedure 3.14 requires applicants to submit documentary evidence to the Residential Tenancy Branch and serve it on the opposing party "not less than 14 days before the hearing." In this case, the Tenant's documentary evidence was not submitted or served until October 12, 2016 – 14 days before the hearing. The Tenant's documentary evidence was not available during the hearing and the Landlord claims he

has not received it. In light of the Tenant's failure to comply with Rule of Procedure 3.14, the hearing proceeded without the Tenant's documentary evidence.

The Landlord's documentary evidence was sent to the Tenant by registered mail on October 19, 2016. A Canada Post customer receipt, including a tracking number was included with the Landlord's documentary evidence. When asked why the Landlord waited until October 19, 2016 to submit his evidence, he stated he was waiting until the last minute to receive and respond to the Tenant's evidence, but that nothing arrived. The Tenant acknowledged receipt and confirmed she had time to review and consider it.

The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions to me.

I have reviewed all evidence and testimony before me that met the requirements of the Rules of Procedure; however, I refer to only the relevant facts and issues in this Decision.

Issues to be Decided

1. Is the Tenant entitled to an order cancelling the 1 Month Notice?
2. Is the Tenant entitled to an order granting recovery of the filing fee?

Background and Evidence

The Landlord provided with his documentary evidence a copy of the tenancy agreement between the parties. It confirms a one-year fixed-term tenancy began on February 1, 2016. Rent in the amount of \$1,700.00 per month is due on the first day of each month. The Tenant paid a security deposit of \$850.00 at the beginning of the tenancy.

The Landlord wishes to end the tenancy on the bases that the Tenant has seriously jeopardized the health or safety or lawful right of another occupant or the Landlord; has engaged in illegal activity that has, or is likely to, damage the Landlord's property; and has breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Landlord testified the tenant keeps a cat and ducks on the rental property, contrary to the tenancy agreement. The tenancy agreement submitted into evidence by the Landlord includes the following hand-written term on page three: "NO Pet allowed." The initials "K.L." appear below.

The Landlord stated that on April 16, 2016, he attended the property and noticed a cat in the window of the rental unit. He took a photograph of the cat in the window and sent a copy of the photograph to the Tenant via text with a request to meet and discuss the cat, which the Tenant refused. Copies of the photograph and text messages were included with the Landlord's documentary evidence.

The Landlord also included with his documentary evidence a photograph of six ducks on the property, and an enclosure for them. He expressed that the waste produced by the cat and ducks was a significant sanitary concern, and noted that the Tenant did not pay a pet damage deposit.

In reply, the Tenant acknowledged she obtained the cat and ducks after she moved into the rental unit. However, she stated she was not aware of the term of the rental agreement restricting pets, and that she did not receive several pages of the tenancy agreement.

The Landlord also testified that the Tenant has caused damage to the property by removing an aluminum deck covering and storing it under the deck. The Landlord testified that it will cost him \$3,000.00 to replace. Included with the Landlord's documentary evidence was a "before" photograph purported to be taken on January 16, 2016, which shows a large aluminum awning covering over the entire deck, and some garden equipment under the deck. The "after" photographs, purported to have been taken on June 28, 2016, shows the awning removed and the waste deposited under the deck.

In reply, the Tenant agreed she removed the deck cover but stated she did so on the advice of a friend who told her it was unsafe. Her friend is a journeyman of some description. She testified the mess under the deck has since been cleared up, and that the yard looks better than it did.

Finally, the Landlord testified the Tenant keeps the yard in poor condition. He referred to a copy of a bylaw violation warning notice, dated May 24, 2016, which warns of a potential fine for depositing rubbish in an open space. A copy of the notice was included with the Landlord's documentary evidence. Also included was a photograph, purported to have been taken on June 8, 2016, showing trees and cuttings deposited in front of a fence.

Analysis

In light of the oral and documentary evidence submitted by the parties, and on a balance of probabilities, I find:

Section 47 of the *Act* permits a landlord to end a tenancy for cause. In this case, the Landlord issued the 1 Month Notice on the bases that the Tenant has seriously jeopardized the health or safety or lawful right of another occupant or the Landlord; has engaged in illegal activity that has, or is likely to, damage the Landlord's property; and has breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

I find there is insufficient evidence before me to conclude the Tenant has seriously jeopardized the health or safety or lawful right of another occupant or the Landlord, or has engaged in illegal activity. Accordingly, this analysis proceeds only on whether or not the hand-written term of the tenancy agreement prohibiting pets is a material term that has been breached by the Tenant.

Residential Tenancy Branch Policy Guideline 8 provides guidance with respect to material terms. It states:

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.

To determine the materiality of a term...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.

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.

Policy Guideline 8 goes on to provide a mechanism for a landlord who wishes to end a tenancy for breach of a material term:

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:

- *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.*

In this case, it was clear that the term prohibiting pets was and remains very important to the Landlord, who testified to his concern about animal waste and potential damage to the rental property. He took efforts to include a hand-written term prohibiting pets in the tenancy agreement, and the Tenant provided her initials next to that term. Accordingly, in all the circumstances, I find the prohibition on having pets is a material term of the tenancy agreement.

However, I find there was insufficient evidence to convince me, on a balance of probabilities, that the Tenant was given notice to correct the issue as outlined in Policy Guideline 8, reproduced above. Accordingly, the tenancy continues until otherwise ended in accordance with the *Act*.

The Tenant is in breach of a material term of the tenancy agreement. I order the Tenant to remove all pets from the rental property no later than November 30, 2016. If the Tenant fails to comply with this Order, the Landlord will be at liberty to issue a further notice to end tenancy for cause on the basis that the Tenant has not complied with an order under the legislation within 30 days after the tenant received the order or the date in the order, pursuant to section 47(1)(l) of the *Act*.

As the 1 Month Notice has been cancelled, I find the Tenant is entitled to recover the filing fee of \$100.00 paid to make the Application. I order that this amount may be deducted from a future rent payment.

Conclusion

I order the Tenant to remove all pets from the rental property no later than November 30, 2016.

I order that the tenancy continue until otherwise ended in accordance with the *Act*.

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 27, 2016

Residential Tenancy Branch