



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, MNSD, FF; CNC, MNDC, AAT, FF

Introduction

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

- an order of possession for cause pursuant to section 55;
- authorization to retain all or a portion of the tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

This hearing also addressed the tenant's cross application for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the "1 Month Notice") pursuant to section 47;
- a monetary order for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement pursuant to section 67;
- an order to allow access to or from the rental unit or site for the tenant or the tenant's guests 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 agent, WK (the "landlord") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Each party confirmed receipt of the other party's application and 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.

Issue(s) to be Decided

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

Is the landlord authorized to retain all or a portion of the tenant's security deposit?

Is the tenant entitled to monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the tenant entitled to an order to allow access to or from the rental unit or site for the tenant or the tenant's guests?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

As per the submitted tenancy agreement and testimony of the parties, the tenancy for the furnished unit began on October 15, 2015 on a fixed term until September 30, 2016 at which time the tenancy continued on a month-to-month basis. Rent in the amount of \$2,160.00 is payable on the first of each month. The tenant remitted a security deposit in the amount of \$1,050.00 at the start of the tenancy.

In March of 2016 each party received a letter from strata alleging the property was being used for an illegal commercial purpose, specifically a massage parlour. The tenant replied to the strata allegation and the investigation was discontinued.

In July of 2016, the tenant advised the landlord he had sublet the rental unit from July until September 2016 to cover the period the tenant was out of the country on vacation. The landlord communicated his dissatisfaction about this sublet and requested the tenant sign a mutual agreement to end tenancy. The tenant did not sign the mutual agreement to end tenancy and in turn, the landlord requested the tenant have the sub tenant sign a "form K". The sub tenant vacated the rental unit in September of 2016.

On November 7, 2016 the tenant advised the landlord he would again be subletting the rental unit. The landlord advised the tenant in writing that he did not authorize the sublet and would be issuing a 1 Month Notice. This same date the tenant applied to reserve the elevator for a move.

The tenant acknowledged receipt of the landlord's 1 Month Notice dated November 8, 2016 by registered mail. The grounds to end the tenancy cited in that 1 Month Notice were;

- the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord
- 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 adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant
- tenant has assigned or sublet the rental unit/site without landlord's written consent

On November 8, 2016 the tenant received notification from the head concierge on behalf of strata that his request for the use of the elevator had been denied. In the end, the sublet did not materialize; the tenant notified the prospective sub tenant that the landlord did not authorize it.

Landlord Claims

The landlord seeks to end the tenancy on the basis of the illegal commercial operation and unauthorized sublet. The landlord also seeks to retain the security deposit and recover the filing fee.

Tenant Claims

The tenant seeks to have the 1 Month Notice set aside, compensation for every day he has been unable to utilize the rental unit due to the denial of elevator services and an order requiring the landlord to allow him access to the elevator. The tenant calculates he is owed a daily rental rate of \$68.00 plus an additional daily rate of \$20.00 for aggravated damages from November 8, 2016 to December 16, 2016 for a total of \$3,344.00.

The tenant explained that the aggravated damages are sought because the landlord intentionally denied his right to the elevator. He explained that previously he had removed the mattresses from the bedrooms for the sublet and upon notification the sublet was not permitted he sought to replace the mattresses for his own use. The tenant contends without the authorized use of the elevator he cannot move his belongings back into the rental unit and as a result the unit remains unoccupied. The tenant acknowledged he maintains a key to the rental unit.

Landlord Reply

The landlord contends that strata denied the use of the elevator, due to the belief a sub tenant was moving in. Further the landlord testified that because the rental unit is furnished the tenant does not require the use of the elevator, to move items.

Analysis

While I have turned my mind to all the documentary evidence, including emails, text messages, miscellaneous letters, photographs, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each party's claim and my findings around each are set out below.

Landlord Claims

The onus is on the landlord to prove the reasons listed on the 1 Month Notice took place by the tenant or person permitted on the property by the tenant.

Although the landlord has provided evidence in the form of photographs of an individual at the concierge desk who allegedly told the concierge he needed access to the rental unit for a scheduled massage, neither the individual shown in the photographs nor the concierge were presented as witnesses to confirm this. In the absence of corroborating evidence and in conjunction with the strata's decision to cease the investigation, I find the landlord has failed to prove his burden in establishing the tenant operated an illegal commercial business.

In relation to the summer sublet, I am satisfied the landlord communicated its dissatisfaction with the sublet but did not withhold consent. I find it probable, the landlord knew it could not unreasonably withhold consent during this fixed term tenancy and in an effort to end the tenancy asked the tenant to sign a mutual agreement to end tenancy. In the absence of a reply from the tenant, the landlord requested a signed form K. Upon expiry of the fixed term tenancy; the landlord renewed the tenancy on a month to month basis. These undisputed actions taken by the landlord show the landlord knew of this sublet in July 2016, renewed the tenancy and did not attempt to end the tenancy through the dispute resolution process until November 2016, four months after the tenancy was renewed and sublet ended. For the above reasons, I find the landlord acceded to the summer sublet.

The November sublet was clearly not authorized by the landlord and as evidenced by the testimony of both parties, did not occur. Therefore, I find the landlord has failed to prove the tenant has assigned or sublet without the landlord's written consent.

Overall, I find the landlord has failed to satisfy his burden of proving the reasons behind the 1 Month Notice. Accordingly, the 1 Month Notice is set aside and the tenancy will continue until it is ended in accordance with the *Act*.

As the tenancy is set to continue I find the landlord's application to retain the security deposit premature and dismiss this portion of the landlord's application.

As the landlord was not successful in this application, I find that the landlord is not entitled to recover the \$100.00 filing fee paid for the application.

Tenant Claims

The tenant seeks \$3,344.00 in compensation for the loss of use of the elevator.

As per section 28 of the *Act* a tenant's entitlement to quiet enjoyment include rights to reasonable privacy, freedom from unreasonable disturbance, exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit and use of common areas for reasonable and lawful purposes, free from significant interference.

Pursuant to the Residential Tenancy Policy Guideline #6 "Right to Quiet Enjoyment" a tenant's right to quiet enjoyment may be breached by frequent and ongoing interference or unreasonable disturbances. Situations in which the landlord directly caused the interference and situations in which the landlord was aware of interference and failed to take reasonable steps to rectify it would constitute a breach.

A breach of quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the *Act*. When a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim.

To prove a loss, the applicant must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the other party in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the applicant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I accept both parties evidence that the tenant was denied the use of the elevator. Upon review of the documentary evidence, I find the landlord informed strata the tenant's tenancy was set to end and instructed strata to deny any incoming elevator requests from the tenant.

I am satisfied the landlord partially restricted the tenant's access contrary to the *Act* constituting a breach of quiet enjoyment.

The tenant maintains access to the furnished rental unit through the use of his key, the stairs and regular use of the elevator. The landlord is obligated to grant full access to the rental unit, which includes access to the elevator for move-in purposes. In the absence of this, the tenant's remedy would be to move in the alleged missing mattresses through regular use of the elevator. I find irrespective of the strata's denial of the elevator for move-in purposes, the tenant had a duty to minimize his loss and gain full access. I find the tenant did not mitigate and accordingly find the tenant is not entitled to \$3,344.00 in damages.

As the 1 Month Notice has been set aside and the tenancy set to continue, I order the landlord to allow access to or from the rental unit for the tenant or the tenant's guests which includes reserving the elevator for the tenant's move-in purposes.

As the tenant was not entirely successful in this application, I find that the tenant is not entitled to recover the \$100.00 filing fee paid for the application.

Conclusion

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 landlord's application to retain all or a portion of the tenant's security deposit is dismissed with leave to reapply.

The tenant's claim for a monetary order for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement is dismissed without leave to reapply.

The landlord is ordered to allow access to or from the rental unit for the tenant or the tenant's guests, which includes reserving the elevator for the tenant's move-in purposes.

Neither party is entitled to recover the filing fee for their application.

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: December 20, 2016

Residential Tenancy Branch