Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CYCLONE HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MT CNC OPC FF

Introduction

This hearing was convened in response to applications by both parties pursuant to the *Residential Tenancy Act* (the "Act").

The landlord applied for:

- an Order of Possession for cause pursuant to section 55, and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- more time to make an application to cancel the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 66, and
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord's agent, VR, ('landlord) testified on behalf of the landlord in this hearing, and was given full authority by the landlord to do so. The tenant's daughter, FM, ('tenant') testified on behalf of the tenant during this hearing, and was given full authority to do so by the tenant.

Both parties confirmed receipt of each other's applications for dispute resolution hearing package ("Applications") and evidence. In accordance with section 88 and 89 of the *Act*, I find that both the landlord and tenant were duly served with the Applications and evidence.

The landlord testified that the 1 Month Notice to End Tenancy for Cause, with an effective date of November 30, 2016 (the 1 Month Notice) was served to the tenant by attaching a copy to the door of the rental suite on October 25, 2016. The landlord

entered into written evidence a copy of that Notice, which was incorrectly dated November 25, 2016. The landlord requested an amendment to reflect the corrected date of the 1 Month Notice. The tenant indicated during the hearing that there was no issue with the service of the 1 Month Notice, or the correction. Accordingly, I find that the 1 Month Notice was served to the tenant in accordance with section 88 of the *Act*, with a corrected date of October 25, 2016.

Preliminary Issue—Tenant's late application

The tenant filed her application for dispute on November 25, 2016, although the 1 Month Notice was posted to her door on October 25, 2016, as corrected at the hearing. The tenant has the right to dispute the Notice within 10 days after receiving it, unless the arbitrator extends that time according to Section 66 of the *Act*.

Section 66 (1) of the *Act* reads:

> *The director may extend a time limit established by this Act only in exceptional circumstances, other than as provided by section 59(3) or 81(4).*

Normally if the tenant does not file an Application within 10 days, they are presumed to have accepted the Notice, and must vacate the rental unit. As the 1 Month Notice was incorrectly dated November 25, 2016 by the landlord, the time period for dispute may have been misconstrued by the tenant. As the time limit to file is based on the date of the notice, which in this case was incorrect by over a month, I must allow the tenant more time to file her dispute due to this exceptional circumstance. As the tenant did file her dispute within 10 days of the date the landlord provided on the notice, November 25, 2016, I am accepting her late application.

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 entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The landlord's 1 Month Notice cited the following reasons for ending this tenancy for cause, as outlined in the following portions of section 47 of the *Act*:

Landlord's notice: cause

47 *(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies…*

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that…

(ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

(iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord…

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

The landlord's agent, VR, testified that 3 notices have been given to the tenant for smoking marijuana and having too many pets. He also stated that the daughter of the tenant was not to be residing there as there was a history of abuse by the daughter towards her mother. VR testified that 4 dogs were in the suite without permission of the landlord, and that the tenant was smoking marijuana while the maintenance person was there. The landlord's witness, DT, testified that he was attending the suite on September 28, 2016 to fix a plugged sink. He stated that he smelled a strong odour of marijuana while in the suite. He also testified that the tenant was on the couch with a lady, who apologized saying that she smoked marijuana for medical reasons. He reported this incident to the building manager.

The tenant's daughter testified on behalf of her mother disputing the landlord's submission that there were 4 dogs in the suite. She testified that there were only the allowable 2 dogs and 1 cat in the suite, and that a pet deposit in the amount of $300.00 was paid to the landlord in November 2014 for these pets. She said that the tenant has a receipt for this pet deposit. She testified that the dogs were chihuahuas, and could easily be confused as more as they could be loud. The tenant's witness, RG, testified that the tenant had only 3 chihuahuas and 1 cat, and that the landlord was discriminating against the tenants as they were Afro Canadian. He testified that the dogs are pretty loud, and could easily be confused as more.

The tenant's daughter did admit that her mother was smoking marijuana, but for medical reasons, and that she only smoked outside. She was also adamant that her mother never apologized to the maintenance person, and did not agree with his version of the events on September 28, 2016. She said the landlord was fully aware that the tenant had her doctor's permission to smoke marijuana. She also testified that she was taking care of her mother, as she is sick. She testified that there was only one occasion where the police were called because of an argument that ensued after her mother refused to take her medication.

The landlord's agent responded that a $300.00 pet deposit was paid, but no pet agreement was ever signed, nor was permission ever given. She testified that there was a pet policy that prohibited more than 2 dogs.

Analysis

Section 47(1) of the *Act* allows a landlord to end a tenancy for cause for any of the reasons cited in the landlords' 1 Month Notice.

A party may end a tenancy for the breach of a material term of the tenancy but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term. As noted in RTB Policy Guideline #8, 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. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have stated in the agreement that one or more terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Policy Guideline #8 reads in part as follows:

> *To end a tenancy agreement for breach of a material term the party alleging a breach…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 regards to the landlord's allegation that there has been a breach of a material term of the tenancy agreement, I find the acknowledgement of a pet deposit by both parties contributes to the uncertainty about whether there is in fact a breach by the tenant. The burden of proof rests with the landlord to provide proof that there is in fact a breach. I find that there is nothing but disputed testimony about the number of approved pets residing in the unit. I find that the landlords have not met their burden of proof to show that the tenant has breached a material term of this tenancy.

The landlord had also expressed concern about the tenant's daughter residing in the suite with the tenant. I am not satisfied that her presence is a breach of a material term of this tenancy, nor am I satisfied that she has engaged in any illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety, or physical well-being of another occupant, nor am I satisfied she is likely to jeopardize a lawful right or interest of another occupant or the landlord.

The landlord also testified that there was evidence of marijuana smoking by the tenant. While the landlord's testimony regarding the marijuana smoking was not completely disputed by the tenant, I cannot find that the tenant engaged in any illegal activity. The tenant provided an acceptable explanation for the marijuana smoke, and therefore I cannot grant the landlord's application on this basis.

For the reasons cited above, I find that the landlord has failed to demonstrate to the extent required that the tenant has contravened section 47 of the *Act*, and accordingly I am allowing the tenant's application for cancellation of the 1 Month Notice. The tenancy will continue as per the current tenancy agreement.

Conclusion

The landlord's 1 Month Notice to End the Tenancy is cancelled and of no continuing force, with the effect that this tenancy continues until ended in accordance with the *Act*.

As the filing fee is a discretionary award given to a successful party after a full hearing on its merits, I dismiss the landlord's application to recover the $100.00 filing fee.

This Decision is final and binding on both parties.

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: January 13, 2017

Residential Tenancy Branch