Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Goran Holdings Ltd
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking to cancel a notice to end tenancy.

The hearing was conducted via teleconference and was attended by the tenant and three agents for the landlord. The tenant had arranged for three witnesses to attend the hearing, however none were called to provide testimony.

At the outset of the hearing I questioned the tenant regarding when he submitted his Application for Dispute Resolution. I inquired about this because I was trying to determine if he had submitted his Application within the legislated time frame for him to do so.

Because the tenant was disputing a 1 Month Notice to End Tenancy for Cause he was allowed 10 days from the date he received the Notice to submit his Application. The tenant testified that he received the Notice on November 22, 2016. The tenant submitted that because of the way the landlord served the Notice he determined it was deemed received 3 days later.

Through discussion and review of the Residential Tenancy Branch electronic file I determined that the tenant had submitted his Application for Dispute Resolution on December 2, 2016 and made some changes requested by the Branch before a hearing was scheduled.

Based on the tenant's testimony I find the tenant received the 1 Month Notice on November 22, 2016. As a result, the tenant had until December 2, 2016 to file his Application. Based on the above, I am satisfied the tenant has submitted his Application for Dispute Resolution seeking to cancel the 1 Month Notice issued on November 22, 2016 within the legislative time frames.

Residential Tenancy Branch Rule of Procedure 3.1 requires the applicant to serve the respondent with their evidence within three days, if available, of their Application being accepted. For any evidence not available at the time the applicant filed their Application

it must be served on the respondent **as soon as possible** or at least no later than 14 days prior to the hearing.

Rule of Procedure 3.15 states where possible, copies of all of the respondent's available evidence must be submitted to the Residential Tenancy Branch and served on the other party in a single complete package.

The respondent must ensure documents and digital evidence that are intended to be relied on at the hearing are served on the applicant and submitted to the Residential Tenancy Branch **as soon as possible**. In all events, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than 7 days before the hearing.

In the event that evidence is not available when the respondent submits and serves their evidence, the arbitrator will apply Rule 3.17.

Rule of Procedure 3.17 states that evidence not provided to the other party and the Residential Tenancy Branch in accordance with the *Residential Tenancy Act (Act)* or Rules 3.1, 3.2, 3.10, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

From the testimony of each party, I am satisfied that the each party served the other with one package of evidence that met with the requirements set out under Rule of Procedure 3.1 and 3.15, respectively. However, the tenant acknowledged serving an additional package to the landlord and the Residential Tenancy Branch on January 10, 2017 or 6 days before the hearing.

The tenant submits that this evidence is relevant because it is his response to the landlord's evidence. He submits it was late being submitted because he did not receive the landlord's package in time to respond within the 14 days required.

I note that the tenant's second package of evidence consists of 1 ¼ page typewritten document with 8 points the tenant makes in response to the landlord's evidence package; a copy of a Court of Appeal for British Columbia decision dated from 1982; 5 typewritten statements from other occupants in the residential property dated between January 6, 2017 and January 9, 2017; a Notice of Hearing document dated April 3,

1995 confirming a hearing between the landlord and another party on April 18, 1995 at 10:00 a.m.

The Rules of Procedure set in place rules for the service of evidence as noted above. When one party submits an Application for Dispute Resolution they should be prepared to present their evidence and be prepared to respond, at the hearing, to all possible response and rebuttal from the respondent. The Rules of Procedure do not allow for a secondary period during which the applicant may submit and serve additional evidence in response to the respondent's evidence.

However, if the respondent provides the applicant with their evidence prior to the 14 day deadline for evidence required by the applicant then by all means the applicant can submit additional evidence to the other party and the Residential Tenancy Branch. There is no obligation on the part of an arbitrator to allow evidence, even in response to the respondent's evidence that is served less than 14 days prior to the hearing.

In addition, other than the 1 ¼ page of 8 points, I see no reason why the additional evidence could not have been anticipated and/or obtained and submitted prior to the 14 day deadline. In addition, I find the bulk of the late evidence submission is of no or little value to the outcome of this hearing. As such, I have not considered this additional evidence in this decision.

I note that Section 55 of the *Act* requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a 1 Month Notice to End Tenancy for Cause and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 47, 67, and 72 of the *Act.*

Should the tenant be unsuccessful in seeking to cancel the 1 Month Notice to End Tenancy for Cause it must also be decided if the landlord is entitled to an order of possession pursuant to Section 55(1) of the *Act*.

Background and Evidence

Both parties submitted a copy of a tenancy agreement signed by the parties on February 17, 2004 for a tenancy beginning in March 2004 for current monthly rent of $1,050.00 due on the 1st of each month with a security deposit of $400.00 paid. The parties agree the tenancy agreement contains Clause 18 in regard to pets. The Clause reads as follows:

> "Unless specifically permitted in writing in advance by the landlord, the tenant must not keep or allow on the residential property, any pet , including a dog, cat, reptile, or exotic animal, domestic or wild, fur bearing or otherwise. Where the landlord has given his permission in advance in writing, the tenant must ensure that the pet does not disturb any person in the residential property or neighbouring property, and further the tenant must ensure that no damage occurs to the rental unit or residential property as a result of having or keeping the pet. This is a material term of this Agreement. If any damage occurs caused by the pet, the tenant will be libel for such damage and will pay the landlord sufficient monies to compensate the landlord in respect of damages, expenses, legal fees, or any other reasonable costs incurred by the landlord. Further, if the landlord gives notice to the tenant to correct any breach, and the tenant fails to comply within a reasonable time, the landlord has a right to end the tenancy along with making the appropriate claims against the tenant. Having regard to the potential noise factors, health requirements and mess, the tenant will not encourage or feed wild birds or animals at or near the residential property.
>
> Any terms in this tenancy agreement that prohibits, or restricts the size of, a pet or that governs the tenant's obligations regarding the keeping of a pet on the residential property is subject to the rights and restrictions under the *Guide Animal Act.*"

The parties agree that in 2011 the tenant requested, in writing, permission from the landlord to obtain a dog and that the landlord refused the request. The landlord provided into evidence the landlord's response to the tenant's request at that time dated September 26, 2011 that read:

> "Sorry to be a killjoy, but at this time I unfortunately will not be able to give the ok for you to get a dog. The two dogs (as far as I am aware) that currently live in the building are in ground floor suites, with no one below, and still there are some issues. If we start a precedent of dogs on upper floors it puts me in an even more difficult spot. Thanks for understanding"

The parties agree the tenant obtained a dog in the fall of 2016. The tenant confirmed he got the dog in September 2016 after his doctor recommended he get a therapy dog. The tenant submitted that on the day he got the dog he sent an email to the landlord explaining that he had done so and at his doctor's recommendation. The tenant testified that he later confirmed that the email did not get sent, in error.

The landlords submitted that when they discovered the tenant had obtained a pet they issued him a written warning on October 20, 2016 advising him that they thought his having a pet was a breach of a material term of the tenancy. The indicated that he had until November 15, 2016 to remove the dog and that failure to do so may result in a termination of the tenancy.

The parties confirm that to the date of the hearing the tenant still has the dog. On November 22, 2016 the landlord issued a 1 Month Notice to End Tenancy for Cause with an effective vacancy date of December 31, 2016 citing the tenant was in breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. Both parties submitted copies of the Notice as evidence.

The landlord submitted over the years and prior to the landlord having a pet policy for the building some tenants had obtained pets. The landlord submits that in some cases they grand parented these pets and they currently have 1 dog and 3 cats in the building. The landlord stated that they recently checked with their tenants to determine how many people had pets and they "registered" these existing pets and have allowed the tenants who had them to retain them but that they will not approve "replacement" pets if something happens to the existing pets.

The landlord submitted that the occupant of the unit below this tenant's rental unit recently obtained a dog and after the landlord advised her that she was in breach of the term she found a new home for her pet and is now in compliance with her tenancy agreement.

The tenant submitted that he is aware of at least one other tenant with a dog and another with a cat, in addition to those identified by the landlord. The tenant testified that these tenants are concerned that they might be evicted if the landlord finds out about their pets.

The tenant asserts the landlord should not be allowed to end the tenancy for breach of a material term because the landlord has not applied the pet policy uniformly or consistently amongst other occupants in the building and as such it cannot be considered a material term. The tenant relies on two Supreme Court of British Columbia Judicial Review decisions and two Residential Tenancy Branch Decisions.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

I note the Supreme Court decisions referred to include: **Devon Properties Ltd v B. C. (Attorney General)** (1995) and **Al Stober Construction Ltd. v Charles Henry Long** (2001). I also note that both of these decisions pre-date the current *Residential Tenancy Act* proclaimed in 2004.

Both of these decisions rely on the requirements under the respective legislation that required a term in a tenancy agreement to be intended to: "promote fair distribution of a service or facility to every occupant in the residential property; promote the

convenience, safety and welfare of every person working or residing in the residential property, or protect the landlord's property from abuse.

Currently, Section 13 of the *Act* outlines what terms are required which includes, among other terms, the "standard terms". The standard terms out listed in the Residential Tenancy Regulation Schedule and include the requirements for a pet clause in the tenancy agreement. Section 3 of the Schedule states: "Any term in this tenancy agreement that prohibits, or restricts the size of, a pet or that governs the tenant's obligations regarding the keeping of a pet on the residential property is subject to the *Guide Dog and Service Dog Act*."

Section 6(3) of the *Act* stipulates that a term of a tenancy agreement is not enforceable if:

> (a) The term is inconsistent with this *Act* or the regulations,
> (b) The term is unconscionable, or
> (c) The term is not expressed in a manner that clearly communicates the rights and obligations under it.

I am satisfied that the Clause 18 of the tenancy agreement complies with the requirements set forth in both Sections 6(3) and Section 13 of the *Act* and Section 3 of the Schedule.

I am also satisfied that the parties were aware of the significance of the term in the tenancy agreement. Specifically, I find the tenant was aware of the requirement to obtain written permission from the landlord to obtain a pet at both the signing of the tenancy agreement and when he requested permission for a pet in 2011.

I also find that despite this knowledge I find the tenant obtained a pet in 2016 without permission of the landlord. I accept the tenant's testimony that he did try to inform the landlord he got a pet on the day that he did but that his email was not delivered. Despite this, I find that this act did not constitute seek written approval from the landlord but rather was only informational.

I find that a pet policy containing a clause that allows pets with written permission is, by definition, a discretionary approval that the parties have agreed allows the landlord to decide if they will allow a pet. I find from the submissions of the landlord that they have a pet policy that does allow for pets in ground floor units and that allows tenancies that had pets prior to the pet policy to retain their pets.

As such, in the case before me, I find the landlord has applied some consideration to circumstances when they would approve pets and when they might not. As a result, I find the landlord's policy is not simply arbitrary.

Residential Tenancy Policy Guideline #8 stipulates that 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 during a dispute resolution hearing, 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.

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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I am satisfied from the testimony of both parties regarding the request for permission in 2011 indicates that both parties were aware of the importance of this term to the tenancy agreement. I find that if the tenant had not thought the term was material at that time he never would have asked for permission or then heeded the decision by the landlord to decline his request at that time.

As a result, I am satisfied that Clause 18 is a material term of the tenancy agreement.

I accept that the landlord has acknowledged that there have been unapproved pets allowed to stay in the residential property after the landlord had failed to take action against those tenants in the past despite being aware of their pets. I accept that these pets are included in the numbers the landlord has indicated.

However, in the case before me, I find the landlord took action as soon as they were aware the tenant had the pet and followed the correct procedure to inform the tenant of the breach and provided him time to rectify the situation.

In addition, I find, despite the tenant's testimony, there is no evidence before me that the tenant has medical reasons for a therapy animal or that his pet is subject to the *Guide Dog and Service Dog Act.*

While I have considered the above noted Judicial Reviews I find they provide little assistance in the case before me. I make this finding, in part, because the Reviews themselves pre-date the current legislation that outlines the requirements for terms in tenancy agreements.

In addition, my findings above show that the landlord circumstances in this case differ substantially from the Judicial Review cases:

1. In **Devon Properties Ltd**. the tenant had had her pet since the start of the tenancy and the landlord had failed to do anything about it. In the case before me, I have found the landlord dealt with the issues immediately and in compliance with the suggested approach in Policy Guideline #8; and
2. In **Al Stober Construction Ltd. v Charles Henry Long** the wording of the clause was too broad for consideration as a material term and the inconsistent enforcement of the policy. In the case before me, I have found the term is clearly written and compliant with all requirements under the *Act* and Regulation. I have also found the landlord has, for the most part, presented a consistent approach to the enforcement of their policy.

Similarly the two Dispute Resolution Decisions submitted by the tenant I find the cases are too dissimilar to the current case to not be useful in this adjudication. In case one, the landlord had issued notices to 10 tenants who had had their pets for many years with no threat of enforcement.

In case two, the landlord only threatened enforcement of the pet clause in the tenancy agreement as a breach of a material term when the tenant's dog disturbed other tenants.

For the above reasons, I find the landlord has established the tenant has breached a material term of the tenancy agreement and is allowed to end the tenancy pursuant to Section 47. As a result, I find the 1 Month Notice to End Tenancy for Cause issued on November 22, 2016 is enforceable.

Section 52 of the *Act* requires that any notice to end tenancy issued by a landlord must be signed and dated by the landlord; give the address of the rental unit; state the effective date of the notice, state the grounds for ending the tenancy; and be in the approved form.

I find the 1 Month Notice to End Tenancy for Cause issued by the landlord on November 22, 2016 complies with the requirements set out in Section 52.

Section 55(1) of the *Act* states that if a tenant applies to dispute a landlord's notice to end tenancy and their Application for Dispute Resolution is dismissed or the landlord's notice is upheld the landlord must be granted an order of possession if the notice complies with all the requirements of Section 52 of the *Act*.

Conclusion

Based on the above, I dismiss the tenant's Application for Dispute Resolution, in its entirety without leave to reapply.

I find the landlord is entitled to an order of possession effective **two days after service on the tenant**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

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 20, 2017

Residential Tenancy Branch