



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC OPB FF CNC

Introduction

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

The tenant applied for:

- cancellation of the landlord’s 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47, and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord applied for:

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

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. For the purposes of this decision, the tenant in this application will be referred to as “the tenant”, although there were 3-4 other tenants residing at the rental unit, one of whom was the spouse of the tenant in this application, and whom attended this hearing, but did not offer testimony.

Both parties confirmed receipt of each other’s applications for dispute resolution hearing package (“Applications”) and evidence. In accordance with sections 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 (‘1 Month Notice’), with an effective date of December 4, 2016 (later corrected by letter to the

tenant to December 31, 2016), was personally served to the tenant on November 3, 2016. The landlord entered into written evidence a copy of that Notice. The tenant indicated during the hearing that he received the 1 Month Notice as stated by the landlord. Accordingly, I find that the 1 Month Notice was served to the tenant in accordance with section 88 of the *Act*.

The landlord personally served the 1 Month Notice to the tenant on November 3, 2016, and followed up with a letter from her counsel dated November 9, 2016, summarizing the reasons for the 1 Month Notice as stated above, and correcting the effective date on the 1 Month Notice to December 31, 2016. The tenant testified during the hearing that he had no issue with the corrected date, and as such I find the 1 Month Notice to have a corrected effective date of December 31, 2016.

Issues(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? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant and landlord's applications and my findings around each are set out below.

In August of 2016 the tenant signed a one-year fixed tenancy Agreement for a tenancy that is intended to cover the period from September 1, 2016 until August 31, 2017. Monthly rent is set at \$3,250.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$1,625.00 security deposit paid on or about July 28, 2016.

The landlord's 1 Month Notice identified December 4, 2016, as the effective date to end this tenancy. The landlord cited the following reasons for the issuance of the Notice:

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Tenant has allowed an unreasonable number of occupants in the unit/site.

Tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk.

Tenant has assigned or sublet the rental unit/site without landlord's written consent.

At the hearing, the landlord explained her reasons for seeking an end to this tenancy for cause. The first reason was the tenant breaching the terms of the rental agreement by subletting and allowing unapproved occupants to reside at the rental premises. On July 24, 2016, the tenant filled out a rental application listing three other friends and himself as tenants. The application was reviewed and approved by an agent on behalf of the landlord, and the written tenancy agreement was signed by the landlord on August 14, 2016 listing only one tenant on the agreement, although there was an understanding that the tenant may reside there with the three other occupants. Although the written tenancy agreement was included in the landlord's evidence package, the rental application was not. A 19 item addendum was attached to the written tenancy agreement, which was also provided as part of the evidence package. The landlord issued the 1 Month Notice for breach of items #11 and #19 on the addendum which stated that "the tenant must not assign or sublet all or a portion of the rental property to another person", and "the tenant must obtain the landlord's approval for any additional occupant other than the ones listed in the application. The tenant is fully responsible for any damages caused by guest and/or occupant".

The landlord testified that these additional clauses were fully discussed and explained clearly to the tenant. On August 15, 2016, the tenant emailed the landlord stating that one of the tenants would be replaced with another. On September 4, 2016, the tenant sent another email to the landlord stating "we finally found someone for the basement room, just wanted to let you know". The landlord replied on September 5th, 2016 to that last email stating "thanks for letting me know about the fifth person. Please note as per our contract you have to get the pre approval for any additional person. [D] is the 5th person and there shouldn't be any additional person".

The landlord followed up with a letter on September 15, 2016 to the tenant informing that no other occupants are to be living at the rental premises other than the four on the application. The landlord named the four approved occupants, including the replacement tenant. The landlord wrote "if there is any other people except the ones named above, are living in this address, they must move out by the end of September or you will be on breach of the contract".

The landlord also sought an end to this tenancy because she was unable to renew her home insurance due to too many occupants in the residence. The landlord testified that she attempted to obtain home insurance from several brokers, all of whom denied her on the same grounds. The brokers informed her that the number of unrelated people on the premises were too high, and posed too much of a risk. The landlord provided her insurer's "Rules and Coverages-Tenants", which states "the residence must not contain more than two additional unrelated roommates. All can be named on the policy". The landlord also included a message from her broker dated September 9, 2016 stating that "we are unable to provide a quote for this property due to the tenants renting from you, are subletting to 3 other individuals". The landlord provided another email from a different broker who stated the "underwriter considers offering you coverage as long as the property is rented to 2 families not 4 individuals". The landlord's home insurance policy was ultimately cancelled by her insurer, as stated in the letter dated November 24, 2016. The letter read "this is to confirm that...insurance policy...as rented dwelling has been cancelled effective September 17, 2016 by us. Reason for cancellation...Insurance does not insure house with more than 3 unrelated tenants". As the landlord is unable to obtain home insurance, she believes this puts her property at significant risk, one of the reasons cited on the 1 Month Notice.

The tenant testified during the hearing that although he does not dispute that there were five occupants in the rental unit, they were all approved by the landlord. The tenant acknowledged that although there were only four people included in the original rental application, he did inform the landlord that he was looking for a fifth person. The tenant submitted that he had a different version of the addendum, which he included in his evidence package. Item #19 on the 'original' copy the tenant included in his evidence package reads "no other person other than the ones listed in the application form may occupy the rental unit. The tenant is fully responsible for any damages caused by guests and/or occupants. The landlord responded that the tenant's initials were on top of the revised addendum.

The tenant testified that the landlord's September 5th, 2016 email was unclear and he interpreted the email as no sixth person was to reside there. He also testified that he found a broker who would insure the premises, and included the quote in his evidence package. He testified that he presented this quote to the landlord, who did not respond. The tenant is adamant that the landlord had agreed to five tenants, and this was supported by the fact that the residence was 2200 square feet, and had 5 bedrooms. He is disputing that the number of occupants in the residence puts the landlord's property at significant risk. He stated that although home insurance is not his responsibility, he did try to assist the landlord by locating an insurer.

The landlord responded that the rental premises was a four bedroom residence, and that the fifth bedroom was a rec room, not a bedroom. The tenant replied that the place was shown to him as a five bedroom residence by the landlord.

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 this case, the landlord has maintained that the tenant's failure to obtain approval from the landlord to allow a new occupant constituted a breach of a material term of the Agreement. The landlord maintains that only four occupants were approved to reside at the rental premises, and she never gave permission for a fifth.

The landlord submitted correspondence between her and the tenant in this dispute disputing how the expectations were very clear about allowing an additional occupant without prior approval from the landlord. Although the term “sublet” is used by the landlord in this dispute, I must note that RTB Policy Guideline #19 clearly provides the definition of a “sublet” versus a “roommate” situation, which states:

“Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate...”

By the above definition the fifth occupant cannot be considered a “sublet”, but a roommate, as the tenant still resides there. As such I find that the tenant is not in breach of item #11 on the addendum, which disallows the tenant from subletting or assigning.

This leaves the question of whether the tenant breached item #19, which prohibits any additional occupants other than the ones listed in the application, unless approved of by the landlord. Although there may have been two versions of this addendum, both clearly state that the tenant is only allowed the occupants listed on the application. As a copy of the application was not provided to me by either party, I must consider the testimony and evidence that was provided in this hearing by both parties in regards to whether a fifth occupant was approved, or not. In considering this matter, I note that the tenant was the only signatory to the Agreement. It is disputed as to how many occupants were approved to actually live in the rental unit, and there is nothing in the evidence or testimony to support that the tenant breached item #19 by allowing “any additional occupant other than the ones listed in the application” to reside in the rental unit. For the reasons above I find that the landlord has not established that the fifth occupant constituted the breach of a material term of the Agreement.

I have also considered the landlord’s claim that the tenant(s) have put the landlord’s property at significant risk. The landlord had produced several pages of correspondence from insurance brokers supporting the fact that she was unable to insure her home due to her not meeting the conditions of the policy. Although the term “sublet” was incorrectly used, as explained above in my analysis, the correspondence from the insurance broker clearly stated that that no more than 3 unrelated tenants were allowed,

and her insurance policy was cancelled as a result. The tenant did produce his own insurance quote, disputing the fact that the landlord cannot obtain home insurance.

Although the landlord did produce some evidence that her property may be at risk, I cannot make a finding that it is the tenant who put the landlord's property at significant risk, especially when it is disputed as to how many occupants were originally agreed to by both parties. I do not find the landlord has demonstrated that the tenant's actions have put the property at risk, nor is it the tenant's responsibility to ensure that the landlord meets insurance policy guidelines, unless it was clearly communicated to, and agreed to, by the landlord to the tenant upon signing the tenancy agreement.

For the reasons cited above, I allow the tenant's application to cancel the 1 Month Notice. As the filing fee is a discretionary award given to a successful party after a full hearing on its merits, I allow the tenant's application to recover the \$100.00 filing fee from the landlord, and I dismiss the landlord's application to recover hers. The tenant may also choose to give effect to this monetary award by reducing a future monthly rent payment by \$100.00.

Conclusion

The tenant's application to cancel the 1 Month Notices is allowed, and I dismiss the landlord's application for an Order of Possession. The Notice is of no continuing force or effect. This tenancy continues until ended in accordance with the *Act*.

I allow the tenant to implement a monetary award of \$100.00, by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of \$100.00, and the landlord must be served with **this Order** as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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 12, 2017

Residential Tenancy Branch

