



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SEVILLE MANAGEMENT & LEASING LTD

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47.

The landlord's agent, NC, testified on behalf of the landlord in this hearing and was given full authority to do so by the landlord. Both parties 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 confirmed receipt of the tenant's application for dispute resolution hearing package ("Application"). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the Application. The tenant did not submit any written evidence for this hearing. The tenant confirmed receipt of the landlord's evidence. In accordance with section 88 of the *Act*, I find the tenant was duly served with copies of the landlord's evidence.

The landlord testified that the 1 Month Notice was served to the tenant on January 17, 2017, by way of posting to the tenant's door. The landlord entered into written evidence a copy of that Notice, as well as a Proof of Service. Accordingly, I find that the 1 Month Notice was served to the tenant in accordance with section 88 of the *Act*. The effective date of the 1 Month Notice is corrected to February 28, 2017 as section 47(2)(b) of the *Act* states that a tenancy must effectively end on a "day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement".

Issues

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

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...*

(d) the tenant or a person permitted on the residential property by the tenant has

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant.

...

(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.

...

(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;

(j) the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser viewing the residential property.

The landlord's agent, NC, testified that the tenant was issued the 1 Month Notice for not being truthful in his rental application. The agent stated that the tenant falsely represented himself, and breached the material terms of this tenancy agreement by not disclosing that he had a dog, and that he was a smoker. The landlord submitted, in evidence, a copy of the tenancy agreement, which states that "the tenant agrees to the following material term regarding smoking: No smoking of any combustible material is permitted on the residential property, including the rental unit". The tenancy agreement also had a handwritten condition that "no dogs are allowed in the building. No other pets".

The landlord issued two letters to the tenant dated January 17, 2017. One letter was for breaching the no smoking clause on the tenancy agreement after receiving complaints from two tenants above the tenant's rental suite. Two landlord included two letters of complaint from other tenants indicating that they "have smelled the scent of cigarette and marijuana smoke", and for the second hand smoke the tenants have smelled in their apartment. The second letter from the landlord was for breaching the no dogs or pets clauses on the tenancy agreement, and for not being truthful in his application for tenancy about owning a pet.

The landlord's witness, GM, testified in this hearing that she was the building manager and had originally shown the tenant the rental suite, and filled out the application with him. She testified that he stated to her that he was a non-smoker, and that he had no pets. She stated that he never mentioned owning a service dog, and that the tenant should have presented her with the service dog certificate. She further testified that there was a strict non-smoking policy in the building, and that she never received any service dog certificate from the tenant. She also stated that no pet deposit was ever collected from the tenant.

The tenant did not dispute the fact that he owned a dog, or the fact that he did not disclose it to the landlord when applying for the tenancy. The tenant testified that his dog is a service dog, and therefore is not considered a "pet". He stated that there is no obligation on his part to disclose to the landlord that he had a service dog due to concerns about discrimination.

The tenant stated that it was his right not to disclose his service dog, and that he showed the building manager his Service Dog Certificate upon meeting her in the building lobby. He testified that he offered to let the building manager photocopy the certificate, but that she had declined and said it was fine. He testified that he was only instructed to clean up after his service dog, and that his dog must wear a vest. The tenant stated that a week and a half later he was asked for a pet deposit, which he refused after informing the landlord that service dogs do not require pet deposits since they were not considered "pets". The tenant received the 1 Month Notice two days after this meeting.

The tenant also testified that he does smoke, but not in the apartment because of the service dog. He testified that he would always go "out front to smoke", and that the complaints about marijuana smoke could not be attributed to him as he did not smoke marijuana. He testified that there were other tenants who smoked in the car port near his apartment, and that the other tenants may have thought that it came from his suite. He testified that the tenants in a nearby unit admitted to smoking medical marijuana, and that he was being wrongfully accused. The landlord confirmed that these tenants were smoking marijuana, and their tenancy has ended as a result. The building manager disputes the tenant's testimony that she stated that she did not require the service certificate, or that she had asked the tenant for a pet deposit.

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 lack of disclosure about a service dog cannot be considered a breach of a material term of the tenancy agreement when a service dog is not considered a pet. Service dogs fall under the Guide Dog and Service Dog Act, and must not be restricted by conditions of a tenancy agreement.

The landlord also expressed concern that the tenant was smoking on the residential premises, when smoking is strictly prohibited on the residential premises. The tenant disputed the landlord's claims, stating that although he does smoke, he takes care to do it away from the residential premises. The tenant disputed that he never smoked marijuana, and that it was possible that he was being wrongfully accused for the cigarette smoke when people smoked within close proximity to his rental unit. The burden of proof rests with the landlord to provide proof that there is in fact a breach. I find that the landlord had not established that the tenant was the source of the cigarette or marijuana smoke, and therefore the landlord had not met their burden of proof to show that the tenant has breached a material term of this tenancy.

The landlord also indicated on the 1 Month Notice that the tenant had engaged in illegal activity, and that the tenant had seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant. I find that the landlord did not establish how the tenant had engaged in any illegal activity other than the smoking of marijuana, which may have been wrongly attributed to this tenant. As stated above, the tenant disputes having smoked inside his suite or on the rental premises, and the landlord did not provide sufficient evidence to support

this, or how the tenant had seriously jeopardized the health or safety, or lawful right or interest of any occupant or the landlord.

The landlord also indicated that “the tenant knowingly gives false information” as a reason for the 1 Month Notice, although section 47(1)(j) of the *Act* reads “the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser viewing the residential property”. The landlord had crossed out, by hand, a portion of this sentence, and in either form I find that the landlord had not provided sufficient evidence to demonstrate that this tenancy should end on this basis.

For the reasons cited above, I find that the landlord had 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*.

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: March 17, 2017

Residential Tenancy Branch