Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC FF

Introduction

This hearing dealt with the tenants' 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, and authorization to recover the filing fee for this application from the landlord 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. The landlord's agent, SL ('landlords"), testified on behalf of the landlords in this hearing, and was given full authority by the landlords to do so.

The landlords' agent confirmed receipt of the tenants' application for dispute resolution hearing package ("Application"). In accordance with section 89 of the *Act*, I find the landlords duly served with copies of the tenants' Application. Both parties acknowledged receipt of each other's evidence for this hearing.

As the tenants testified that they had received the 1 Month Notice on March 1, 2017, I find that this document was duly served to the tenants in accordance with section 88 of the *Act*.

Issues to be Decided

Should the landlords' 1 Month Notice be cancelled?
If not, are the landlords entitled to an Order of Possession?

Are the tenants entitled to recover the filing fee for this application from the landlords?

Background and Evidence

The landlords' agent testified to the following. This month-to-month tenancy began on March 1, 2015 with rent currently set at $2,572.50 per month. The landlords reside in a suite on the ground floor, while the tenants occupy the rest of the home. On January 9, 2017 the landlords sent a letter to the tenants after the landlords had noticed that guests

were leaving and exiting the rental suite with their own keys. The landlords warned the tenants against subletting and unauthorized guests, and gave the tenants until January 26, 2017 to remove these guests.

On January 12, 2017, the tenants responded that they were not subletting the suite, but that these occupants were roommates. The landlords responded with a letter on January 13, 2017 that the tenants needed prior permission from them to have additional occupants. The landlords gave notice of entry for an inspection on January 27, 2017, which was rejected by the tenants stating that they were at work. The landlord gave notice for February 15, 2017, providing the reason that they had to ensure that these additional occupants have vacated the suite.

The tenants responded by email on January 30, 2017 stating that the roommates were moving out. The landlords sent an email on February 14, 207 asking the tenants for a statement confirming whether these guests were removed. As the landlords did not receive confirmation they served the tenants with a 1 Month Notice on February 28, 2017 stating that the tenants had breached a material term of the tenancy agreement. The landlords testified that they observed at least four other occupants coming in and out of the suite.

The tenants testified during the hearing that there were a total of eight occupants in the home. The tenants testified that nothing had changed since the beginning of the tenancy in March of 2015, and that they were in fact renting the entire house. The tenants testified that the landlords occupied the rental suite in the basement of the home, which was vacant when they had first rented the house. The tenants testified that the portion they rented had two living rooms, two washrooms and the home spanned two floors, and contained five bedrooms. The tenants stated that that there was nothing in the tenancy agreement stating that they could not have roommates. The tenants testified that in addition to themselves, their two children resided with them, along with the four roommates. One of the children sleeps in the living room.

The landlords responded that they had never met these four roommates, and that when the tenancy began they believed that the home was going to be occupied by a family of four. The landlords believed that there must have been a misunderstanding, and admitted that there was no discussion about the number of occupants in this tenancy. The landlords testified that they had discovered the additional occupants when they had moved into the downstairs suite in December of 2016. They also admitted that they had never prohibited the tenants from making additional keys, and assumed that anyone not listed in the tenancy agreement needed permission to reside there.

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 landlords believe that the tenants' failure to obtain approval from the landlords to allow additional occupants constituted a breach of a material term of the Agreement. The landlords maintain that the assumption was that the home would be occupied by only a family of four, and only the persons named on the tenancy agreement.

The landlords stated in the hearing that they believed the tenants were subletting the home. I note that that the term "sublet" is also used in the warning letters sent to the tenants by the landlords. In the letter dated January 9, 2017 the landlords referred to sections 34(1) and 47(1)(i) of the Act, and notified the tenants that "sublet tenants are

not authorized to be on the property". Although the term "sublet" is used by the landlords 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 additional occupants cannot be considered "sublets", but roommates, as the tenants still reside there. As such I find that the tenants have not breached any material term by subletting, as the additional occupants do not meet the definition set by RTB Policy Guideline #19.

This leaves the question of whether the tenants had breached the tenancy agreement by allowing additional occupants other than the ones listed on the tenancy agreement. Both parties in this hearing agreed that there are more than four occupants in the rental home. I must consider the testimony and evidence that was provided in this hearing by both parties in regards to whether the additional occupants were approved, or not. In considering this matter, I note the tenancy agreement submitted by the landlord does not contain any addendums that specifically state that any additional occupants other than the ones listed on the tenancy agreement are prohibited. The only portion of the tenancy agreement that addresses the issue of additional occupants is the standard term on the form in condition 11(3) that states "if the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end a tenancy. Disputes regarding the notice may be resolved through dispute resolution under the Residential Tenancy Act". 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 tenants were only allowed a maximum of four occupants in the rental suite. The landlords, in their own testimony, stated that there was no discussion regarding the number of occupants when the tenancy agreement was signed. There is also nothing in the tenancy agreement prohibiting the tenants from making additional keys, or allowing access to other occupants to enter or exit the home.

For the reasons outlined above, I find that the landlords have not established that the number of occupants in the rental home constituted a breach of a material term of the Agreement. I allow the tenants' 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 tenants' application to recover the $100.00 filing fee from the landlords. The tenants may also choose to give effect to this monetary award by reducing a future monthly rent payment by $100.00.

Conclusion

The tenants' application to cancel the 1 Month Notice is allowed. The Notice is of no continuing force or effect. This tenancy continues until ended in accordance with the *Act*.

I allow the tenants 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 tenants are provided with a Monetary Order in the amount of $100.00, and the landlords must be served with **this Order** as soon as possible. Should the landlords 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: April 13, 2017

Residential Tenancy Branch