Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding RANDALL NORTH REAL ESTATE SERVICES INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC, O, FF

Introduction

This proceeding dealt with the tenant's application to cancel a 1 Month Notice to End Tenancy for Cause. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

With consent, the tenant's application was amended to name the landlord as the corporate property management company and not the individual property manager.

In filing her Application for Dispute Resolution the tenant had also requested that the landlord pay for installation of a privacy fence or purchase of privacy shrubs. I tried to facilitate a mutual agreement with respect to this request and although the tenant was willing to pay for one-half of the cost the landlord was not agreeable to paying for any portion of this. As an alternative, the tenant requested that I authorize her to leave her bicycles and waste receptacles kept on the patio in front of the rental unit. The landlord requested orally during the hearing that I order the tenant to move these items to the rear yard of the townhouse. I considered these requests but I have declined to give authorization or an order as requested for the reasons provided in the analysis section of this decision and this portion of the tenant's application is dismissed with leave.

The landlord pointed out that the tenant had served her evidence package upon the landlord one day late, or only 13 clear days before the hearing instead of 14 days. I explored with the landlord whether the landlord was prejudiced by the late service. The landlord acknowledged that the landlord was not prejudiced but objected to some of the content of the tenant's evidence package, namely letters written by other tenants and a former manager of the property. I informed the landlord that in the absence of prejudice I was prepared to admit the tenant's evidence package and that the landlord may make arguments that the letters be given little evidentiary weight. The landlord appeared agreeable to this approach until the hearing was nearing an end and the attempts to reach a mutual agreement failed. I have admitted the

tenant's evidence but the content of the letters were not relied upon by the tenant during the hearing. Nor, were they relied upon by me in making this decision. Rather, the most relevant documents reviewed and relied upon are the tenancy agreement; Notice(s) to End Tenancy; and, written communication with respect to the alleged breach of the tenancy agreement. I also gave considerable weight to the oral testimony and submissions of both parties.

Issue(s) to be Decided

1. Should the 1 Month Notice(s) to End Tenancy for Cause be upheld or cancelled?
2. Is it necessary or appropriate to issue any authorization or orders to either party with respect to storage of items on the patio?

Background and Evidence

A tenancy agreement was executed by the tenant and a former landlord on December 27, 2014 for a tenancy set to commence on January 1, 2015. Ownership of the property changed and the current property management company was employed to manage the property by the new owner in April 2017. The tenant is currently required to pay rent of $928.00 on the first day of every month. The rental unit is a townhouse with a small covered patio in the front of the unit and a fenced backyard that is accessed from inside the rental unit or through a gate at the rear of the property.

The landlord served two 1 Month Notices to End Tenancy for Cause (the "Notices") upon the tenant. The first was served in person on May 15, 2017 and the second was left in the mail slot of the rental unit on May 19, 2017. The landlord explained that the Notices were issued for the same reason and the landlord was concerned the first Notice may be viewed as insufficiently completed since the space for indicating the method of service was not completed. The landlord considers the second Notice to have replaced the first Notice. Upon review of the two Notices, I was satisfied that they both conveyed the same reason for ending the tenancy, essentially the same details of cause, and the same effective date. I also noted that the tenant had included copies of both Notices in her evidence package. Accordingly, I considered both Notices as being under dispute so that the tenant would not be prejudiced by the landlord's issuance of a replacement Notice shortly after the tenant filed her Application for Dispute Resolution.

The Notices have a stated effective date of June 30, 2017 and indicate the reason for ending the tenancy is: "*Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so*." In the details of cause, the landlord wrote on the second Notice:

> "Tenant was given 14 day written notice on April 19th to clean up the front yard per section 20 of the Tenancy Agreement, which states that all property of the tenant kept on the residential property must be kept in PROPER STORAGE AREA….Tenant has been

> advised the front door, walkway, patio is not a proper storage area. Section 22 of the tenancy agreement, states that garbage, waste, boxes, papers, and recyclables must not be placed or left on patio/front door. Bikes are to be stored in designated"
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> [Reproduced as written on second Notice]

The landlord submitted that all tenants of the residential property were given a written notice on April 19, 2017 to inform them they are required to remove "unsightly debris and inappropriate items from the immediate exterior of the building" as "the new owner has requested that the front porches and yards be cleaned up of trash and clutter immediately". The notice provides tenants 14 days to do so and if tenants fail to do so the landlord will act upon "the violation of the terms and conditions of your rental agreement." In the notice the landlord listed various items that are "no longer allowed to be stored in the front of your unit" including bikes and toys, and a requirement that garbage bins and recycling bags are to be stored in the backyard.

Upon receipt of the April 19, 2017 notice the tenant enquired as to the particular section in the tenancy agreement the landlord was referencing in the notice. The landlord responded by pointing to section 20 of the tenancy agreement. On May 1, 2017 the landlord sent another notice to all tenants reminding them they had one week left to clean up unacceptable items from their front yards. On May 9, 2017 the landlord sent another notice to all tenants indicating several tenants were still in contravention of "the rules set forth by the new owners" with reference to section 20 of the tenancy agreement and indication that if a tenant does not comply by "April 11, 2017" the tenant would receive an eviction notice.

In this case, it is undisputed that the tenant continues to store bikes, garbage bins and recycling bins ("the subject items") on the patio located directly in front her rental unit.

The landlord submitted that the tenant is in violation of sections 20 and 22 of the tenancy agreement and the tenant's refusal to comply with the landlord's demands to relocate the above described items has left the landlord no choice but to serve the tenant with an eviction notice. The landlord is of the view that the tenant could have easily avoided this dispute by moving her possessions to the back yard of the townhouse unit.

Sections 20 and 22 of the tenancy agreement state:

> **20. STORAGE.** All property of the tenant kept on the residential property must be kept in safe condition in proper storage areas and is the tenant's risk for loss, theft, or damage from any cause, whatsoever. Hazardous or dangerous items must not be brought onto or kept on or in the residential property or rental unit. <u>It is a material term of this Agreement that items stored inside the rental unit must be limited in type and quantity so as not to present a potential fire or health hazard, or to impede access to, egress from or normal movement within any area of the rental unit.</u>

Vehicles. [I did not reproduce this section as the dispute does not pertain to vehicle storage]

Bicycles. Bicycles are to stored in designated areas only. They must not be kept, left, or stored on a balcony or hallway. They must not be moved through a lobby or hallway, or placed in an elevator.

22. WASTE MANAGEMENT. Garbage, waste, boxes, papers or recyclable materials must not be placed or left in hallways, a parking area, driveway, patio, or other common area of the residential property, except those areas designated for disposal. All garbage must be drained, bagged or wrapped, and tied security before being placed in a chute or approved receptacle. Spillage must be cleaned up immediately by the person responsible. Any large items to be discarded, such as furniture, must not be abandoned or placed in garbage collection areas, but must be removed from the residential property by the tenant at the tenant's expense. The tenant must comply with the residential property recycling methods."

[Reproduced as written with my emphasis underlined]

The landlord also provided a copy of a document entitled "Information for Incoming Tenants" dated December 28, 2014. It does not appear to be an addendum to the tenancy agreement since the tenancy agreement does not indicate there is an addendum. The document indicates garbage and recyclable items are to be placed in the appropriate container and that the containers are located in the parking area at the rear of the building. However, during the hearing I heard that tenants take their individual garbage and recycling containers to the driveway for the garbage company to pick up and I did not hear of a central garbage/recycling containers. The document also indicates that not to be left on the walkway or in a hallway and are to be chained to the bike rack; however, I did not hear that there was a bike rack at the property from either party.

The landlord acknowledged that the tenant may have been storing the subject items on the front patio for quite some time and attributes this to the negligence of the former property manager in failing to enforce the terms of the tenancy agreement. The landlord is of the position that the current landlord is not bound by the former manager's negligence and is not required to continue to permit tenants to violate the terms of their tenancy agreements.

As far as the reason for ending the tenancy, as indicated on the Notices, the landlord originally stated that the reason selected [Breach of a material term] was the only one reason on the Notices that applied since there was violation of the tenancy agreement by the tenant. I noted that in order to end the tenancy the landlord must establish that the term violated by the tenant is a material term. The landlord subsequently submitted that all terms of a tenancy agreement are material terms since they are contained in a written agreement that the tenant signed.

The tenant testified that she has stored the subject items on the covered front porch since the start of the tenancy and that she had a discussion about it with the former property manger. The former property manager was agreeable to the tenant leaving these items on the front porch. The tenant was of the view that the path that leads to the back yard is unsafe and difficult to navigate due to rocks and potholes. Further, when it is dark or snowy in the winter months navigating the path is even more difficult and unsafe. The tenant was of the position that the backyard slopes and is not level which makes it difficult to store garbage and recycling bins back there. In addition, the recycling becomes water logged when it rains. The tenant stated that she had stored bikes in the backyard before and a bike was stolen. The tenant considers the front porch more secure. For all of these reasons, the tenant is of the position that she is storing her possessions in an appropriate place and not breaching the tenancy agreement.

The landlord's caretaker acknowledged that she has removed some rocks from the path that leads to the backyard but was of the position the path is not unsafe or difficult to navigate. Nevertheless, the landlord was willing to do more work in path area to make it easier to navigate. The tenant pointed out that the current landlord has only been managing the property in the spring and summer months and has not managed the property during the winter months.

The landlord stated that most other tenants are able and have been willing to comply with the rules and have even put in storage sheds in the back yard to secure and protect their personal property. The landlord also pointed out the tenant has been chaining the bikes to a support post on the front porch which the landlord sees as another violation of the tenancy agreement.

Both parties were in agreement that there had been some previous discussion regarding installation of a privacy fence or shrubbery in the front of the tenant's patio. Although the landlord indicated this was not the landlord's first choice, the landlord was willing to permit some storage on the front patio if the storage was shielded by a privacy fence. However, the parties were in dispute as to which party should pay the price for installation of a privacy fence. The landlord stated that if a privacy fence were installed it would have to be done properly with fence posts cemented into the ground. The landlord estimated that this would cost approximately $250.00.

Analysis

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove, based on a balance of probabilities, that the tenancy should end for the reason(s) indicated on the Notice.

The reason indicated on the Notices to End Tenancy before me is that the tenant remained in breach a material term of the tenancy agreement despite written notice to correct the breach, as provided under section 47 of the Act. In keeping with the principles of statute interpretation, all words contained in the relevant section(s) of the legislation must be given meaning. Section 47

of the Act permits a landlord to end the tenancy where the tenant has violated a material term of the tenancy agreement. The Act does not merely state violation of a term or any term. Accordingly, in order to end the tenancy, the landlord must first establish that the tenant in this case has violated a material term of the tenancy agreement.

The landlord pointed to two relevant sections of the tenancy agreement as a basis for ending the tenancy, sections 20 and 22. I proceed to consider whether these terms are material terms.

Residential Tenancy Branch Policy Guideline 8: *Unconscionable and Material Terms* provides policy statements and information with respect to unconscionable and material terms. Under the section "material terms" the policy guideline provides:

> **Material Terms**
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> 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.
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> 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.
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> 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.
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> 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:
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> - 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.
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> 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.

Upon review of sections 20 and 22 of the tenancy agreement, I note that there is one sentence in section 20 that does indicate that particular requirement is a material term of the tenancy agreement. I underlined that sentence in producing section 20 in the "Background and Evidence" section of this decision. The material term pertains to storage of items in the rental unit that would be a fire or health hazard. The landlord who created the tenancy agreement specified that one term was material and did not specify other requirements contained in sections 20 and 22 as being material and I am of the view that was done intentionally and this is of significance in determining whether the terms in question are material. I find it reasonable that a term concerning the storage of items that pose a fire or health hazard would be a material term since a breach of that term has potential to cause significant risk to property and persons and the consequence being evicted due to a breach of that term is reasonable. In contrast, the storage of a say a bicycle on a balcony appears to be much less dangerous and eviction for this reason very severe.

Also of consideration is that the former manager employed by the former landlord was agreeable, or at least did not take any enforcement action, to permitting the tenant to store her garbage/recycling bins and bikes on the front patio which also points to the former landlord not considering the location of these items to be a material terms of the tenancy agreement. If a former owner or manager of the residential property did not consider a term in the tenancy agreement to be a material term during the tenancy, a term does not become a material term when there is a change in ownership or management of the property. As provided in the policy guideline, a term is determined to be material at the time the tenancy agreement is created, not when the landlord changes, since a tenancy agreement runs with the land and a new landlord inherits the existing tenancy agreement. Therefore, the actions of a former owner/manager may be relevant in determining whether a term is material or not.

I also note that in an email the landlord's agent wrote to the tenant on May 2, 2017 she states: "I was looking into speaking to the owners about leaving garbage cans out front but after what I saw yesterday, I will not be doing this." The landlord attached photographs of a large pile of garbage and debris left on the outside of a different rental unit. It would appear the property manager was considering the possibility of allowing garbage cans to be left on the front patio which is further indication that the term would not be considered material as a material term is to be so important that even a trivial breach would be grounds for eviction. As I stated to the landlord during the hearing, each dispute turns on its own merits and breach of the Act by another tenant with respect to improper disposal of possessions does not create a material term for this tenant.

In light of the above, I find the wording of sections 20 and 22 of tenancy agreement and the actions of the tenant and former manager for a considerable period of time before ownership/management of the property changed do not indicate that the location for storage of

bicycles and garbage/recycling bins are materials terms of the tenancy agreement. Therefore, I find the tenant has not breached a material term of the tenancy agreement and I grant the tenant's request to cancel the Notices to End Tenancy.

Since the tenant's application to cancel the Notices was successful, I award the tenant recovery of the filing fee she paid for this application. The tenant is authorized to deduct $100.00 from a subsequent month's rent in satisfaction of this award. When the tenant deducts $100.00 from a subsequent month's rent payment in satisfaction of this award the landlord must consider the rent to be paid in full for that month.

As for the tenant's request that I order the landlord to pay to install a privacy fence or privacy shrubbery, I decline to do so for the following reasons.

Section 32 of the Act provides that for the landlords obligation to repair and maintain a property. Section 32(1) provides:

> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
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> (a) complies with the health, safety and housing standards required by law, and
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> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

I find I am not satisfied that privacy fencing or privacy shrubbery is required in order for the landlord to comply with section 32 of the Act.

As for the tenant's request that I authorize her to leave her bikes and garbage/recycling bins on the front patio; and, the landlord's opposing request that I order the tenant to remove these items from the front patio, I decline to make any order or authorization for the reasons that follow.

Section 20 of the tenancy agreement provides that bicycles are not to be stored on a balcony or hallway but it does not specifically state patio. The "Information for Incoming Tenants" document indicates bikes are not to be left on the walkway. In this case, the tenant is currently storing the bicycles on a patio by the front door and walkway. I did not hear arguments from either party as to whether I should consider the patio to be the same as a balcony or a walkway or the enforceability of the "Information for Incoming Tenants" document. Therefore, I find I was not provided with sufficient arguments from the parties as to whether the storing a bicycle on the patio in front of the tenant's unit would violate section 20, as it is written.

As for the garbage and recycling bins, section 22 prohibits a tenant form storing these items "in hallways, a parking area, driveway, patio, or other common area of the residential property." By including the words "or other common area" I interpret this term to mean the tenant must not store garbage or recycling on a patio that is considered a common area. In this case, the tenant is currently storing these items on the patio right in front of her rental unit but I did not hear arguments from either party as to whether the subject patio would be considered a common area or an area for the exclusive use of the tenant. Therefore, I find I was not provided with sufficient arguments as to the status of the patio as common property or an area for exclusive use of the tenant in order to make a determination as to whether storing garbage and recycling bins on this patio would violate section 22 of the tenancy agreement, as it is written.

Since I have declined to authorize or order the tenant to leave or remove the subject items from the patio, I strongly encourage the parties to try to reach a mutual agreement with respect to this matter. However, if they are unable to reach a resolution the parties may make an Application for Dispute Resolution to seek further assistance and make appropriate arguments. With a view to aiding the parties reach a mutual agreement I provide the following information for the parties to consider.

As seen above, in interpreting terms of a contract, which includes tenancy agreements, it is important to give the words used in the term meaning and not interpret the term by inserting words that are not present.

Further, under section 6 of the Act, in order for a term to be enforceable it must be:

> (3) A term of a tenancy agreement is not enforceable if
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> (a) the term is inconsistent with this Act or the regulations,
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> (b) the term is unconscionable, or
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> (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

In contract law, where a term in a contract may be interpreted in more than one way, the benefit of an alternative interpretation is usually given to the party that did not draft the contract. A tenancy agreement is drafted by a landlord so the tenant, as the non-drafting party, receives the benefit of a term that may be reasonably interpreted in a different way.

Conclusion

The 1 Month Notices to End Tenancy issued on May 15, 2017 and May 19, 2017 are cancelled and the tenancy continues. The tenant was awarded recovery of the filing fee she paid for her application and the tenant has been authorized to deduct $100.00 from a subsequent month's rent in order to satisfy this award.

I was not provided sufficient arguments from the parties that would allow me to make a decision to authorize the tenant to leave her possessions on the patio or order her to remove them and I have declined to make an order or provide authorization to either party. Rather, the parties are encouraged to try to resolve this matter by way of a mutual agreement. If the parties are unable to resolve this matter they may seek further dispute resolution assistance by filing an Application for Dispute Resolution and making the appropriate arguments.

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: July 14, 2017

Residential Tenancy Branch