Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ZETAN ENTERPRISES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC FF

Introduction

This hearing dealt with an application by the tenant pursuant to the *Residential Tenancy Act* ("the Act") for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause ("1 Month Notice") pursuant to section 47 *Act;* and
- a return of the filing fee pursuant to section 72 of the *Act.*

Both tenant and the landlord attended the hearing. All parties present were given a full opportunity to be heard, to present their sworn testimony and to make submissions under oath.

The tenant confirmed receipt of the landlords' 1 Month Notice to End Tenancy on June 3, 2017. I find the tenant to have been duly served with the landlords' notice to end tenancy in accordance with the *Act*.

Issue(s) to be Decided

Can the tenant cancel the landlords' Notice to End Tenancy? If not, are the landlords entitled to an order of possession?

Can the tenant recover the filing fee from the landlords?

Background and Evidence

Testimony was provided to the hearing by the landlords' agent, J.K. that this tenancy began on December 1, 2017. Rent was $2,500.00 per month, and a security deposit of $1,250.00 paid at the outset of the tenancy, continues to be held by the landlords.

On June 3, 2018 the landlords served the tenant with a 1 Month Notice to End Tenancy. The reasons cited on the 1 Month Notice were listed as follows:

- *Tenant has allowed an unreasonable number of occupants in the unit*
- *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 assigned or sublet the rental unit/site without the landlord's written consent*

The landlords explained it had come to their attention that the tenant had been renting out rooms in the rental unit to various, unknown persons. The landlords said they were fined $600.00 by the strata because it had been discovered during a routine fire inspection that the solarium had been converted to a bedroom. During the fire inspection a bed was discovered in the solarium, a privacy blocker had been added to the doors, and a lock had been put on the door to the solarium.

The landlords' agent said it was confirmed at the start of the tenancy that the rental unit was to be occupied solely by the tenant and his wife who are named on the tenancy agreement. A copy of an email clearly stating this fact was provided to the hearing as part of the landlords' evidentiary package.

A May 9, 2018 letter from the strata to the landlords stated as follows, "It has come to the attention of the Council that your tenant S.V. has rented multiple suites (8) in the [name of building] and in turn is not living in them but renting them out to students…As the owner, [you] are responsible for the actions of your tenant." This letter then continues to cite the strata bylaw which the tenant is alleged to have violated. It quotes rule 7.4, "under no circumstances will an owner be permitted to increase the number of bedrooms in a strata lot unless the owner is restoring the strata lot back to the original development floor plan not exceeding its specifications." While rule 7.5 notes, "owners are not allowed to partition or sub-divide existing rooms in their strata lot unless the owner is restoring the strata lot back to the original development floor plan not exceeding its specifications."

The tenant disputed that he was subletting any rooms, or permitting persons unknown to him from occupying the rental unit. The tenant explained he travelled extensively on

business and was often away from the country; however, he maintained that he was the main tenant of the rental unit. The tenant continued by stating that the persons who were in occupation of the rental unit in question, were his employees and therefore entitled to remain in the property because he had signed a tenancy agreement naming himself and his company as tenants. The tenant said the solarium in question contained a fold out couch and not a permanent bed. He explained this was used to relax and nap on, and was not a permanent structure.

Analysis

I will begin by examining the portion of the tenant's application to dispute the landlords' 1 Month Notice by first examining the portion of the notice related to subletting and assignment of the tenancy agreement.

Having issued a notice to end this tenancy, the landlords have the burden of proving they have cause to end the tenancy.

Section 47(1)(i) of the *Act* notes;

> **47** (1) A landlord may end a tenancy by giving notice to end the tenancy if the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*;…

The tenant maintained during the course of the hearing, that he occupied the rental unit and the other persons living there were his employees and were therefore allowed to be in occupation of the suite, as per the tenancy entered into between himself, his company and the landlord.

The definition of a 'subletter' is very narrow and is contained in *Residential Tenancy Policy Guideline* #19:

> When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and a new agreement (usually called a sublease) is typically entered into by the original tenant and the sub-tenant. The original tenant remains the tenant of the original landlord, and, assuming that the original tenant moves out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant.
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> The use of the word 'sublet' can cause confusion because under the Act it refers to the situations where the original tenant moves out of the rental unit and has a subletting agreement with a sub-tenant. 'Sublet' is also used to refer to situations where the tenant

> remains in the rental unit and rents out space within the unit to others. In determining if a scenario such as this is a sublet as contemplated by the Act, the arbitrator will assess whether or not the relationship between the original tenant and third party constitutes a tenancy agreement and a landlord/tenant relationship, as described above. If there is a landlord/tenant relationship, the provisions of the Act apply to the parties. If there is no landlord/tenant relationship, the Act does not apply.
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> When determining whether a One Month Notice to End Tenancy for cause was issued properly, the arbitrator will examine a number of factors, including the terms of the tenancy agreement between the original landlord and the tenant, whether the agreement contains terms restricting the number of occupants or the ability of the tenant to have roommates and the intent of the parties.

I find the landlords have failed to show the tenant subletted the rental unit as defined in the description from the *Residential Tenancy Policy Guideline.* Little evidence was presented at the hearing showing that the tenant had entered into a new tenancy agreement with any of these people in occupation of the suite, no evidence was presented that he accepted rent from these people, and little evidence was presented to dispute the tenant's assertion that he occupied the rental unit. I find that the landlords have failed to demonstrate that subletting of the unit has occurred.

The second portion of the landlords' 1 Month Notice concerned a Breach of a Material Term.

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…*

While the tenant has acknowledged other persons occupy the rental unit, he disputed that a permanent bedroom was present in the unit and argued his employees were permitted under the tenancy agreement as one of the named tenants on the tenancy agreement was his company. The landlords provided little evidence that he provided any warnings to the tenant related to his concerns for the property.

I find that the landlords are relying heavily hearsay from the concierge and limited, undisputed evidence provided by the Strata that the tenant houses students in the rental unit and in other parts of the building. No evidence was presented that the landlords warned the tenant in a manner as described above, of a potential breach of a material term of the tenancy agreement. I find that the landlords have not met the burden of proof demonstrating that the tenant has breached a material term of this tenancy. For these reasons, I dismiss this portion of the landlords' 1 Month Notice.

The final portion of the landlords' 1 Month Notice relates to the section of the Notice to End Tenancy indicating that the tenant has allowed an unreasonable number of occupants in the rental unit. The landlords argued that the tenant had unreasonably placed a bed in the solarium and had converted the two-bedroom unit into a three bedroom rental. They stated this was in contravention to the strata bylaws and in turn, they received a $600.00 fine. While I appreciate the landlords' frustration, I must consider the facts of the case as they relate to the 1 Month Notice. In this situation, the tenant was at one point housing another person in a unit designed to be occupied as a two bedroom. I do not find the presence of a third person in a two bedroom unit to be unreasonable. Furthermore, the landlords failed to provide sufficient evidence indicating the exact number of persons whom they suspected to be in the rental unit. The landlords stated that a subsequent inspection of the rental unit revealed the bedroom in the solarium to have been removed, thus eliminating any potential conflict with their strata. For these reasons, I find the landlords have failed to show that the tenant housed an unreasonable number of occupants in the rental unit.

The tenant was successful in his application to cancel the landlords' 1 Month Notice. This decision does not preclude the landlords from pursuing other relief under the *Act* to which they may be entitled.

As the tenant was successful in his application, he may recover the $100.00 filing fee from the landlords.

Conclusion

The landlord's 1 Month Notice to End the Tenancy is cancelled and of no continuing force or effect. This tenancy shall continue until it is ended in accordance with the *Act*.

The tenant is awarded a monetary award of $100.00 in satisfaction for a return of the filing fee.

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: August 8, 2018

Residential Tenancy Branch