Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, LRE, FFT

Introduction

This decision is in respect of the tenant's application for dispute resolution under the *Residential Tenancy Act* (the "Act"), and under which the tenant seeks the following:

1. an order cancelling a One Month Notice to End Tenancy for Cause (the "Notice");
2. an order suspending or restricting the landlord's right to enter the rental unit; and,
3. an order for compensation for recovery of the filing fee.

A dispute resolution hearing was convened at 11:00 a.m. on October 29, 2018. The tenant, the landlord, and the landlord's agent attended the hearing, were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses. The parties did not raise any issues in respect of service of documents.

While I have reviewed all oral and documentary evidence submitted that met the requirements of the *Rules of Procedure* and to which I was referred, only evidence relevant to the issues of this application are considered in my decision.

I note that section 55 of the Act requires that when a tenant applies for dispute resolution seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the application is dismissed and the landlord's notice to end tenancy complies with the Act.

Issues to be Decided

1. Is the tenant entitled to an order cancelling the Notice?
2. If the tenant is not entitled to an order cancelling the Notice, is the landlord entitled to an order of possession?

3. Is the tenant entitled to an order suspending or restricting the landlord's right to enter the rental unit?
4. Is the tenant entitled to an order for compensation for recovery of the filing fee?

Background and Evidence

The tenancy between the parties commenced on January 15, 2018, and is to end on January 15, 2019, with no option to extend the lease. (I note that fixed-term tenancies of this nature are not permitted under the Act and I will address this point later in the Decision.) Monthly rent of $2,000.00 is due on the first of the month. The tenant paid a security deposit of $1,000.00 and no pet damage deposit. The landlord submitted a copy of the written tenancy agreement into evidence.

The landlord's agent testified that the Notice, which was submitted into evidence, was issued and served on the tenant, in person, on August 31, 2018. Service was witnessed by a cousin of the landlord.

The grounds on the Notice for why the tenancy was ending were as follows: (1) the heat and gas were not hooked up under the tenant's name, as they were supposed to be; (2) the tenant had pets, specifically two (2) cats in the rental unit, contrary to the tenancy agreement; (3) the tenant was smoking on or in the rental unit, contrary to the tenancy agreement; (4) the tenant has been uncooperative in permitting the landlord to show the rental unit, which is currently for sale on the market; and, (5) the rental unit is not clean.

In reviewing the tenancy agreement, I noted that there is no clause prohibiting pets, no clause prohibiting smoking, and heat and gas are checked off as being included in the rent. The landlord's agent explained that it was an understanding between the parties that there were no pets allowed and that no smoking was a strata rule. Further, the landlord explained that the understanding of a no pets rule is evidenced by the lack of a pet damage deposit being required under the tenancy agreement.

Regarding the attempts by the landlord's agent (who is also the landlord's real estate agent), the agent testified that there were several times when he was trying to show the rental unit, suggesting times and dates, none of which appeared to work for the tenant. The agent provided at least a 24 hours' notice in some cases, and more than 24 hours' notice in others, but that tenant always said it was not a good time.

The tenant testified that “we don’t have pets” and that he only looked after his mother’s two cats for a week while she was going through some unfortunate personal matters. The tenant’s wife smoked, on the balcony, but no longer does that as the strata only recently put in rules about no smoking anywhere on the property. He noted that he received one note from the landlord regarding the smoking, and that it was quickly resolved. Regarding the cleanliness, the tenant said that his place is clean and that there are no issues.

Regarding the gas and heat (electricity), he noted that these accounts were ultimately put under his wife’s name and that this is no longer an issue. There was some testimony regarding illegal activities in one of the bedrooms, but this was apparently due to one of the tenant’s young boys locking his room so that his brother could not access his toys.

Finally, the tenant testified that on one occasion when he told the landlord that his visit would not work, the landlord threatened to bring the police to carry out the inspection. Ultimately, this never occurred and a potential buyer (according to the landlord’s agent) withdrew their interest in the property.

In his submissions, the tenant argued that there is no factual evidence or proof for any of the stated grounds on the Notice.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Where a tenant applies to dispute a One Month Notice to End Tenancy for Cause, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the Notice is based.

Regarding the issue of heat and water, I note that the tenancy agreement clearly indicates that heat and water are included in the rent. While the landlord testified that there was an “understanding” between the parties that the tenant would take care of the heat and water, it is the terms of the written tenancy agreement which prevail unless both parties have consented to an amended, written term of the agreement. As such, I

do not find that the landlord has established this as a valid ground on which the Notice was issued.

Regarding the issue of no pets, I note that the tenancy agreement does not anywhere state that pets are prohibited. That the landlord did not collect a pet damage deposit is not in and of itself to establish that the agreement prohibited pets. The tenant did not dispute the landlord directly on this point, but rather, testified that he does not have pets. The landlord cannot end a tenancy for a material term which is not in the tenancy agreement. As such, I do not find that the landlord has established this as a valid ground on which the Notice was issued.

Regarding the issue of the rental unit not being clean, the landlord submitted no documentary evidence to establish that the "property [is] not clean" as written on the Notice. Likewise, the landlord submitted no documentary evidence to establish that any of the rental unit is broken or damaged. As such, I do not find that the landlord has established this as a valid ground on which the Notice was issued.

Regarding the issue of there being engaged in illegal activity within the rental unit, the landlord provided no evidence of such activity occurring, and as such I do not find that the landlord has established this as a valid ground on which the Notice was issued.

Finally, regarding the issue with the tenant being uncooperative with respect to visits by the landlord's agent in showing the rental unit to prospective buyers, I turn to section 29 of the Act which states as follows

> 29 (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
>
> (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
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> (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
>
> (i) the purpose for entering, which must be reasonable;
>
> (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

The landlord is permitted by the Act to provide notice that they intend to enter a rental unit, and the landlord is permitted to enter the rental unit whether or not the tenant

agrees or disagrees with the date and time of entry. Entering the rental unit for the purpose of showing it to prospective buyers is a reasonable purpose under the Act. Section 28(c) of the Act protects a tenant's exclusive possession of the rental unit *subject to section 29* of the Act.

In this case, the tenant was rather uncooperative in his dealings with the landlord's agent, who had the legal right to enter the rental unit on the date and time being provided in the written text message notices. Indeed, it should be unnecessary for the police to attend to such entries: if the landlord provides sufficient notice that complies with section 29(1) of the Act, then the landlord may enter the rental unit whether the tenant agrees with this entry or not. Having said this, I do not find there is sufficient evidence establishing that the tenant prevented these entries from being effected; the landlord or her agent simply failed to follow through with the entries. Given the above, I do not find that the landlord has established this as a valid ground on which the Notice was issued.

Taking into consideration all the evidence and testimony presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving any of the grounds on which the Notice was issued.

As such, the landlord's Notice, dated August 31, 2018, is cancelled and of no force or effect. The landlord is not entitled to an order of possession under section 55 of the Act. This tenancy will continue until it is ended in accordance with the Act.

Similarly, and in regard to the tenant's application for an order suspending or restricting the landlord's right to enter the rental unit, I do not find that the landlord's written (text) messages, or any other evidence presented to me for that matter, to the tenant have in any way breached the Act, and as such I find on a balance of probabilities that the tenant has not met the onus of proving that he is entitled to an order suspending or restricting the landlord's right to enter the rental unit. If the landlord gives the tenant notice pursuant to section 29(1) of the Act, the tenant is required to allow this to happen, whether or not the tenant or any member of his family is in the rental unit. As such, I dismiss that aspect of the tenant's application, without leave to reapply.

As noted earlier in this Decision, the written tenancy agreement regarding this rental unit is of a fixed term, stated to end on January 15, 2019, with no option to renew the tenancy on a month to month basis.

I note that, pursuant to section 13.1 of the *Residential Tenancy Regulation,* there is only one circumstance under which a fixed term tenancy may end, and that is when the landlord or a close family member of the landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

While I did not hear any evidence regarding whether this was the circumstance under which the tenancy was created, and I do not make any findings of fact or law in respect of whether the tenancy agreement complies with the Act, I do wish to bring this to the parties' attention.

Finally, as the tenant was partly successful in his application, I grant him a monetary award in the amount of $50.00 for partial recovery of the filing fee. I order that the tenant may retain $50.00 from the rent for November 2018 or December 2018 in satisfaction of this award.

Conclusion

I order that the landlord's Notice, dated August 31, 2018, is cancelled and of no force or effect. The landlord is not entitled to an order of possession under section 55 of the Act. This tenancy will continue until it is ended in accordance with the Act.

I dismiss the tenant's application for an order suspending or restricting the landlord's right to enter the rental unit, without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: October 29, 2018

Residential Tenancy Branch