Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MACDONALD COMMERCIAL REAL ESTATE SERVICES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC FFT

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 corporate landlord was represented by its agent DW (the "landlord"). The co-tenant EH (the "tenant") primarily spoke on behalf of both named tenants.

As both parties were present service of documents was confirmed. The tenant confirmed receipt of the landlord's 1 Month Notice dated August 27, 2018 on August 31, 2018. The landlord confirmed receipt of the tenant's application for dispute resolution dated September 4, 2018 and evidentiary materials. The tenant confirmed receipt of the landlord's evidence package. Based on the undisputed evidence I find that the parties were each served with the respective materials in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Should the 1 Month Notice be cancelled? If not is the landlord entitled to an Order of Possession?
Are the tenants entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the parties' claims and my findings around each are set out below.

The parties agreed on the following facts. This tenancy originally began in June 1998 for a fixed term of 1 year. After the original fixed term tenancy ended the tenancy continued on a month-to-month basis. A second fixed term tenancy agreement was signed by the parties dated June 1, 2000. No additional tenancy agreements were drafted after the term of that fixed term tenancy ended and the tenancy continued on a periodic basis.

The current monthly rent is $1,683.00 payable on the first of each month. A security deposit of $600.00 was paid at the start of the original tenancy and is still held by the landlord. No pet damage deposit was ever requested or paid.

The landlord issued the 1 Month Notice dated August 27, 2018 indicating the reason for the tenancy to end is that the tenant has breached a material term of the tenancy and has failed to correct it within a reasonable time after written notice to do so. The landlord submits that there are three material terms that have been breached in the June 1, 2000 agreement. These are; that the tenants have a pet cat in contravention of Paragraph 17 of the tenancy agreement which prohibits pets without prior written notice, and that the tenants' adult child resides in the rental unit as an additional occupant despite not being named in the tenancy agreement. In addition the landlord submits that the tenants' conduct and attitude have been rude and aggressive. The landlords say that the behavior is contrary to the Paragraph 20 of the tenancy agreement which provides that, "The Tenants and guests shall not carry on any activity that shall be deemed a nuisance and shall abide by all relevant rules and by-laws.

The landlord submitted into written evidence warning letters issued to the tenants dated January 25, 2018, February 13, 2018, March 26, 2018 and May 15, 2018. The January 25, 2018 letter primarily deals with various requests made by the tenants for repairs and maintenance of the rental suite. The landlord does not make any reference to the tenants' pets or child residing in the suite. The landlord does characterize the tenants' behavior as consistently rude, a nuisance and a material breach of Paragraph 20 of the tenancy agreement.

The landlord's letter of February 13, 2018 raises the issues of the tenants' pet cat and adult child who were confirmed to be residing in the rental suite during a site inspection on January 26, 2018. The landlords state that they believe this is a breach of a material term of the tenancy agreement and advise the tenants that the breach must be corrected within 30 days of the issuance of the letter. Subsequent correspondence from the landlord reiterates their position and that if the breaches are not remedied a Notice to End Tenancy will be issued.

The tenants submit that during the nearly two decades of this tenancy the tenants have only recently been told that they cannot have their pet or their adult son residing in the rental suite. The tenants also submit that their behaviour has not been contrary to the tenancy agreement such that this tenancy should end.

The tenants testified that the pet referenced by the landlord is a cat which they owned at the time that the original tenancy agreement of 1998 was entered. The tenants said that they originally owned three cats when the tenancy began and the others have passed on. They stated that until the letter of February, 2018 they have never been told that they may not have a pet. The tenants do not know why the tenancy agreement would contain a no pets clause when the landlord was aware of the presence of the cats.

Similarly, the tenants submit that their adult son is listed as one of the occupants in the original 1998 tenancy agreement. The tenants testified that during the course of the tenancy the son has moved out to live on his own during some periods, has returned to reside with the tenants during other periods and currently resides with the tenants in the rental suite. While the tenants were uncertain of the exact dates that their son occupied the rental suite they said that he has been living there since about 2010.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause, the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files an application to dispute the notice, the landlord bears the burden to prove, on a balance of probabilities, the grounds for the 1 Month Notice.

The landlord must show on a balance of probabilities, which is to say it is more likely than not, that the tenancy should be ended for the reasons identified in the 1 Month Notice. In the matter at hand the landlord must demonstrate that the tenant breached a

material term of the tenancy agreement. Residential Tenancy Policy Guideline 8 defines a material term as term of an agreement that is so important that the most trivial breach of that term gives the other party the right to end the agreement. Whether a term in an agreement is material is determined by the facts and circumstances of the tenancy agreement. To end a tenancy for a breach of a material term the party alleging the breach must inform the other party in writing that there is problem believed to be a material breach, that the problem must be fixed by a reasonable deadline, and if the problem is not fixed the party will end the tenancy.

The landlord points to three individual terms in the tenancy agreement of June, 2000 as material terms whose breach should give rise to cause to end this tenancy.

Paragraph 20 of the tenancy agreement provides that, “The Tenants and guests shall not carry on any activity that shall be deemed a nuisance and shall abide by all relevant rules and by-laws”. I find this term to be vague and unclear to the extent that it is unenforceable. The term references rules and by-laws but does not provide any further explanation as to who establishes these rules, how a tenant may determine what the relevant rules are or whether they are available in written form. The term prohibits activity that shall be deemed a nuisance but again provides no information on who makes that determination, what specific conduct would be deemed a nuisance and how a tenant may know what activities would fall under this heading. The fact that the term prohibits activities that would be deemed a nuisance **and** that the tenants must abide by rules and by-laws, indicates that even if a tenant complied with relevant rules they may be deemed to be a nuisance and in breach of this term. I find that this term of the agreement to be vague, open to subjective interpretation and too unclear to be enforceable.

I find that the terminology used for the portions of the tenancy agreement dealing with pets and additional occupants to have more certainty. The terms state that a tenant may not have pets of any kind or permanent occupants not named in the tenancy agreement, without the prior written consent of the landlord. The tenants do not dispute that these clauses are present in the tenancy agreement but submit that the landlord has not enforced them for nearly two decades and should be estopped from relying upon them to end the tenancy.

I find that the tenants’ argument to have merit. I accept the undisputed evidence of the tenants that their pet cat was one of three to have been owned at the outset of the tenancy. Over the course of this tenancy the landlord has had ample opportunity to

enforce the clauses of the tenancy agreement. I accept the tenants' undisputed evidence that they made it clear at the outset of the tenancy that they were in possession of three cats and that the landlord did not insist upon compliance. I accept the tenants' evidence that they were transparent that their adult child was residing with them, having returned to the rental building in or about 2010 after living independently for a time.

In the present case I find that the landlord was aware of both the pet and the adult son who were residing in the rental unit with the tenants. Based on the documentary evidence submitted I find that these were not raised as a violation of a material term of the tenancy agreement until February, 2018.

In the initial warning letter of January 25, 2018 the presence of a pet or additional occupant is not mentioned. The first mention of these issues as a basis for this tenancy to end is in the warning letter of February 13, 2018. The letter suggests that the violation was first discovered during an inspection on January 26, 2018 and the landlord testified that they took immediate action upon discovering the violation. I do not find the landlord's evidence to be persuasive.

I do not find it reasonable that the landlord was unaware of the presence of a pet and additional occupant for so many years. Based on the documentary evidence of the correspondence between the parties, the landlord or their agents attended the rental suite on numerous occasions throughout the tenancy responding to the tenant's requests and conducting maintenance. I find that it is beyond reasonable credulity that at no time was the landlord aware of the presence of a pet or additional adult occupant until January, 2018. I find it more likely that the landlord was aware of the presence of a pet and additional occupant or had ample opportunity to reach that conclusion during their attendance at the rental suite.

If these clauses in the tenancy agreement were meant to be a material term that would give rise to the right to end the tenancy it is reasonable to expect that the landlord would have issued a warning letter earlier in the tenancy. I find that the landlord's conduct, failing to investigate if there was a breach of the tenancy agreement and failing to issue any warning to the tenant prior to February, 2018 leads me to conclude that these terms were not considered material terms of the tenancy agreement.

Simply adding in a tenancy agreement the words, "this is a material term of the agreement", does not make it so. A material term is one that is so important that the most trivial of breaches would give rise to the right to end the tenancy. I find that a term

that is not investigated and not enforced for many years to fall far short of being a material term. Consequently, I find that the breaches of the terms of the tenancy agreement by the tenants do not constitute a breach of a material term that would give rise to an end of this tenancy.

I allow the tenants' application and cancel the 1 Month Notice. The notice is of no further force or effect. This tenancy continues until ended in accordance with the *Act*.

As the tenants' application was successful the tenants may recover the $100.00 filing fee for their application. As this tenancy is continuing the tenants may make a one-time deduction of $100.00 from their next scheduled monthly rent payment in full satisfaction of their monetary award.

Conclusion

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

The tenants may make a one-time deduction of $100.00 from their next scheduled rent payment.

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: October 22, 2018

Residential Tenancy Branch