



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution filed on September 26, 2018, wherein the Tenant sought to cancel a 1 Month Notice to End Tenancy for Cause and to recover the filing fee.

The hearing was conducted by teleconference at 9:30 a.m. on November 6, 2018. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The Tenant failed to indicate that the rental unit is a coach house located on the Landlord's property. As noted later in this my Decision, it appears there are numerous rental units on the rental property; as such, I amend the Tenant's Application to identify the unit as the "Coach House".

The parties confirmed their email addresses during the hearing. The parties further confirmed their understanding that this Decision would be emailed to both parties and that any applicable Orders would be emailed to the appropriate party.

Issues to be Decided

1. Should the Notice be cancelled?
2. Is the Tenant entitled to recovery of the filing fee?

Background and Evidence

Residential Tenancy Branch Rules of Procedure—Rule 6.6 provides that when a tenant applies to cancel a notice to end tenancy the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenant applied for dispute resolution and is the Applicant, the Landlords presented their evidence first.

The rental unit is a 2 bedroom coach house above the garage, which also includes another room which the Landlord stated could also be used as a bedroom. The Landlord, and the co-owner, W.T., live in the main-house. He stated that there is a third building, which is referred to as the “Cottage”, which is occupied by W.T.’s daughter.

The Landlord also stated that in 2015 the Tenant was living in the Coach House, as a sub tenant of the previous Tenant ,R.V. When R.V. left, the Landlord and R.L. entered into an oral tenancy agreement in late August or September 2016.

The Landlord stated that at the start of the tenancy the Tenant R.L. and his wife were living in the Coach House. At some point in time the Tenant and his wife separated.

A copy of the Notice was provided in evidence by the Tenant. The Notice was not dated, although the Landlord did indicate it was served on the Tenant on September 26, 2018.

The reasons cited on the Notice are as follows:

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

The Landlord stated that during the tenancy, and with the Landlord's consent, the Tenant moved his motor home onto a pad by the rental unit. The Landlord stated that from his observations the Tenant has been in his motor home more than he has been in the rental unit. He stated that the Tenant uses the shower and bathroom in the rental unit but appears to sleep in the motor home.

The Landlord stated that after the Tenant and his wife separated, and at some point in March of 2018, the Tenant allowed two people to live in the rental unit and to his knowledge the Tenant is subletting to them or has assigned his tenancy without the Landlord's consent.

The Landlord stated that earlier in March of 2018 the Tenant asked the Landlord if he could have someone move in to help share the property. The Landlord said that he agreed but told him he wanted to meet and vet the people moving in. The Tenant declined the Landlord's request and 2-3 weeks later these two people moved in.

The Landlord stated that the reason they issued the Notice is because they rented the unit to two people, not three and if they had rented to three people he would have charged more for wear and tear. Additionally, the Landlord stated that he has the right to know who is living in the rental unit.

W.T. also testified on behalf of the Landlord. She stated that in April of 2018 the Tenant approached her about obtaining a roommate. W.T. stated that she told him that she was not in favour of it. The Tenant disagreed and stated that he should be able to have guests and roommates.

W.T. stated that despite her telling the Tenant he could not have a roommate, he allowed a friend, L., and her daughter, L., to move in. W.T. confirmed that she has met them and was informed by L. that she was paying the Tenant \$1,000.00 per month. W.T. noted that the total amount of rent payable is \$1,000.00 such that L. is paying all the rent.

In response the Tenant testified as follows.

The Tenant confirmed that the Notice he received was not dated. He also confirmed that both "in person" and "on the door or in mailbox or mail slot" were checked off although "in person" was also crossed off on his copy. The Tenant confirmed that the Notice was personally served on him on September 26, 2018.

The Tenant confirmed that he did not have a written tenancy agreement with the Landlord.

The Tenant stated that he is only on the island on which the rental unit is located 3 days a week as he works off the island.

The Tenant confirmed that L. and L. share the rental unit with him. He stated that he continues to live in the rental unit, although he sleeps in his motor home. He further confirmed that he prepares his meals in the cottage, and on a barbeque beside his motor home. He stated that he normally eats out or barbeques, although sometimes he shares meals with L. and her daughter. He stated that he uses the kitchen and watches t.v. when they go to work.

The Tenant confirmed that he pays \$1,000.00 per month. He further confirmed that L. pays as she is able "up to \$1,000.00 per month" and he pays the all the utilities and takes care of any maintenance or yard work.

The Tenant stated that there are no hook ups for the motorhome. He confirmed that he uses the cottage for the bathroom and kitchen such that there is no sewage waste generated in the motorhome.

The Tenant stated that there is another person living on the property, a fellow by the name of L. who also lives in a motor home beside the cottage occupied by the Landlord's daughter. The Tenant stated that there is also a basement suite in the Landlord's house which is occupied by a tenant by the name of R.

In reply, the Landlord, L.M., confirmed that there is another person living on the property in a motorhome.

L.M. stated that he has met the occupant of the coach house once. He stated that he has not met the daughter. He confirmed that they have been here approximately six or seven months. He stated that the time he met the occupant she informed him that she was paying \$1,000.00 per month.

L.M. stated that in April of 2018 after the occupants moved in, L.M. offered to draft a tenancy agreement confirming his roommates and R.L. stated he would refuse to sign it.

Analysis

After consideration of the testimony and evidence before me, and on a balance of probabilities I find as follows.

A tenancy may only end in accordance with section 44 of the *Residential Tenancy Act*.

Section 44(1)(a)(iii) and section 47 provide that a landlord may end a tenancy with one month's notice if the landlord has cause to end the tenancy.

To be effective a notice to end tenancy must comply with section 52 which reads as follows:

- 52** In order to be effective, a notice to end a tenancy must be in writing and must
- (a) be signed and dated by the landlord or tenant giving the notice,
 - (b) give the address of the rental unit,
 - (c) state the effective date of the notice,
 - (d) except for a notice under section 45 (1) or (2) [*tenant's notice*], state the grounds for ending the tenancy,
 - (d.1) for a notice under section 45.1 [*tenant's notice: family violence or long-term care*], be accompanied by a statement made in accordance with section 45.2 [*confirmation of eligibility*], and
 - (e) when given by a landlord, be in the approved form.

The use of the word “must” confirms that section 52 is mandatory.

I find that the Notice was not dated by the Landlord. As such the Notice is ineffective.

To illustrate the importance of dating the Notice I note the following. A Landlord must prove they have cause to issue a notice to end tenancy under section 47 at the time the notice is issued. While events following the issuance of the notice may be relevant to some extent, an Arbitrator must find that the Landlord had sufficient cause *at the time the notice was issued*.

The Tenant's Application to cancel the Notice is granted. The tenancy shall continue until ended in accordance with the Act.

Although I am canceling the Notice due to its failure to comply with section 52, I wish to point out the following.

The Landlord issued the Notice alleging the Tenant had assigned or sublet without the Landlord's consent.

Pursuant to s. 34 of the *Residential Tenancy Act*, a tenant must not assign a tenancy agreement unless the landlord consents in writing. However, the Landlord bears the burden of proving the Tenant has assigned or sublet his tenancy.

The parties are reminded of the following definitions from *Residential Tenancy Branch Policy Guideline 19*

Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.

...

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.

The evidence before me indicates that the Tenant continues to have access to the rental unit such that it appears as though he has not assigned his tenancy or entered into a sub-tenancy as alleged by the Landlord.

The Landlord also claimed the Tenant allowed an unreasonable number of occupants in the rental unit.

Policy Guideline 19 further provides as follows:

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, with no rights or responsibilities under the *Residential Tenancy Act*.

The Landlord indicated that the rental unit had two dedicated bedrooms and possibly a third. The evidence before me indicates that the Tenant has allowed two other people to share the rental unit.

The parties agree that when the tenancy began the Tenant and his wife occupied the rental unit. The evidence before me indicates three people now occupy the rental unit.

Although it is not necessary for me to make such a finding, based on the fact I have canceled the notice pursuant to section 52, I note that more occupants than that which was contemplated when a tenancy began, does not, in and of itself, indicate an *unreasonable* number of occupants. Further, it is unlikely that occupants equal to the number of bedrooms in a rental unit would be considered *unreasonable*.

I also note the provisions of section 13(2)(f)(iv) of the *Act* allow a landlord to charge more rent for additional occupants, but only in the event the tenancy agreement specifically provides for such rent variation. In the case before me the parties agreed no written tenancy agreement exists.

Conclusion

The Notice was not dated such that it fails to comply with section 52. The Tenant's request to cancel the Notice is granted.

Having been successful in his application, the Tenant is entitled to recover the filing fee. Pursuant to section 72 of the *Act*, he may reduce his next month's rent by \$100.00 as recovery of this amount.

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: November 7, 2018

Residential Tenancy Branch