Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT MNDCT, OLC

Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution, filed on October 22, 2018, wherein they sought the following relief:

- An Order canceling a 1 Month Notice to End Tenancy for Cause issued on August 31, 2018 (the "Notice");
- an Order for monetary compensation from the Landlord;
- an Order that the Landlord comply with the *Residential Tenancy Act,* the *Regulations,* or the residential tenancy agreement; and,
- recovery of the filing fee.

The hearing was scheduled for October 30, 2018 at 11:00 a.m. Both parties called into the hearing. The Tenants were also assisted by an Articled Student, R.T. All in attendance were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

Preliminary Matter—Landlord's Evidence

Introduced in evidence by the Landlord were notes from a neighbour, E.H. The Landlord indicated in her online submission that these notes were not provided to the Tenants for confidentiality reasons.

Hearings before the Residential Tenancy Branch are conducted in accordance with the *Residential Tenancy Branch Rules of Procedure* and the Principles of Natural Justice.

The *Rules* provide that all evidence upon which either party intends to rely must be filed at the Branch and served on the other party within strict time limits.

As noted during the hearing, one of the Principles of Natural Justice is that a party to a dispute has the right to know of the claim against them including the opportunity to review and respond to any evidence which may be considered by the decision maker. As this evidence was not provided to the Tenants, I have not considered it in making my Decision.

At the outset of the Tenant's reply, R.T. claimed that she did not have all of the Landlord's evidence. The Landlord confirmed that she provided the hearing package to the Tenants on October 9, 2018. The Tenant C.J. admitted that she had seen the Landlord's photos, suggesting that she did not provide a copy to her counsel. I find that the Tenants received the Landlord's evidence (save and except for the notes from E.H.) and therefore considered the Landlord's evidence in making my Decision.

No other 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 Matter—Issues to be Decided

On their Application for Dispute Resolution the Tenants claimed one cent in monetary compensation. On their Monetary Orders Worksheet filed in support of their monetary claim, the Tenants simply wrote "receipts to follows" without any details of their monetary claim.

Residential Tenancy Branch Rule of Procedure 2.3 provides that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Hearings before the Residential Tenancy Branch are schedule on a priority basis. Time sensitive matters such as a tenant's request for emergency repairs or the validity of a notice to end tenancy are given priority over monetary claims.

It is my determination that the priority claim before me is the validity of the Notice. I also find that this claim is not sufficiently related to the Tenants' monetary claim or their request for an Order that the Landlord comply with the *Act,* the *Regulations,* or the tenancy agreement; accordingly I exercise my discretion and dismiss the balance of the Tenants' claims with leave to reapply.

Issues to be Decided

1. Should the Notice be cancelled?

2. Should the Tenants recover 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 Tenants applied for dispute resolution and are the Applicants, the Landlord presented their evidence first.

The Landlord testified that she does not reside on the property, although she does use the property as a farm. She also testified that the rental unit is part of a side by side rental building, both of which are rented out. She confirmed that she also rents out the "old house" on the property in the summer as a short term vacation rental.

The Landlord testified that this tenancy began "gradually" over time starting some time in November of 2017 as that was when the Tenants began bringing their personal items to the rental unit.

She confirmed that there was no written tenancy agreement at the start of the tenancy, although she did provide them with a tenancy agreement in June of 2018 setting out her understanding of the tenancy. She stated that they refused to sign the agreement.

The Landlord stated that the reasons giving rise to Notice relate to her concerns over how the Tenants keep their share of the rental property as well as their use of a common storage area.

The reasons set out in the Notice are as follows:

- the Tenant or a person permitted on the residential property by the Tenant has
    - significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property, and,
    - seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant,
- the Tenant has not done required repairs of damage to the unit/site;
- Breach of a material term that was not corrected within a reasonable time after written notice to do so;

The Landlord stated when she first rented to them she believed that they were both retired; however, as the tenancy went on she realized that the male Tenant builds houses and does renovations as a "side job". She confirmed that in the Spring of 2018 it became clear to her that he was working more regularly as when she arrived she saw large equipment on the rental property.

The Landlord confirmed that she knew that he could "do things" because originally she had hired him in October 2017 to do some finishing at the duplex. She claimed that she did not realize he would have a large construction business operating out of the rental unit.

The Landlord stated that her concern is that the Tenants have all this construction equipment spilling over into common areas and which doesn't fit with the overall use of the property. She stated that their personal items and construction equipment have completely taken over the shared storage areas.

Photos provided in evidence by the Landlord depict the storage shed as being full of such items as well as construction equipment and materials in most of the outdoor areas.

The Landlord also stated that the other renter, E.H., in the other side of the duplex, has not been able to use the storage shed for her personal storage as the subject Tenants have told her that she is not allowed to. The Landlord confirmed that this was a term of

E.H.'s tenancy agreement that she have access to this shared area such that the Tenants are affecting E.H.'s legal right to access to this area.

The Landlord confirmed that she has raised these issues with the Tenants on numerous occasions, both in writing and personally. On May 27, 2018 she met with the Tenant, C.J., to discuss her concerns following which she provided a letter (of the same date) to the Tenants wherein she detailed her expectations around cleaning up the area. The letter included the following instructions:

> To be completed by June 10, 2018:
>
> 1. tent door goes on
> 2. all possessions cleared out in front of house
> 3. gate to conceal back area installed
> 4. front of annex completed (I will supply some plywood)
> 5. trailer moved
>
> To be completed by September 1, 2018:
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> - back area by the annex to be cleaned up; and,
> - 1/3 of the storage area cleared for use by E.H. by no later than September 1, 2018.
>
> Finally, she directed that the tent and wood pile were to be removed by April 1, 2019.

The Landlord testified that the condition in which the Tenants keep the rental property significantly impacts E.H. as the Tenants and E.H. share a backyard and she has to look at all of these possessions and construction equipment from her side of the duplex.

The Landlord also testified that this negatively impacts her vacation rental business. She stated that this business involves the old house on the property which the Landlord maintains as a "pristine property" and is rented out at a premium. She stated that the view from the vacation rental is negatively impacted by the condition of the Tenants' property.

The Landlord also testified that she keeps the monthly rent in the duplex low as she is concerned about the lack of reasonable rental accommodation on the island upon which the rental unit is located. To facilitate this, she relies on the higher rent from the weekly vacation rental of the old house to subsidize the amounts charged for the duplex. She stated that she informed the Tenants of this when they moved in and further informed

them that it was necessary that they keep the property tidy and well maintained to ensure she can rent out the old house at a premium.

In response to the Landlord's claims, the Tenant, C.J., testified as follows. She stated that they moved in April 1, 2018 and paid rent for March 2018, not November 1, 2017 as alleged by the Landlord. She confirmed that the Landlord hired L.L. to complete some finishing work at the rental unit.

C.J. stated that they are still in the process of "settling in there" and that it took a long time to move their items in as they needed to consolidate all of their items.

C.J. stated that the landlord expected them to care for the lawn, yet never told them to do so.

She also claimed that they have acceded to the Landlord's requests to clean up the property and noted that the trailer has been gone for two months and the big vinyl tent was moved out in early September. She also stated that there is a separation between their driveway and the backyard which means that the view from the road is not as described by the Landlord and that the neighbour, E.H., cannot see their items.

C.J. further stated that they were using the tools outside to finish work inside the rental unit as requested by the Landlord and as such the items were moving in and out as needed.

In response to the Landlord's claim that E.H. does not have adequate access to the storage shed, C.J. said that she told E.H. that they would clear a space for her and that they have moved their items to facilitate this.

The Tenant alleged that the rental unit had been cleaned up since the photos were taken by the Landlord, but again stated that it was a "process".

The Tenant confirmed that she was aware the Landlord subsidized the rental for the duplex by charging more for the old house vacation rental. She also confirmed she was aware of the Landlord's need to have the rental property in presentable condition to ensure she could rent the vacation rental out.

The Tenant confirmed that she believes that this situation is "workable" and that the tenancy does not need to end. She stated that she understood how the Landlord

wanted to have the rental unit ready for the city folk for a “pastoral view” but views the property as a working property because it is a farm.

Counsel for the Tenants submitted that the back yard, including the septic area, is shared by the Tenants and the other Tenant in the duplex such that the Landlord is responsible for the maintenance of the yard pursuant to section 32(1) of *Act* and *Residential Tenancy Agreement Policy Guideline 1.*

Counsel also submitted that the fact that the tenancy agreement is oral has created a misunderstanding, the consequence of which should not be borne by the Tenants alone.

Counsel for the Tenants denied that L.L. is operating a business out of the rental property and stated that he stores his construction equipment elsewhere. She noted that the construction trailer was on the property for only a month and the tent has been moved since September.

Analysis

Ending a tenancy is a significant request and may only be done in accordance with the *Residential Tenancy Act.* A landlord who seeks to end a tenancy for cause pursuant to section 47 of the *Act* bears the burden of proving the reasons for ending the tenancy on a balance of probabilities.

After consideration of the testimony and evidence of the parties, I find the Tenants’ Application should be granted and the Notice should be cancelled.

The Landlord alleged the Tenants have *significantly* interfered with or unreasonably disturbed another occupant or the Landlord, as well as *seriously* jeopardizing the health or safety or lawful right of the landlord or another occupant. The use of such wording in the legislation is purposeful and reflects the standard of proof required for a landlord to end a tenancy for these reasons.

I find the Landlord has failed to meet the burden of proving this tenancy should end for the reasons cited on the Notice.

The Landlord alleged that the Tenant, E.H., was significantly impacted by the condition in which the Tenants keep their side of the duplex. While E.H. provided a letter to the

Landlord, that letter was not admissible as it was not shared with the Tenants. Further, E.H. did not attend the hearing to provide testimony. While it may be that the condition in which the Tenants keep their portion of the rental property negatively impacts E.H., I find the Landlord has failed to submit sufficient evidence to support a finding that this is a *significant interference* or *unreasonable disturbance* warranting an end to this tenancy.

Similarly, the Landlord stated that she expects the condition the rental unit is kept by the Tenants to negatively impact her vacation rental business of the old house. At present she was not able to provide any evidence to support such a finding. Should the circumstances change whereby this business is negatively impacted, the Landlord is at liberty to serve another 1 Month Notice to End Tenancy for Cause.

The Notice also states the Tenants have not done required repairs of damage to the rental unit. The evidence indicates the parties agreed the Tenant, L.L., would complete renovations and maintenance to the property. The Landlord confirmed that she was not alleging the Tenants had damaged the property; rather, she submitted that they did not complete the tasks as agreed. Section 47(1)(g) contemplates *damage* caused by the Tenants and is therefore not applicable to the circumstances in this case.

I find the Landlord has also failed to prove that the Tenants have breached a material term of the agreement.

Residential Tenancy Policy Guideline 8—Unconscionable and Material Terms provides guidance with respect to the issue of material terms and provides in part as follows:

> **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.

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:

- 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.

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.

Without a written tenancy agreement, it is difficult to find that a particular clause/term is a material term of a tenancy. While oral agreements are enforceable pursuant to section 1 of the *Act,* parties are encouraged to evidence their agreement in a written tenancy agreement. Further, section 13(1) of the *Act* requires a landlord to prepare such a written agreement.

Oral agreements often result in disagreements between the parties as to their terms. I agree with counsel for the Tenants that any ambiguity in the terms of the contract should not be interpreted to the detriment of the Tenants. This is consistent with the legal principle *Contra proferentem* which provides that where there is ambiguity in a contract the contract should be interpreted in favour of the party who did not draft the contract. In this case, the Landlord is responsible for drafting the residential tenancy agreement (contract) and as such any ambiguity should be interpreted in favour of the Tenant.

In this case, the Landlord alleges that the storage of construction equipment and materials was a breach of a material term. As she originally hired the Tenant, L.L., to do work on the property, and this work involved the use of such construction equipment and materials, it is incongruous to suggest that storage of such items would result in an end to the tenancy.

The evidence before me suggests the Tenants have taken steps to remove large construction equipment and materials since receiving the Landlord's written request that they do so, as well as receiving the Notice. They acknowledge that their rent is subsidized by the higher rent charged for the vacation rental and that they are expected to keep their share of the rental property in a presentable condition. I am confident the Tenants will continue to improve the appearance of their outdoor areas.

Similarly, I accept the Tenants' submissions that they have cleared the storage area to make room for their neighbour, E.H., to have access to the storage area. Should this continue to be an issue, the Landlord is at liberty to re-issue a Notice to End Tenancy.

Conclusion

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

Having been substantially successful in their application the Tenants are entitled, pursuant to section 72 of the *Act,* to recover the $100.00 filing fee. They may reduce their next month's rent accordingly.

The Tenants' claim for an Order that the Landlord comply with the *Residential Tenancy Act,* the *Regulation* and the tenancy agreement, as well as their request for monetary compensation is dismissed with 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 *Residential Tenancy Act*.

Dated: November 14, 2018

Residential Tenancy Branch