



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding REMAX MASTERS REALTY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants on December 13, 2018 (the “Application”). The Tenants applied to dispute a One Month Notice to End Tenancy for Cause dated December 06, 2018 (the “Notice”). The Tenants sought reimbursement for the filing fee.

Legal Counsel appeared for the Tenants at the hearing. The Property Manager appeared at the hearing for the Landlord.

The parties confirmed the correct spelling of the names of Tenant S.S. and the Landlord and these are reflected in the style of cause.

I explained the hearing process to the parties who did not have questions when asked. The Property Manager provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose in this regard.

The parties were given an opportunity to present relevant evidence, make relevant submissions and ask relevant questions. I have considered the documentary evidence submitted as well as all oral testimony and submissions of the parties. I will only refer to the evidence and submissions I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. If the Notice is not cancelled, should the Landlord be issued an Order of Possession?
3. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. It is between the Landlord, for the owner, and Tenants in relation to the rental unit. The tenancy started March 01, 2017 and is for a fixed term ending February 28, 2019. Rent is \$7,800.00 per month due on the first day of each month. The agreement has an addendum which includes the following term:

1. USE OF PREMISES....The landlord grants permission for sublets including short term sublets so long as the upkeep and quality of care for the home is not compromised. Tenant shall comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi-governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises.

The Notice was submitted as evidence. The grounds for the Notice are a breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Property Manager testified that he sent the Notice by registered mail to the Tenants December 07, 2018. Legal Counsel said he was sure the Tenants received the Notice a day or two after it was sent and said he accepted the testimony of the Property Manager in this regard.

The Property Manager submitted that the Tenants have breached term one in the addendum to the tenancy agreement.

The position of the Landlord was that the Tenants were marketing or listing the rental unit for short-term accommodation contrary to a city by-law and the Landlord was being fined by the city for this. The Property Manager testified that the Landlord had received an order from the city in relation to this. The Property Manager said the Landlord wanted to comply with the city by-laws and that the city suggested looking at the tenancy agreement for an avenue to evict the Tenants. The Property Manager said the Landlord is taking the city's guidance in relation to what to do about the situation.

The Property Manager said the Landlord is relying on the order of the city to show the Tenants have breached term one in the addendum. The Property Manager also said the Landlord is

relying on an admission by the Tenants that they are marketing or listing the rental unit for short-term accommodation. The Property Manager said the Tenants never disputed this.

The Property Manager testified that he reviewed the tenancy agreement, including term one in the addendum, with the Tenants upon the parties signing the agreement. The Property Manager said he thought the fact term one was in the agreement meant it was a material term of the agreement. The Property Manager advised that all written warnings sent to the Tenants about this issue were included in the evidence package. The Property Manager said the written warnings did not state that the Tenants were breaching a material term of the tenancy agreement or that the Landlord viewed term one of the addendum to be a material term.

I asked the Property Manager why term one in the addendum is a material term of the tenancy agreement. He said he was unaware of the distinction but that it should be a material term because of the excessive fines the owner is receiving from the city.

The Property Manager said the parties did not have any particular discussion about term one itself when the agreement was signed. He then said the Landlord mentioned short-term rentals were fine and that the parties did discuss the term. The Property Manager testified that term one was changed because it was important to the Tenants to be able to do short-term rentals. The Property Manager testified that the Landlord was fine with short-term rentals as long as they complied with the relevant law and therefore included this in the term.

Legal Counsel acknowledged that the Tenants signed and understood the tenancy agreement. Legal Counsel did not make further submissions in relation to term one being a material term other than to submit that it is not a material term of the tenancy agreement.

Legal Counsel submitted that the RTB does not have jurisdiction in this matter. He submitted that the city is expecting the RTB to enforce their by-laws and that the city should enforce them rather than the RTB. Legal Counsel pointed to section 4(e) of the *Residential Tenancy Act* (the "Act") which states that the Act does not apply to "living accommodation occupied as vacation or travel accommodation". He submitted that the RTB does not have jurisdiction over roommates, subleasing or short-term rentals.

Legal Counsel submitted that term one in the addendum states that the rental unit can be used for short-term rentals and therefore the Tenants cannot be breaching this term as the term itself permits short-term rentals.

Legal Counsel submitted that a similar city by-law as is at issue here was in force when the tenancy agreement was entered into and therefore the term in the agreement was already contrary to the city by-laws at the outset. He said the Landlord acquiesced to a breach of the city by-laws by including term one in the addendum. Legal Counsel submitted that the Landlord cannot now use the term to evict the Tenants. He submitted that the Landlord waived their right to do so by allowing for short-term rentals in the tenancy agreement.

I did not understand Legal Counsel to acknowledge that the Tenants are marketing or listing the rental unit for short-term rentals as alleged.

In reply, the Property Manager testified that the Landlord thought the Tenants wanted to rent some of the rooms in the rental unit to students and therefore the Landlord allowed for short-term rentals. He said the understanding was still that the Tenants would comply with the relevant laws and that therefore the remainder of term one was included in the tenancy agreement.

Analysis

I am satisfied I have jurisdiction in this matter. Section 4 of the *Act* states that the *Act* does not apply to “living accommodation occupied as vacation or travel accommodation”. This applies where the alleged “tenant” stays at a residence for vacation or travel purposes. Here, the parties entered into a fixed term “residential tenancy agreement” starting March 1, 2017 and ending February 28, 2019. There is no indication in the materials that the Tenants occupy the rental unit for vacation or travel purposes. Nor was this suggested by any of the parties. Section 4 of the *Act* therefore does not exclude jurisdiction in this dispute.

The vacation or travel aspect of this dispute relates to the Tenants allegedly renting the rental unit out to others on a short-term basis, presumably for vacation or travel. Section 4 of the *Act* is not relevant here as the dispute is not between short-term renters and the Tenants or short-term renters and the Landlord. The dispute is between the Tenants and Landlord who have entered into a “residential tenancy agreement”.

Nor do I accept that I have no jurisdiction based on the remaining arguments made by Legal Counsel. This dispute is not between roommates, parties who have sub-let a residence or parties who have entered into a short-term tenancy agreement. The Tenants are clearly “tenants” as that term is used in the *Act*. The Landlord is clearly a “landlord” as that term is defined in section 2 of the *Act*. These parties clearly entered into a “tenancy agreement” as that term is defined in section 2 of the *Act*. I note that the tenancy agreement is a fixed term tenancy for two years. In these circumstances, I have jurisdiction over the dispute and the jurisdiction of the RTB over roommates, sub-lets and short-term rentals is irrelevant.

I acknowledge that I do not have jurisdiction to enforce city by-laws. However, that is not what the Landlord is seeking. The Landlord is seeking to enforce term one in the addendum of the tenancy agreement. It is clearly within my jurisdiction to enforce tenancy agreements. The fact that the subject matter of the dispute relates to a city by-law does not preclude jurisdiction given the wording of term one in the addendum which states that the Tenants will “comply with any and all laws, ordinances, rules and orders of any and all governmental or quasi-governmental authorities affecting the cleanliness, use, occupancy and preservation of the Premises”. Compliance with city by-laws is a term of the tenancy agreement and therefore a matter over which I have jurisdiction.

The Landlord was permitted to serve the Notice based on the ground noted pursuant to sections 47(1)(h) of the *Act*. The Tenants had 10 days from receiving the Notice to dispute it under section 47(4) of the *Act*.

The Property Manager testified that he sent the Notice by registered mail to the Tenants December 07, 2018. Legal Counsel said he was sure the Tenants received the Notice a day or two after it was sent and accepted the testimony of the Property Manager in this regard. Therefore, I find the Tenants received the Notice December 08, 2018 or December 09, 2018. Based on the branch records, I find the Tenants disputed the Notice December 13, 2018, within the time limit set out in section 47(4) of the *Act*.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules of Procedure. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

Section 47(1)(h) of the *Act* states:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

...

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

Policy Guideline 8 deals with material terms in a tenancy agreement and states:

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.

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.

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...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...

[emphasis added]

I am not satisfied term one in the addendum is a material term of the tenancy agreement for the following reasons.

Neither the tenancy agreement nor the addendum state term one is a material term.

The Property Manager is the person who reviewed the tenancy agreement with the Tenants prior to signing. The Property Manager was unaware that there is a difference between a term and material term in a tenancy agreement. This causes me to question how the parties could have intended term one in the addendum to be a material term.

When asked why I should find term one to be a material term, the Property Manager focused on the fines being issued to the owner of the rental unit. As noted above in the Policy Guideline, it is not the consequences of a breach of a term that determines whether it is material or not.

I am not satisfied based on the testimony or evidence of the Landlord that term one was determined by the parties to be a material term of the tenancy agreement. I acknowledge that the Property Manager testified that the term was important to the Tenants; however, I am not satisfied both parties agreed it was so important that the most trivial breach of the term would give the other party the right to end the agreement. I would expect strong evidence on this point in the absence of an agreement stating a term is a material term. Here, the agreement does not state term one is a material term and I do not find that the Landlord has submitted strong evidence to support that it is a material term or to demonstrate the intention of the parties in this regard.

Upon considering the testimony of the parties and evidence submitted, the Landlord has not satisfied me that term one in the addendum is a material term of the tenancy agreement. This is a precondition to finding that the Landlord has grounds to end a tenancy under section 47(1)(h) of the *Act*. In the absence of a finding that the term relied on is a material term, the Landlord has failed to prove the grounds for the Notice.

I also note that the Landlord did not inform the Tenants in writing that they believe the Tenants are breaching a material term of the tenancy agreement as required by Policy Guideline 8. I would not have upheld the eviction in these circumstances given the agreement does not state term one is a material term and the Landlord did not provide notice that they believe the Tenants are breaching a material term.

In the circumstances, I am not satisfied the Landlord has established the grounds for the Notice. The Notice is therefore cancelled. The tenancy will continue until ended in accordance with the *Act*.

Given the Tenants were successful in this application, I award them reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, the Tenants are permitted to deduct \$100.00 from one future rent payment as reimbursement for the filing fee.

Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

The Tenants are awarded reimbursement for the \$100.00 filing fee. The Tenants are permitted to deduct \$100.00 from one future rent payment as reimbursement for 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 *Act*.

Dated: January 28, 2019

Residential Tenancy Branch