Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC ERP FFT LRE OLC PSF

Introduction

This hearing dealt with the tenant's application pursuant to the Residential Tenancy Act (the "*Act*") for:

- Cancellation of the landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to section 47;
- An order to allow access to or from the rental unit or site for the tenant or the tenant's guests pursuant to section 30;
- An order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70;
- An order to the landlord to make emergency repairs to the rental unit pursuant to section 33;
- An order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- Authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord acknowledged receipt of the Notice of Hearing and Application for Dispute Resolution. Both parties acknowledged that they received the other party's evidence package. No issues of service were raised. I find each party was served in accordance with the *Act*.

Preliminary Issue: Severance of Portion of Tenant's Application

Residential Tenancy Branch Rules of Procedure, number 2.3 states that:

> "**2.3 Related issues**
>
> Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply."

It is my determination that the priority claim regarding the One Month Notice and the continuation of this tenancy is not sufficiently related to any of the tenant's other claims to warrant that they be heard together. The parties were given a priority hearing to address the question of the validity of the One Month Notice.

The tenant's other claims are unrelated in that they do not pertain to facts relevant to the grounds for ending this tenancy as set out in the One Month Notice. I exercise my discretion to dismiss all the tenant's claims with leave to reapply except for the cancellation of the One Month Notice and recovery of the filing fee for this application.

Both parties were informed of section 55 of the *Act* which requires, when a tenant submits an Application for Dispute Resolution seeking to cancel a One Month Notice to End Tenancy for Cause 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 has issued a notice to end tenancy in compliance with the *Act*.

Issue(s) to be Decided

1. Is the tenant entitled to cancellation of the One Month Notice pursuant to section 49 of the *Act*?
2. Is the tenant entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
3. If the tenant's application is dismissed and the One Month Notice is upheld, is the landlord entitled to an order of possession, pursuant to section 55 of the *Act*?

Background and Evidence

The parties agreed they entered into a tenancy which started on March 15, 2012 and is ongoing. Rent of $700.00 a month was payable on the first of the month. At the beginning of the tenancy, the tenant provided a security deposit of $350.00 which the landlord holds.

A copy of the tenancy agreement was submitted as evidence.

The landlord submitted the following evidence:

- A One Month Notice dated October 31, 2018 stating a move out date of November 1, 2018;
- Multiple photographs of the interior of property;
- Multiple photographs of the parking area;
- Multiple photographs of a camper located on the property; and
- A service receipt from a plumbing/heating company.

The landlord testified that the rental until consisted of a basement suite located in a single-family residence. The landlord testified that there are three rental units on the property: two rental units in the basement and one upstairs.

The landlord testified that there is a room adjacent to the tenant's rental until which contains two hot water furnaces for the property (hereinafter referred to as the "utility room"). The landlord stated that, although there is an access door to the utility room from the tenant's unit, the utility room was not part of the tenant's rental unit. The landlord testified that there was also an exterior entry in the utility room. However, the landlord testified that the tenant blocked this exterior access without the landlord's permission. Accordingly, the landlord did not have access to the utility room without obtaining the tenant's permission; accordingly, the landlord could only access the utility room through her unit.

The landlord testified that the tenant's use of the utility room was unpermitted and interfered with the operations of the property. He said that the tenant regularly hung laundry to dry near the hot water tanks which obstructed airflow to the hot water tanks. The landlord testified that this frequently caused the pilot light in the hot water tanks to go out which interfered with hot water supply to the other units. However, the landlord testified that he has not had the hot water tanks recently inspected or serviced by a plumbing/heating service provider.

The landlord provided a photograph showing clothes hanging near the hot water tanks. The landlord testified that, when the hot water tank pilot light went out, he needed to go to the utility room to re-ignite the pilot light. The tenant permitted the landlord access through her unit on 24-hour notice.

The landlord also testified that the tenant was improperly using two parking spaces at the property for the past three years without his consent. The landlord testified that the property has three parking spaces: one space for each of the rental units. He referenced the tenancy agreement which stated that only one parking space is included with the tenancy. The landlord presented a photograph which he stated showed two of tenant's vehicles parked on the property. However, the landlord also testified that he never instructed the tenant to only park one vehicle on the property.

The landlord also testified that the tenant has been storing a camper on the front yard of the property since July 2018 without his permission. The landlord testified he immediately demanded the tenant remove the camper, which the tenant refused to do. The landlord testified that this camper blocked the driveway and it hindered the landlord's ability to perform roofing work on the property. He also claimed the camper was unsightly.

The landlord presented a letter dated October 10, 2018 demanding that the tenant remove her camper and that she also remove her possessions from the vicinity of the hot water tanks by October 17, 2018 or the landlord would end the tenancy. On October 31, 2018, the landlord testified that he personally delivered the One Month Notice to end this tenancy to the tenant as the tenant failed to carry out the instructions in the letter.

The landlord's One Month Notice provided notice of termination of the tenancy for cause pursuant to s. 47(d)(ii), s. 47(d)(iii) and s. 47(h) of the *Act* which states that:

> 47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
> …
> (d) the tenant or a person permitted on the residential property by the tenant has
> (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
> (iii) put the landlord's property at significant risk;
> (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”

The tenant disagreed with the landlord and testified that the utility room was part of her rental unit; she has been occupying that space since she started her tenancy in 2012. The tenant testified that she used the utility room to launder her clothes and store her possessions.

The tenant acknowledged blocking the exterior door, so the landlord could not enter,and requiring 24-hour notice to access the utility room. However, the tenant testified that was appropriate since the utility room was part of her rental until and she had the right to protect her security and safety.

The tenant testified that, although she did store possessions in the laundry area, she did not hang clothes near the hot water tank as claimed by the landlord. The tenant presented a photograph which showed the utility room being much neater and cleaner that the photograph presented by the landlord.

The tenant testified that the drying of her clothes did not affect the hot water tank, as claimed by the landlord. The tenant stated that she had the hot water tanks inspected by a plumbing/heating company and the service technician advised her that drying clothes did not interfere with the functioning of the hot water tanks. Rather, the tenant testified that the technician told her that hot water tanks were not operating properly because the hot water tanks needed routine cleaning and maintenance. The tenant presented a receipt from the plumbing/heating service provider.

The tenant testified that she did park two vehicles on the property. However, she testified she used the second space with the permission of another tenant who did not use the space.

The tenant acknowledged that she did place a camper on the front yard of the property without the landlord’s permission. The tenant testified that the camper is on the lawn and it does not block the driveway access. She testified the camper does not move and is fixed on blocks. The tenant stated she needed it for storage of her personal possessions.

The deadline to dispute the One Month Notice is ten days after effective service. The tenant acknowledged personal service of the One Month Notice on October 31, 2018. The tenth day after October 31, 2018 was Saturday, November 10, 2018. However,

when the deadline to file an application falls on a non-business day of the RTB, the deadline is extended to the next business day of the RTB. In this matter, the deadline would extend to Tuesday, November 13, 2018 since the RTB is closed on Saturdays and Sundays and the branch was closed on Monday, November 12 for Remembrance Day. As such, I find that tenant has filed this application for dispute resolution within the ten-day period.

Analysis

The parties submitted considerable evidence and testimony. I will only reference relevant facts in my decision.

As set out in the Residential Tenancy Branch Rules of Procedure 6.6, if the tenant files an application to dispute a notice to end tenancy, the landlord bears the burden to prove the grounds for the notice. Accordingly, the landlord's One Month Notice must be cancelled unless the landlord can prove on a balance of probabilities that cause existed for the notice.

The landlord claimed that the One Month Notice is valid on all three circumstances upon which the notice is based: the tenant's conduct in relation to the utility room, the tenant's use of two parking spaces; and the tenant's storage of a camper without the landlord's consent. I will analyse each of these issues separately.

Utility Room

The landlord claimed that tenant's use of the laundry room endangered the property and breached a material term of the tenancy agreement. Specifically, he argued that the clutter from clothing in the utility room caused extinguishment of the pilot light from lack of air flow. However, I do not find this argument persuasive. The landlord has not had the hot water tanks professionally serviced and the landlord did not present any expert evidence establishing a causal relationship between storing clothes in the utility room and the proper functioning of the hot water tank.

On the other hand, the tenant had the hot water tank professionally serviced and she was advised that the problems with the hot water tank were not related to airflow problems. Rather, the tenant's evidence suggests that issues with the hot water tanks was related to a need of cleaning and servicing which is unrelated to tenant's use of the utility room.

I find that the landlord has not produced adequate evidence to establish on the balance of probabilities, that the tenant's use of the utility room "seriously jeopardized the health or safety of the landlord" pursuant to s. 47(d)(ii) of the *Act* or "put the property at significant risk" pursuant to s. 47(d)(iii) of the *Act*.

The landlord also claimed that the tenant's use of the utility room breached a material term of the contract. I find that the tenant has been openly asserting exclusive control over the utility room by barricading the external access, controlling access through her rental unit, using the room to launder her clothes, and store possessions. This conduct raises the issue of estoppel.

Estoppel is a legal principle wherein a party can waive their right to assert a legal right they might otherwise have. Estoppel arises when:

- the parties have a shared understanding;
- one party conducts itself in reliance on that understanding; and
- that party would suffer a detriment if the other party is now permitted to act inconsistent with that understanding.

In this case, although the landlord claims that the utility room was not included as part of the tenant's rental unit, the landlord's failure to communicate any disagreement with the tenant using the utility room for the past six years means that the landlord, through his silence, has provided implied consent to the tenant to occupy and use the utility room. Further, I note that the landlord's own letter dated October 10, 2018 does not demand that the tenant stop using the utility room. Rather, the letter simply demands that the tenant stop drying clothes in the immediate vicinity of the hot water furnaces.

It is also my finding that the tenant has shown that, to allow the landlord to now depart from the long-implied position would be detrimental to the tenant. The tenant has an established practice of using the utility room to launder her clothes and store her possessions.

For the above-stated reasons, I find that the landlord is estopped from denying the tenant access to the utility room and I find the landlord has not met the burden of proof necessary to establish that the tenant's use of the utility room breached a material term of the tenancy agreement.

Parking Spaces

The landlord also asserted that cause existed to end this tenancy because the tenant has been using two parking spaces instead of one. I find that the tenant's use of two parking spaces has not "seriously jeopardized the health or safety of the landlord" or "put the property at significant risk". The only issue in dispute in relation to the tenant's use of the parking spaces is whether this breached a material term of the tenancy agreement

The tenant acknowledged that she used an additional parking space with the permission of another tenant In the absence of any contradictory evidence from the landlord, I find the tenant's explanation to be credible. As such, I do not find that the tenant breached a term of the contract by parking a second vehicle on the property. Further, even if I had found that the tenant had breached the tenancy agreement, I would not grant an order of possession based on the tenant's use of the parking spaces as the landlord has not provided any warning.

Camper

I find the landlord has failed to provide adequate evidence that, on the balance of probabilities, the camper seriously jeopardized the health or safety of the landlord" pursuant to s. 47(d)(ii) of the *Act* or "put the property at significant risk" pursuant to s. 47(d)(iii) of the *Act.*

The landlord did not submit evidence in support of his claim that the location of the camper hindered the landlord's ability to make roofing repairs.. Rather, the tenant testified the landlord was able to perform the roof maintenance work despite the location of even the camper.

The landlord did not provide the tenant with a notice to end tenancy on the basis that the tenant "…significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property" pursuant to s. 47(d)(i) of the *Act*. I note that the tenant's storage of the camper on the property may well have violated s. 47(d)(i) of the *Act*. However, I will not make any findings in regard to s. 47(d)(i) of the *Act* since the landlord did not make such a claim in his One Month Notice.

The final issue that needs to be analyzed is whether the storage of the camper breached a material term of the tenancy agreement. A party may end a tenancy for the breach of a material term of the tenancy, but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the

breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term.

As noted in *Residential Policy Guideline No.8 Unconscionable and Material Terms*, 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. The question of whether a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties have stated in the agreement that one or more terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether the clause is material.

Residential Policy Guideline No.8 reads in part as follows:

> To end a tenancy agreement for breach of a material term the party alleging a breach 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.

In this matter, we must first analyze whether the tenant breached a material term of the tenancy agreement by storing the camper on the front yard of the property. The tenancy agreement provided the tenant with exclusive possession of the rental unit.

The *Act* defines a "rental unit" as the living accommodation rented or intended to be rented to a tenant. On the other hand, the *Act* defines a “common area" as any part of residential property the use of which is shared by tenants, or by a landlord and one or more tenants. I find that tenant’s rental unit consists of the basement suite occupied by the tenant.I also find that the front yard of the property is a common area since it is shared with the other tenants.

In this matter, the tenancy agreement is silent in regard to the use of the common area. However, s. 28 of the *Act* states that a “…tenant is entitled to quiet enjoyment including, but not limited to, rights to the following: … (d) use of common areas for reasonable and

lawful purposes, free from significant interference." I find that there is an implied term in the tenancy agreement that the tenant may use the common areas of the property, including the front yard area, for reasonable and lawful purposes, free from significant interference pursuant to s. 28 of the *Act*.

However, since the common area is shared, I also find that there is an implied term in the tenancy agreement that the tenant shall not exclusively possess the common area in a way that prevents the other tenants or the landlord from using the common areas of the property. The storage of the camper on the property may constitute a violation of this implied term. However, I do not find that the landlord has provided adequate evidence to establish that the implied term of the tenancy agreement which prevents the tenant from exercising exclusive possession of the front yard is a material term of the tenancy agreement.

Accordingly, I find that the landlord is not entitled to an order for possession based upon the tenant's storage of the camper in the front yard. Although I find that the landlord has not satisfied his burden to establish cause to end this tenancy, I have not made a finding that the tenant has a right to store their camper on the property. The tenant may have breached the tenancy agreement by storing the camper on the property and the landlord may pursue for applications for remedies for this conduct. I only find herein that the landlord has not satisfied his burden of establishing on a balance of probabilities that this breach was a material term of the contract.

The landlord may make a further application for dispute resolution for an order under section 62 of the *Act* to require the tenant to remove the camper; if such an order were granted, the landlord could seek a termination of this tenancy if the tenant failed to comply with the order. However, such an application is not presently before me.

Since the tenant has been successful in this application, I grant the tenant's request to recover the $100.00 filing fee pursuant to section 72 of the *Act* which the tenant may deduct from a future rent payment on a one-time basis.

Conclusion

I dismiss all the tenant's claims, except the tenant's claims for cancellation of the One Month Notice and recovery of the filing fee for this application, with leave to reapply.

I cancel the landlord's One Month Notice. This tenancy shall continue until it is ended in accordance with the *Act*.

The tenant may withhold $100.00 from a future rent payment on one occasion as reimbursement of the filing fee pursuant to section 72 of the *Act*.

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: January 2, 2019

Residential Tenancy Branch