



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, OPC, FFL

Introduction

This hearing dealt with the tenants' application seeking the following:

- to cancel the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47 of the *Residential Tenancy Act* (the *Act*); and
- an order to have the landlord comply with the *Act* and/or tenancy agreement.

This hearing also dealt with an application by the landlord pursuant to the *Act* seeking the following:

- an Order of Possession on the basis of the 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to sections 47 and 55; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenants (collectively the "tenant") and the landlord's agent (the landlord) appeared at the hearing. All parties present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that she served the notice of dispute resolution package to the landlord's agent personally, by hand. Although the tenant cannot recall the exact date on which she served the documents by hand, the landlord's agent confirmed receipt of the notice of dispute resolution package and evidence, and confirmed that the service of the documents adhered to the timelines set out in the Residential Tenancy Branch Rules of Procedure. Therefore, I find

that the landlord has been duly served with the notice of dispute resolution package and evidence, in accordance with section 89 of the *Act*.

The landlord testified that she served her notice of dispute resolution package and evidence to the tenants by way of registered mail on December 06, 2018. The tenant confirmed receipt of the documents and accompanying evidence. Therefore, I find that the tenants have been served with the notice of dispute resolution package and evidence in accordance with section the *Act*.

Preliminary Issue – Scope of Application

I advised the parties that the tenants have applied for a number of items as part of their application. Residential Rules of Procedure, Rule 2.3 states that, if, in the course of the dispute resolution proceeding, the Arbitrator determines that it is appropriate to do so, the Arbitrator may sever or dismiss the unrelated disputes contained in a single application with or without leave to apply.

I informed the parties at the beginning of the hearing that I was concerned that we would not have time to cover all aspects of the tenants' application in the time allotted. I informed the parties that the application in relation to the tenants' request to cancel the 1 Month Notice took precedence and as such would be heard first. I informed the parties that if time allowed I would continue to hear evidence in relation to the remainder of the tenants' application. However, due to time constraints, the remainder of the tenants' application, with respect to seeking an order to have the landlord comply with the *Act* and/or tenancy agreement was not heard, and therefore, that portion of the tenants' application is dismissed with leave to reapply.

Issues(s) to be Decided

Is the landlord entitled to end this tenancy on the basis of the 1 Month Notice and to obtain an Order of Possession? Is the landlord entitled to recover the filing fee for this application from the tenants?

Should the landlord's 1 Month Notice be cancelled?

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 respective claims presented by the parties and my findings are set out below.

The parties agreed that the tenancy began on September 19, 2015. The monthly rent was determined to be due on the first day of each month. The monthly rent was set at \$1,200.00 and has since been increased to \$1,299.00. The parties agreed that the tenants provided a security deposit in the amount of \$600.00 which continues to be held by the landlord. The landlord provided as evidence a copy of a written tenancy agreement signed by both parties, which confirms the details provided by the parties.

The subject rental property is the upper unit of one-half of a duplex structure. The duplex contains an upper unit and lower unit on one side of the structure, and an upper unit and lower unit on the other side of the structure. The backyard of the duplex is not separated by the fence, and is open to be accessible by the occupants of both sides of the duplex.

The landlord issued a 1 Month Notice, dated November 15, 2018, to the tenants with an effective vacancy date of January 01, 2019. The landlord's 1 Month Notice identified the following reasons for ending this tenancy for cause:

Tenant or a person permitted on the property by the tenant has:

- *significantly interfered with or unreasonably disturbed another occupant or the landlord;*

In the section of the 1 Month Notice titled "Details of Cause", the landlord provided the following details to describe the nature of the purported activity which comprised the significance interference of unreasonable disturbance:

"This 3 bedroom upper suite is not suitable for a family with 5 young children. The noise and disturbance to the tenant below at all hours has resulted in our losing an excellent tenant. Tenants must ensure that they and their guests/children do not unreasonably disturb other occupants."

The landlord testified that the rental unit is not suitable for the size of the tenants' family, as the tenants' have five children, which results in a total of seven occupants living in the rental unit. The landlord provided that the children range in age from two years to either twelve or thirteen years.

The landlord testified that the other occupants of the duplex have brought forth complaints with respect to the conduct of the tenants' children. The occupant of the unit directly beneath the rental unit, who will be identified as "DM", has alleged that the tenants' children create too much noise and disturbance as a result of their behaviour, which has adversely affected his life and his ability to live in his unit in a peaceful fashion.

The landlord alleges that, according to the occupant of the lower unit, the actions of the tenants' children include excessive jumping and running which result in a significant amount of noise emanating to the unit below, as well as excessive noise in general which continues late into the evening. The landlord provided written statements provided by the occupant of the lower unit.

The landlord also testified that the occupant of the lower unit alleged that the tenants caused water damage to the unit below. The landlord provided that a toilet had overflowed which leaked water to the floor and the unit below, and that on a different occasion, a bathroom sink had overflowed which also resulted in water leaking to the unit below.

The landlord asserted that the noise created by the tenants' children caused the occupant of the lower unit to give written notice to end his tenancy. The occupant of the lower unit did eventually reconsider and move his belongings back to the rental unit. However, the occupant of the lower unit maintained that the issue of the noise and disturbance being generated from the upper unit and from the tenants' children has not been mitigated.

The landlord testified that the occupant from the other side of the duplex, who will be identified as occupant "AB", has also filed complaints with respect to the conduct of the tenants' children. The landlord provided a written statement from occupant AB in which it is alleged that the behaviour of the tenants' children has been disruptive to her and her children.

Occupant AB alleged that the tenants' children have bullied and threatened her children, and have been verbally abusive and levelled threats against her child. Occupant AB has alleged that the tenants' children have used a piece of fencing and fashioned it into a spear and have run around the common backyard with the makeshift spear in hand. The occupant AB also alleges that the tenants' children are hazardous in the manner in which they ride their bikes in the backyard, and also alleges that the children knock on her doors and windows early in the day such that it is bothersome and depicts a lack of boundaries and infringes on her privacy and quiet enjoyment.

The landlord also submitted pictures which she says depict that the rental unit has been left dirty and in an unsanitary state. The landlord testified that the pictures were taken when the landlord entered the suite while attending the unit after having been given permission from the tenants.

The landlord testified that when the parties entered into a tenancy agreement, the landlord was aware that the tenants had four children, and were not aware that the tenants were expecting a fifth child.

The tenant AC testified that the landlord was aware that the tenants had four children and were expecting a fifth child, and that the landlords never raised the issue of the rental unit being unsuitable for a family of seven at the time a tenancy was entered into, and nor did they raise the issue during the course of the tenancy until such time that the landlord served the 1 Month Notice.

The tenant denies the allegations submitted by the occupant AB, and provides that her children play in a fashion that is fitting given their respective ages. The tenant denies that any of her children fashioned a makeshift spear from a piece of fencing, and that the incident in question was actually when one of her children was playing with a twig.

The tenant testified that the occupant AB has two children who also use the backyard for playing, and that AB's children play in a manner similar to that of the tenant's children, yet their conduct is not scrutinized in a similar manner.

The tenant testified that the former occupant of the lower unit, who will be identified as occupant "C", also had a child who also played in the common backyard and on the residential property in a manner similar to the tenant's own children.

The tenant referred to the children of the other occupants to make the point that her children are being singled out for actions, such as playing in a manner fitting their age, and are subsequently being accused of generating too much noise or of being a nuisance or a disturbance, but that the children of the other occupants have in the past, and continue to, undertake the same activities and are not accused of the same issues and are not the subject of similar complaints.

The tenant testified that one of occupant AB's children plays with a wagon aggressively and pushes it into the fence which damages the fence, yet her own children are accused of damaging the fencing due to their alleged actions of kicking a ball against the fence. The tenant denies the allegations made by the occupant AB, and asserted that AB had previously asked that the tenants' children play with AB's children and attend a birthday party for AB's child.

The tenant testified that she denies the allegations made by the occupant of the lower unit, DM. The tenants asserted that neither they, nor their children, deliberately caused a water leak or water damage, and that the incidents of water leakage were the result of separate accidental events.

The tenant testified that on one occasion, one of her children caused a bathroom sink to overflow, and that on a separate occasion, the tenant "JC" caused the toilet to overflow, and that neither incident was due to willful, negligent actions. The tenant further highlighted that during the course of the tenancy, which began in 2015, those two instances represent the only accidental cause of water leakage.

Furthermore, the tenants asserted that they took immediate action to mitigate the water leakage by mopping and collecting the water, and that, to their knowledge, that action to mitigate was sufficient, since they were not aware that the water had leaked to the lower unit until they were notified by the lower occupant, DM.

The tenants denied the allegations submitted by the occupant DM. The tenants testified that their children do not stay up as late as DM alleges, as some of their children attend school, and the others go to bed at a time appropriate for their young age. The tenant denied that her children jump off of beds, or undertake action that would cause significant disturbance to the occupant of the lower suite. The tenants provided that they have raised their children to be respectful to other people, including adults and other children.

The tenant testified that she would describe her children as being regular children who act and play in a manner that befits their respective ages, and that, to some extent, it is reasonable to accept that children will play and interact in such a manner that some level of noise will inevitably be generated during the day.

However, the tenant denies that her children remain awake during late hours of the night as alleged by the landlord. The tenant provided that she and her husband have raised their children to be respectful, and that to the extent possible, they have attempted to direct their children to be respectful of others and to attempt to reduce the level of noise they generate.

The tenant denies that the rental unit is in a dirty state, as alleged by the landlord. The tenant responded to the landlord's allegations of the rental unit being in an unclean and filthy state by testifying that the pictures submitted by the landlord are not an accurate depiction of the rental unit. The tenant asserted that the pictures depict only the bathroom and one bedroom, but that the rest of the rental unit is clean. The tenants asserted that they have been going through a momentary "rough patch" and that usually the rental unit is in a clean condition.

The tenant AC asserted that both she and her husband are respectful tenants and refutes the allegations submitted by the landlord and the other occupants. The tenant provided that both she and her husband work, and therefore, their lifestyle is not such that they would create an undue level of noise.

The tenant AC testified that she has a part-time job, and a full-time job, and that she does not conduct herself in a manner that would disturb other tenants. She further provided that she too works shift-work, and can therefore understand the need for other occupants to benefit from quiet sleep to accommodate their respective work schedules, and that both her and her husband, as well as her children, would not undertake any action to disturb other occupants during the night.

The tenants testified that some of their children attend school, and are therefore away during the weekday, and that their schedule with respect to sleep is geared around having to go to bed at an appropriate time in order to awake and attend school the next day. The tenant testified that her children would not be permitted to stay up late into the night, as is alleged by the landlord.

The tenants also asserted that their younger children who do not attend school are also put to bed around the same time as the other children and are not awake late into the night such that they would make noise to disturb other occupants of the duplex.

The tenant testified that neither she nor her husband have disturbed other occupants or the landlord, asserting that they are both respectful adults with jobs, and are raising young children, and do not engage in a lifestyle such that they would be awake during late hours creating noise.

The tenant further testified that the only other occupants permitted in the rental unit are her children, and that the basis of the noise complaints, and complaints in general, are centred around the purported conduct of her children, as alleged by other occupants.

The tenant testified to deny the allegations made with respect to the alleged conduct of her children, and asserted that both she and her husband have raised their children to be respectful of others, and that her children do not cause the level of noise or disturbance alleged by the landlord.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if, among other things 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,

In accordance with subsection 47(4) of the *Act*, the tenant must file an application for dispute resolution within ten days of receiving the 1 Month Notice. In this case, the tenants received the 1 Month Notice on November 15, 2018. The tenants filed their application for dispute resolution on November 19, 2018. Accordingly, the tenants filed within the ten day limit provided for under the *Act*.

Where a tenant applies to dispute a 1 Month Notice, or in a matter in which the landlord seeks an Order of Possession, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 1 Month Notice to end a tenancy for cause is based. Therefore, in the matter before me, the burden of proof rests with the landlord.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim (and bearing the burden of proof) has not met the burden on a balance of probabilities and the claim fails.

Both parties have provided documentary evidence, along with their respective testimony and submissions. However, the question of what occurred is not an easy determination to make when weighing conflicting verbal testimony before me and reports received from third parties

who were not present at the hearing, particularly as the burden of proof to justify ending the tenancy is on the landlord.

I find that the evidence and testimony provided by both parties was reliable and depicted a version of events that was equally probable. However, the test that I must apply in this matter is a balance of probabilities, which is to say, that it is more likely than not that, based on the evidence and testimony, that events occurred in a certain way as opposed to another.

Although the landlord's evidence and submissions were considered on merit, in weighing the evidence and testimony from both parties, I find that the landlord had the burden of providing *definitive evidence and testimony* and that the landlord failed to meet that burden.

In the matter before me, I find that, on a balance of probabilities, the landlord has failed to provide sufficient evidence that the tenants have undertaken action that would leave it open to the landlord to find that the tenants, or people permitted on the property by the tenants, have significantly interfered with or unreasonably disturbed another occupant or the landlord.

Both parties have provided testimony, evidence, and submissions in support of their respective positions. In weighing the evidence and testimony, I will consider the relevance of the testimony and evidence as it relates to the substantive issue which forms the basis of the tenants' application to dispute the 1 Month Notice, and the landlord's application seeking an Order of Possession pursuant to the 1 Month Notice. The substantive issue is whether, as the landlord claims on the 1 Month Notice, the tenants, or a person permitted on the property by the tenants has, significantly interfered with or unreasonably disturbed another occupant or the landlord.

I accept the evidence provided by the tenant AC whereby she described that neither she nor her husband cause noise or disturbance that would interfere with the landlord or other occupant. The landlord did not dispute this portion of the tenant's testimony. The central issue is not whether the tenants are the cause of the significant interference or unreasonable disturbance, but rather, whether the occupants—in this case, the tenants' children—permitted on the property by the tenants, have caused significant interference or unreasonable disturbance to the other occupants of the duplex.

The allegations of significant interference or unreasonable disturbance alleged by the landlord and by the other occupants of the duplex focus primarily on the purported actions of the tenants' children, and, as a related matter, whether the tenants have adequately mitigated the purported noise and disturbance caused by the children.

I find that part of the central component of the complaints raised by the landlord and the other occupants is the question of whether the tenants have sufficiently intervened to mitigate the purported actions of their children which form the basis of the noise and disturbance complaints.

However, such concern invariably goes to the issue of whether the tenants are adequately parenting their children, and as such, the question of whether the tenants' effectiveness as parents in an effort to influence and vary the behaviour and subsequent actions of their young children is beyond the scope of the dispute resolution process and my jurisdiction.

Therefore, the issue for me to determine is whether the purported actions of, and interference caused by, the tenants' children constitutes a *significant* interference and *unreasonable* disturbance, and whether the tenants have attempted to mitigate the actions of their children to the extent possible.

Section 47 of the *Act* provides, in part, the following:

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
(i)significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

The *Act* provides only that the landlord may end a tenancy for cause if the tenant has caused significant interference or an unreasonable disturbance; however, the *Act* does not provide any guidelines as to what constitutes significant interference or an unreasonable disturbance. I must also consider that the people permitted on the residential property in this case are children, and that what might be considered "unreasonable" or "significant" must be viewed in light of the fact that the interpretation of unreasonableness or significant interference is being applied to children.

Based on the testimony from the parties, and keeping in mind that the onus is on the landlord to provide definitive evidence to prove otherwise on a balance of probabilities, I find that the actions of the tenants and their children do not constitute significant interference or create unreasonable disturbance.

Both parties testified that the purported noise results from the children playing inside the rental unit and on the common property and yard shared with the other occupants. While the other occupants might view the noise as a disturbance, I do not find that the act of children playing and conducting themselves in a manner that might create noise can be categorized as significant interference or unreasonable disturbance, given the fact that they are children.

I accept the submission from the tenant AC that the conduct of her children is reasonable and fits the routine behaviour for children, especially given the respective ages of the children, and that the children simply play in a manner that is befitting of their respective ages.

I also accept the tenants' testimony that they have adequately intervened as parents to correct their children's behaviour when necessary, and that after being made aware of the noise complaints, the extent of their ability to mitigate the noise created by their children was to reinforce the parenting principles that they had already been applying.

I find that the tenants' testimony, whereby they assert that some of the noise being created due to their children playing in a normal manner should not be construed as unreasonable, is a reasonable determination to make, as there will inevitably be some level of noise resulting from such activity.

Therefore, based on the foregoing, I find that the neither the tenants, nor their children, have, through their actions, caused interference or disturbance that could, given the circumstances described, be categorized as significant or unreasonable.

I also note that the parties provided conflicting testimony with respect to the landlord being aware that the tenants would be expecting a fifth child. The landlord testified that they were aware that the tenants would have four children, but the tenant provided that the landlord knew that the tenants were expecting a fifth child, as the tenant AC was noticeably pregnant when the tenants moved-in.

I accept the tenant's testimony that at any rate, the landlord was aware that there were five children residing in the rental unit for a number of years, and only raised the issue recently, and that during the course of the tenancy, which began in September 2015, the landlord never raised the issue of the fifth child as a concern or as an unacceptable component of the tenancy.

Therefore, I find that the landlord, by accepting that the tenants had five children since nearly the onset of the tenancy, has not demonstrated that the rental unit is now unsuitable for the tenants and their five children. I further find that the reasons submitted by the landlord in determining that the rental unit is unsuitable to accommodate five children goes to the issue of the noise complaints, on which I have already made a determination.

With respect to the issue of the water leaks causing disturbance to the occupant of the unit below the tenants, I accept the evidence from the tenant AC that the occurrences were due to accidents, and did not stem from deliberate, negligent behaviour. The landlord issued the 1 Month Notice citing noise and disturbance, primarily from the tenants' children. I find that the two occasions of water leakage, attributed to separate accidental incidents during the course of the lengthy tenancy, do not constitute unreasonable disturbance such that it would leave it open to the landlord to issue a 1 Month Notice on those grounds.

Based on the foregoing, I find that, on a balance of probabilities, the landlord has not met the burden of proving that the tenants engaged in behaviour that "significantly interfered with or unreasonably disturbed another occupant or the landlord", as set out on the 1 Month Notice.

Conclusion

Based on the above, I order the 1 Month Notice, dated November 15, 2018, is cancelled and is of no force or effect. The tenancy will continue until it is ended in accordance with the *Act*.

As the landlord was not successful in its application, I find that the landlord is not entitled to recover the cost of 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 *Residential Tenancy Act*.

Dated: January 18, 2019

Residential Tenancy Branch