



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the Landlord: OPC, FFL
For the Tenants: CNC, LRE, FFT

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*);
- an order to suspend or set conditions on the landlord's right to enter the rental unit; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72;

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 tenants pursuant to section 72.

The tenants and the landlord's agents 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 tenants testified that they served the Tenants' Application for Dispute Resolution hearing package ("dispute resolution hearing package"), along with their evidence, to the landlord by way of registered mail on January 11, 2019. The landlord confirmed receipt of the tenants' dispute resolution hearing package and the tenant's evidence.

Therefore, I find that the landlord has been served with the tenants' notice of dispute resolution package, and accompanying evidence, in accordance with section 89 of the Act.

The landlords testified that they served the Landlord's Application for Dispute Resolution hearing package ("dispute resolution hearing package"), along with their evidence, to the tenants by way of registered mail on January 14, 2019. The tenants confirmed receipt of the landlord's dispute resolution hearing package and the landlord's evidence. Therefore, I find that the tenants have been served with the landlord's notice of dispute resolution package, and accompanying evidence, in accordance with section 89 of 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 Tenancy Branch 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.

The Residential Tenancy Branch Rules of Procedure, Rule 2.3 provides me with the discretion to sever unrelated claims:

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.

After reviewing the documentary evidence, the tenant's claim, and hearing from the tenant, I determined that the tenant's claim in relation to cancelling the 1 Month Notice was unrelated to the other issues raised by the tenant. As the 1 Month Notice is the more pressing matter, I dismissed the remainder of the tenant's claim 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? Are the tenants entitled to recover the filing fee for this application from the landlord?

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 July 01, 2017. The monthly rent was determined to be due on the first day of each month. The monthly rent was set at \$3,000.00 and remains in that amount. The parties agreed that the tenants provided a security deposit in the amount of \$1,500.00 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 orally by the parties.

The subject rental property is a single-family detached house. The tenancy agreement is such that the tenants rent the entire house as the rental unit under the tenancy.

The landlord issued a 1 Month Notice, dated December 12, 2018, to the tenants with an effective vacancy date of January 31, 2019. The landlord's 1 Month Notice identified the following reasons for ending this tenancy for cause:

Tenant has assigned or sublet the rental unit/site without the landlord's written consent;

- *Tenant or a permitted on the property by the tenant has:*
 - *significantly interfered with or unreasonably disturbed another occupant or the landlord*
 - *put the landlord's property at significant risk*
- *Tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that has, or is likely to:*
 - *jeopardize a lawful right or interest of another occupant or the landlord*

In the section of the 1 Month Notice titled “Details of Cause”, the landlord provided the following details to supplement the landlord’s assertion that the tenants have assigned or sublet the rental unit/site without the landlord’s written consent :

“December 18th, 2018 – City of Kelowna Bylaw Officer Informed Landlord of secondary suite being rented without permission, and the property being run as an illegal AirBnB. Fines are being imposed against the owner for the Tenant’s illegal actions.” [reproduced as written]

The landlord testified that the tenants have sublet the lower portion of the house by entering into a tenancy with two female sub-tenants, who, for the purpose of this decision will be identified as “SW” and “SE”. The landlord testified that at no point since the onset of the tenancy did the landlord provide consent—either in writing, verbally, by way of email or text message, or in any other fashion—to the tenants to permit them to sublet any portion of the house or property which comprises the residential unit or residential property by entering into a sub-tenancy with sub-tenants.

The landlord clarified that when they refer to the “landlord” not providing any such consent for the tenants to sublet the rental unit or rental property, the term “landlord” in this context is meant to include the owner of the property, the initial property management company, the new property management company, or any agent or employee of either the initial property management or new property management company.

The landlord testified that the owner of the property, “RP”, contracted the services of the initial property management company, which, for the purpose of this decision, will be identified as “RMS”. The new property management company, which, for the purpose of this decision, will be identified as “APM” purchased RMS and inherited the assets, accounts, and portfolio of RMS, which meant that APM inherited the authorization to act as authorized agent for RP with respect to the property that comprises the rental unit.

The landlord provided as evidence copies of tenancy agreements between the tenants and the occupants (SW and SE) of the lower suite of the house which comprises the residential property. The landlord stated that these unauthorized sublet tenancy agreements depict the tenants being listed as the landlords, and the occupants (SW and SE) of the lower suite being listed as the tenants. The address of the subject rental unit is listed as being the lower suite of the house which comprises the residential property. The most recent sublet tenancy agreement indicates that the tenancy was

renewed between the same parties under a fixed-term for the period of April 26, 2018 to April 25, 2019.

The landlord testified that the tenants have been subletting the upper portion of the house without authorization from the landlord by entering into short-term rental agreements with occupants by way of vacation rental websites. The landlord provided copies of advertisements on a vacation rental website, which, for the purpose of this decision, will be referred to as "ABNB".

The landlord asserted that the advertisements on ABNB show that the rental unit is listed as the subject vacation property, and that the individuals offering the vacation property for rent are the tenants.

The landlord also provided copies of text message correspondence between the tenants and the occupants of the lower suite, in which the parties discuss that the upper suite was frequently rented by the tenants as a short-term vacation rental suite.

The landlord testified that they inspected the rental unit on approximately two or three occasions each year. The landlord provided that the tenants had always had the entire house furnished, such that the lower portion of the house appeared to be a furnished area used by the actual tenants, and that it did not present in a manner such that one would assume that it was being sublet to other occupants as a separate suite.

The landlord stated that on December 18, 2018, a municipal bylaw officer ("BO") contacted the landlord to advise that house was the subject of bylaw violations. The landlord testified that the BO informed them that the upper portion of the house was being used as a short-term vacation rental, and that the lower portion had been rented as a separate suite to other occupants.

The landlord testified that they only came to learn that their tenants were subletting the lower portion of the rental property as a separate suite, and that they were illegally renting the upper portion as a short-term vacation rental, after receiving communication from the BO on December 18, 2018.

The landlord testified that the BO issued an order pursuant to a municipal bylaw to have the lower suite decommissioned, as the owner of the property is not permitted to have an unauthorized suite in the single-family home.

The landlord stated that the BO provided the occupants of the lower suite with the contact information for the landlord, and that subsequently, the landlord was able to communicate directly with the occupants of the lower unit, SE and SW. The landlord testified that the occupants of the lower unit provided the landlord with documentary evidence, such as copies of their sublet tenancy agreement with the tenants, and copies of email and text message communication which depict that the tenants admitted to using their rental unit as a short-term vacation rental. The landlord states that the email and text message communication between the tenants and SE and SW also demonstrates that a tenancy agreement existed between the parties.

The landlord also provided a copy of a letter, dated May 03, 2018, in which the tenants (acting as landlords with respect to the sublet tenancy with SW and SE) write to SW and SE with respect to matters related to their tenancy agreement. The letter bears the signature of the tenants. The landlord asserted that this further reinforces that the tenants have sublet the rental unit without written consent from the landlord.

The parties provided that the occupants of the lower suite vacated the residential property on January 15, 2019.

The tenants testified that they had entered into a sublet tenancy agreement with the occupants of the lower suite. The tenants stated that although they did not have written permission to do so, that their understanding was that one of the property managers, "PS", may have provided verbal consent to permit them to do so.

When asked to clarify whether he gave consent to the tenants to sublet the rental unit, PS provided sworn testimony to state that he had never provided any such consent to the tenants either verbally or in any other form. PS further underscored that the tenants testified to never having written consent from the landlord to sublet the rental unit.

The tenants testified that they had signed a written tenancy agreement with the landlord, which was a fixed-term tenancy that ended on June 30, 2018 and subsequently reverted to a month-to-month tenancy. The tenants agreed that the terms of their tenancy agreement did not permit them to sublet the rental unit. The tenants asserted that since the tenancy reverted to a month-to-month tenancy, that the terms of the tenancy agreement no longer applied, and that the term prohibiting them from subletting the rental unit no longer precluded them from doing so.

The tenants provided testimony to deny ever having offered their rental unit as a short-term vacation rental. The tenants testified that the advertisements listed on ABNB are false advertisements which could have been created by another party.

The tenants testified that they received the 1 Month Notice on January 07, 2019, and that it was discovered in their mailbox. The tenants denied receiving notification of any registered mail item which would correspond with the landlord's assertion that the 1 Month Notice was served to the tenants in December 2018.

The tenants testified that during communication with the landlord at some point in late December 2018, the landlord verbally told them that a 1 Month Notice was issued. The landlord testified to having re-served the 1 Month Notice after communication with the tenants.

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 has assigned or sublet the rental unit/site without the landlord's written consent.

The landlord asserted that the 1 Month Notice was served to the tenants by way of registered mail on December 19, 2018. The Canada Post website provides information associated with the tracking number related to the registered mail item. The tracking history provides that the registered mail item accepted on December 19, 2018 did not result in delivery to the intended recipients. Instead, the item was unclaimed by the intended recipient and subsequently returned to the sender.

The tenants provided sworn testimony that they received the 1 Month Notice on January 07, 2019. I find that since the 1 Month Notice which the landlord asserted was sent by registered mail was returned to the sender, the tenants could not have received the 1 Month Notice by way of the registered mail service. Therefore, I find that the tenants must have received the 1 Month Notice by another method.

The tenants testified that they received the 1 Month Notice on January 07, 2019 in their mailbox, and that the landlord re-served the 1 Month Notice subsequent to conversations between the parties with respect to the 1 Month Notice. Therefore, in determining the date on which the 1 Month Notice was received by the tenants, I will accept the tenants' testimony and find that the 1 Month Notice was received by the tenants on January 07, 2019.

Section 47(2) of the Act provides as follows:

- (2) A notice under this section must end the tenancy effective on a date that is
 - (a) not earlier than one month after the date the notice is received,

Since it has been determined that the 1 Month Notice was received in January 2019, the earliest effective date that can be attributed to the Notice is the last day of the following month, which is February 28, 2019. Therefore, in accordance with section 53(2) of the Act, I find that the corrected effective date of the Notice is February 28, 2019.

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 January 07, 2019. The tenants filed their application for dispute resolution on January 05, 2019. Accordingly, I find the tenants filed within the ten day limit provided for under the *Act*.

The tenants testified that they learned of the 1 Month Notice during conversations with the landlord's agent, and therefore had filed an application for dispute resolution before receiving the 1 Month Notice on January 07, 2019. The notes on file indicate that the tenants updated their application to reflect the date on which they received the 1 Month Notice.

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.

I find that the landlord has met the burden of proof to demonstrate that the tenants had sublet the rental unit without the written consent of the landlord. My reasons for finding so are set out below.

The landlord has provided as evidence a written tenancy agreement which demonstrates that the tenants sublet the rental unit by entering into a sublet tenancy with the occupants of the lower suite. The tenants provided sworn testimony to confirm that the copy of the tenancy agreement was genuine and was endorsed by the parties to the agreement, such that both the tenants and the sub-tenants (the occupants of the lower suite) provided their respective signatures on the agreement.

The tenants provided sworn testimony that at no point during the course of their tenancy did they have written consent from the landlord to sublet the rental unit. In effect, the tenants provided sworn testimony to acknowledge that they violated section 34(1) of the Act. Section 34(1) of the Act provides:

34 (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.

Therefore, the landlord had cause to issue 1 Month Notice pursuant to section 47(1)(i) of the Act, which provides:

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

(i) the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 [assignment and subletting];

Sections 34 and 47 of the Act inherently apply to all tenancies, irrespective of whether the parties have a written tenancy agreement which expressly prohibits the tenants from being able to sublet the rental unit without written consent from the landlord.

Section 47(3) of the *Act* requires that "a notice under this section must comply with section 52 [*form and content of notice to end tenancy*]." I am satisfied that the landlord's 1 Month Notice entered into written evidence was on the proper RTB form and complied with the content requirements of section 52 of the *Act*.

Based on the foregoing, I find that the landlord has proven that it had valid cause to issue the 1 Month Notice pursuant to sections 34(1) and 47(1)(i) of the Act. Therefore, I decline to grant the tenants' request to cancel the landlord's 1 Month Notice. I find that pursuant to the 1 Month Notice dated December 19, 2018, the tenancy will end on the corrected effective date of the 1 Month Notice, February 28, 2019.

Accordingly, pursuant to sections 47 and 55 of the Act, I find that the landlord is entitled to an Order of Possession pursuant to the 1 Month Notice. The Order of Possession must be served on the tenant. As the corrected effective date of the 1 Month Notice is February 28, 2019, the Order of Possession takes effect by 1:00 p.m. on February 28, 2019.

As I have upheld the landlord's 1 Month Notice, and granted an Order of Possession pursuant to the 1 Month Notice, on the basis that the tenants sublet the rental unit without the written consent of the landlord, I find that the need does not exist to consider and make findings regarding the other reasons indicated on the 1 Month Notice, as the issue of determining the validity of the other reasons has been rendered moot.

Since the landlord has been successful in this application, I allow the landlord to recover the \$100.00 filing fee from the tenant.

Conclusion

The tenants' application is dismissed, in its entirety, without leave to re-apply.

I allow the landlord's application to end this tenancy based on the 1 Month Notice. Pursuant to section 55 of the Act, I grant an Order of Possession to the landlord. The landlord is provided with an Order of Possession effective by 1:00 p.m. on February 28, 2019. Should the tenant(s) fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I issue a monetary Order in the landlord's favour in the amount of \$100.00, to enable the landlord to recover the filing fee from the tenant. The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: February 13, 2019

Residential Tenancy Branch