



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC FFT

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47, and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package ("Application"). In accordance with section 89 of the *Act*, I find the landlord duly served with the tenant's Application. The landlord was not served with the tenant's evidentiary materials. Accordingly, the tenant's written evidence was excluded for the purposes of this application. The tenant confirmed receipt of the landlord's evidentiary materials. In accordance with section 88 of the *Act*, I find the tenant duly served with the landlord's evidence.

The tenant acknowledged receipt of the 1 Month Notice to End Tenancy for Cause, dated March 12, 2019. Accordingly, I find that the 1 Month Notice was served to the tenant in accordance with section 88 of the *Act*.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This month-to-month tenancy began on May 1, 2013, with monthly rent currently set at \$1,100.00, payable on the first of each month. The landlord collected, and still holds, a security deposit in the amount of \$540.00.

The landlord testified in this hearing that on February 6, 2019 she received a warning from the strata for a bylaw infraction for having a dog in her rental unit. As dogs were not allowed as per strata bylaws, and as the landlord was unaware of any dogs in the rental unit, the landlord attempted to contact the tenant by telephone, but was unable to reach him. The landlord then sent an email, which she received a response to.

The landlord then discovered that the tenant was out of the country, unbeknownst to her, and a friend was looking after the rental unit for him. The landlord then asked to view the place, and was told that the tenant's friends would give her access as the tenant would be away until May 2019. The landlord spoke to the tenant's friend, who confirmed that the tenant had left the country in September of 2018. The dog belonged to the friend's girlfriend, who visits him. The landlord did some further investigating by asking the caretaker to look up the key FOB data for the rental unit, and the caretaker provided the landlord with the FOB identification numbers, dates and times of usage, and physical descriptions as captured by camera footage. The landlord verified that the users and holders of the FOBs were the tenant's friend and his girlfriend.

The landlord was extremely disturbed as none of this information was ever disclosed to the landlord. The landlord then served the tenant with a 1 Month Notice on March 12, 2019 as she believed the tenant has sublet the rental unit to his friend without her knowledge or permission.

The landlord served the notice to end tenancy providing the following grounds:

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

It was undisputed by both parties that the friend was often at the rental unit several days a week despite the fact the friend had another residence. The landlord believes that he stayed there as the rental unit was near his place of work. The landlord submitted detailed evidence to support her findings.

It was also undisputed that the tenant has been out of the country for the majority of the time since leaving in September 2018. The tenant returned December 19, 2018 to December 24, 2018, and the FOB data confirms this. The landlord believes that the regular FOB usage by the tenant's friend and his girlfriend supports her belief that the tenant has sublet the rental unit, along with the fact that the tenant has been away with the exception of the short period in December 2018.

The tenant does not dispute that he had left the country, stating that it was for his work, and on a temporary basis. The tenant testified that he still resides at the rental unit, and is still paying rent and utilities. The tenant admits that he has allowed his friend access for the purposes of checking up on his place, but disputes that he has sublet the rental unit to him. The tenant testified that his personal belongings, including clothing and personal items were still in the rental unit.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. The tenant filed his application on March 19, 2019, 7 days after the 1 Month Notice was served to him. As the tenant filed his application within the required period, and having issued a notice to end this tenancy, the landlord has the burden of proving she has cause to end the tenancy on the grounds provided on the 1 Month Notice.

The landlord provided detailed and undisputed evidence to support how the tenant had allowed his friend and his girlfriend to occupy the rental unit without her permission or knowledge. I must, however, consider whether this would be considered a sublet as contemplated under the legislation.

Although the term "sublet" is used by the landlord in this dispute, I must note that RTB Policy Guideline #19 states the following:

"C. SUBLETTING

Sublets as contemplated by the Residential Tenancy Act

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy

agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement."

In this case, although I can sympathize with the landlord how it was extremely disturbing to discover that the tenant had allowed another party to occupy the rental unit without her knowledge or permission, I find that the landlord's evidence does not sufficiently support whether a sublease agreement exists between the tenant and another party. RTB Policy #19 defines a sublet arrangement whereby the original tenant moves out of the rental unit and grants exclusive occupancy to the subtenant, forming a landlord-tenant relationship with the subtenant. While I do accept the landlord's testimony and evidence that the friend and his girlfriend occupy the rental unit on a very frequent basis, I am not satisfied that the evidence submitted supports that a sublease agreement exists. As stated above, the onus falls on the landlord to prove their case, and in this case I find that landlord has not met the burden of proof to support that the tenant had sublet or assigned the rental unit without the landlord's written consent. Accordingly, I allow the tenant's application to cancel the 1 Month Notice. The tenancy will continue until ended in accordance with the *Act* and tenancy agreement.

As the filing fee is a discretionary award given to a successful party after a full hearing on its merits, I allow the tenant's application to recover the \$100.00 filing fee from the landlord, and I dismiss the landlord's application to recover hers. The tenant may also choose to give effect to this monetary award by reducing a future monthly rent payment by \$100.00.

Conclusion

I allow the tenant's application to cancel the landlord's 1 Month Notice to End the Tenancy. The 1 Month Notice dated March 12, 2019 is cancelled, and is of no continuing force, with the effect that this tenancy continues until ended in accordance with the *Act*.

I allow the tenant to implement a monetary award of \$100.00, by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of \$100.00, and the landlord must be served with **this Order** as soon as possible. Should

the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order 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: May 14, 2019

Residential Tenancy Branch