Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

The tenants apply to cancel a one month Notice to End Tenancy dated and received June 10, 2019. The Notice claims that the tenants have" assigned or sublet the rental unit without the landlord's permission." Such conduct, if true, is a permissible ground for a landlord to end a tenancy under s. 47 of the *Residential Tenancy Act* (the "*Act*").

All parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

At the start of the hearing the landlord, represented by her daughter Ms. V.L., requested permission to amend the Notice to add additional grounds. Counsel for the tenants did not consent. The request was refused. It would be unfair to require the tenants to defend themselves against further claims only raised at this hearing. If the landlord considers there are other valid grounds for ending the tenancy she may issue another Notice. This view is expressed without prejudice to the assertion of any estoppel argument should another Notice issue for basically the same conduct.

Issue(s) to be Decided

Have the tenants assigned or sublet the rental unit?

Background and Evidence

The rental unit is the two bedroom upper portion of a house. There is a basement suite that the landlord rents to others. There is a written tenancy agreement. It shows that

the applicant Mr. S.C. is the sole tenant. The tenancy started in February 2015. The monthly rent is currently $1600.00. The landlord holds a $1500.00 security deposit.

There is a garage behind the house. Though it appears that both sides have measured the size of the garage and its door, they have provided differing measurements at this hearing. I determine that the garage is about 20 feet wide, 19 to 20 feet deep and with a garaged door perhaps 15 or 16 feet wide.

The tenancy agreement indicates that the rent includes "parking for 2 vehicles." The parties seem to agree that means the tenant has use of the entire garage.

Ms. V.L. argues that it is not a two car garage and her father, the landlord's husband, made a mistake when he was preparing the tenancy agreement. I consider a 20 foot wide garage to be ample though snug space for two average cars side by side.

In perhaps May 2019, the tenant ran an ad offering 200 square feet "10 X 18 ish" of the garage to be rented for storage for $225.00 per month. He found an interested party to rent the space. A text from the tenant to the person I will refer to as the "lessee" confirms the arrangement was to start June 1 at a rent of $225.00 per month, first and last month's rent in advance, terminable by either on 30 days notice.

On June 7 Ms. V.L. came to property to discover the lessee pushing a vehicle into the garage. She immediately confronted the tenant who apologized for not consulting her about renting it out and who offered to end the arrangement with the lessee immediately.

Instead, the landlord, through Ms. V.L., issued this Notice. The tenant has ended the arrangement to let others use the garage for storage and the lessee has removed the car and any other items he had there.

Analysis

Ms. V.L. for the landlord stated in strong terms that she had consulted with the Residential Tenancy Branch on more than one occasion about the tenant's conduct in this matter and says she was directed to issue the Notice to End Tenancy based on the ground indicated. Indeed, in an effort to corroborate that assertion she has made an application under the *Freedom of Information and Protection of Privacy Act* (FOIPPA) for the voice recording of her conversation with a Residential Tenancy Branch agent on June 10, 2019.

She had not been provided with any recording prior to this hearing. I find it would not have assisted her in this matter even if the agent had given her the direction she claims she received.

As the *Act*, s. 64(2) notes, arbitrators acting under the auspices of the Director are not bound by the decisions made on the Director's behalf. Similarly arbitrators are not bound by the advice or direction an agent at the Residential Tenancy Branch might dispense. Clearly, in the event such an agent was mistaken or was misunderstood, the other party to a tenancy agreement should not bear the consequences.

And so, while there is a concern that the landlord was given misguiding direction by Residential Tenancy Branch agent, it cannot be a factor in the determination here about whether or not the tenant has, in fact, assigned the tenancy agreement or sublet the rental unit.

Subletting or Assignment?

Section 47 permits a landlord to end a tenancy if her tenant "assigns or sublets the rental unit" without consent. Clearly there has been no consent by the landlord to the arrangement between the tenant and the lessee, but has there been a subletting or an assignment within the meaning of those words as used in the *Act*?

Subletting

The *Act* 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]*;

Section 1 of the *Act*, the definition section, indicates:

> **"sublease agreement"** means a tenancy agreement
> (a) under which

(i) the tenant of a rental unit transfers the tenant's rights under the tenancy agreement to a subtenant for a period shorter than the term of the tenant's tenancy agreement, and
(ii) the subtenant agrees to vacate the rental unit at the end of the term of the sublease agreement, and

(b) that specifies the date on which the tenancy under the sublease agreement ends;

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

"rental unit" means living accommodation rented or intended to be rented to a tenant;

It is fair to assume that when the *Act* was drafted it was contemplated that a subletting would be accomplished through the use of a “sublease agreement” and that the subletting being prohibited without landlord consent was the type of subletting defined in the definition of “sublease agreement.” In other words, if a tenant sublet the rental unit through a mechanism other that a “sublease agreement” as defined in the *Act*, it was not a subletting that was prohibited in the absence of landlord consent.

It is clear that the arrangement between this tenant and the lessee was not a “sublease agreement.” The agreement did not involve “living accommodation” and so it was not respecting a “rental unit.” In such a case the arrangement was therefore not a “tenancy agreement.” As there was no “tenancy agreement” there could be no “sublease agreement” as, by definition “sublease agreement” means “a tenancy agreement.”

In any event, the arrangement was not a “tenancy agreement” because neither subsections (i) or (ii) in the definition of “sublease agreement” were met. The rental period with the lessee was what is known as a tenancy at will and was not for a shorter term than the tenant’s periodic rental period. The agreement had no term. Secondly, it did not specify an end date.

Even leaving aside the question, raised at hearing, about whether or not the subletting contemplated in the *Act* must be of an entire rental unit, the arrangement was not a subletting as that term is used in s. 47 of the *Act*.

Assignment

The term “assignment” is not defined in the *Act*. Residential Tenancy Policy Guideline 19, “Assignment and Sublet” defines it as “the act of permanently transferring a tenant’s rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.”

Clearly that has not happened here. The tenant and his partner retain exclusive possession of the core rental unit. He remains the landlord’s tenant.

In my view the tenant has granted his lessee a license to use a portion of the garage for storage, a non-residential use. I am not convinced that the lessee had any larger area that the “10 X 18 ish” area advertised for $225.00 per month. It’s clear that the lessee was paying the $225.00 asked for in the ad and there is no convincing reason to suspect he was receiving anything more than the “half a garage” offered in the ad. I acknowledge Ms. V.L.’s assertion that the tenant moved his own large items out of the garage and then back in again after the lessee quit the garage but I find the tenant’s claim that he did not to be equally convincing.

The situation is more in line with the one offered in the Guideline:

> If a tenant is allowing their rental unit or space within their rental unit to be used for a commercial venture, such as a vacation or travel accommodation, a landlord may issue a One Month Notice to End Tenancy (form RTB-33) for a breach of a material term.

It is not an assignment.

Conclusion

The tenant has not assigned his tenancy agreement or sublet the rental unit. The application is allowed. The one month Notice to End Tenancy dated June 10, 2019 is cancelled.

As he has been successful the tenant is entitle to recover the $100.00 filing fee for this application. I authorize him to reduce his next rent due by $100.00 in full satisfaction of the 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: August 16, 2019

Residential Tenancy Branch