Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CL 17719 GP LTD and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes: OPC FFL CNC FFT

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the "Act") for Orders as follows:

The landlord requested:

- an Order of Possession for cause pursuant to section 55; and
- authorization to recover their filing fee for this application from the tenants pursuant to section 72.

The tenants requested:

- 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 of the *Act*.

JG and AG appeared on behalf of the landlord in this hearing. Both parties confirmed receipt of each other's applications for dispute resolution hearing package ("Applications") and evidence. In accordance with sections 88 and 89 of the *Act*, I find that both the landlord and tenants were duly served with the Applications and evidence.

The tenants confirmed receipt of the 1 Month Notice, which was posted on their door on July 5, 2019. Accordingly, I find that the 1 Month Notice was served to the tenants in accordance with section 88 of the *Act*.

Issues

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

Are both parties entitled to recover the filing fees for their applications?

Background and Evidence

This month-to-month tenancy began on February 1, 2009, with monthly rent currently set at $700.00 per month, payable on the first of each month. The landlord currently holds a security deposit of $325.00 for this tenancy. The tenants continue to reside in the rental unit.

The landlord submitted the notice to end tenancy providing two grounds:

1. The tenant has allowed an unreasonable number of occupants in a rental unit; and
2. Breach of a material term of the tenancy agreement that was not corrected within a reasonable amount of time after written notice to do so.

Both parties confirmed that two parties current reside in the rental unit, as named in the tenants' application: AD and ED. The landlord testified that only AD was authorized to live in this one bedroom rental unit, but AD had allowed his daughter ED and the daughter's boyfriend to live in the rental unit with him, without the landlord's permission. The landlord provided a copy of the tenancy agreement which names AD as the sole tenant.

The landlord submitted a copy of a caution letter sent to the tenant on June 22, 2019. The landlord testified in the hearing that they had discovered an unauthorized vehicle parked in the parking lot, and the landlord did not receive a response after leaving a note. The landlord had discovered that this vehicle belonged to the boyfriend of the tenant's daughter. The landlord submits that the boyfriend had access to the parking lot with a key, and was actually residing there. The letter, dated June 22, 2019, requested that the vehicle be removed and not park there effective immediately, that the key used be returned immediately to the landlord, that all unauthorized occupants living in the rental unit move out by June 30, 2019, and for the tenant to refrain from throwing items off the balcony.

The landlord testified that on July 5, 2019, the tenant was issued the 1 Month Notice as the tenant had failed to fulfill the demands listed in the caution letter. The landlord testified that the landlord was contacted by a concerned tenant who had witnessed the boyfriend moving items in and out of the rental unit on July 10, 2019, and in a manner to avoid being detected by the cameras.

The tenants do not dispute that ED is an additional occupant in the rental unit, but that this was with the knowledge of the landlord. Ed testified in the hearing that she had been residing there with her father for 10 years, and that the key was given to her by the landlord. The tenants submitted in evidence a copy of a previous RTB decision dated September 25, 2018, that names both tenants. The landlord does not dispute that both tenants were named in that decision, but that the names were not submitted by himself. The landlord does not dispute that two keys were issued for the rental unit, but testified that the second key was not issued in order to allow the occupancy of a second tenant.

The tenants dispute that the boyfriend resides there, or had ever resided there. ED testified that her boyfriend is a guest who visits here, and was unaware that he was prohibited from using the parking space. The tenants testified that they had stopped parking the vehicle there after being informed that this was not allowed. The tenants dispute that the July 10, 2019 moving incident ever took place.

Analysis

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below

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 tenants filed their application on July 10, 2019, five days after they were served with the 1 Month Notice. As the tenants had filed their application within the required period, and having issued a notice to end this tenancy, the landlord has the burden of proving the landlord has cause to end the tenancy on the grounds provided on the 1 Month Notice.

Although the landlord testified that tenant's daughter's boyfriend was residing there, the tenants dispute this stating that he was merely a guest. The landlord testified that the

move-out was witnessed by another tenant, which the tenants dispute ever happened. I have considered the evidence and testimony before me, and I find that the landlord has failed to meet the burden of proof to support that the boyfriend had in fact resided there. Although the landlord did witness the vehicle parked there, and although it was undisputed that he boyfriend had access the building with a key, I find that this does not sufficiently demonstrate the boyfriend's occupancy of the rental unit. Furthermore, I find that although the landlord testified that a concerned tenant had reported the move-out on July 10, 2019, that tenant did not attend the hearing to provide sworn testimony confirming this. In light of the disputed facts surrounding the boyfriend's occupancy, I find that the landlord has not met the burden of proof to support that claims that the boyfriend had resided there, and therefore I do not find that the landlord has grounds to end the tenancy on this basis.

It was undisputed by both parties that ED resides in the rental unit with AD. The tenant ED testified that she had lived there for 10 years, with the landlord's knowledge. Although I accept the landlord's testimony that the names of the tenants were not submitted by the landlord in the previous referenced decision, I find it undisputed that the tenants have been candid about the fact that ED has been residing there. Although the landlord disputes that the second key was issued to ED, or that this second key was to be used by a second tenant, I find that on a balance of probabilities, based on the evidence and testimony provided, that ED has been in fact residing there for a period of time, and at least since June 13, 2018 when the tenants had filed their last application.

Residential Tenancy Policy Guideline #11 states the following about express and implied waivers:

"There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel….

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional."

As noted above, a notice to end tenancy must be clear, unambiguous and unconditional. This extends to the terms of a tenancy, including the tenants who may reside in a rental unit. The tenant ED testified that she had been living there 10 years. Despite the fact that ED is not named in the tenancy agreement, I accept the testimony of the tenants that ED had been residing there for a period of time. The tenants were not issued a caution letter until June 22, 2019, despite the fact that ED had included herself as a named tenant in an application that was filed on June 13, 2018, a year prior to this caution letter. The terms of the tenancy agreement become ambiguous when the tenant ED had been residing there for some time, with no written warnings from the landlord until June 22, 2019 that this was not allowed. I find an implied waiver exists for this tenancy, and that ED had been residing there for some time as a tenant despite the fact that she was not initially named in the original tenancy agreement. Accordingly, I am not satisfied that the landlord has grounds to end this tenancy on the basis that the tenant has allowed an unreasonable number of occupants in the rental unit.

The other reason provided on the 1 Month Notice for ending this tenancy is that the tenants have breached a material term of the tenancy agreement, and have not corrected this breach within a reasonable amount of time after being given written notice to do so. 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 RTB Policy Guideline #8, 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 or not 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 or not the clause is material.

Policy Guideline #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 regards to the landlord's allegation that there has been a breach of a material term of the tenancy agreement, the tenants testified that they had responded to the landlord's caution by removing the unauthorized vehicle as they were unaware of the breaches listed in the caution letter.

Based on the evidentiary materials as well as the testimony in the hearing, I am not satisfied that the tenants have failed to correct any material breaches after being informed by the landlord. As stated earlier in my decision, I am not satisfied that the landlord had provided sufficient evidence to support that any unauthorized occupants were residing in the rental unit, and I accept the tenants' testimony that after being informed about the parking situation, ED's boyfriend no longer parks his vehicle there.

For the reasons cited above, I find that the landlord has not met their burden of proof in establishing that they have cause to end this tenancy under section 47 of the *Act*, and accordingly I am allowing the tenants' application for cancellation of the 1 Month Notice dated July 5, 2019. The tenancy will continue until ended in accordance with the *Act* and tenancy agreement.

As the tenants were successful in their application, I allow the tenants to recover the filing fee for this application.

I dismiss the landlord's entire application without leave to reapply.

Conclusion

I allow the tenants' application to cancel the 1 Month Notice dated July 5, 2019. The 1 Month Notice of is of no force or effect. This tenancy continues until ended in accordance with the *Act*.

I allow the tenants 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 tenants are 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.

The landlord's entire application is dismissed without leave to reapply.

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: September 9, 2019

Residential Tenancy Branch