Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOME LIFE PROPERTY MANAGEMENT DIVISION and [tenant name suppressed to protect privacy]

INTERIM DECISION

Dispute Codes CNC, OLC, RR, FFT

Introduction

This hearing dealt with the tenants' 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;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenant(s) to reduce rent for repairs, services or facilities agreed upon but not provided, including their alleged loss of quiet enjoyment of the premises, pursuant to section 65; and
- authorization to recover the filing fee for this application from the landlords 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.

As Tenant CC (the tenant) confirmed that they received the landlords' 1 Month Notice posted on the tenants' door by one of the landlord's representatives on August 17, 2019, I find that the tenants were duly served with this Notice in accordance with section 88 of the *Act*. Landlord Representative BC, who represented both the property management company hired on March 18, 2019 to manage this property for the owner of the property, SR, and Landlord MP confirmed that they received copies of the tenants' dispute resolution hearing package sent by the tenants by registered mail in late August 2019. I find that the landlords were duly served with this package in accordance with section 89 of the *Act.* Since both parties confirmed that they had received one another's written evidence and had reviewed that evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Although I attempted to hear all of the tenants' application during the time allotted, I advised the parties at the beginning of this hearing that it might only be possible to hear evidence regarding the most pressing of the matters raised by the tenants in their application, the tenants' application to cancel the 1 Month Notice. I noted that time had already been allotted for me to hear the landlords' application to obtain an Order of Possession based on the same 1 Month Notice, as well as the landlords' application for a monetary award, on December 10, 2019 (see file reference above). With the agreement of the parties, I adjourned consideration of the tenants' monetary claim for a retroactive rent reduction based on their alleged loss of quiet enjoyment to be heard on December 10, 2019, in concert with the landlords' own application for a monetary award. For this reason, the evidence and sworn testimony considered during the October 29, 2019 hearing was limited to those issues associated with the landlords' 1 Month Notice and the tenancy agreement between the parties that gave rise to the landlords' issuance of that Notice.

Issues(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession? Are the tenants entitled to a monetary award for their loss of quiet enjoyment during the course of this tenancy? Should any other orders be issued with respect to this tenancy? Are the tenants entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The tenants moved into this three level home on January 29, 2019, with Landlord MP's (MP's) permission, a few days before their scheduled date to take occupancy of the premises on February 1, 2019. Prior to that time and until March 18, 2019, MP was managing this home co-owned by their sister, Landlord SR (the landlord) and the landlord's spouse.

The parties agreed that monthly rent is set at $2,600.00 for this three level home, containing three bedrooms on the main floor, a kitchen and living room area on the uppermost level, and a recreation room on the lowest level. The parties agreed that the tenants have paid $2,600.00 in monthly rent for each of the months since February 1, 2019, with the exception of the month of June 2019. At a hearing of the tenants' application for dispute resolution on May 13, 2019, the parties agreed that the tenants would be allowed to deduct $1,925.00 from their June 2019 rent payment for their loss

of use of the property from the beginning of their tenancy until May 13, 2019, the date of that hearing. This settlement agreement was confirmed in the decision of the Arbitrator presiding over the hearing of the tenants' application (see above for file reference). The settlement agreement reported by the Arbitrator read as follows:

> *During the hearing, the parties agreed to settle these matters, on the following conditions:*
>
> - *The parties agreed that the locks to the rental unit have been changed;*
> - *The parties agreed that the owner will pay the tenants the sum of $1,100.00 which was previously offered; The landlord MP agreed to pay the tenants the amount of $825.00 for a total owing to the tenants of $1,925.00, This is comprised of loss of use of premises from when the tenancy commenced until May 13, 2019;*
> - *The tenants will be entitled to deduct the amount of $1,925.00 from June 2019, rent in full satisfaction of this agreement; and*
> - *The landlord agreed that the balance of work to be completed would be completed no later than May 27, 2019...*

In their decision, the presiding Arbitrator emphasized the following:

> *...The tenants are at liberty to apply for future loss of premises for the time period after May 13, 2019, if a settlement cannot be made. The tenants are a liberty to reapply for monetary compensation for loss of quiet enjoyment as indicated in their application...*

The landlords' 1 Month Notice identified the following reasons for seeking an end to this tenancy for cause by September 30, 2019:

> *Tenant has allowed an unreasonable number of occupants in the unit/site*
>
> *Tenant has assigned or sublet the rental unit/site without landlord's written consent.*

In support of the 1 Month Notice, Landlord Representative BC entered into written evidence a copy of the warning letter sent to the tenants on June 18, 2019, after the landlords became aware that an unauthorized person was residing in the rental unit.

...There is no Subletting allowed without prior written consent from the owner or Landlord, as per the signed tenancy agreement. There has been no such written consent sent to the owner or myself. You will have 20 days to have the occupant(s) removed from the property; a follow up inspection will be on July 8th; between the hours of 9 am and 5 pm to ensure that there is no subletting of this space...

In that letter and in this hearing, the landlords' representatives asserted that the tenants were bound by the provisions of the Addendum to the Residential Tenancy Agreement they signed, which contained the following clauses:

(7) No overcrowding or subletting
(8) Any extra person to be approved by MP in writing

Although Landlord Representative BC advised in their June 18, 2019 letter that this was the landlord's first warning letter, they did not specify how many warning letters could or would be issued. They also did not state what would occur if the tenants failed to abide by their request. Landlord Representative BC only stated in that letter that "further action will be taken." The letter made no mention that failure to comply could lead to the issuance of a 1 Month Notice.

Tenants CC, JL and GT (CC's daughter) gave sworn testimony supported by written evidence that a non-family member did move into the lower level of the rental home from May 15 to July 1, 2019. They testified that they understood from numerous conversations with MP prior to their agreeing to rent these premises that they would be allowed to offset some of their monthly rent by having one or two non-family members reside in the lower level of the rental home. They said that this was the primary reason that they were attracted to this rental home. They asserted that prior to their moving in and during the early stages of their tenancy that MP had even encouraged them to find potential roommates for the lower level to share the costs with the family.

The tenants also maintained that they were never provided with a written Residential Tenancy Agreement (the Agreement) by MP who was then managing the property for the landlord until February 27, 2019. They claimed that MP gave many excuses as to why the tenants were not being provided with a written Tenancy Agreement. During the first six weeks of their tenancy, MP was undertaking major renovations to the premises while they resided there. The tenants gave sworn testimony and written evidence that they were not presented with the Agreement for signature by MP until February 27, 2019, and not on February 1, 2019, the date that MP had filled in for the signature of the Agreement. Although MP gave sworn testimony that the tenants signed the Agreement

on February 1, 2019, MP confirmed that MP had actually completed all of the Agreement, including the date before handing the document to Tenants CC and JL for signature. The tenants provided written evidence that they were presented with little option on February 27, 2019, but to sign the Agreement under duress, as by that time MP had adopted an intimidating and threatening demeanour with them regarding their tenancy. They also claimed that they had received no indication from MP at that time that MP would withhold permission to find someone to move into the lower level of the rental home. The tenants maintained that they had an oral agreement with MP that was at odds with the terms as set out in the Agreement which they felt forced to sign on February 27, 2019, and not on February 1, 2019, the date claimed by MP and as shown beside their signatures. They also provided written statements and sworn testimony from a number of witnesses, including Witnesses RW and LD, both of whom attended the hearing and gave undisputed sworn testimony that they had overheard conversations between the tenant(s) and MP in which MP clearly agreed that the tenants would be permitted to identify non-family members to reside with them so as to help them pay for their rent. The tenants also gave undisputed sworn testimony that neither Landlord Representative BC nor the landlord gave them any indication during their first meeting with them to alert them that non-family members or other occupants would not be allowed to reside in the rental unit with the tenants.

Separate from whether their oral agreement with MP, which prompted them to enter this tenancy, takes precedence over the written Agreement they signed containing Clauses 7 and 8 in the Addendum, the tenants also gave sworn testimony that they took quick action to make sure that the person living with them as of May 15, 2019 had vacated the rental unit by the landlord's July 8, 2019 inspection date. They testified that the person living in their lower level moved out on July 1, 2019.

Landlord Representative BC testified that inspectors from their office attended the property on July 8, 2019, as scheduled. Landlord Representative BC said that an inspector reported that a young woman was still living in the lower level of the rental home in contravention of the warning letter sent in June 2019. When asked as to how the inspector knew this, Landlord Representative was uncertain as to whether they spoke to the young woman living there, or whether they obtained this information from any of the tenants. Landlord Representative BC confirmed that the inspector had not provided any written evidence for consideration at this hearing, nor was the inspector available to provide sworn testimony.

Tenant JL confirmed that they spoke with the inspector from Landlord Representative BC's company on July 8, 2019, and advised them at that time that the woman living in

the lower level had vacated the rental unit on July 1. Tenant GT also gave sworn testimony that they were in another room when Tenant JL told the inspector that no one else was living there and the tenants were using the lower level themselves now.

Tenant JL also testified that the definition of subletting as set out in the *Act* did not properly describe the arrangement whereby the non-family member was living in the lower level of this rental home for a six-week period ending on July 1.

At the hearing, MP testified that in addition to the person living in the lower level of the home in May and June, that Tenant GT's male friend, Witness LD, was also occupying the premises illegally. When asked to explain how MP knew this, MP said that LD's vehicle was parked there all the time, and MP sees him coming and going frequently. The tenants and Witness LD denied that LD is residing with the tenants. Although LD admitted staying overnight once or twice per week or month, LD said that they reside elsewhere.

Analysis

Section 47 of the *Act* contains provisions by which a landlord may end a tenancy for cause by giving notice to end tenancy. Pursuant to section 47(4) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within ten days after the date the tenant received the notice. If the tenant makes such an application, the onus shifts to the landlord to justify, on a balance of probabilities, the reasons set out in the 1 Month Notice. Any of the reasons cited on the 1 Month Notice may enable a landlord to end the tenancy for cause. In this case, the 1 Month Notice cited two reasons for ending this tenancy.

Whether or not any oral agreement established between the tenants and MP when they were managing the property on the landlord's behalf takes precedence over the Agreement and Addendum signed by the tenants, the landlords still have to establish that the contraventions claimed warrant ending the tenancy for cause.

Although Clause 7 of the Agreement states that there will be no overcrowding or subletting, the landlord still has to establish one of the following:

- that there were an unreasonable number of occupants living in the rental unit; or
- that the rental unit was sublet to someone not listed on the Agreement or not established as a tenant in the oral agreement between the tenants and MP before the Agreement was signed.

If the landlords can establish that either of the above occurred, the landlords would also have to demonstrate on a balance of probabilities that proper notice was given to the tenants to correct any problem that existed and that the tenants failed to comply with that notice.

In considering this matter, I should first note that Clauses 7 and 8, may or may not have any legal effect, either because they contradicted the oral agreement between the tenants and MP, or because the term itself may be unconscionable or expressed in such a way as to be unclear as to the rights and obligations attached to those Clauses, which would be in contravention of section 6(2) or (3) of the *Act.*

MP gave sworn evidence at the hearing that he completed the dating of the tenants' signature on the Agreement before they signed the document. The tenants maintained that this signing actually occurred almost four weeks after the date identified on the Agreement by MP. There is also evidence that MP altered the pet damage provisions in the Agreement. This latter point is of no real consequence to the matters before me, other than the rather cavalier manner that MP appears to have taken with respect to what was intended to be a legally enforceable contract between the parties.

In this case, even if I were to accept that the disputed Agreement is the legally binding contract between the parties for this tenancy, the test for the first reason cited in the landlord's 1 Month Notice is whether the tenants have allowed an unreasonable number of occupants in the unit. In this regard, this is a three bedroom rental unit extending over three separate levels of this rental home. Rather than the four people who were scheduled to be residing in this rental unit according to the Agreement, the tenants allowed for a short period of time an extra person to reside there, albeit in a different part of the residence. Based on a balance of probabilities, I find little in the landlords' evidence that would establish that five people living in this house was an unreasonable number of occupants for this dwelling.

Turning to the second of the reasons identified in the landlords' 1 Month Notice, Tenant JL questioned whether the arrangement whereby the tenants obtained someone else to reside in the lower level of their rental home truly constituted a sublet as defined under the *Act*. While they were receiving lodging payments from the person staying with them for a six week period, the tenants all remained in residence in this home.

Section 1 of the *Act* contains the following definition of a sublease agreement:

> ***"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;

Residential Tenancy Branch Policy Guideline 19 provides the following guidance to Arbitrators for the distinction between roommates and subletting agreements:

...Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate, with no rights or responsibilities under the Residential Tenancy Act.

The use of the word 'sublet' can cause confusion because under the Act it refers to the situation where the original tenant moves out of the rental unit, granting exclusive occupancy to a subtenant, pursuant to a sublease agreement. 'Sublet' has also been used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. However, under the Act, this is not considered to be a sublet. If the original tenant transfers their rights to a subtenant under a sublease agreement and vacates the rental unit, a landlord/tenant relationship is created and the provisions of the Act apply to the parties. If there is no landlord/tenant relationship, the Act does not apply...

(underlined emphasis in original)

From this guidance, the arrangement the tenants entered into with the person who was staying with them may not actually have constituted a sublet for the purposes of the *Act*, but was more in the nature of an occupant/roommate.

In this case, whether or not this were a true sublet and whether in contravention of Clause 8 of the Addendum to the Agreement, I find that the tenants did in fact comply with the warning letter sent to them on June 15, 2019, advising them that the additional person living with them needed to vacate the premises by July 8, 2019. While all three tenants gave convincing first hand sworn testimony that the person residing with them in their lower level vacated the premises by July 1, 2019, the landlords relied on a second-hand report provided by one of the inspectors to Landlord Representative BC. The landlords could have had one of the inspectors provide sworn testimony at this hearing, but did not. At the hearing, Landlord Representative BC said that one of the inspectors was actually working that day but had just left the office and would be unavailable to call as a witness. The tenants gave convincing sworn testimony on this point, especially that provided by Tenant GT who heard Tenant JL clearly tell the inspectors that no one else was living in the basement anymore.

By contrast, Landlord Representative BC was not even sure who the inspectors believed was living in the lower level of the home or who told them who was living there. Landlord Representative BC said that they thought it was the young woman herself who provided that information to the inspectors. Later, Landlord Representative BC said they thought it was Tenant CC who provided this information. Landlord Representative BC eventually advised that she was not sure who told the inspectors that there was someone still living in the lower level of the rental home. Based on this evidence, I find on a balance of probabilities that the landlords have not demonstrated that the tenants failed to abide by the request in the warning letter to have anyone not listed on the Agreement vacate the premises by July 8, 2019, the date cited in the warning letter.

I also note that the warning letter itself never advised the tenants that failure to abide by the request in the warning letter could lead to the issuance of a 1 Month Notice and end their tenancy for that reason.

For the reasons stated above, I allow the tenants' application to cancel the 1 Month Notice as I find on a balance of probabilities that neither of the reasons stated in the 1 Month Notice warranted the issuance of this Notice to the tenants.

Since the tenants' have been successful in an important part of their application, I allow them to recover the $100.00 filing fee for their application.

Conclusion

The tenants' application to cancel the 1 Month Notice is allowed. The landlords' 1 Month Notice of August 17, 2019, is of no continuing force or effect. This tenancy continues until ended in accordance with the *Act.* In making this final and binding determination regarding the landlords' 1 Month Notice, I advised the parties that there is no need to consider that portion of the landlords application to be heard on December 10, 2019 that involves the landlords' application for an Order of Possession for cause with respect to the 1 Month Notice of August 17, 2019 that has been cancelled (see above noted file).

I allow the tenants to recover their $100.00 filing fee from the landlords. As this tenancy is continuing, I allow the tenants to reduce a future monthly rent payment by $100.00 in order to implement this decision.

As I did not have time to consider the other monetary aspects of the tenants' application, I am adjourning the remainder of the tenants' application to be heard along with the landlords' application for a monetary award at the scheduled December 10, 2019 hearing referenced above. As mentioned to the parties at the hearing, neither party is allowed to provide any additional written evidence with respect to the tenants' application for a monetary award, nor are the tenants allowed to amend their existing application. The landlords remain at liberty to amend their own existing application, provided that the amendments are made in accordance with the RTB's Rules of Procedure with respect to amended applications. This would normally restrict the landlords to amendments to the issues identified in their original application.

Although both parties assured me that they have the proper call in information for the already scheduled December 10, 2019 hearing, I have included the call-in information for that hearing at the beginning of this decision. I should note that the call-in time and details for calling into the reconvened hearing of the remainder of the tenants' application and consideration of the monetary portion of the landlords' application remain the same as those that they used for the current hearing.

This interim 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: October 29, 2019

Residential Tenancy Branch