



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding EDUARDO HOLDINGS LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **CNC FFT**

Introduction

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

- An order to cancel a One Month Notice to End Tenancy for Cause ("Notice") pursuant to section 47; and
- Authorization to recover the filing fees from the landlord pursuant to section 72.

Both the tenant and the landlord attended the hearing. The landlord was represented at the hearing by its agent, JW ("landlord") and counsel, TC. As both parties were present, the exchange of documents was confirmed. The landlord acknowledges receipt of the tenant's Notice of Dispute Resolution Proceedings but denies receiving any evidence from the tenant. The tenant testified she did not send any evidence to the landlord. As the tenant has not served evidence in accordance with rule 3 of the Residential Tenancy Branch Rules of Procedure, documentary evidence from the tenant was not considered. The tenant acknowledges being served with the landlord's evidence package. The landlord's documentary evidence will be referred to in this decision.

Issue(s) to be Decided

Should the One Month Notice To End Tenancy for Cause be upheld or cancelled?
Is the tenant entitled to recover the filing fee?

Preliminary Matters

Section 63 of the *Act* allows an Arbitrator to assist the parties settle their dispute and record the settlement in the form of a decision and order if the parties settle their dispute during the dispute resolution proceeding. Accordingly, I attempted to assist the parties to resolve this dispute by helping them negotiate terms of a settlement. The parties could not reach consensus on the terms of a settlement; therefore, I base this decision on the testimony and evidence provided by the parties for this hearing.

Background and Evidence

The landlord provided the following testimony. The rental unit is a one bedroom apartment. The tenant had an original tenancy agreement with the landlord dated March 4, 2010. A new tenancy agreement was signed with the named tenant and her husband the following month on April 1, 2010 when the tenant got married. Rent was set at \$860 per month payable on the first day of the month. A security deposit of \$430.00 was collected and is still being held by the landlord. Currently, the rent is \$1,120.00 per month. A copy of the tenancy agreement signed on April 1, 2010 was provided as evidence by the landlord. Clause 13 of the tenancy agreement was highlighted in the landlord's testimony which reads:

No person, other than those listed in paragraphs 1 and 2 above, may occupy the rental unit. A person not listed in paragraph 1 or 2 above who resides in the rental unit for a period in excess of fourteen cumulative days in any calendar year will be considered to be occupying the rental unit contrary to this Agreement and without right or permission of the landlord. This person will be considered a trespasser. A tenant anticipating an additional person to occupy the rental unit must promptly apply in writing for permission from the landlord for such person to become an approved occupant. Failure to apply and obtain the necessary approval of the landlord in writing is a breach of a material term of this Agreement, giving the landlord the right to end the tenancy after proper notice.

Clause 19 reads:

OCCUPANTS AND INVITED GUESTS. The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit. The landlord must not impose restrictions guests and must not require or accept any extra charge for daytime visits or overnight accommodation of guests. If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end a tenancy. Disputes regarding the notice may be resolved by applying for dispute resolution under the Act.

The landlord and the tenant signed a mutual agreement to end a tenancy on April 5, 2018, ending the tenancy on May 31, 2018. Financial incentive was offered to the tenant. The landlord testified they did not choose to seek an Order of Possession

based on the Mutual Agreement because the tenant had recently had a baby and they felt it would be cruel to enforce it at that time. The tenancy continued on.

On September 18, 2019, the landlord served the tenant with a One Month Notice To End Tenancy for Cause ("Notice") by posting it to the tenant's door. The tenant acknowledges receiving it on that date. The reason provided on the Notice reads:

Tenant has allowed an unreasonable number of occupants in the unit/site.

The landlord argues that the tenancy agreement included only the two named tenants and clause 13 of the tenancy agreement prohibits any other occupants. After entering into the tenancy agreement, the tenants had two children, who are currently aged 2 and 6. The landlord argues the 2 children were not authorized by the landlord to occupy the rental unit.

At the hearing the landlord referred me to their submissions which states the landlord's concerns:

- *an unreasonable number of occupants in a unit causes excessive wear and tear to walls and flooring, over-use of appliances, plumbing, electricity, and creates excess noise.*
- *The landlord is very concerned about the current overcrowded living arrangements provided for the two growing children. The Landlord feels that it is not healthy or acceptable for the children to be sleeping in the same bedroom with a married couple. The landlord has serious concerns about the occupancy now and looking ahead to the future.*

In evidence, the landlord provided photographs of the rental unit to show the state of decoration and repair.

The tenant argues it's just her, her husband and their two children living in the rental unit. The children are very small and do not take up very much room. She and her family keep the rental unit clean and tidy. She testified she has searched for another place to live however finding a two bedroom unit within her price range is very difficult. The tenant testified that the two bedroom units in the building are renting for \$2,200.00, much more than she can afford. She is a good renter, always pays the rent on time and the owners only want her out to get a higher rent for the unit. She may leave the rental unit later on, however that will happen when she is ready to do so.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

6. Enforcing rights and obligations of landlords and tenants

- 1) The rights, obligations and prohibitions established under this *Act* are enforceable between a landlord and tenant under a tenancy agreement.
- 2) A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58 (1) [*determining disputes*].
- 3) A term of a tenancy agreement is not enforceable if
 - a) the term is inconsistent with this *Act* or the regulations,
 - b) the term is unconscionable, or
 - c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

47 Landlord's notice: cause

- 1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
 - c) there are an unreasonable number of occupants in a rental unit
- 4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

The tenant acknowledged receipt of the Notice on September 18, 2019 and filed an Application for Dispute Resolution on September 20th. I find the application was filed within 10 days of receiving the Notice in accordance with section 47(4) of the *Act*. If the tenant files the application, the landlord bears the burden to prove he or she has valid grounds to terminate the tenancy for cause. The landlord must show on a balance of probabilities, which is to say it is more likely than not, that the tenancy should be ended for the reasons identified in the Notice.

The landlord seeks to end the tenancy for a breach of section 47(1)(c) for an unreasonable number of occupants. There are two factors to determine here. First, is the term restricting the number of occupants unconscionable and second, is the number of occupants unreasonable?

Residential Tenancy Branch Policy Guideline-8 defines an unconscionable term as a term of tenancy that is oppressive or grossly unfair to one party. Terms that are unconscionable are not enforceable.

Whether a term is unconscionable depends upon a variety of factors. A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

Term 13 of the tenancy agreement seemingly restricts the tenant's capacity to have children and allow them to co-habit with her without the permission of the landlord. First, the tenant is obligated to provide the necessities of life for her children which includes providing them with shelter. The children are dependents of the tenant and are therefore cannot be 'trespassers' as defined by term 13 of the tenancy agreement. I find the strict observation of terms 13 and 19 of the tenancy agreement are unconscionable as they exploit the tenant's needs. Whereas another adult moving into the rental unit could be considered an occupant and therefore a 'trespasser', the tenant's children clearly cannot. I find the term requiring written permission from the landlord to have her own children live in the rental unit to be grossly unfair to the tenant and is therefore unconscionable. In accordance with section 6(3), as the term has been found to be unconscionable, the term is not enforceable.

Second, the landlord argues that the number of people in the rental unit are unreasonable. I find the landlord's argument that 4 people living in the one-bedroom apartment causing excessive wear and tear to walls and flooring, over-use of appliances, plumbing, electricity, and creating excess noise to be a false argument. The landlord had demonstrated insufficient evidence of any of the detriments listed. From the landlord's photographs provided, I cannot determine any of the damage or noise concerns inferred by the landlord. Further, the tenancy agreement shows the tenant pays her own electricity.

Lastly, the landlord's statement of concern for the health and safety of the children I find to be ingenuine. The landlord has not alleged any harm coming to the children resulting from this tenancy. The tenant and her husband have the right to determine what is best for their children, given the family's own circumstances. The landlord has neither the right nor the moral obligation to determine this for the tenant or her family. The landlord has not proven, on a balance of probabilities, that there are an unreasonable number of occupants living in the rental unit.

Given my findings that the term restricting occupants is unenforceable due to being unconscionable and that the number of occupants in the rental unit is not unreasonable, the landlord's One Month Notice to End Tenancy for Cause is cancelled and of no further force or effect.

As the tenant's application was successful, the tenant is also entitled to recovery of the \$100.00 filing fee for the cost of this application. The tenant may deduct \$100.00 from a future rent payment in accordance with section 72 of the *Act*.

Conclusion

The One Month Notice to End Tenancy for Cause is cancelled and of no further force or effect.

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: November 27, 2019

Residential Tenancy Branch