



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC FF

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution. A hearing by telephone conference was held on December 12, 2019. The Tenants applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- cancellation of the Landlord's 1 Month Notice to End Tenancy for Cause (the Notice) pursuant to section 47.

Both parties attended the hearing and provided testimony. All parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me.

Neither the Landlord nor the Tenant raised any issues with respect to service of the Notice of Hearing, or the documentary evidence each party was relying upon during the hearing. Both sides confirmed they had copies of each other's documentary evidence.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues(s) to be Decided

- Are the Tenants entitled to have the Notice cancelled?
 - If not, is the Landlord entitled to an Order of Possession?

Background and Evidence

The Landlord issued the Notice for the following reasons:

- *Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.*
- *Tenant has assigned or sublet the rental unit/site without landlord's written consent.*

The Tenants acknowledged receiving the Notice on October 10, 2019. The Landlord attached a letter to the Notice, which specified that the Tenants have fundamentally breached the tenancy agreement by failing to get prior written consent to bring additional renters into the unit. The Landlord stated the Tenants continue to bring people in despite being made aware the Landlord was not okay with this anymore.

The following facts are not in dispute: the Tenants have lived in the rental unit for 20 years, and a copy of the tenancy agreement was provided into evidence. The rental unit is part of a 35 unit complex, and the building was purchased by the new owners in December 2018. The property manager at the hearing has stated he has only been involved with the tenancy since they new ownership took over. The onsite caretakers were also both present, and stated that they have been the caretakers for 14.5 years, and have dealt with the Tenants for many years. The Tenants rent a 2 bedroom unit (plus den).

The Landlord stated that since they took over ownership and management last December, they have tried to enforce and be firm on some of the terms in the tenancy agreement. More specifically, the Landlord is trying to enforce the following term of the tenancy agreement as a material term:

9. **ADDITIONAL OCCUPANTS.** When a person who is not listed in paragraph 2 above, resides in the premises for a period in excess of two weeks in any calendar year they shall be considered to be occupying the premises contrary to this Agreement and without the right or permission of the landlord. This person shall be considered as a trespasser. Where the tenant anticipates an additional person in the rental premises, they shall promptly apply in writing for permission from the landlord for such person to become a permanent occupant. Failure to apply and obtain the necessary approval of the landlord in writing is considered a fundamental breach of this Agreement. The landlord may at his option give immediate notice to end the Agreement or may at his option give notice to the tenant to immediately correct the breach. The landlord has the right to end the tenancy, if the tenant fails to correct the said breach within a reasonable time after having been given written notice by the landlord.

The Landlord elaborated and stated that sometime in June, the caretakers noticed that there was an additional occupant in the Tenants rental unit, and reported this to the them.

The Landlord stated that they issued a warning letter on June 25, 2019, stating the Tenants are breaching their agreement by bringing in unapproved occupants. The Landlord asked the Tenants to remove the additional occupants by July 15, 2019. The Tenants wrote back to the Landlord and explained that they had been given permission by previous management to rent these rooms out, and were allowed up to 6 occupants, which they have not exceeded. The Landlord wrote again to the Tenants on June 18, 2019, and asked that they provide whatever written authorization they had to substantiate their alleged agreement with the previous Landlord and owner. The Landlord was never provided anything from the Tenants, and the Landlord issued another warning at the end of August 2019, stating that they would seek to end the tenancy if the Tenants continued to bring in extra renters, without prior consent. Subsequently, the Tenants were issued the Notice because they failed to adhere to the Landlords' warning letters.

The Tenants acknowledge that they continue to rent to two additional people who are not on the tenancy agreement. The Tenants explained that they have a long history of renting out the bedrooms to additional occupants while they also reside in the rental unit. The Tenants explained that one of them lives in the den, the other Tenant lives in the living room, and they rent the two bedrooms out to other occupants on a rotating basis. The Tenants argued that the previous Landlords knew about their rental regime, and did not take issue with it, which entitles them to continue doing it. The Tenants stated that based on the doctrine of estoppel, the Landlord cannot enforce term #9 as a material term because it has been immaterial for so many years.

The caretakers confirmed that they have known about the Tenants renting out their extra rooms for many years, and they had raised this issue with the previous owner/manager many times. The caretakers stated that they did not have the power to stop the Tenants, so they would just tell the previous owner, who in turn did not take action to stop it. The caretakers confirmed that the Tenants have been renting out rooms for over 10 years now.

Analysis

In the matter before me, the Landlord has the onus to prove that the reasons in the Notice are valid.

I have reviewed the Notice issued by the Landlord and I find it meets the form and content requirements under section 52 of the *Act*.

First, I turn to the second ground the Landlord selected on the Notice which is alleging that the Tenants have assigned or sublet the rental unit/site without landlord's written consent. In my consideration of this matter, I turn to Residential Policy Guideline #19 which states:

Assignment

Assignment is 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.

[...]

Subletting

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.

It is undisputed that the Tenants continue to live in the rental unit, while they rent portions out to other occupants. As the Tenants have remained in the unit during the material time, I find they have not assigned or sublet the unit. I find the Landlord has not established that there are sufficient grounds to end the tenancy on this cause.

Next, I turn to the first ground the Landlord identified on the Notice which is that the Tenants have breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

I acknowledge this tenancy has been going on for around 20 years now, and the Tenants have a history of renting out rooms to others. It is undisputed that the building ownership changed last December 2018, and that, although the property manager and owner changed at that time, the caretakers have been continuously onsite and employed for around 15 years.

I note the current owner and manager of the unit is seeking to enforce a "material term" of the tenancy agreement (term #9 for additional occupants without permission). Although this term was included in the original tenancy agreement, signed nearly 20 years ago, I

note the Tenants have been renting out the rooms, without getting prior written consent, for around a decade now. The caretakers confirmed that they were aware of this issue for many years, and because they had no authority, they would forward this information to the previous manager, who in turn did not take any formal steps to enforce the issue. I note the Tenant has raised the issue of estoppel to prevent the Landlord from relying on this term.

Estoppel by Convention

In a recent Supreme Court of Canada decision, *Ryan v. Moore*, 2005 2 S.C.R. 53, the court explained the issue of estoppel by convention as follows:

59 After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

- (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
- (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
- (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

Applying the above, I find as follows:

- (1) The Tenants have allowed additional occupants to rent living space within their rental unit for around 10 years. Although the tenancy agreement states the Tenants must obtain prior written consent before bringing in new occupants, the Landlord/agent was aware of the Tenants not adhering to this term of the tenancy agreement, and did not take any steps to stop or enforce this term. In fact, the caretaker stated they made the previous manager aware many times over many

years, and nothing was done. I find there was an implied consent given through this conduct.

- (2) The Tenants relied on this assumption and continued to rent to unapproved occupants.
- (3) It would be unjust and unfair to prevent the Tenants from renting the space out, as this is likely an additional source of revenue which they have become accustomed to.

Applying the principle of estoppel by convention, I find that the Landlord is estopped from enforcing this term as a material term of the tenancy agreement. I find it important to note that even though the rental unit sold last year, the tenancy agreement remains unchanged, and transfers to the new owner. The new owner is not entitled to change that agreement, without consent of all parties. Similarly, the Tenant may not unilaterally change terms.

Given my findings on this matter, I further find there is insufficient evidence from the Landlord to show that the Tenants have breached a material term of the tenancy agreement by their conduct. As a result, I find there is insufficient cause to end the tenancy under this Notice.

As the Tenants were successful with their application, I grant them the recovery of the filing fee against the Landlord. The Tenants may deduct the amount of \$100.00 from 1 (one) future rent payment.

I note that the Landlords do not have sufficient cause to end the tenancy based on *this* Notice. I find it important to note that the previous manager did not seek to enforce this term of the tenancy agreement, which is partly what has estopped the new Landlord from enforcing that term in the agreement.

I find the Tenants are now, formally, put on notice that the new owners and managers are intending to rely on the written/original terms of the tenancy agreement, going forward. I find this Notice to End Tenancy serves as written warning to the Tenants that they must comply with the written terms in their original tenancy agreement. I order the Tenant to comply with the term #9 of the agreement, once the current occupants move out.

Conclusion

The Tenants' application is successful. The October 2019 Notice is cancelled.

The tenancy will continue until ended in accordance with the Act.

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: December 12, 2019

Residential Tenancy Branch