Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes AS, CNC, FFT

Introduction

In this dispute, the tenant seeks the following relief under the *Residential Tenancy Act* (the "Act"):

1. an order cancelling a One Month Notice to End Tenancy for Cause (the "Notice"), pursuant to section 47 of the Act;

2. an order allowing the sublet of a rental unit, pursuant to section 65 of the Act; and,

3. recovery of the filing fee pursuant to section 72 of the Act.

The tenant applied for dispute resolution on November 21, 2019 and a dispute resolution hearing was held on January 14, 2020. The tenant, an interpreter for the tenant, and the landlord attended the hearing, and they were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. No issues of service were raised by the parties.

I have reviewed evidence submitted that met the *Rules of Procedure* and to which I was referred but have only considered evidence relevant to the issues of this application.

Finally, I note that section 55 of the Act requires that when a tenant applies for dispute resolution seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the application is dismissed and the landlord's notice to end tenancy complies with the Act.

Issues

1. Is the tenant entitled to an order allowing a sublet of the rental unit?
2. If not, is the tenant entitled to an order cancelling the Notice?
3. If not, is the landlord entitled to an order of possession?
4. Is the tenant entitled to recovery of the filing fee?

Background and Evidence

The tenant runs a restaurant and does not live in the rental unit but rents out the rental unit to her restaurant workers. The landlord issued a Notice to end the tenancy because the tenant does not have the written consent of the landlord to rent out (that is, sublet) the rental unit to others. Rent is $948.00 and the tenancy is, as confirmed by the parties, a month-to-month tenancy (or a "periodic tenancy" as it's called in the Act).

In a previous arbitration hearing the Notice was considered to be served on the tenant on November 7, 2019. A copy of the Notice was submitted into evidence; the Notice was issued because the "Tenant has assigned or sublet the rental unit/suite without landlord's written consent." (The previous arbitration hearing file is referenced on the cover page of this decision.)

As explained by the landlord in her introductory testimony, the Notice was issued because "the tenancy agreement doesn't allow sublet." This is the second time this has occurred, even though she has previously told the tenant that subletting is not permitted under the tenancy agreement. While a copy of the written tenancy agreement was not submitted into evidence for this dispute, it was available in the parties' previous dispute file. For the purposes of expediency and procedural fairness, the parties consented to my accessing this file for the sole purpose of reviewing and considering the written tenancy agreement.

Submitted into evidence (in the previous file) is a two-page copy of the tenancy agreement. It is dated and starts on April 1, 2018 and is between the tenant and the former landlord. The tenancy was initially a one-year fixed term tenancy converting to a month-to-month thereafter. Clause 17 of the tenancy agreement is titled "Assign or Sublet" and the clause states that the "Tenant shall not assign or sublet the premises without the prior written consent of the Landlord."

Submitted into evidence (in the file before me) is a copy of page 6 of what appears to be a new tenancy agreement, and where at the bottom of the page the following hand-printed annotation appears:

SUBLET 1 BEDROOM, 1 person only

It is then initial by what appears to be initials of the tenant and the landlord. Neither party, however, spoke about this addendum or annotation, or made any mention of it.

The landlord purchased the rental unit a few years ago and inherited the tenancy. She was not apparently aware of the subletting at the time but found out some time later when the strata imposed a bylaw fine for not letting them know about the elevators being used for moving tenants in and out of the building. On a few occasions during her testimony the landlord mentioned that having sublet tenants has resulted in conflict with the strata bylaws (with the elevator use and also with a noise complaint). One must give the strata two weeks' notice in order to secure the elevator for moving new tenants into the building.

Both parties spoke about the issue of whether the tenant was making a profit from subletting; however, as explained to them, I would not be delving into this issue. Whether a tenant is profiting from a sublet is not a factor in assessing whether either party is in breach of the Act as it pertains to an assignment or sublet as is the case here. I should also add that both parties spoke about the possible reasons for the landlord attempting to end the tenancy, including the potential for a rent increase. Again, the motives behind a landlord's intention to end a tenancy based on this type of Notice are not in issue.

The landlord further testified that this whole issue is "stressing me out" and she feels like she has zero control over her own property.

In her testimony, the tenant argued that this entire dispute and the Notice "feels unfair" because she had, and has, previously rented out the rental unit for a few years before the new landlord came into the scene without any issues. "For quite some time before the rental unit was sold," added the tenant's interpreter. And she said that in the 8 years she has been subletting, there was not any strata-type in or out fees. Though, she expressed an understanding that the strata rules may have changed, and she is certainly willing to pay whatever fees are expected or required. But, "suddenly, she [the landlord] said no," and wondered "why is the landlord so upset?"

She explained that she rents out the rental unit to her restaurant workers, and that if she has to end the tenancy as a result of this dispute that it would not be fair to her workers. Moreover, she stressed that she always pays the rent on time (in advance, even, with post-dated cheques) and that the rental unit is for her workers, not for her. (Implying, I would assume, that there is no profit motive for her.)

In closing, the tenant simply “wants this to be as fair as possible” (in the words of her interpreter). She does not want the landlord to arbitrarily deny the tenant’s choice to sublet, and that other than the one-time noise and elevator bylaw issues, there is no reason to end the tenancy.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In this case the onus falls on the landlord to prove, or establish, the ground on which the Notice was issued.

Subsection 47(1) and (i) of the Act states that a landlord may end a tenancy by giving notice to end the tenancy if “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.”

Section 34 of the Act states that

> (1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.
>
> (2) If a fixed term tenancy agreement has 6 months or more remaining in the term, the landlord must not unreasonably withhold the consent required under subsection (1).
>
> (3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

Section 34(1) is the starting point in my analysis. Has the landlord consented in writing? I find that she has not. The tenant does not reside in the rental unit, and as such, any occupant paying rent to live in the rental unit must be considered a sublet tenant. While

neither party spoke about the annotation that appears at the end of what can only be a new tenancy agreement, the annotation does not, I find, convey consent of the landlord to sublet the rental unit, which is a two-bedroom rental unit. Indeed, the annotation implies that the tenant may only rent out only one bedroom, which is not unusual when a tenant resides in a rental unit and seeks a roommate. In any event, the tenant did not put forward this argument that the rather ambiguous annotation supports a claim that the landlord may have consented to a sublet.

Given the above I must come to the conclusion that the landlord has not at any time consented in writing to the tenant subletting the rental unit. As the tenancy is not a fixed term tenancy, I need not determine whether section 34(2) might provide an exception to this restriction. That is to say, whether the landlord has or is unreasonably withholding consent for the tenant to sublet is moot.

Having found that, under section 34(1) of the Act, as the landlord did not consent in writing, the tenant is not permitted to sublet the rental unit. As such and taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has met the onus of proving the ground on which the Notice was issued.

As the landlord has met their onus of proving the ground on which she issued the Notice, I dismiss the tenant's application for an order cancelling the Notice, without leave to reapply. The Notice, dated September 13, 2019 and served November 7, 2019, is upheld.

Section 52 of the Act requires that any notice to end tenancy issued by a landlord must be signed and dated by the landlord, give the address of the rental unit, state the effective date of the notice, state the grounds for ending the tenancy, and, be in the approved form.

Having carefully reviewed the Notice I find that it complies with the requirements set out in section 52. It is signed and dated by the landlord, it gives the address of the rental unit, it provides the effective date of the Notice, it states the ground for ending the tenancy, and it is in the approved form ("#RTB-33 (2016/12").

Section 55(1) of the Act states that if a tenant applies to dispute a landlord's notice to end tenancy and their Application for Dispute Resolution is dismissed or the landlord's

notice is upheld the landlord must be granted an order of possession if the notice complies with all the requirements of section 52 of the Act.

Having dismissed the tenant's application, having upheld the Notice, and having found that the Notice complies with all the requirements of section 52 of the Act, I grant the landlord an order of possession. This order of possession shall be issued in conjunction with this decision to the landlord, who is then responsible for serving the order on the tenant.

Finally, I note that the tenant applied for an order under section 65(3)(g), which is an order **"**that a tenancy agreement may be assigned or a rental unit may be sublet if the landlord's consent has been unreasonably withheld contrary to section 34(2)." Given that the tenancy is not a fixed term tenancy, it follows that this issue is rendered moot. I make no further decision or finding in this regard, and that aspect of the tenant's application is dismissed without leave to reapply.

As the tenant was not successful in her application, she is not entitled to recovery of the filing fee. This claim is dismissed without leave to reapply.

Conclusion

I hereby dismiss the tenant's application without leave to reapply.

I hereby grant the landlord an order of possession, which must be served on the tenant and is effective two days from the date of service. This order may be filed in, and enforced as an order of, the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: January 14, 2020

Residential Tenancy Branch