



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNC CNR FFT OLC

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;
- cancellation of the landlord's 10 Day Notices to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

CB, advocate for the landlord, represented the landlord in this hearing. 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.

The tenants confirmed receipt of the 1 Month Notice dated November 30, 2019, and the 2, 10 day Notices to End Tenancy for Unpaid rent dated December 17, 2019 and December 24, 2019. Accordingly, I find that the 1 Month Notice and 2, 10 Day Notices served to the tenants in accordance with section 88 of the *Act*.

The landlord confirmed receipt of the tenants' dispute resolution application ('Application'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenants' Application.

Preliminary Issue – Service of Evidence

The tenants served the landlord with another evidence package one day before the hearing. The landlord requested the exclusion of these late evidentiary materials as they did not have an opportunity to review this evidence before the hearing.

Rule 3.14 of the RTB's Rules of Procedure establishes that a respondent must receive evidence from the applicant not less than 14 days before the hearing. The definition section of the Rules contains the following definition:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.14 and the definition of days, the last day for the tenants to file and serve evidence as part of their application was January 13, 2020.

This evidence was not served within the timelines prescribed by rule 3.14 of the Rules. Where late evidence is submitted, I must apply rule 3.17 of the Rules. Rule 3.17 sets out that I may admit late evidence where it does not unreasonably prejudice one party. Further, a party to a dispute resolution hearing is entitled to know the case against him/her and must have a proper opportunity to respond to that case.

In this case the landlord did not have the opportunity to review the late evidence submitted by the tenants. I find the admission of this evidence would be prejudicial to the respondent. The tenants failed to submit their evidence within the required timelines, and in the manner required by the *Act*. On this basis I find that there is undue prejudice by admitting the tenants' late evidence. For these reasons, I exercise my discretion to exclude the tenants' late evidence that was served one day before the hearing date.

Although both parties expressed concern about the service of the remainder of the evidence submitted, I am satisfied that both parties had the opportunity to review each other's evidence before the hearing, with the exception of the tenants' late evidence excluded above. I find that there is no undue prejudice to either party by admitting the remainder of the evidentiary materials, which I find was served in accordance with section 88 of the *Act*. I therefore exercise my discretion to admit this evidence for the purpose of this hearing.

Issues

Should the landlord's 1 Month Notice and 10 day Notices be cancelled? If not, is the landlord entitled to an Order of Possession?

Are the tenants entitled to an order requiring the landlord to comply with the Act, regulation or tenancy agreement?

Are the tenants entitled to recover the filing fee for this application?

Background and Evidence

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.

This fixed-term tenancy began on April 1, 2019, and ends on March 31, 2020. Monthly rent is set at \$2,200.00 plus \$40.00 for utilities. The tenancy agreement submitted in evidence by the tenants state that "rent is due and payable in advance by the first day of each month.". The security deposit for this tenancy is set at \$1,100.00. A handwritten note, initialed by both parties, state that the landlord received \$500.00 in cash towards the security deposit on February 26, 2019, and that the full deposit must be received by the landlord by March 1, 2019".

Both parties confirmed that there was also a pet damage deposit in the amount of \$1,100.00 for this tenancy. The landlord testified that the tenants have not paid this pet damage deposit in full. The tenants testified that the \$1,100.00 was payable in installments, and they have paid \$850.00 towards the full amount.

The landlord testified that the tenants had unilaterally decided to change the tenancy agreement ~~by deciding to make their rent and pet damage deposit payments in installments.~~ **The landlord testified that both parties mutually agreed to change the payment schedule of rent and pet damage deposit to be paid in installments. The landlord testified that the tenants had then decided to change the schedule without his permission.** The landlord issued the tenants a 10 Day Notice on December 17, 2019 for failing to pay \$1,100.00 by December 6, 2019, and another 10 Day Notice on December 24, 2019 for failing to pay \$1,100.00 by December 6, 2019, \$1,100.00 by December 20, 2019, and the remaining \$350.00 pet damage deposit. The

tenants dispute the validity of the 10 Day Notices stating that they have always paid their rent on time.

The reasons provided on the 1 Month Notice were:

- a) The tenants or a person permitted on the property by the tenants have engaged in illegal activity that has, or is likely to jeopardize the lawful right or interest of another occupant or the landlord;
- b) The tenants have significantly interfered with or unreasonably disturbed another occupant or the landlord;
- c) The tenants or a person permitted on the property by the tenants have seriously jeopardized the health or safety or lawful right of another occupant or the landlords;
- d) Security or pet damage deposit not paid within 30 days as required by the tenancy agreement; and
- e) 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.

The landlord references a previous application filed by the tenants in relation to this tenancy. The previous hearing was held on November 25, 2019 to hear the tenants' application for an order for the landlord to perform repairs, as well as comply with the Act. In the decision dated December 4, 2019, the Arbitrator dismissed the tenants' application. The tenants filed a monetary claim, which was not considered by the Arbitrator, and was dismissed with leave to reapply.

In support of the 1 Month Notice, the landlord provided a substantial amount of written evidence, and as noted above, although I have turned to mind all the documentary evidence properly before me, as well as the testimony from the hearing, not everything is reproduced here. The following is a summary of the reasons for why the landlord issued the 1 Month Notice, and why the landlord is requesting that the tenancy be terminated on the grounds provided on the Notice.

- 1) *The tenants or a person permitted on the property by the tenants have engaged in illegal activity that has, or is likely to jeopardize the lawful right or interest of another occupant or the landlord.*

The landlord submits that the tenants have filed a fraudulent monetary claim. The landlord submits that the tenants' claim is fraudulent, and not evidence based. The landlord submits that the landlord and their witness as been assaulted twice

by the tenants, and as a result the landlord now requires a police escort. The landlord provided a description of the incidents in his evidentiary materials that took place on October 29, 2019 and January 17, 2020. The landlord submits that the tenants have prevented him from attending the residence to serve notices in accordance with the *Act*, and that the tenants have filed retaliatory harassment charges against the landlord for attempting to post notices in accordance with the *Act*.

- 2) *The tenants have significantly interfered with or unreasonably disturbed another occupant or the landlord.*

The landlord submits that the tenants have engaged in relentless harassing, bullying, threatening, defamatory, and malicious behaviour. The landlord submits that the tenants' have unilaterally changed the payment schedule, interfered with the landlord's right to serve notices and documents, assaulted the landlord, and infringed the landlord's privacy.

- 3) *The tenants or a person permitted on the property by the tenants have seriously jeopardized the health or safety or lawful right of another occupant or the landlord.*

The landlord submits that the tenants have caused the landlord undue stress and anxiety, and the landlord now requires the escort of the police when in the presence of the tenants. The landlord submits that the tenants have made false allegations, which now requires the landlord to have a witness at all times.

- 4) *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.*

The landlord submits that the tenants have breached a material term of the tenancy agreement by unilaterally changing the payment schedule for the payment of rent, utilities, and pet damage deposit.

- 5) *Security or pet damage deposit not paid within 30 days as required by the tenancy agreement.*

The landlord submits that the tenants have failed to pay the full pet damage deposit.

The tenants responded that they are in fact the victims of the landlord's retaliatory actions and bullying, as evidenced by three notices to end tenancy issued by the landlord within a short period of time. The tenants submit that the landlord's decision to serve a Notice to End Tenancy on December 24, 2019 was a tactic used to upset the tenants and their children.

The tenants submit that the landlord has no basis to end this tenancy on the grounds provided on the 1 Month Notice, and dispute that they have engaged in any illegal or fraudulent activity. The tenants submit that they truly are under the care of a physician for medical issues, and have not made any fraudulent or malicious claims. The tenants also dispute having ever assaulted the landlord.

The tenants submitted in evidence a payment history to show that they have always made their payments on time. The tenants referenced the demand letter dated December 17, 2019 from the landlord which references "instalment payments of \$1540 (\$1100 rent + \$20.00 water/sewer \$60 Hydro + \$350 pet deposit" which are to be paid "immediately", and a further instalment of "\$1180 (\$1100 rent + \$20 water / sewer + \$60 Hydro)" to be paid by December 20, 2019. A copy of this letter was included in evidence.

Analysis

Section 26 of the Act, in part, states as follows:

Rules about payment and non-payment of rent

- 26** (1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

The landlord has issued 2, 10 Day Notices to End Tenancy for Unpaid Rent to the tenants despite the tenants' testimony that they have always paid the rent on time. The landlord submits that the tenants have unilaterally changed the payment schedule, which the tenants dispute. ~~I find that there is evidence to support that the landlord has accepted instalment payments from the tenants, as evidenced by the landlord's own~~

~~demand letter dated December 17, 2019.~~ **A demand letter issued by the landlord, dated December 17, 2019, was submitted in evidence.** The letter references instalments of \$1,100.00 for rent, and an instalment for the pet damage deposit. **I find the evidence does support that a mutual agreement did exist between the parties for the rent and pet damage deposit payments to be paid in installments. I find that the evidence also supports that the tenants requested that the payment schedule be changed back to reflect the original terms of the tenancy agreement, which the landlord did not agree to. Despite the changes in the terms of payment, the tenants testified that the payments have been made on time.**

In light of the conflicting testimony, the burden of proof is on the landlord to support that the tenants have contravened section 26 of the *Act*. **I find that during this tenancy, the terms of payment have changed at least once, but no new tenancy agreements were signed. The original tenancy agreement requires that rent be paid “when it is due under the tenancy agreement”. Whether or not the landlord had agreed to change the payment schedule back to monthly, the original tenancy agreement requires that payment be made by the first day of each month. Furthermore, section 46 of the *Act* also only allows a landlord to issue a 10 Day Notice for unpaid rent, and not a pet damage deposit. I am not satisfied that the evidence provided by the landlord supports that the tenants have contravened section 26 of the *Act* by failing to pay rent when it is due under the tenancy agreement.**

I find that the landlord has failed to provide sufficient evidence to support that the tenants have failed to fulfil their obligations under section 26 of the *Act*. Accordingly, the 10 Day Notices dated December 17, 2019 and December 24, 2019 are both cancelled, and are of no force or effect.

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenants may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. As the tenants filed their application within the required period, and having issued a notice to end this tenancy, the landlord has the burden of proving they have cause to end the tenancy on the grounds provided on the 1 Month Notice.

The landlord submits that the tenants have engaged in illegal activity, which is disputed by the tenants.

RTB Policy Guideline #32 speaks to the meaning of "Illegal Activity", and what may constitute "illegal activity" and circumstances under which termination of the tenancy should be considered

The Meaning of Illegal Activity and What Would Constitute an Illegal Activity

The term "illegal activity" would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw.

In considering whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy, consideration would be given to such matters as the extent of interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects the landlord or other occupants.

I have considered the evidentiary materials submitted by the landlord, as well as the testimony in this hearing. As stated above, the burden of proof falls on the landlord to support their claim. In this case the onus is on the landlord to demonstrate that the tenants' behaviour would be considered illegal, and whether this illegal activity is serious enough to warrant the termination of this tenancy.

In this case, although I find that the two incidents described by the landlord do involve very heated interactions from the tenants, I am not satisfied that the tenants' behaviour could be considered illegal, especially to the extent that warrants the termination of this tenancy on this basis. Accordingly, I am not satisfied that the landlord has met the burden of proof to end this tenancy on the basis of illegal activity.

The landlord is also seeking an end to this tenancy on the basis of the tenants significantly interfering or disturbing the landlord. Although I accept the landlord's testimony that he has felt threatened by the tenants' behaviour, the tenants provided contradictory testimony that the landlord has engaged in behaviour that was equally distressing to the tenants. As stated above, I am not satisfied that the landlord had provided sufficient evidence to show that the tenants had unilaterally changed the

payment schedule, or engaged in illegal activity. Based on the testimony and evidence before me, I find that the relationship between the two parties has deteriorated greatly, to the extent that the landlord feels the need to have a witness and officer present. The landlord testified that the tenants have made false allegations, which have affected his health. Although I accept the landlord's testimony that he has been greatly impacted by the incidents that have taken place during this tenancy, the tenants testify to feeling equally distressed. For these reasons, I am not satisfied that the landlord has met the burden of proof to end this tenancy on the grounds of significant interference or disturbance, or on the grounds of seriously jeopardizing the healthy or safety, or lawful right of the landlord.

The landlord also stated 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 dispute that they had unilaterally changed the payment schedule. ~~As stated above, I find that there is an active dispute about whether there has been a mutual agreement to change the terms of payment for this tenancy. I find the evidence submitted supports that the tenants have made payments in instalments during this tenancy. However, I am not satisfied that the landlord had provided sufficient evidence to support that the tenants have done so without the explicit or implied consent of the landlord. In light of the disputed payment schedule, and whether the tenants have failed to make payments as agreed to by both parties, I am not satisfied that the tenants have breached a material term of the tenancy agreement.~~

I find that the evidence does support that there is an active dispute about how and payments should be made. As stated above, the original agreement is reflected in the written tenancy agreement, which requires rent to be paid on a monthly basis. Since the beginning of this tenancy, the payment schedule has changed at least once, without any amendment to this original agreement, or the signing of a new tenancy agreement. I am not satisfied that the tenants have "unilaterally changed the tenancy agreement" as alleged by the landlord. I find that the ongoing dispute between the parties has contributed to an inability of both parties to achieve a mutual resolution to the dispute of how and when payments should be made. I am not satisfied that this dispute can be attributed solely to the tenants. I find the evidence is not sufficient to support a material breach of the tenancy agreement, especially to the extent that this tenancy should end on this basis.

The landlord also served the 1 Month Notice for the tenants' failure to pay the pet damage deposit in full within 30 days as required by the tenancy agreement. I find that the tenancy agreement does not clearly state that the tenants were required to pay the entire pet damage deposit within 30 days. I find that there is evidence that supports an alternative arrangement made to allow the tenants to make payments in instalments.

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 on the grounds provided on the 1 Month Notice, and accordingly I am allowing the tenants' application for cancellation of

the 1 Month Notice dated November 30, 2019. The tenancy will continue until ended in accordance with the *Act* and tenancy agreement.

The tenants also filed an application requesting an order for the landlord to comply with the *Act*. The tenants testified that they have been harassed by the being issued multiple Notices to End Tenancy by the landlord, one of which was on Christmas Eve. In light of the evidence before me, I am not satisfied that the landlord had contravened the *Act* or tenancy agreement in the issuance of these Notices to End Tenancy. I find that these Notices were served in accordance with the *Act*. I am not satisfied that the tenants had provided sufficient evidence to demonstrate how the landlord had contravened the *Act*. Accordingly, I dismiss this portion of the tenants' application with leave to reapply.

As the tenants' application had merit, I allow the tenants to recover the filing fee from the landlord.

Conclusion

The landlord's 10 Day Notices dated December 17, 2019 and December 24, 2019 are cancelled, and are of no force or effect.

The landlord's 1 Month Notice dated November 30, 2019 is cancelled and is of no force or effect. This tenancy is to continue until ended in accordance with the *Act*.

I find that the tenants are entitled to recover the filing fee for this application. 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 tenants' application for the landlord to comply with the *Act* is dismissed with 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: February 3, 2020

Residential Tenancy Branch