



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Nechako River Ranch Ltd and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC MNDCT RP PSF OLC 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.
- a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make repairs to the rental unit pursuant to section 33;
- an order to the landlord to provide services or facilities required by law pursuant to section 65; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

AD and PD 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 landlord confirmed receipt of the tenant's application for dispute resolution ('applications'). In accordance with section 89 of the *Act*, I find the landlord duly served with the tenants' application.

The landlord testified that they were unable to view the videos submitted in evidence by the tenants, as well as a photograph. As these items were determined to be unrelated to the main application, which is cancellation of the 1 Month Notice to End Tenancy, these items will be excluded for the purposes of this hearing. As all parties confirmed receipt

of each other's evidentiary materials, with the exception of the aforementioned items, I find that these were duly served in accordance with section 88 of the *Act*.

As the tenants confirmed receipt of the 1 Month Notice dated December 28, 2019, which was personally served on the tenants on that date, I find the 1 Month Notice duly served in accordance with section 88 of the *Act*.

Residential Tenancy Branch (RTB) Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply. It is my determination that the priority claims regarding the One Month Notice and the continuation of this tenancy are not sufficiently related to any of the tenants' other claims to warrant that they be heard together. The parties were given a priority hearing date in order to address the question of the validity of the Notice to End Tenancy. I exercise my discretion to dismiss all of the tenants' claims with leave to reapply except the application to cancel the 1 Month Notice and for recovery of the filing fee.

Issues

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 recover the filing fee for this application?

Background and Evidence

This month-to-month tenancy began on March 17, 2012. Monthly rent is currently set at \$1,306.00, payable on the first of every month. The tenants currently still reside on the property. Both parties confirmed in the hearing that the landlord had accepted rent for February and March 2020, after the effective date of the 1 Month Notice, and did not indicate that these payments were for use and occupancy only.

The landlord issued a 1 Month Notice to End Tenancy on December 28, 2019, providing following grounds:

1. The tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord;
2. The tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
3. The tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk;

4. The tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety, or physical well-being of another occupant;
5. The tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety, or physical well-being of another occupant; and
6. 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's agents testified in the hearing that the main reason for why they are ending this tenancy is because the tenants continue to leave the gate unlocked, despite repeated warnings and requests for them to keep the gate locked at all times.

A copy of the tenancy agreement was submitted in evidence, which contains a condition as follows:

"The Tenant agrees to close the gate themselves and their visitors at anytime and also agree to have the gate locked whenever they leave the property."

- i. *Should it be found that damage was done to the property or livestock, because of tenants or their visitors not closing the gate as requested, the tenants will be responsible for costs pertaining to lost, damaged, or stolen property or livestock".*

The landlord's agents testified that by leaving the gate unlocked, the tenants put the landlord's assets at risk. The landlord's agents testified that the tenants' actions have caused them stress as they now have to take action to ensure that the property is secured. The landlord's agents testified that this was not an issue at the beginning of the tenancy, but mainly in the last 6 to 9 months. The landlord's agents testified that the property houses several recreational vehicles and boats that are parked on the property, as well as expensive equipment, and that the importance of keeping the gate locked have been emphasized to the tenants. The landlord included in their evidentiary materials letters sent to the tenants about keeping the gate locked at all times, photos of the items stored on the property, and articles to support that break and enter is a risk in the area.

The tenants responded that the tenancy agreement simply states that the gate be closed, but only locked whenever they leave the property. The tenants testified that that they had issues with the lock freezing in the wintertime, creating a safety risk for the tenants who would need to get out. The tenants further pointed out that the landlord's

property and equipment have remained secure, and nothing has been damaged, lost, or stolen due to the gate. Furthermore, the tenants testified that the landlord's expectations exceed what is required of them as tenants, and that the landlord is running a business on the property in addition to the managing the tenancy.

The landlord also indicated on the 1 Month Notice that the tenants have hunted on the property, which is considered illegal and prohibited. The tenants do not dispute that they are in possession of gun, but testified that they were on their way to the adjacent land where it was legal to hunt.

The landlord also included documents in their evidentiary materials about the tenants' unsupervised and unleashed dogs.

The tenants expressed concern about the landlord's behaviour towards them, especially after the last hearing held on October 8, 2019. The landlord disputes that the 1 Month Notice is related the previous arbitration hearing.

Analysis

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

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. The tenants filed their application on January 7, 2020, 10 days after the date the tenants received the 1 Month Notice. As the tenants filed her 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.

It was undisputed by both parties that the tenants had paid rent after the effective date of the 1 Month Notice, which was accepted by the landlord. It was also undisputed that the landlord did not indicate to the tenants that these payments were for "use and occupancy" only.

Residential Tenancy Policy Guideline #11 discusses the Amendment and Withdrawal of Notices, specifically what happens when payment is accepted after the effective date of a Notice is given.

"The question of waiver usually arises when the landlord has accepted rent or money payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent.

If the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by evidence as to:

- *whether the receipt shows the money was received for use and occupation only.*
- *whether the landlord specifically informed the tenant that the money would be for use and occupation only, and*
- *the conduct of the parties.*

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel....

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional."

By accepting payment after the 1 Month Notice was issued to the tenant, particularly after the effective date of the Notice, and without indicating that this payment was for use and occupancy only, I find that the landlord had implied that that this tenancy was reinstated, and to continue as per the Act and tenancy agreement.

As noted above, the notice to end tenancy must be clear, unambiguous and unconditional. By accepting rent payment after the effective date of the Notice without informing the tenants that this payment was for use and occupancy only, the Notice became ambiguous whether this tenancy had ended on the effective date of January 31, 2020, or not.

Furthermore, I find that the landlord failed to provide sufficient evidence to support that the tenants had participated in any illegal activity. The landlord did not provide any confirmation that any of the tenants have been charged with any offences.

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, it is disputed about whether the tenants' behaviour could be interpreted as "hunting" on the landlord's property. I am not satisfied that the landlord has provided sufficient evidence to support that the tenants have been hunting on the property, nor am I 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, or hunting on the property.

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 testified that they have not breached a term of the tenancy agreement. Although the landlords have expressed to the tenants on multiple occasions, in writing, that the tenants must keep the gate locked at all the times, I find that the tenancy agreement does not require this of the tenants. I find that the tenancy agreement only requires that the tenants keep the gate closed, and locked "whenever they leave the property." I am not satisfied that the tenants have breached a material term of the tenancy agreement, or to the extent that justifies the end of this tenancy.

The landlord expressed a high level of concern about the tenants' behaviour. In addition to the concern about the tenants' dogs, the landlord expressed concern about the tenants' refusal to keep the gate locked at all times. The tenants provided several

responses to these concerns, including the tenants' concern for their own safety. Despite the landlord's concerns about security, I am not satisfied that the landlord had provided sufficient evidence to support that the tenants' actions have caused them to suffer any losses or breaches in security. As stated above, I find that the tenancy agreement does not specifically require the tenants to keep the gate locked when they are on the property. Furthermore, I find the tenants' concerns about their safety to be valid. In light of the fact that the burden of proof is on the landlord to justify the end of the tenancy on the grounds provided on the 1 Month Notice, I am not satisfied that the landlord has provided sufficient evidence to support that the tenants' actions are significant enough to justify ending this tenancy on the grounds on the 1 Month Notice.

For all the reasons cited above, I am allowing the tenants' application for cancellation of the 1 Month Notice dated December 28, 2019. The tenancy will continue until ended in accordance with the *Act* and tenancy agreement.

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

Conclusion

I allow the tenants' application to cancel the 1 Month Notice dated December 28, 2020. The 1 Month Notice of is of no force or effect. This tenancy continues until ended in accordance with the *Act*.

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 remainder of the tenants' application 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: March 11, 2020

Residential Tenancy Branch