Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC DRI

Introduction

This hearing dealt with an 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; and
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43.

The applicant indicated in the hearing that he wished to be referred to as MJ. I will refer to the applicant as MJ or "applicant" in this decision to differentiate him from the original tenant AW ("tenant"). 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 application for dispute resolution hearing package ("Application"). In accordance with section 89 of the *Act*, I find the landlord duly served with the tenant's Application.

Preliminary Issue – Applicant's Evidence

The landlord testified in the hearing that he did not receive all of the applicant's evidence. The landlord testified that he had received the initial package, but not the subsequent packages, which the landlord testified were from email addresses that did not contain the applicant's name and were therefore not opened.

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, I find that the landlord had testified that he did not receive the subsequent evidence submitted by the tenant.

As I am not satisfied that the landlord was served with the subsequent evidence packages by the applicant, only the original evidence package served by the applicant will be admitted for this hearing. The subsequent evidence packages will be excluded.

Preliminary Issue: Adjournment of Hearing

The applicant testified that he suffers from disabilities that may prevent him from being able to prepare for the hearing without assistance.

The applicant requested an adjournment of the hearing during the hearing at the beginning of the hearing at 9:45 a.m., but after discussing the option of an adjournment, the tenant confirmed at 9:52 a.m., that he wished to proceed with the hearing. The landlord was opposed to an adjournment as he felt that the applicant was capable of proceeding with the hearing.

In consideration of the fact that the applicant has a disability that may hinder his ability to proceed with the hearing, I still considered the following criteria for an adjournment.

Rule 6 of the Residential Tenancy Branch Rules of Procedure state that the “Residential Tenancy Branch will reschedule a dispute resolution proceeding if written consent from both the applicant and the respondent is received by the Residential Tenancy Branch before noon at least 3 business days before the scheduled date for the dispute resolution hearing”.

The criteria provided for granting an adjournment, under Rule 6.4 are;

- whether the purpose for the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1…
- whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether the party had sufficient notice of the dispute resolution hearing…
- the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and
- the possible prejudice to each party.

Although the applicant expressed concern that he had a disability that may prevent him from being able to proceed with the hearing, I find that the applicant was able to file an

application and submit evidence without the assistance of another party. In assessing the applicant's ability to proceed with the hearing, I find that the applicant was able to comprehend the possible outcomes of the hearing, and what his obligations were as an applicant. Furthermore, after explaining to the applicant the option to adjourn the matter, the applicant later declined to proceed with an application for an adjournment.

I did not find it prejudicial to the applicant to proceed with the matter, and furthermore I find that it would be prejudicial to the landlord as the matter pertained to a notice to end tenancy, and the landlord was ready to proceed with the application that was filed almost two months prior to the hearing date. Accordingly, an adjournment was not granted. The hearing proceeded.

Preliminary Matter: Does the Residential Tenancy Branch have jurisdiction to hear the dispute between the parties?

The applicant testified that he moved into the rental unit on October 28, 2019. He testified that he had placed an online advertisement looking for housing, and it was answered by the landlord's original tenant AW. The applicant testified that AW allowed him to stay at the rental unit with him for $100.00 per week, and informed him that he could take over the tenancy if he purchased his belongings.

The landlord confirmed that there was no written tenancy agreement between the landlord and AW, but that there was a verbal agreement for a tenancy between the parties. AW paid monthly rent of $950.00 to the landlord. The landlord testified that he was unaware of the arrangement between AW and the applicant until he knocked on the door on November 26, 2019 and discovered that the applicant was residing there. The landlord had attended to serve AW with a 10 Day Notice for Unpaid Rent as well as a 1 Month Notice for Cause.

The landlord testified that he had made several attempts to contact AW, without any success. The landlord testified that the rental unit still contained AW's furniture, and he was concerned about how to take vacant possession of the rental unit and deal with AW's belongings before re-renting the rental unit. The landlord testified that on December 6, 2019 the applicant requested to stay in the rental unit, for which he would pay $950.00 for. The landlord allowed the applicant to stay, on a "use and occupancy only" basis, and accepted the rent. The landlord testified that he was concerned about his ability to legally enter into a new tenancy at this time as he had yet to communicate with AW. The landlord agreed to allow the applicant more time to find new housing, and accepted the rent on a use an occupancy basis.

On March 5, 2020, the landlord served the AW with another 1 Month Notice to End Tenancy for Cause, with an effective date of April 4, 2020. The 1 Month Notice was posted on the door, and noted AW as the tenant, as well as "all occupants". The applicant received this 1 Month Notice, and filed this application to cancel it.

The applicant testified that he had purchased AW's belongings on December 10, 2019, and felt that he had taken over the tenancy from AW. The applicant felt that it was unconscionable to accept rent on a use and occupancy basis as he felt that he was now legally the tenant. The applicant testified that he wanted to remain as a tenant, but the landlord wanted more rent. The applicant testified that he had informed the landlord of the transfer of the lease, which the landlord disputes.

Analysis

RTB Policy Guideline #19 clearly provides the definition of a "sublet" versus a "roommate" situation, which states:

> *"Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate…"*
>
> *"Unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. While the sublease can be very similar to the original tenancy agreement, the sublease must be for a shorter period of time than the original fixed-term tenancy agreement – even just one day shorter. The situation with month-to-month (periodic) tenancy agreements is not as clear as the Act does not specifically refer to periodic tenancies, nor does it specifically exclude them. In the case of a periodic tenancy, there would need to be an agreement that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy.*
>
> *The sub-tenant's contractual rights and obligations are as set out in the sublease agreement. Generally speaking, the sub-tenant does not acquire the full rights provided to tenants under the Act. For example, if the landlord ends the tenancy with the original tenant, the tenancy ends for the sub-tenant as well. The sub-*

tenant would not be able to dispute the landlord ending the tenancy with the original tenant; it would be up to the original tenant to dispute the notice."

By the above definitions the appicant in this dispute cannot be considered a "sublet" or a "tenant", but a roommate or occupant, as AW was still residing there when the applicant moved in.

I now must consider whether an assignment had taken place.

RTB Policy Guideline #19 states the following about assignment of tenancy agreements.

B. 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. When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment. It is possible that the original tenant may be liable to the landlord under the original agreement.

For example:

- *the assignment to the new tenant was made without the landlord's consent;*
- *or the assignment agreement doesn't expressly address the assignment of the original tenant's obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.*

Section 34 of the *Act* states that the tenant cannot assign or sublet the rental unit without the landlord's written consent. In this case, I find that the tenant did not assign the rental unit, as there was no assignment agreement signed between the tenant and occupant and the landlord did not consent to any assignments.

In the absence of an assignment, I find that a tenancy still exists between AW and the landlord. Although the landlord served AW with a 1 Month Notice on March 5, 2020, and previous Notices to End Tenancy before that date, the landlord has yet to obtain on Order of Possession following the issuance of these Notices. I find that AW has yet to provide written confirmation to the landlord that he has ended this tenancy.

As per Residential Tenancy Policy Guidelines 13 and 19 above, I find that the applicant has no rights or obligations under AW's original tenancy agreement. No written tenancy

agreement was signed between the landlord and the applicant, and the landlord did not provide written or verbal permission for the AW to assign or sublet or have another occupant at the rental unit. The landlord accepted the rent from the applicant on the basis of use and occupancy only, which the landlord had issued as he did not want to reinstate the tenancy. I do not find the acceptance of rent on a use and occupancy basis to be unconscionable as the landlord is still bound by a tenancy agreement with AW, and has issued AW a 1 Month Notice to End Tenancy for Cause.

I am unable to consider this application as I find that there is no tenancy agreement between the applicant and the landlord. The applicant is not a tenant under the definition of section 1 of the *Act*. Residential Tenancy Branch Policy Guideline #13 establishes that an occupant has no rights or obligations under the tenancy agreement, unless all parties agree to enter into a tenancy agreement to include the occupant as a tenant. As I am not satisfied that the landlord agreed to include the applicant as a tenant in the tenancy agreement, the *Act* does not apply to their relationship. On this basis, I cannot consider the application as I have no jurisdiction in this matter.

Conclusion

I find that a tenancy does not exist between the applicant and the landlord in this matter. Accordingly, I decline to hear this matter as I have no jurisdiction to consider the application.

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: May 15, 2020

Residential Tenancy Branch