



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Sutton Max Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: CNC

Introduction

This hearing dealt with an application by the tenant pursuant to section 47 of the *Residential Tenancy Act* for an order to set aside a notice to end tenancy for cause. Both parties attended this hearing and were given full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The parties represented themselves. The landlord was accompanied by their agents.

As both parties were in attendance, I confirmed service of documents. The parties confirmed receipt of each other's evidence. I find that the parties were served with evidentiary materials in accordance with sections 88 and 89 of the *Act*.

Both parties provided extensive documentary evidence. I have considered all the written evidence and oral testimony provided by the parties but have not necessarily alluded to all the evidence and testimony in this decision.

Issues to be decided

Does the landlord have reason to end the tenancy or should the notice to end tenancy be set aside and the tenancy be allowed to continue?

Background and Evidence

The background facts are generally undisputed. The tenancy started on June 01, 2013. The monthly rent is \$2,270.00 payable on the first of the month. The rental unit is a 775 square foot, two-bedroom apartment. A copy of the tenancy agreement was filed into evidence. The only person named as the tenant is IY. The tenant stated that since the start of the tenancy he shared one bedroom with his brother and found a room mate for the second bedroom. The tenant testified that he continues to reside in the rental unit with his brother but has had a variety of roommates over time.

The landlord's main complaint was that the tenant does not live in the rental unit and that he rents out the unit to as many as 5 to 6 occupants. The landlord complained that the unit is not designed to accommodate 5 to 6 occupants and this has resulted in the breakdown of appliances from overuse. The landlord also stated that other residents of the building have made noise complaints against the occupants of the rental unit and that she has received emails from the building manager, PD, regarding the coming and goings of people to the rental unit.

The landlord testified that the tenant is advertising the availability of space inside the rental unit, on Airbnb and filed evidence to support her testimony. In an email dated October 16, 2019, the building manager informed the landlord that the rental unit was being advertised on Airbnb and reminded the landlord that the strata will levy a fine of \$1,000.00 per day to the owners of condos who rent out their condos for short term stays of less than six months.

The tenant stated that the AirBnb listing became live in October 2019 by mistake and was taken down immediately. The tenant denied renting the rooms on a short-term basis. He stated that only one occupant (RV) left prior to a tenancy of 6 months but did so due to the Pandemic.

The tenant denied all allegations and referred to a previous decision dated October 02, 2019. The file number is provided on the first page of this decision. The tenant had applied to dispute a notice to end tenancy for cause dated May 30, 2019. The reasons for the notice were similar to the notice to end tenancy that is the subject of this hearing:

1. The tenant has allowed an unreasonable number of occupants in the rental unit
2. The tenant or the tenant's guest has significantly interfered with or unreasonably disturbed another occupant or the landlord, has seriously jeopardized the health and safety of another occupant or the landlord and has put the landlord's property at significant risk
3. The tenant has sublet the unit without the landlord's permission

During that hearing on October 02, 2019, the landlord requested to withdraw the notice as she had not filed sufficient evidence to support it and her witness was not available. The Arbitrator denied the landlord's request and the notice was set aside. The tenant stated that since the notice to end tenancy was set aside, the landlord was not permitted to serve another notice for the same cause. However, the notice that is the subject of today's hearing is dated June 24, 2020 and pertains to events that occurred after the initial notice dated May 30, 2019.

The tenant referred to another hearing that was conducted on December 20, 2019. The file number is provided on the first page of this decision. The tenant had applied for an order directing the landlord to allow additional occupants access to the rental unit and for a monetary order for compensation for loss under the *Act*. During that hearing the parties came to an agreement and the terms of the agreement were documented in a decision dated December 23, 2019.

As per the agreement, the tenant was required to provide the landlord with information regarding prospective room mates for vetting and approval. The tenant stated that the landlord is disapproving room mates unreasonably and has informed the tenant that she will not be approving any additional occupants. The landlord stated that she has already approved the tenant's brother KY to occupy the rental unit.

The tenant agreed that new occupants moved in on July 01, 2020 and August 01, 2020, without the landlord's permission. The tenant stated that the landlord refused to vet or approve these occupants despite having provided her with their applications. The tenant stated that the landlord permitted him to have room mates for the past six years and that:

"The Doctrine of Estoppel prohibits prosecution simply because he changes his mind 6+ years later."

On June 04, 2020, the parties attended another hearing in response to the tenant's application for an order to allow access to or from the rental unit for them or their guests and for an order requiring the landlord to provide services or facilities required by law and to comply with the *Act*. The file number is provided on the first page of this decision. The tenant IY, his brother KY and two occupants RW and NU were named as applicants.

In a decision dated June 05, 2020, the Arbitrator ruled as follows:

I dismiss the tenants' application for the landlord to provide the FOB, keys, and a strata form K, for occupant NU to live at and access the rental property.

The tenants' application for: an order to allow access to or from the rental unit for the tenants or the tenants' guests; an order requiring the landlord to provide services or facilities required by law; an order requiring the landlord to comply with the Act, Regulation or tenancy agreement; and authorization to recover the filing fee for this application; is dismissed without leave to reapply.

The landlord filed several emails from the building manager (PD), that kept her informed of the coming and goings of various people into the building, carrying baggage. Photographs taken from surveillance were provided to the landlord who filed them into evidence. In an email dated July 01, 2020. PD informed the landlord that occupant NU had returned to the rental unit.

On June 24, 2020, the landlord served the tenant with a one-month notice to end tenancy for cause. The effective date of the notice is July 31, 2020. The tenant applied to dispute the notice in a timely manner.

The reasons for the notice are:

- Tenant has allowed an unreasonable number of occupants in the unit
- Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to damage the landlord's property
- 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 without landlord's written consent

Analysis

As stated at the start of this decision, both parties provided extensive documentary evidence which I have considered but have not necessarily alluded to all the evidence and testimony in this decision. In order to support the notice to end tenancy, the landlord must prove at least one of the reasons for the notice to end tenancy.

- **Tenant has allowed an unreasonable number of occupants in the unit**

Based on the testimony and documents filed into evidence by both parties, I find that the landlord permitted the tenant to have roommates from the start of tenancy. The tenancy agreement is not specific as to the number of occupants/room mates that are permitted to reside in the rental unit but the strata by laws permit up to 5 occupants in a two-bedroom unit. The tenant's main evidence is that the landlord has been aware of the number of occupants in the rental unit for the last six plus years and did not raise any objections.

I accept the tenant's testimony that the landlord did not object to the tenant having roommates since the start of the tenancy seven years ago and that the doctrine of estoppel precludes the landlord from asserting something contrary to what is implied by her previous actions. However, I must now determine whether the tenant allowed an unreasonable number of persons to occupy the rental unit.

Based on the photographs from the surveillance camera, emails from the building manager (PD) to the landlord and the other documents filed into evidence I find that:

On April 18, 2020 a lady with suitcases (photograph) moved into the rental unit

On July 01, 2020, AC moved in (IY's testimony during hearing)

On July 01, 2020, NU moved back in (PD's email to landlord)

On August 01, 2020, GA moved in (IY's testimony during hearing)

Tenant IY and his brother KY live in the rental unit. (IY's testimony during hearing)

Based on the above I find that within the period of April 18, 2020 to August 01, 2020, which is approximately 3.5 months, a total of 4 people moved into the rental unit.

Given that each person will reside for at least six months and that the tenant and his brother reside at the rental unit, I find on a balance of probabilities that it is more likely than not that as of August 01, 2020, there are at least 6 people residing in this two-bedroom condo.

Even though the strata by-laws permit it, I find that 5 people residing in a two-bedroom, 775 square foot condo is unreasonable. Based on the documentary evidence and testimony of both parties I find that the total number of occupants is at least 6 as of August 01, 2020 and therefore I accept the landlord's testimony that the tenant has allowed an unreasonable number of occupants in the rental unit.

- **Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to damage the landlord's property**
- **Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so**

The landlord alleges that the tenant has engaged in illegal activity by renting out space in the apartment for short stays and that by doing so the tenant has breached a material term of the tenancy agreement and the strata by-laws. The tenant has also put the landlord at risk of being fined \$1,000.00 per day for short stay rentals.

The landlord stated that despite verbal and written warnings the tenant continued to rent to short term occupants and this was not corrected after written notice to do so. The tenant denied the allegation that he was renting out the unit for short stays of less than six months but agreed that occupant RV resided at the rental unit for 5 months.

I have considered the following evidence in my determination of the landlord's allegation that the tenant rents space in the rental unit for short term stays.

a) Photograph taken during inspection on April 18, 2020

The photograph shows a female with suitcases, sitting in the living room of the rental unit during an inspection by the landlord on April 18, 2020. A note by the landlord indicates that this female is unknown to the landlord.

b) Email from the building manager PD dated July 01, 2020 to tenant YI

In this email PD asks YI *"Who is the person now using fob #702 registered to N? This person brought some bags and other stuff into the building late on June 30. Tall, slim, glasses"* PD also adds that he spoke with YI's brother who mentioned that occupant NU is back at the rental unit.

c) Email from the building manager PD dated July 10, 2020.

The email states that PD recorded a male moving his belongings into the rental unit and describes the male as a *"nice guy"* who *"seemed uncertain about the rental"*. PD goes on to say that the male informed him that he would be staying for 3 months. The email contained a photograph of the male, taken on June 30, 2020 by the surveillance security cameras.

d) Email from the building manager PD dated July 17, 2020 to the landlord

This email is regarding an unregistered occupant in the rental unit and advises the landlord to have this occupant registered.

Based on the above I find that over a space of 3.5 months, at least four occupants moved in and as stated above if every occupant stayed a minimum of six months, the unit would be overcrowded and if they did not then on a balance of probabilities, I find that it is more likely than not that the tenant rented to people who stayed for a short period of time.

From the dates that the occupants moved in, the last one being August 01, 2020, I have determined that as of August 01, 2020, there are at least six persons occupying the two bedroom unit which would confirm the landlord's allegation that the tenant has allowed an unreasonable number of people in the unit. However, if some moved out sooner than six months then there would be no overcrowding, but that would confirm the landlord's allegation that the tenant rented space in the rental unit for short stays.

- **Tenant has assigned or sublet the rental unit without landlord's written consent**

The tenant was given a written warning on May 07, 2020 to cease the activity of renting to multiple occupants and the tenant continues to do so. I must now decide whether the tenant is subletting or keeping room mates.

The landlord clearly stated that she does not approve of the tenant having any persons living in the unit other than the tenant's brother KY.

Residential Tenancy Policy Guideline#19 addresses assignments and sublets.

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 or roommate, with no rights or responsibilities under the *Residential Tenancy Act*.

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 and has a subletting agreement with a sub-tenant. 'Sublet' is also used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. In determining if a scenario such as this is a sublet as contemplated by the *Act*, the arbitrator will assess whether or not the relationship between the original tenant and third party constitutes a tenancy agreement and a landlord/tenant relationship.

If there is a landlord/tenant relationship, the provisions of the *Act* apply to the parties. If there is no landlord/tenant relationship, the *Act* does not apply. Roommates and landlords may wish to enter into a separate tenancy agreement to establish a landlord/tenant relationship between them or to add the roommate to the existing tenancy agreement in order to provide protection to all parties under the legislation.

In this case the tenant rented out space in the rental unit without getting the written consent of the landlord. The landlord issued a one-month notice to end tenancy for the tenant's failure to obtain the landlord's written consent to "sublet". To term this living arrangement as a sublet, I must determine whether the tenant is residing in the rental unit while he rents the second bedroom to temporary occupants.

I have considered the following documents to determine whether the tenant YI resides in the rental unit.

a) Email from the building manager PD to landlord dated October 16, 2019

In this email, PD informs the landlord that YI had reactivated an advertisement on Airbnb that he used in the past to rent space inside the rental unit.

b) Email from the building manager PD to landlord's agent, dated March 19, 2019

In this email, PD informs the landlord's agent that YI does not live in the building.

Based on the above I find on a balance of probabilities that it is more likely than not that tenant YI does not live in the rental unit and accordingly this living arrangement with multiple other occupants fits the definition of a sublet. The tenancy agreement clearly states that subletting is not permitted without the consent of the landlord. In this case the landlord objects to persons occupying the rental unit other than tenant IY and his brother KY.

c) Conversation by text message between NU and prospective occupant enquiring about rental

Based on the conversation by text message, on July 28 and 29, 2020, it appears that NU advertised the availability of a room in the rental unit and a prospective occupant is asking questions about the other occupants of the unit. NU informs her that there are two males in the other bedroom who are not siblings.

Based on the above and especially from PD's email dated March 19, 2019, I find on a balance of probabilities, that it is more likely than not that the tenant IY does not reside in the rental unit and therefore the living arrangement fits the definition of a sublet.

Based on the testimony and documents filed into evidence I find that there have been several people who have lived in this rental unit since October 2019.

- In October 2019 occupant LC was residing in the unit
- In November 2019 occupant EM was residing in the unit
- December 2019 – occupant RV moved in and remained till April 30, 2020
- April 18, 2020 – lady in photo moved into rental unit
- June 30, 2020 – occupant AC moved into the rental unit
- July 01, 2020 – occupant NU returned to the rental unit
- August 01, 2020 – GA moved into the rental unit.

Despite the tenant agreeing to allow only approved occupants to move in, the tenant continued to move people in without the approval of the landlord. In the space of 10 months there are at least 7 people who moved into the rental unit. It is not clear when the above-named occupants moved out but if I accept that YI and his brother occupied one bedroom in the rental unit, then on a balance of probabilities it is more likely than not that:

1. There are an unreasonable number of occupants in this rental unit
2. Some occupants spent less than six months in the rental unit

If the tenant does not reside in the rental unit then the living arrangement fits the definition of “subletting” and the tenant is in breach of the tenancy agreement and the *Residential Tenancy Act* which clearly do not allow a tenant to sublet without the permission of the landlord. If the tenant resides in the rental unit then I find on a balance of probabilities that it is more likely than not that the tenant has allowed an unreasonable number of people to occupy the rental unit.

In addition, the tenant agreed that the last two occupants moved in without the approval of the landlord. Therefore, the tenant has breached a term of the agreement that was entered into by both parties during the hearing on December 20, 2019 and documented in a decision dated December 23, 2019.

In a decision dated June 05, 2020, the Arbitrator ruled as follows:

I dismiss the tenants’ application for the landlord to provide the FOB, keys, and a strata form K, for occupant NU to live at and access the rental property.

Despite this ruling, NU moved back in as per an email from the building manager PD dated July 01, 2020.

In summary:

- If the tenant resides at the rental unit, then it is more likely than not that the tenant has allowed an unreasonable number of occupants in the rental unit.
- If the tenant does not reside in the rental unit then the living arrangement is a sublet without the landlord’s permission.

- The tenant allowed occupants to move in without the landlord's approval which is a contravention of the agreement the parties made during the hearing on December 20, 2020
- Tenant allowed NU to move back in which is also a contravention of the order dated June 05, 2020.

Based on the number of occupants that have lived in the rental unit and continue to live there in the last 10 months and the testimony of the tenant that he and his brother also live in the rental unit, I find that the tenant has breached at least one or more of the following:

1. The tenancy agreement
2. The *Residential Tenancy Act*
3. The strata by-laws
4. The agreement made on December 20, 2019
5. The order granted to the landlord on June 05, 2020

I find that the landlord has proven that despite multiple warnings and 3 dispute resolution proceedings, the tenant has continued to engage in activity that involves renting space in the two-bedroom unit to multiple occupants. I further find that despite having received a written warning, verbal warnings and a notice to end tenancy, the tenant did not change his behaviour and the new occupants continue to move in as recently as 12 days before this hearing.

Based on my findings I uphold the notice to end tenancy.

Section 55 of the *Residential Tenancy Act* addresses an order of possession for the landlord and states:

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

In this case, I find that the landlord served the tenant with a notice to end tenancy that complies with section 52. I have determined that the landlord has proven her case and therefore I have upheld the notice to end tenancy. Under the provisions of section 55, I must issue an order of possession when I have upheld a notice to end tenancy.

Accordingly, I so order. The tenant must be served with the order of possession. Should the tenant fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

Conclusion

The notice to end tenancy is upheld and I grant the landlord an order of possession effective two days after service on the tenant.

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: August 31, 2020

Residential Tenancy Branch