



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNC FFT OLC LRE

Introduction

This hearing dealt with the tenant's application pursuant to 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;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 55;
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 63; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*.

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 hearing package ("Application"). In accordance with section 89 of the *Act*, I find the landlord duly served with the tenant's Application. Both parties confirmed receipt of each other's evidentiary materials, which were duly served in accordance with section 88 of the *Act*.

The tenant acknowledged receipt of the 1 Month Notice to End Tenancy for Cause dated August 26, 2020, which was posted on her door on the same date. In accordance with sections 88 and 90 of the *Act*, I find the tenant deemed served with the 1 Month Notice on August 29, 2020, 3 days after posting.

Issue(s) to be Decided

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

Is the tenant entitled to an order for the landlord to comply with the *Act*?

Is the tenant entitled to an order to suspend or set conditions on the landlord's right to enter the rental units?

Is the tenant entitled to recover the filing fee for this application from the landlord?

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 tenancy originally began in June of 2016. Both parties continued to enter into new tenancy agreements during this tenancy. On November 29, 2019, both parties signed a new tenancy agreement for fixed-term for the period of March 1, 2020 to June 30, 2020. The tenancy has continued after June 30, 2020 on a month-to-month basis, as confirmed in the last hearing, with monthly rent currently set at \$1,458.00, payable on the first of the month. The landlord collected a security deposit at the beginning of the tenancy in the amount of \$650.00, which he still holds. Both parties agree that the tenant is currently paying \$50.00 per month for use of the garage.

The landlord had previously served the tenant with a 1 Month Notice on June 24, 2020, which was disputed by the tenant, and cancelled by the Arbitrator in the decision dated October 8, 2020. On August 26, 2020, the landlord had served the tenant with a new 1 Month Notice. Neither party submitted a copy of the 1 Month Notice dated August 26, 2020, but both parties confirmed in the hearing that the 1 Month Notice indicated the following grounds for why the landlord wished to end this tenancy:

1. The tenant is repeatedly late paying rent.
2. The tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk.

3. Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.
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 provided the following submissions about why the 1 Month Notice was issued. The landlord testified that the tenant had a history of late rent payments, and provided a summary of the late rent payments in 2019 and 2020, which included late rent for the months of January 2020, May 2019, August 2019, and January 2020. The tenant does not dispute these late rent payments, but testified that the landlord did not previously have an issue with these late rent payments with the exception of the last late rent payment, for which he had served her a 10 Day Notice for Unpaid Rent on January 2, 2020. The tenant testified that the most recent late payment was due to the delay in mail over the holidays, which the landlord received after January 1, 2020.

The landlord testified that the tenant has also breached a material term of the tenancy agreement, and has caused extraordinary damage to the site and property by using the garage as storage instead of parking. The landlord testified that he had only agreed to allow the tenant to use the garage for parking, and not for the storage of her personal belongings or garbage. The landlord provided photographs and warning letters sent to the tenant about her use of the garage, and storage of her items on the property. The landlord also submitted a photo of a storage box the tenant had on site without the landlord's knowledge or permission. The landlord testified that the tenant's usage puts his property at significant risk as the garage was not meant for such usage.

The tenant does not dispute that she has used the garage for storage, but testified that she would be returning the garage to the landlord in the same condition, and that she has not caused any damage to the landlord's property, nor has she put the landlord's property at risk. The tenant testified that the landlord is upset about the cat that she occasionally cares for, but which is not her pet. The cat is referenced in the previous decision, and the tenant has been ordered to remove the cat by October 31, 2020.

The tenant is also seeking an order to set conditions on the landlord's right to enter the rental unit for the purpose of inspections. The tenant testified that the landlord would attend to "inspect" the property on his hands and knees, while filming, and for which she had to take time off work for.

Analysis

Section 47 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. As the tenant filed her application within the required period, and having issued a notice to end this tenancy, the landlord has the burden of proving that he has cause to end the tenancy on the grounds provided on the 1 Month Notice.

I note the wording of RTB Policy Guideline #38, which provides the following guidance regarding the circumstances whereby a landlord may end a tenancy where the tenant is repeatedly late paying rent.

Three late payments are the minimum number sufficient to justify a notice under these provisions...

However, if the late payments are far apart an arbitrator may determine that, in the circumstances, the tenant cannot be said to be “repeatedly” late...

The tenant expressed concern that this tenancy should not end on the grounds of repeated late rent payments when it was never an issue since the tenancy started in June of 2016.

I have considered the evidence submitted as well as the sworn testimony of both parties. Although I find that the landlord did provide undisputed evidence and testimony that the tenant has been late paying rent on several occasions, three of which had occurred in 2019, I find that the tenant has established that late rent payments have been accepted for some time without proper written warning from the landlord.

I find the continued acceptance of late rent payments in the past raises the issue of implied waiver. Although rent may be payable on the first of the month, the acceptance or implied acceptance of late payments, may contribute to ambiguity. In this case the landlord had accepted at least 3 late rent payments in 2019. A warning to a tenant must be unambiguous and clear. By accepting late rent payments on multiple occasions without properly informing the tenant in writing that these payments were considered late, and could possibly be considered a breach of the tenancy agreement and the *Act*, the terms of the tenancy become ambiguous. I find that the landlord has accepted late rent payments for a long period of time, and has failed to clearly communicate to the tenant that this is not acceptable. I find that the landlord has provided the tenant with written warnings for other issues in this tenancy, but I am not satisfied that the landlord has provided sufficient evidence to support that he had communicated to the tenant that

late rent payments are not acceptable until January of 2020. I find that since that 10 Day Notice was issued, the tenant has made her rent payments on time. On this basis, I find that the landlord has not sufficiently established that this tenancy should end on the grounds of repeated late rent payments.

The landlord also indicated on the 1 Month Notice that he wished to end the tenancy because of a “breach of a material term of the tenancy agreement that was not corrected within a reasonable time after 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...*

Although it was undisputed that the landlord did provide written warning to the tenant not to use the garage as storage, and that this constituted a breach of a material term of the tenancy agreement, in review of the tenancy agreement and documents submitted for this hearing, I am not satisfied that the tenant's use of the garage for storage constitutes a breach of a material term of the tenancy agreement. I find that both parties

entered into an agreement for the tenant to use the garage for \$50.00 per month, which gives her exclusive use of this space. Although the landlord may consider this usage to be a material breach, I am not satisfied that the landlord has sufficiently supported this proposition. For this reason, I am find that the landlord has failed to support that the tenant has breached a material term of the tenancy agreement, and that this tenancy should end on that basis.

I am also not satisfied that the tenant has caused extraordinary damage to the property or site, nor has she put the landlord's property at significant risk. I find that the landlord has not provided sufficient evidence to support that the tenant has caused any damage, nor that her actions may result in significant damage or risk. I am not satisfied that this tenancy should end on these grounds.

I find that the landlord has not met the burden of proof to support that this tenancy should end on the grounds provided on the 1 Month Notice. Accordingly, I allow the tenant's application to cancel the 1 Month Notice dated August 26, 2020. The tenancy will continue until ended in accordance with the *Act*.

The tenant also applied for an order to suspend or set conditions on the landlord's right to enter the rental unit, and for the landlord to comply with the *Act*. I am not satisfied, based on the evidence provided, that the landlord has contravened the *Act*. Accordingly, I dismiss this portion of the tenant's application without leave to reapply.

I allow the tenant's application to recover the \$100.00 filing fee from the landlord. The tenant may choose to give effect to this monetary award by reducing a future monthly rent payment by \$100.00.

Conclusion

I allow the tenant's application to cancel the 1 Month Notice and recover the filing fee for this application. The landlord's 1 Month Notice to End the Tenancy dated August 26, 2020 is cancelled and is of no continuing force or effect. This tenancy is to continue until ended in accordance with the *Act*.

I allow the tenant to implement a monetary award of \$100.00 for the filing fee by reducing a future monthly rent payment by that amount.

The remainder of the tenant's application is dismissed without 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: October 30, 2020

Residential Tenancy Branch