Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Code: CNC

Introduction

The tenant seeks an order under section 62 of the *Residential Tenancy Act* ("Act") to cancel a One Month Notice to End Tenancy for Cause ("Notice").

The tenant filed an application for dispute resolution on September 25, 2020 and a hearing was held on November 27, 2020. The tenant, the landlord, and the landlord's daughter attended the hearing and were given a full opportunity to be heard, present testimony, make submissions, and call witnesses. No issues of service were raised by the parties.

Issues

1. Is the tenant entitled to an order cancelling the Notice?
2. If not, is the landlord entitled to an order of possession of the rental unit?

Background and Evidence

I only review and consider oral and documentary evidence meeting the requirements of the *Rules of Procedure,* to which I was referred, and which is relevant to determining the issues. Only relevant evidence needed to explain my decision is reproduced below.

The landlord and the landlord's daughter (referred to interchangeably as the "landlord" for brevity) testified that they issued the Notice, a copy of which was submitted into evidence, on September 20, 2020. There were several grounds listed on the Notice including one for repeated late payment of rent, which is not considered here due to legislative restrictions regarding ending tenancies for repeated late payment of rent during the pandemic.

However, there were a few other grounds that I will enumerate shortly. The two primary reasons why the landlord issued the Notice are (1) the tenant is growing cannabis in the basement (or ground level of the house) and (2) the tenant is subletting or assigning the tenancy without the landlord's written consent.

The landlord testified that they are fairly certain there are other people residing in the rental unit who are not on the tenancy agreement. The tenant confirmed this and said that there are a total of 3 people living in the house. He said that he rented out two of the three bedrooms in the three-bedroom house. They are what he called "roommates." One of them helps the tenant out with daily chores and so forth. To reiterate, he testified that that he does not sublet the property; he resides within the house.

As for the other ground, the landlord testified that the tenant has set up a few tents inside the house. These are foil-lined tents used for growing and cultivating cannabis plants. Photographs of the tents were submitted into evidence. These photographs were purportedly sent to the landlord from a previous occupant of the house who left in May 2020. There is also a photograph of an electrical panel box in the ground floor. The landlord testified that the insurance company told her that insurance premiums would increase if there a cannabis grow operation in the property. The landlord testified that she is alarmed and has a difficult time sleeping.

The tenant testified that a certified electrician did some work to allow the plants to be cultivated, but that there has been no change to the electrical system. There are 4' x 4' and a 5' x 5' tents in use; they are "not that big or anything," he added. He also noted that he has a license to grow cannabis.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Where a tenant applies to dispute a One Month Notice to End Tenancy for Cause, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the Notice is based. The grounds listed on the Notice (other than the one regarding repeated late payment of rent) were:

> (1) the tenant or a person permitted on the residential property by the tenant has put the landlord's property at significant risk (section 47(1)(d)(iii) of the Act);

(2) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that has caused or is likely to cause damage to the landlord's property (section 47(1)(e)(i) of the Act);

(3) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord (section 47(1)(e)(iii) of the Act); and,

(4) the tenant assigned the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 of the Act (Section 47(1)(i) of the Act.

First, while there is evidence that the tenant is growing cannabis plants within foil-lined tents, there is no evidence that the cultivation operation has, in fact, put the property at significant risk. There is no evidence from an electrician, a fire inspector, or a house inspector establishing that the electrical and plumbing structures needed to support the operation have, in fact, put the property at significant risk, that they jeopardize the lawful right or interest of the landlord, or that the cultivation operation has caused damage.

While I understand the landlord's concerns about the *prima facie* often-negative feelings or reaction associated with "grow ops," properly built operations that meet building codes do not present the risk that is alleged. In the absence of evidence that the tenant's growing of cannabis has actually damaged the property, or that his operation presents an actual risk, I cannot conclude that any of the first three grounds under which the Notice was issued are met. Finally, while the landlord referred to the insurance company's reference to higher insurance premiums, there is no evidence from the insurance company itself to attest to this fact, or to any documentation from the insurance company explaining how they arrived at this conclusion without having examined the property. There is a reference in the landlord's evidence to an electrician having concerns, but, in the absence of an electrician's testimony or documentary evidence (such as an inspection), I cannot find that there is a basis on which the Notice may be upheld on the first three grounds.

Regarding the fourth ground, namely that is assignment or sublet, I turn to section 34 of the Act which states

(1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.

(2) If a fixed term tenancy agreement has 6 months or more remaining in the term, the landlord must not unreasonably withhold the consent required under subsection (1).

(3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

In this dispute, the landlord believes that other people live in the house. It turns out that there are two other people to whom the tenant called “roommates.” It appears that all three people living in the property share the house, the kitchen, and so forth.

It is important to distinguish between an assignment and a sublet, and that of a shared accommodation arrangement such as it is with roommates. As per *Residential Tenancy Policy Guideline 19,* an “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” (page 2). A “sublet” occurs when “a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant” (page 3).

However, where a tenant remains in the rental unit, and the tenant takes on roommates (as the tenant appears to have done here), then this cannot be considered an assignment or sublet. If the tenant actually moved out the house and rented it out to a tenant who took exclusive possession, then an assignment or sublet might occur. This is not the case in the present arrangement.

Given the evidence presented by the parties, I find that no assignment or sublet has occurred. Therefore, the ground under section 47(1)(i) of the Act on which the Notice was partially based has not been established

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving the grounds on which the Notice was based.

Accordingly, I hereby order that the Notice issued on September 20, 2020 is cancelled. The Notice is of no force or effect and the tenancy shall continue until it is ended in accordance with the Act.

That having been said, the tenant may wish to consider obtaining an inspection or safety inspection of his cultivation activities in order to mitigate or alleviate the landlord's genuine concerns about the risks that are often associated with such activities.

Conclusion

I hereby grant the tenant's application.

I order that the One Month Notice to End Tenancy for Cause issued on September 20, 2020 is cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the Act.

This decision is made on authority delegated to me under Section 9.1(1) of the Act.

Dated: November 27, 2020

Residential Tenancy Branch