



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) and an Amendment to the Application for Dispute Resolution (the Amendment) that were filed by the Tenant under the Residential Tenancy Act (the Act), seeking:

- Cancellation of a One Month Notice to End Tenancy for Cause (the One Month Notice);
- An order for the Landlord to comply with the Act, regulation, or tenancy agreement;
- An order that the Landlord has unreasonably withheld consent to assign or sublet the rental unit; and
- Recovery of the \$100.00 filing fee.

I note that section 55 of the Act requires that when a tenant submits an Application seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with section 52 of the Act.

The hearing was convened by telephone conference call and was attended by the Tenant and the agent for the Landlord (the Agent), both of whom provided affirmed testimony. As the Agent acknowledged receipt by the Landlord or their agents of the Notice of Dispute Resolution Proceeding Package, including a copy of the Application and the Notice of Hearing, and raised no concerns with regards to service, the hearing proceeded as scheduled. As both parties acknowledged receipt of each other's documentary evidence and neither party raised concerns regarding service nor requested that evidence be excluded, I have accepted all of the documentary evidence before me from both parties for consideration. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of

Procedure (the Rules of Procedure), I refer only to the relevant and determinative facts, evidence and issues in this decision.

At the request of the Tenant, copies of the decision and any orders issued in their favor will be emailed to them at the email address provided in the Application. At the request of the Agent, a copy of the decision and any orders issued therein favor of the Landlord will be emailed to them at the email address provided in the hearing, which has been recorded on the cover page for this decision.

Preliminary Matters

Preliminary Matter #1

In their Application the Tenant sought multiple remedies under multiple unrelated sections of the Act. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

As the Tenant applied to cancel a One Month Notice, I find that the priority claim relates to whether the tenancy will continue, or end, and I therefore exercise my discretion to dismiss the following claims by the Tenant with leave to reapply:

- An order for the Landlord to comply with the Act, regulation, or tenancy agreement; and
- An order that the Landlord has unreasonably withheld consent to assign or sublet the rental unit.

As a result, the hearing proceeded based only on the Tenant's Application seeking cancellation of a One Month Notice and recovery of the filing fee.

Preliminary Matter #2

Although another agent for the Landlord Y.P. was personally named in the Application as a respondent, the parties agreed at the hearing that the Landlord is a corporation, as set out in the tenancy agreement, and that Y.P. is an agent for the Landlord. As the matter before me to decide is possession of the rental unit and validity of a One Month Notice, I have removed Y.P. as a respondent, and have named only the Landlord as the respondent in the decision and any associated orders.

Issue(s) to be Decided

Is the Tenant entitled to cancellation of the One Month Notice?

If the Tenant's Application seeking cancellation of the One Month Notice is dismissed or the One Month Notice is upheld, is the Landlord entitled to an Order of Possession?

Is the Tenant entitled to recovery of the \$100.00 filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me, signed by the Tenant, their previous spouse S.G., and an agent for the Landlord on February 24, 2004, states that the month to month tenancy commenced on March 1, 2004, that rent in the amount of \$940.00 is due on the first day of each month, and that a security deposit and a pet damage deposit were collected in the amount of \$940.00 (\$470.00 per deposit). At the hearing the parties confirmed that rent is due on the first day of each month.

The tenancy agreement also states that as a material covenant of the tenancy agreement, a breach of which will constitute grounds for termination of the tenancy, only the Tenant and S.G. are tenants or occupants of the rental unit under the tenancy agreement and that only they are permitted to reside in the rental unit as permanent occupants, unless otherwise agreed to by the Landlord in writing. Further to this, the tenancy agreement states that a guest remaining in the rental unit for a period in excess of two weeks will be deemed to be a permanent occupant of the rental unit for the purposes of the tenancy agreement.

During the hearing the parties agreed that these are the correct terms of the written tenancy agreement entered into and that no subsequent tenancy agreements have been entered into by the parties.

The Agent stated that it is the Landlord's belief that the Tenant has been subletting the rental unit to their partner, a person not named in the tenancy agreement as either a tenant or an occupant, without written consent or approval from the Landlord, since September of 2020, when the Tenant left the country. As a result, the Agent stated that a One Month Notice was posted to the door of the rental unit on November 27, 2020. The Tenant acknowledged receipt of the One Month Notice, which they state their house-sitter received off the door of the rental unit on November 30, 2020, and file their Amendment seeking to add cancellation of the One Month Notice to their existing

Application for other matters with the Residential Tenancy Branch (the Branch), on December 10, 2020.

The copy of the One Month Notice in the documentary evidence before me is in writing on the approved form, is signed and dated November 27, 2020, contains the address for the rental unit, has an effective date of December 31, 2020, and states that the reason for issuance of the One Month Notice is because the Tenant has assigned or sublet the rental unit without the Landlord's consent. Under details of cause it states that the Tenant's former spouse has been residing in another province for over a year, that the author was advised by the Tenant that they were moving overseas to work for their father, and that there is a person residing in the suite who is neither a tenant or occupant of the rental unit according to the tenancy agreement, nor approved by the Landlord to reside in the rental unit.

The Tenant acknowledged that they have been out of the country since September 2020, as they went to visit family. The Tenant stated that although they had already planned to return, their return date is currently uncertain as their father has had a second stroke. The Tenant stated that all of their possessions remain in the rental unit as they plan to return, and that they only took their suitcase with them to visit their family when they left in September. The Tenant stated that they have no other permanent address and that they continue to pay rent by cheque in their own name to the Landlord each month. The Tenant also acknowledged that their partner is house-sitting for them but stated that the rental unit is not their permanent address, that their partner retains their own permanent residence at a different address, and that their partner simply attends the rental unit periodically for a few days at a time to look after the place as they have plants, and there have been issues with flooding, the electrical system, and the locks which give access to the rental unit.

The Tenant stated that although they have travelled for significant periods of time in the past (one to one and a half years at a time), this has never been an issue for the Landlord before, likely because their former spouse continued to reside in the rental unit. The Tenant alleged that the Landlord has now taken issue with their travels because their former spouse has not lived in the rental unit since 2018, and they have a house-sitter who attends the rental unit periodically to look after the rental unit and their possessions. In support of their position that they have not sublet or assigned the rental unit to their partner, they submitted written statements from both their partner/house-sitter and their ex-spouse, who is the other Tenant listed in the tenancy agreement, as well as copies of email correspondence between themselves and the agent for the Landlord Y.P.

The Agent disagreed with the Tenant's testimony that their partner is not an occupant of the rental unit and only attends periodically for a few days at a time. The Agent, who also resides in the building, stated that they see the Tenant's partner coming and going from the rental unit daily, that lights are always on in the rental unit, and that smoke can regularly be smelled coming from the rental unit as the Tenant's partner smokes. As a result, the Agent stated that they believe that the Tenant's partner is subletting the rental unit from the Tenant. The Agent did however agree that rent continues to be paid by cheque in the Tenant's name and that the majority of the Tenant's possessions remain in the rental unit.

Analysis

Based on the written tenancy agreement in the documentary evidence before me and the affirmed testimony of the parties in the hearing, I find as fact that the terms of the tenancy agreement are as set out in the written tenancy agreement in the documentary evidence before me, with the exception of the amount of rent currently owed each month, which has increased since the time the tenancy agreement was entered into.

As the Tenant acknowledged receipt of the One Month Notice on November 30, 2020, I find as fact that it was served on the Tenant on that date, after having been posted to the door of the rental unit on November 27, 2020. I also note that November 30, 2020, would be the deemed service date for the One Month Notice pursuant to section 90(c) of the Act. As the Tenant filed their Amendment seeking cancellation of the One Month Notice on December 10, 2020, I therefore find that it was filed within the timelines set out under section 47(4) of the Act.

Section 47(1)(i) of the Act states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 *[assignment and subletting]*. Rule 6.6 of the Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities and that the onus to prove the validity of a Notice to End Tenancy falls to the landlord when a tenant disputes the Notice to End Tenancy.

Section 1 of the Act defines a sublease agreement as a tenancy agreement under which the tenant of a rental unit transfers the tenant's rights under the tenancy agreement to a subtenant for a period shorter than the term of the tenant's tenancy agreement, and where the subtenant agrees to vacate the rental unit at the end of the

term of the sublease agreement on the date specified under the sublease agreement. Residential Tenancy Policy Guideline (Policy Guideline) #19 states that 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 and reiterates that unlike assignment, a sublet is temporary. Policy Guideline #19 states that in order for a sublease to exist, the original tenant must retain an interest in the tenancy and that 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, such as one day less than the end date for the fixed-term of the tenancy agreement or one month less a day, if the tenancy continues on a month-to-month basis.

No sublease or assignment agreement was submitted by either party for my consideration and the Tenant stated unequivocally that they have not vacated the rental unit, sublet the rental unit, or assigned their tenancy, as they are simply on vacation visiting family. The written statement submitted by the Tenant's partner M.A. states that they are a house-sitter for the Tenant when the Tenant is away, as there have been security issues with the rental unit in the past, including theft of a bicycle, and because the Tenant is concerned that they Landlord may unlawfully end their tenancy and dispose of their possessions while they are away, as the Landlord wishes for the tenancy to end so that the rental unit may be re-rented to another tenant at a higher rental rate. M.A. also states that they are to water the Tenant's plants and to deposit rent cheques left for the Landlord by the Tenant at the end of each month while the Tenant is away, as the Landlord is very particular about how and when rent is to be paid. There is no indication in the statement before me from M.A. that M.A. resides in the rental unit full time or that they have sublet the rental unit from the Tenant. Further to this, the parties were in agreement that the majority of the Tenant's possessions remain in the rental unit, as they took only a suitcase with them when they left to visit their family abroad in September 2020.

A written statement from the Tenant's ex-spouse was also submitted for my consideration wherein they stated that the Tenant has only visited their family abroad twice in the last 20 years, and attesting that the Tenant is returning to the rental unit as they have not sublet it or rented it out. Although the Agent stated at the hearing that they believe the rental unit has been sublet to the Tenant's current partner, no documentary evidence was submitted in support of this testimony, other than copies of email correspondence authored by another agent for the Landlord Y.P., who did not appear at the hearing, asserting that the Tenant had moved abroad and sublet the rental unit. However, copies of emails also submitted by the Tenant for my review and

consideration from them to Y.P. repeatedly refuted the allegation that they had moved abroad and sublet the rental unit.

Based on the above, I am not satisfied by the Landlord or their agents on a balance of probabilities that the Tenant has given up possession of the rental unit, either permanently by way of an assignment of the tenancy, or temporarily, by way of a sublease agreement, as alleged by the Agent in the hearing and as set out in the One Month Notice. As a result, I find that the Landlord does not have grounds to end the tenancy under section 47(1)(i) of the Act by way of the One Month Notice and I therefore grant the Tenant's Application seeking cancellation of the One Month Notice.

As the Tenant was successful in their Application, I grant them recovery of the \$100.00 filing fee pursuant to section 72(1) of the Act, which they are permitted to deduct in one lump-sum from the next months rent payable under the tenancy agreement, pursuant to section 72(2)(a) of the Act.

Although the parties disputed whether the Tenant's partner meets the definition of a permanent occupant under the written tenancy agreement and therefore whether or not the Tenant has breached their tenancy agreement, the matter before me to decide is whether or not the Landlord has grounds to end the tenancy by way of the One Month Notice. As the One Month Notice relates to assignment or sublet of the rental unit, and not whether the Tenant has breached a term, material or not, of the tenancy agreement or whether the Tenant has unauthorized occupants in the rental unit, I have made no findings of fact or law with regards to those matters.

Conclusion

I order that the One Month Notice dated November 27, 2020, is cancelled and that the tenancy continue in full force and effect, until it is ended by one or both of the parties in accordance with the Act.

Pursuant to section 72 of the Act, the Tenant is permitted to deduct \$100.00 from the next months rent payable under the tenancy agreement, in one lump-sum, in recovery of the filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: January 12, 2021

Residential Tenancy Branch