Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CML Properties
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was 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).

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, the Tenant's advocate (the Advocate), three witnesses and support people for the Tenant, T.L., S.F., and C.C., and two agents for the Landlord, C.D. and J.C. All testimony provided was affirmed. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The Residential Tenancy Branch Rules of Procedure (the Rules of Procedure) state that the respondent must be served with a copy of the Application and Notice of Hearing and section 59(3) of the Act states that except for an application referred to in subsection (6), a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director.

Although the Agent for the Landlord C.D. acknowledged personal receipt of the Notice of Dispute Resolution Proceeding, which includes the Application and the Notice of

Hearing, by the Landlord or their agents on January 20, 2021, they took issue with the fact that it was not served in compliance with the timeline set out under section 59(3) of the Act and the Rules of Procedure. C.D. stated that the Landlord runs many rental units other than the one occupied by the Tenant, and the stress of not knowing whether or not the Tenant planned to dispute the One Month Notice left the Landlord in limbo with regards to whether or not the tenancy would end in compliance with the effective date set out in the One Month Notice.

Residential Tenancy Branch (Branch) records show that the Tenant filed their Application seeking cancellation of the One Month Notice on December 11, 2020, and that the Notice of Dispute Resolution Proceeding was made available for them to pick-up on December 16, 2020, for service on the Landlord by December 19, 2020. Branch records indicate that an email was sent to the Tenant on December 16, 2020, as per their request in the Application, that the Notice of Dispute Resolution Proceeding was available for pick-up, however, the Tenant stated that they could not access their email as they had forgotten their password. The Tenant stated that when they had not heard from the Branch regarding their Application, they contacted the Branch in January of 2021, and were advised that the Notice of Dispute Resolution Proceeding was available. The Tenant stated that they immediately picked it up and served it on the Landlord the same day, January 20, 2021.

Further to the above, the Advocate argued that Landlord knew that the Tenant had disputed the One Month Notice, as the Landlord's agents had contacted the Branch regarding the One Month Notice, and that as everyone had appeared at the hearing, the notice of which had been served on the Landlord well in advance of the hearing date, there should be no issue with proceeding. I agree. Branch records indicate that the Landlord became aware of the Application on January 5, 2021, when C.D. contacted the Branch, and although C.D. argued that the Landlord was "in limbo" with regards to whether or not the Tenant would comply with the One Month Notice, I do not find this argument compelling as they were aware on January 5, 2021, that the Tenant had disputed the One Month Notice and I note that the Landlord took no action to enforce the One Month Notice themselves, through filing an Application for Dispute Resolution with the Branch. Further to this, C.D. acknowledged that the Landlord or their agents was served with the Notice of Hearing on January 20, 2021, well in advance of the March 8, 2021, hearing date, and I note that the Landlord appears to have had no difficulty submitting documentary evidence for my consideration or having agents appear at the hearing on their behalf.

I therefore find, pursuant to section 71(2)(b)of the Act, that the Notice of Dispute Resolution Proceeding was sufficiently served on the Landlord for the purposes of the Act on January 20, 2021, despite having been served more than three days after it became available to the Tenant by the Branch. As a result, the hearing proceeded as scheduled.

Although there was some disagreement between the parties with regards to when and how their respective documentary evidence was served on each other, ultimately the parties agreed to the acceptance of all of the documentary evidence before me for review and consideration. Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email address provided by them in the hearing.

Preliminary Matters

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the Branch) under Section 9.1(1) of the Act.

Issue(s) to be Decided

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

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

Background and Evidence

At the hearing the parties agreed that the fixed term tenancy began on June 1, 2017, at a monthly rent of $650.00, and that the tenancy was currently month to month (periodic). A copy of the tenancy agreement and addendum were submitted for my consideration. In the hearing the parties agreed that rent in the amount of $690.00 is

currently due on the first day of each month. They also agreed that a $325.00 security deposit was paid by the Tenant, which is still held in trust by the Landlord.

The Agent C.D. testified that the Tenant breached term F in the addendum to the tenancy agreement (the addendum), which states that as a material term of the tenancy agreement, the Tenant must get approval from the Landlord in advance and in writing, for any pets, when they obtained a cat without prior written consent of the Landlord. The Agent stated that the wording of this terms makes it clear that term F of the addendum to the tenancy agreement is a material term of the tenancy agreement, and that a One Month Notice was personally served on the Tenant for breach of a material term on December 4, 2020.

The One Month Notice in the documentary evidence before me, signed and dated December 4, 2020, has an effective vacancy date of January 31, 2020, and states that the reason for ending the tenancy is because the Tenant has breached a material term of the tenancy agreement and has not corrected the breach within a reasonable amount of time after being given written notice to do so.

In the hearing the Tenant acknowledged receiving the One Month Notice in person on December 4, 2020. The Tenant also agreed that term F of the tenancy agreement states that prior written approval is required for a pet and that this is a material term of the tenancy agreement. Despite this acknowledgement, the Tenant agreed that they obtained a cat without the written consent of the Landlord.

The parties agreed that the Tenant’s cat first came to the Landlord’s attention in September of 2018, when the Agent J.C., who is the resident caretaker for the building, was asked for approval for a cat by a different occupant of the building on the basis that the Tenant had a cat. The Agents stated that a letter was sent to the Tenant on September 18, 2018, a copy of which was provided for my review, stating that no pets are permitted under their tenancy agreement and requesting that the Tenant honor their tenancy agreement by removing the pet from their rental unit. Although J.C. acknowledged that they did not verify if the cat was subsequently removed, they stated that they had assumed the Tenant had removed the cat.

The Tenant disagreed, stating that there was never any attempt to hide the fact that they did not remove the cat as requested in the September 18, 2018 letter, as it can regularly be seen in their window and on their balcony, and that J.C. was well aware that they had not removed the cat from the rental unit, as they also reside in the building where the Tenant’s rental unit is located. Further to this, the Tenant stated that they had

a conversation with J.C. wherein J.C. stated that if the Landlord took no further action after the September 18, 2018, letter with regards to the cat, it could be assumed that the Tenant was permitted to keep it. J.C. denied any such conversation or agreement. The Agents stated that the cat was not noted again until November 9, 2020, when the Tenant was sent a second letter again reminding them that pets are not permitted in the rental unit under their tenancy agreement, that the keeping of a pet in the rental unit without the Landlord's consent is a breach of a material term of the tenancy agreement, and that a violation of their tenancy agreement may result in the issuance of an eviction notice. The letter also advised the Tenant to remove the cat by December 1, 2020.

At the hearing the Tenant acknowledged that they did not remove the cat as requested in the November 9, 2020, letter, stating that they had now had the cat for 3-4 years, and argued that the Landlord cannot possibly have considered their possession of the cat to be a breach of a material term of the tenancy agreement, as the Landlord had taken no action with regards to their cat after the September 18, 2018, letter, despite the fact that the Tenant had clearly not removed the cat from the rental unit. The Tenant also reiterated their belief that J.C. had given them verbal permission to keep the cat, which J.C. again denied.

The Advocate argued that despite the wording in term F of the addendum, the Landlord clearly did not consider the Tenant's possession of a pet to be a breach of a material term of the tenancy agreement, as after the September 18, 2018, letter was issued, the Landlord took no action to ascertain whether or not the Tenant had removed the cat, and took no expedient action to proceed with enforcement of the material term, only issuing a subsequent letter regarding possession of the pet on November 9, 2020, and a One Month Notice on December 4, 2020, more than two years after the Landlord first became aware that the Tenant had a pet in their rental unit contrary to term F of the tenancy agreement. As a result, and pursuant to Residential tenancy Policy Guideline (the Policy Guideline) #28, the Advocate argued that the Landlord should be prohibited from relying on term F as a material term and from ending the tenancy as a result of the Tenant's possession of the cat. The Tenant also argued that it is not a no-pets building as other occupants of the building have pets. The Agents agreed that several other occupants have grandfathered pets but reiterated their position that the Tenant is prohibited under their tenancy agreement from having any pets without prior written approval from the Landlord.

In the even that the One Month Notice is found to be valid and enforceable, the Tenant and the Advocate requested that an Order of Possession not be issued for a date earlier

than April 30, 2020, for health reasons. The Agents agreed that this date was acceptable, should an Order of Possession be granted to the Landlord.

Both parties submitted documentary evidence in support of their positions, including but not limited to a copy of the tenancy agreement and addendum, the September 18, 2018, and the November 9, 2020, letters, and letters from the Tenant's physician and other associated mental health professionals attesting to the significant mental health benefit the Tenant has derived from the possession of their cat.

Analysis

Based on the documentary evidence and testimony before me, I am satisfied that a tenancy to which the Act applies exists, the terms of which are set out in the tenancy agreement before me and the background and evidence section of this decision.

Section 47 of the Act states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gives written notice to do so. Based on the testimony before me, I am satisfied that the Tenant was served with the One Month Notice on December 4, 2020. Section 47(4) of the Act states that a tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice. Based on Branch records, I am satisfied that the Tenant filed their Application seeking cancellation of the One Month Notice on December 11, 2020, within the time period set out under section 47(4) of the Act.

There was no disagreement between the parties that term F of the addendum states that it is a material term of the tenancy agreement and that the Tenant is prohibited from having pets without prior written approval of the Landlord. There was also agreement that the Tenant did not have written approval from the Landlord for their cat. However, the parties disputed the materiality of the term and whether the Landlord should be permitted to end the tenancy for the Tenant's breach of this term. For the following reasons, I find that term F is not a material term of the tenancy agreement and that the Landlord is therefore not entitled to end the tenancy for breach of a material term of the tenancy agreement as a result of the Tenant's possession of their current pet, which is a cat.

Policy Guideline #8 states that 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. It also states that to determine the materiality of a term during a dispute resolution hearing, the Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach and that it falls to the person relying on the term to present evidence and argument supporting the proposition that the term is a material term. Further to this, Policy Guideline #28 states that the question of whether or not a pets clause is a material term of the tenancy agreement will depend upon what the parties intended to be the consequence of a breach of the clause. While Policy Guideline #28 states that the tenancy agreement itself may designate the pets clause to be a "material term", it also states that this is not always conclusive. Further to this, it states that in some cases a landlord may know of a pet being kept by a tenant in contravention of a pets clause and do nothing about it for a period of time and that while the landlord's mere failure to act is not enough to preclude him or her from later insisting on compliance with the pets clause, such a delay may indicate that the pets clause is not considered by the landlord to be a material term of the tenancy agreement.

Although the Landlord sent the Tenant a letter dated September 18, 2018, stating that the Tenant was prohibited from having a pet and requesting that the Tenant comply with their tenancy agreement by removing the pet, I am satisfied that the Landlord took no reasonable action after the issuance of this letter, to verify that the Tenant had in fact removed the pet as requested, or to proceed with enforcement of term F of the tenancy agreement if the pet was not removed and the Landlord believed that possession of the pet was a breach of a material term of the tenancy agreement. I find it entirely unreasonable for the Agent J.C. to simply have assumed that the Tenant had complied with the Landlord’s request to remove the pet, instead of attempting to verify whether or not the pet was removed, and given the affirmed and undisputed testimony of the Tenant that their cat is regularly visible in their window and on their deck, I find it extremely improbable that neither the Agent J.C., who also resides in the building, nor any other agents for the Landlord, were aware of the Tenant’s continued possession of their pet.

As the Landlord took no further action in relation to the Tenant’s pet and enforcement of term F of the addendum until November 9, 2020, more than two years after the Landlord first became aware of the Tenant’s breach of term F of the addendum, I therefore find, pursuant to Policy Guideline #28, that term F of the addendum was not considered by the Landlord to be a material term of the tenancy agreement. I therefore find that the Landlord has no grounds under section 47(1)(h) of the Act, to end the

tenancy, and I therefore grant the Tenant's Application seeking cancellation of the One Month Notice on the basis of a breach of a material term of the tenancy agreement.

Conclusion

The Tenant is successful in their Application seeking cancellation of the One Month Notice. I therefore order that the One Month Notice is cancelled and that the tenancy continue until it is ended by one or both of the parties in accordance with the Act.

Although this decision has been rendered more than 30 days after the close of the proceedings, section 77(2) of the Act states that the director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period in subsection (1)(d). As a result, I find that neither the validity of this decision and any associated orders, nor my authority to render this decision, are affected by the fact that it was rendered more than 30 days after the close of the proceedings.

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

Dated: April 12, 2021

Residential Tenancy Branch