



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Greenaway realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **CNC, RR, PSF, AAT, RP, LRE, LAT, OLC**

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- An order to cancel a One Month Notice To End Tenancy for Cause pursuant to sections 47 and 55;
- An order to reduce rent for repairs/services/facilities agreed upon but not provided pursuant to section 65;
- An order to provide services or facilities required by a tenancy agreement or law pursuant to section 62;
- An order to allow access to the tenant or their guests pursuant to section 30;
- An order for regular repairs pursuant to sections 32 and 62;
- An order to suspend a landlord's right to enter the rental unit pursuant to section 70;
- Authorization to change the locks to the rental unit pursuant to section 31; and
- An order for the landlord to comply with the *Act*, Regulations and/or tenancy agreement pursuant to section 62.

Both the tenant and the landlord attended the hearing. The landlord was represented by property manager, KG. As both parties were present, service of documents was confirmed. The landlord acknowledged being served with the tenant's Notice of Dispute Resolution Proceedings package. The tenant acknowledged service of the landlord's evidence package however states she received it late. The landlord testified she sent her evidence to the tenant by registered mail on April 26, 2021 and provided the tracking number for the mailing, recorded on the cover page of this decision. In accordance with sections 88 and 90 of the *Act*, the landlord's evidence is deemed served on May 1, 2021, within the 7 days a respondent to an Application for Dispute Resolution has to serve evidence upon the applicant pursuant to Rule 3.14 of the Residential Tenancy Branch Rules of procedure. I allowed the landlord's evidence to be admitted as it was served in accordance with the rules of procedure.

Preliminary Issue – Unrelated Issues

Rules 2.3 and 6.2 of the Residential Tenancy Branch Rules of Procedure (“Rules”) allow an arbitrator to consider whether issues are related and if they would be heard at the same time. I determined the issue of whether to cancel the landlord’s one month notice to end tenancy for cause was unrelated to the tenants’ other issues and dismissed the other issues with leave to reapply at the commencement of the hearing.

Issue(s) to be Decided

Should the landlord’s One Month Notice to End Tenancy for Cause be upheld or cancelled?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. In accordance with rule 7.14, I exercised my authority to determine the relevance, necessity and appropriateness of each party’s evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

A copy of the tenancy agreement was provided as evidence. The tenancy began on September 1, 2018, for one year fixed term, becoming month to month after the first year. Rent was set at \$1,650.00 per month plus \$230.00 for utilities, payable on the first day of each month. A security deposit of \$825.00 was collected and a condition inspection report was done with the previous landlord.

The landlord gave the following testimony. The tenant lives in the upper unit of a house built in 1976 with both upper and lower units. Other unrelated tenants reside in the lower unit.

On February 11, 2021, the landlord served the tenant with a One Month Notice to End Tenancy for Cause(“notice”) by registered mail. The landlord filed proof of service and provided the tracking number for the mailing which is recorded on the cover page of this decision. A copy of the notice was provided as evidence. The reasons for ending the tenancy are as follows:

1. the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord;
2. the tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
3. the tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk;
4. Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/sit or property/park;
5. breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;

Under "details of cause", the landlord writes:

Upon a routine inspection it was discovered that the kitchen plumbing had been leaking and gone unreported by the tenant since March 2020, the water damage and mold was quite visible which is now in the process of remediation. Reporting a leak is a material term of the tenancy agreement. The damage is expected to be in excess of \$10,000, it is undetermined the amount covered by insurance, the claim does have a \$2,000 deductible, we will be seeking compensation from the tenant for the cost to repair the damages. The tenant has been unresponsive in providing tenants insurance information, carrying insurance is a material term of her tenancy agreement.

The tenant in the lower suite has complained about the noise from the upper unit and while a caution notice was served there has been no improvement.

The landlord testified that her company took over management of the rental unit from the previous manager on January 1, 2021. They did an inspection of the unit on January 21st and discovered an unreported leak under the kitchen sink. The landlord testified that the tenant told them it had been leaking since last March. The landlord describes there being significant black mold under the kitchen sink and provided photos from the restoration company hired to investigate as evidence of the mold. The landlord

immediately got a plumber in to stop the leak, however remediation of the damaged cabinets/countertop, laminate flooring and drywall still needs to be done.

On February 6th, the landlord sent the tenant a letter asking her to provide a copy of her tenant's insurance by February 10th. The landlord states in the letter that carrying Tenant's insurance is a material term of the Tenancy Agreement and failure to produce a copy or carry insurance is a breach of that material term, which can result in ending the tenancy.

On February 11th, the landlord served the tenant with a letter advising the restoration work would commence on February 23rd. The letter states the property must be vacated from February 23rd at 8:00 a.m. until February 25th at 5:00 p.m. due to the fact that there is asbestos removal involved and that it is a high-risk project. The letter advises the tenant to contact her insurance company as there would be no compensation to the tenant as the damage was caused by an unreported leak left unattended.

The landlord testified that the tenant did not have tenant insurance, despite signing the tenancy agreement requiring her to do so. The landlord argues the tenant's failure to have tenant insurance constitutes a breach of a material term of the tenancy agreement. The landlord also argues that the tenant's failure to report the leak under the sink put the landlord's property at significant risk and seriously jeopardized the health or safety of the occupants of the lower unit of the house.

The landlord also alleges the tenant has caused noise issues for the lower unit tenants and that the tenant has been provided with caution letters in the past. The lower unit tenants have sent many complaint letters to the landlord however the landlord did not provide any of them to the tenant at the time she served the notice to end tenancy. Nor did the landlord supply the tenant with the chart of complaints compiled by the lower unit tenants. Additional evidence of the lower unit's complaints were provided, however the dates of those complaints were after the landlord served the tenant with the notice to end tenancy.

The tenant gave the following testimony. There was a previous arbitration seeking to end the tenancy early whereby the landlords were unsuccessful. The file number for the previous arbitration is noted on the cover page of this decision, and the landlord provided a copy of the previous arbitrator's decision in her evidence material.

The tenant testified that the landlord never gave her any complaints from the occupants in the lower unit. The tenant argues that the chart of complaints compiled by the lower unit occupants was made after the previously unsuccessful hearing to end the tenancy early.

The tenant testified that, when the lockdown began, the previous property management company came over to look at the deck that was “rotted right through”. The tenant was going to tell them about the leak under the sink when they came back to fix the deck, but they never came back. There is a history of the landlord not fixing anything, even when the tenant complains.

The tenant submits that the home is not built to code for two separate dwelling units. The noises are amplified between the units due to a lack of soundproofing and the landlord is unwilling to assist. She has seen the mayor to discuss illegal suites and their impact on the community.

With respect to the leak under the sink, the tenant acknowledges it had been there for some time before she reported it. The tenant stated it would have been futile for her to tell the landlord about it since the landlord never fixes anything. She did the best she could by putting buckets and towels under the leak. She does not have tenant insurance because she cannot afford to purchase it.

There have been no follow-ups done after being given caution notices by the landlord. The tenant says she has been “blindsided” by the allegations against her.

Analysis

I find the tenant deemed served with the landlord’s One Month Notice to End Tenancy for Cause on February 16, 2021, five days after it was sent via registered mail on February 11, 2021 in accordance with sections 88 and 90 of the *Act*. The tenant filed an Application for Dispute Resolution to dispute the notice four days later, on February 20, 2021 in accordance with section 47 of the *Act*.

Section 47 of the *Act* provides that upon receipt of a Notice to End Tenancy for Cause, the tenant may, within ten days, dispute it by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant files the application, the landlord bears the burden to prove on a balance of probabilities, the grounds for the 1 Month Notice.

First, the landlord argues that the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. Residential Tenancy Branch Policy Guideline PG-8 [Unconscionable and Material Terms] says:

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – 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.*

The landlord alleges the failure to advise the landlord of the leak under the sink is a material term of the tenancy that wasn't corrected after written notice to do so was given. During testimony, the landlord did not provide me with the reference to which term of the tenancy the tenant was breaching in not advising them of the leak under the kitchen sink. Nor did the landlord point my attention to any written material advising the tenant that reporting deficiencies is a material term of the tenancy and that the tenant must correct this by a given deadline. I also find it plausible that the tenant didn't report the leak immediately because she felt the landlord would fail to *Act* on the complaint as they have done with her complaint about the rotten deck. I do not find the tenant failed to correct a material term of the tenancy after being given written notice to do so.

The landlord also alleges the failure to obtain tenant insurance is a material term of the tenancy that was left uncorrected after written notice to do so. While I am satisfied the landlord gave the tenant written notification that they consider carrying tenant insurance to be a material term of the tenancy, and that the tenant had 4 days to provide it to the landlord, I must consider whether failing to have it actually constitutes a breach of a material term. Turning once again to PG-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.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy 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. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

The evidence before me indicates the requests for copies of the tenant insurance came after the landlord discovered the leak under the kitchen sink. It wasn't until after the issue about the tenant having to relocate during the repairs to the rental unit that the landlord began to ask for proof of tenant insurance. I find that the tenancy agreement was drafted with a previous property management company who never followed up with the tenant to ascertain whether she obtained tenant insurance throughout the time they managed the property. Of course, if the tenant had obtained tenant insurance, her insurer would have potentially covered her costs to temporarily relocate during the repairs, and to compensate the landlord for the cost of repairs, however this was a risk the tenant chose to take. Although the tenant has put herself in a position where she could be ordered to pay compensation to the landlord, I do not find acquiring tenant insurance to be a material term of the tenancy.

Other reasons for ending the tenancy revolve around the damage done to the property from the water leak by causing extraordinary damage; putting the landlord's property at significant risk; and seriously jeopardizing the lawful right of the landlord or another occupant. I find the landlord has not provided compelling evidence to satisfy me there is extraordinary damage done to the rental unit. The damage was estimated to take 2 days to remediate (February 23 to February 25) which indicates to me the extent of the damage was not extraordinary. The landlord alleges that the water leak created mold which creates a hazard to the other occupants of the building, however I do not find the landlord has provided sufficient evidence to satisfy me this is the case. The landlord did not point my attention to any air quality studies done to corroborate this argument. Nor do the photographs taken by the remediation company seem to indicate the mold has spread outside the area under the sink. While the landlord has shown there is asbestos in the building, that hazard to the health of the occupants based on the asbestos cannot be attributed to the tenant or the water leak.

Lastly, the landlord alleges the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or

the landlord. In the landlord's notice to end tenancy, under "details of cause", the landlord states, " *The tenant in the lower suite has complained about the noise from the upper unit and while a caution notice was served there has been no improvement.*"

The form also tells the landlord to *describe what, where and who caused the issue and include dates/times, names etc. This information is required. An arbitrator may cancel the notice if details are not provided.*

During the hearing, the landlord acknowledged she did not provide copies of the complaints made against the tenant when serving the notice to end tenancy. Nor did the landlord provide any details about the nature of the incidents to the tenant until she supplied the evidence package to the tenant in preparation for this hearing. The tenant stated she was "blindsided" by the allegations against her. In not providing the dates and times of the allegations of noise in the notice to end tenancy, the landlord has denied the tenant the right to reply to the noise claims made against her. I also find it reasonable that, in a house that was not originally built to contain two dwelling units, there would be an expectation of noise transfer between the units. The landlord has not satisfied me the noises *significantly* interfered with or *unreasonably* disturbed the other occupant.

I find that the landlord has not successfully proven to me the reasons for ending the tenancy are valid. I find the notice to end tenancy issued on February 11, 2021 is of no effect.

Conclusion

The notice to end tenancy issued on February 11, 2021 is of no force or effect. This tenancy shall continue until it is ended in accordance with the *Act*.

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: May 12, 2021