



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding E&E FOOD MARKET LTD. C/O CATHAY PACIFIC
REALTY and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

OPC, FFL

Introduction

The hearing was convened in response to an Application for Dispute Resolution filed by the Landlord, in which the Landlord applied for an Order of Possession and to recover the fee for filing this Application for Dispute Resolution.

The Agent for the Landlord stated that on March 31, 2021 the Dispute Resolution Package and evidence submitted to the Residential Tenancy Branch in March of 2021 were sent to the Tenant at the rental unit, via registered mail. In the absence of evidence to the contrary I find that these documents have been served in accordance with section 89 of the *Residential Tenancy Act (Act)*.

The Tenant stated that he did not receive notice of the aforementioned package that was sent by registered mail and, as such, he did not receive the aforementioned documents. The Agent for the Landlord stated that the aforementioned package was unclaimed and was returned to the sender by Canada Post.

On the basis of the undisputed evidence, I find that the Tenant did not receive notification of the aforementioned mail from Canada Post and that he did not receive the documents that were sent by the Landlord on March 31, 2021. I find it entirely possible that the Canada Post notification was either lost or misdelivered by Canada Post. The parties were advised that the Landlord's evidence will not be accepted as evidence for these proceedings, as it was not received by the Tenant.

The Agent for the Landlord was asked if she would like an adjournment for the purposes of re-serving the Landlord's evidence to the Tenant, in which case the Landlord's evidence would be accepted. The Agent for the Landlord stated that she does not wish

an adjournment; that she wishes to proceed with the hearing today; and that she understands the Landlord's documentary evidence has not been accepted as evidence for these proceedings. The Agent for the Landlord was advised that she has the right to request an adjournment at any point in the hearing. The Landlord did not subsequently request an adjournment.

Legal Counsel for the Tenant stated that the Tenant received an email from the Agent for the Landlord, in which she discussed the impending eviction, which prompted the Tenant to contact the Residential Tenancy Branch. When the Tenant contacted the Residential Tenancy Branch he was informed of these proceedings and he was provided with a copy of the notice of hearing, which enabled him to join this teleconference hearing.

Legal Counsel for the Tenant stated that the Tenant has not seen the Landlord's documents so he is not entirely certain of the claims being made. Legal Counsel for the Tenant agreed to proceed with the hearing with the understanding that the Tenant can request an adjournment at any point in the hearing. The Tenant did not subsequently request an adjournment.

On May 17, 2021 the Tenant submitted evidence to the Residential Tenancy Branch. Legal Counsel for the Tenant stated that this evidence was personally delivered to the Landlord's business address on May 18, 2021. The Agent for the Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant, with the exception of legal counsel, affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

The participants were advised that the Residential Tenancy Branch Rules of Procedure prohibit private recording of these proceedings. Each participant affirmed they would not record any portion of these proceedings.

Issue(s) to be Decided

Is the Landlord is entitled to an Order of Possession?

Background and Evidence

The Landlord and the Tenant agree that:

- The tenancy began on March 01, 2015;
- The Tenant is currently required to pay monthly rent of \$1,192.00; and
- Rent is due by the first day of each month.

The Agent for the Landlord stated that on February 18, 2021 a One Month Notice to End Tenancy for Cause was mailed to the Tenant at the rental unit, via registered mail. She stated that this package was not picked up by the Tenant and it was returned to the Landlord by Canada Post.

The Tenant stated that he was out of town when Canada Post delivered notice of the registered mail and that he attempted to pick up the registered mail after he returned home, but by then it had been returned to the Landlord.

The Tenant stated that he has never seen the One Month Notice to End Tenancy for Cause that was mailed to him on February 18, 2021. The Tenant was advised that the One Month Notice to End Tenancy for Cause that was mailed to him declared that he must vacate the unit by March 31, 2021 and that the landlord was ending the tenancy because the tenant has assigned or sublet the rental unit without the landlord's written consent.

Legal Counsel for the Tenant stated that the Tenant is prepared to respond to the allegations he has assigned or sublet the rental unit, even though he has not received a copy of the One Month Notice to End Tenancy for Cause.

In support of the One Month Notice to End Tenancy for Cause the Agent for the Landlord stated that:

- Other occupants of the residential complex told her that a person named Paul had moved into the rental unit sometime in 2019;
- Other occupants of the residential complex told her that the Tenant had moved out of the rental unit;
- Other occupants of the residential complex told her that they witnessed the Tenant moving furniture out of the rental unit sometime in 2019;
- On February 20, 2020 the Tenant asked the Landlord for a reference;
- The February 20, 2020 reference request was not submitted to the Residential Tenancy Branch;

- In the request for a reference the Tenant told the Landlord he was giving up his “downtown” condo and moving to Delta;
- In the request for a reference that Tenant told the Landlord he was not moving out of the rental unit;
- The request for a reference should be interpreted to mean that the Tenant was living in the “downtown” condo in February of 2020; and
- The written tenancy agreement stipulates that anyone living in the unit must be approved by the Landlord.

In response to the allegations that he has assigned or sublet the rental unit the Tenant stated that:

- He is still living in the rental unit;
- “Paul” was his roommate in 2020 and in January of 2021;
- Other occupants who saw him moving furniture likely saw him help “Paul” move into the rental unit;
- His girlfriend moved into the rental unit with him on February 04, 2021;
- On February 04, 2021 he told the Administrator that his girlfriend was moving into the unit, although he did not identify her as his girlfriend;
- He has not assigned or sublet the rental unit;
- He has no other residence;
- He is frequently away from home on business;
- When he is away from home on business he stays at hotels or similar accommodations;
- When he asked the Landlord for a reference on February 20, 2020, he was gathering references for the purpose of purchasing property in Delta;
- When he asked the Landlord for a reference on February 20, 2020, he was giving up a rental property he had elsewhere on the lower mainland;
- He did not live in the rental property he had elsewhere on the lower mainland;
- He used the rental property he had elsewhere on the lower mainland primarily for storage for his business;
- In the request for a reference he told the Landlord that he was not moving out of the rental unit;
- He regularly shops at the store below the rental unit, which indicates he is still living in the unit; and
- There is no written tenancy agreement.

Analysis

On the basis of the undisputed testimony of the Agent for the Landlord, I find that a One Month Notice to End Tenancy for Cause was mailed to the Tenant at the rental unit on February 18, 2021, via registered mail. I therefore find that this document was properly served to the Tenant in accordance with section 88 of the *Residential Tenancy Act* (*Act*).

On the basis of the testimony of both parties, I find that the Tenant did not receive the One Month Notice to End Tenancy for Cause which was mailed on February 18, 2021, as it was returned to the Landlord by Canada Post.

On the basis of the undisputed testimony of the Tenant, I find that he did not receive the One Month Notice to End Tenancy for Cause that was mailed on February 18, 2021, because he was out of town and the document had already been returned to the Landlord by the time he attempted to retrieve the registered mail. I find this to be a reasonable reason for not receiving the One Month Notice to End Tenancy for Cause that was served by mail.

On the basis of the testimony of the Agent for the Landlord, I find that the One Month Notice to End Tenancy for Cause declared that the landlord was ending the tenancy because the tenant had assigned or sublet the rental unit without the landlord's written consent. As Legal Counsel for the Tenant stated that the Tenant is prepared to respond to the allegations he has assigned or sublet the rental unit, even though he has not received a copy of the One Month Notice to End Tenancy for Cause, I find it reasonable to determine if the Landlord has grounds to end the tenancy pursuant to section 47(1)(i) of the *Act*.

Section 47(1)(i) of the *Act* permits a landlord to end a 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 of the *Act*.

Residential Tenancy Branch Policy Guideline 19, with which I concur, defines a sublease as follows:

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. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.

Residential Tenancy Branch Policy Guideline 19, with which I concur, defines an assignment as "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".

When a landlord wishes to end a tenancy pursuant to section 47(1)(i) of the Act, as is the case in these circumstances, the burden of proving there are grounds to end the tenancy rests with the landlord. I find that the Landlord has submitted insufficient evidence to establish that the Tenant has assigned this tenancy or that he has sublet the rental unit.

On the basis of the undisputed testimony, I find that there has been a male and a female living in the rental unit at various times during the tenancy. I find that the Landlord has submitted insufficient evidence to refute the Tenant's testimony that he was living in the rental unit with these individuals. I therefore accept the Tenant's testimony that he was living in the rental unit with these individuals.

As the Tenant was living in the rental unit with those individuals, I find that he did not transfer his right to occupy the rental unit, either permanently or temporarily. I therefore find that he did not assign the tenancy or sublet the unit to either individual.

When considering this matter, I have placed little weight on the information provided to the Agent for the Landlord by other occupants of the residential complex, which is hearsay evidence that is subject to a wide variety of frailties. I find that the Tenant gave a reasonable explanation for why the other occupants observed him moving furniture when "Paul" was moving into the unit. Without some evidence of why the other occupants concluded that the Tenant had moved out of the unit, I find their opinions to have little evidentiary value.

On the basis of the undisputed testimony, I find that on February 20, 2020 the Tenant asked the Landlord for a reference, at which time he told the Landlord he was giving up

his “downtown” condo. In the absence of any evidence to refute the Tenant’s testimony that the “downtown” condo was used for storage for his business and that he was not living at that location, I find that this request does not establish that the Tenant was living in that location at any time during this tenancy. I find that the Tenant’s testimony that he had this second property for business purposes was a reasonable and credible explanation for having two properties.

I find that the Landlord’s submission that the reference request of February 20, 2020 should be interpreted to mean that the Tenant was living in the “downtown” condo is highly speculative. Although the testimony establishes the Tenant was renting two suites, no evidence was submitted that causes me to conclude that he was living in the “downtown” condo.

On the basis of the undisputed testimony, I find that when the Tenant asked the Landlord for a reference on February 20, 2020, he informed the Landlord that he was not moving out of the rental unit. I find that this declaration supports the Tenant’s testimony that he was still living in the rental unit at that time and refutes the Landlord’s submission that he was not living in the rental unit at that time.

As the Landlord has submitted insufficient evidence to establish grounds to end this tenancy pursuant to section 47(1)(i) of the *Act*, I dismiss the Landlord’s application for an Order of Possession.

I note that I have placed no weight on the Landlord’s submission that the tenancy agreement stipulates anyone living in the unit must be approved by the Landlord. Even if this were true and such a term was enforceable, it would not establish grounds to end the tenancy pursuant to section 47(1)(i) of the *Act*.

As the Landlord has failed to establish the merits of the Application for Dispute Resolution, I dismiss the application to recover the fee for filing the Application for Dispute Resolution.

Conclusion

The application for an Order of Possession is dismissed. This tenancy shall continue until it is ended in accordance with the *Act*.

The Landlord’s application to recover the fee for filing this Application for Dispute Resolution is dismissed.

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: May 26, 2021

Residential Tenancy Branch