Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to call witnesses, and to make submissions.

The tenants confirmed receipt of the 1 Month Notice dated January 25, 2021. The tenants testified in the hearing that although the they were served with the 1 Month Notice, the proof of service was not accurately filled out by the landlord as the tenants were served by the landlord's wife, and not the landlord as indicated on the proof of service. Although I acknowledge the tenants' concerns about the accuracy of the proof of service, I still find that the 1 Month Notice was served to the tenants in accordance with section 88 of the *Act*.

The landlord confirmed receipt of the tenants' application for dispute resolution ('Application') and evidence package. In accordance with section 89 of the *Act*, I find that the landlord duly served with the tenants' Application and evidence.

Preliminary Issue – Is this matter *res judicata*?

The doctrine of *res judicata* prevents a litigant from raising an issue that has already been decided in a previous proceeding. The tenants' argument is that the landlord's previous 1 Month Notice to End Tenancy was cancelled by the Arbitrator after a previous hearing was held, and the landlord had re-served them with the same 1 Month Notice on January 25, 2021, which was now signed and re-dated by the landlord. The

tenants testified that the landlord had also served them with evidentiary materials that were submitted for the previous hearing.

I have reviewed the decision from the previous hearing, and I find that the previous 1 Month Notice was cancelled after the Arbitrator found the 1 Month Notice to be invalid as the Notice was not signed, as required by section 52 of the *Act.* The 1 Month Notice was cancelled as it did not meet the requirements for form and content.

I am not satisfied that this matter was already decided, which is the issue of whether the landlord has grounds to end this tenancy for the reasons provided on the 1 Month Notice. Although the tenants were served with a new 1 Month Notice that appears to be a duplicate of the last one, and although the landlord may have submitted the same evidentiary materials to support their claims, I do not find this matter to be *res judicata* as the tenants were served with a new 1 Month Notice which is not completely identical in form and content to the last one. I am also not satisfied that the previous Arbitrator had made a finding on the merits of the landlord's claims in support of the 1 Month Notice, and for these reasons I will consider whether the new 1 Month Notice should be cancelled, and if not, whether the landlord is entitled to an Order of Possession.

Preliminary Issue – Landlord's Evidence

The tenants testified that they were not served with the landlord's evidentiary materials until April 25, 2021. The tenants confirmed that they did have the opportunity to review these materials, but took issue with the fact that the landlord did not serve the tenants with their evidence until April 25, 2021.

Rule 3.15 of the RTB's Rules of Procedure establishes that "the respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing"

The definition section of the Rules contains the following definition:

> In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days weeks, months or years, the first and last days must be excluded.

In accordance with rule 3.15 and the definition of days, the last day for the landlord to file and serve evidence as part of their application was April 25, 2021.

I find that the landlord's evidence was served within the required timeline. I find that the tenants did have the opportunity to review this evidence, and that there is no undue prejudice by admitting the landlord's evidentiary materials. Accordingly, the landlord's evidence was considered for the purposes of this hearing.

Preliminary Issue – Does the 1 Month Notice Comply with Section 52 of the *Act?*

Section 52 of the *Act* requires that a Notice comply with the *Act,* specifically, that the Notice must: be in writing and must: (a) be signed and dated by the landlord or tenant giving the notice, (b) give the address of the rental unit, (c) state the effective date of the notice, (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and (e) when given by a landlord, be in the approved form.

The tenants noted that the format of the dates provided by the landlord on the 1 Month Notice did not match the recommended format as indicated on the form, which is DD/MM/YYYY. The tenants noted that the landlord provided the abbreviation for the month instead of the two digit numerical reference, and failed to provide the full year. The tenant testified that this lack of adherence to the recommendation created an opportunity for ambiguity as it is unclear as to whether the landlord was referring to 2021, 1921, or 1821, or any other variations that could include "21" in its year.

I have considered the tenants' submissions about the dates, and although the tenants are correct in that the landlord did not use the recommended format, I do not find that a reasonable person would have misinterpreted the year to be 1921 or 1821, or any year other than 2021. Furthermore, section 52 of the *Act* only requires that the landlord date the Notice, and state the effective date. Although the landlord used a different format that the one suggested, I do not find the dates to be unclear or ambiguous, and I therefore find that the formatting does not invalidate the 1 Month Notice. While section 52 of the does reference "approved form", this is in reference to the proper form, and not the format, which in this case was #RTB-33 as correctly used by the landlord

The tenants also pointed out that the effective date provided the landlord does not meet the requirements of the Act. Although this may be the case, section 53 of the *Act* states that incorrect effective dates are automatically changed. An incorrect effective date does not automatically invalidate a 1 Month Notice.

Lastly, the tenants pointed out that the landlord failed to check off the corresponding boxes under the reasons for why the landlord had issued the 1 Month Notice. Although the tenants are correct in that the landlord failed to check off the corresponding boxes

for three of the reasons provided, I find that the landlord still met the requirements of section 52 of the *Act*.

I find that the 1 Month Notice complies with section 52 of the *Act* in form and content, and therefore I will make a finding on whether this Notice should be cancelled or not.

Issues

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony provided in the hearing, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy began on September 28, 2020, with monthly rent currently set at $1,300.00, payable on the first of every month. The landlord collected a security deposit in the amount of $650.00, which the landlord still holds.

On January 25, 2021, the tenants were served with a 1 Month Notice to End Tenancy. This 1 Month Notice was served following a hearing that was held on January 22, 2021 to deal with a similar 1 Month Notice. The previous Notice was cancelled after the Arbitrator made a finding that the Notice did not meet the requirements of section 52 in form and content. The landlord made a correction, and served the tenants with the new Notice, which is now signed, re-dated, but otherwise identical to the last Notice.

The landlord providing the following grounds for why they wished to end the tenancy:

1. 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.
2. The tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety, or physical well-being of another occupant.
3. The tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to jeopardize the health or safety or lawful right of another occupant or the landlord.
4. Breach of a material term of the tenancy agreement that was not corrected within a reasonable amount of time after written notice to do so.

During the hearing, the landlord confirmed why they did not check off the main boxes for #1, 2, and 3 above on the 1 Month Notice. The landlord confirmed that they felt that the tenants had seriously jeopardized the health or safety or lawful right of another occupant or the landlord, but are not alleging that the tenants or their guests have engaged in illegal activity. The landlord felt that the subsections for #2 and #3 applied, and therefore only checked off the corresponding boxes for those subsections.

As noted in the detail section of the 1 Month Notice, the landlord is seeking an Order of Possession as the tenants signed the tenancy agreement which included a clause that there was no smoking on the property whatsoever. Despite this clause, it was undisputed that the tenant AS had smoked on one occasion on the property, and on one further occasion where the tenant admitted that BP had mistakenly smoked inside the home by mistake. The landlord alleges that the tenants continue to smoke inside the rental unit and on the property despite the issuance of several warnings, and the 1 Month Notice. The tenants dispute that they have smoked since the two incidents. The landlord submitted in their evidence the correspondence between the two parties, as well as a letter from the owner and neighbour who occupies the other half of the duplex. The landlord maintains that the landlord and his family, as well as the neighbour, continue to smell an odour of smoke from the tenants' rental unit.

The landlord also testified that the tenants have failed to clean the garage since AS had moved in. The landlord expressed concern about the clutter, which the tenant has refused to address even after the tenant was issued a written warning. The landlord submitted photos to depict the current state of the garage. The tenant testified that he suffers from medical conditions which affects his ability to move items. The tenant testified that the landlord stores many of his items inside the garage, which contains the only entrance to the rental unit. The tenant does not feel that his items pose a threat to the landlord or the landlord's property.

The landlord also testified to other behaviours of the tenants, which the landlord feels has put the landlord and landlord's property at significant risk, including several incidents where the landlord had smelt an odour of kerosene. The landlord testified that they had called the fire department, and it was discovered that the tenants were using kerosene inside the home. The landlord testified that the tenants have a complete disregard for the health or safety of others and the home.

The tenants dispute the allegations of the landlord, and testified that the smell was from gas that had dropped onto the floor.

Analysis

Section 40 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenants may dispute the 1 Month Notice by filing an application for dispute resolution within ten days after the date the tenants receives the notice. As the tenants filed their application within the time limit under the *Act*, the onus, therefore, shifts to the landlord to justify the end of this tenancy on the grounds provided on the 1 Month Notice.

Section 47 of the *Act* allows a landlord to end a tenancy for the following reasons:

> **47** (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
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> (a) the tenant does not pay the security deposit or pet damage deposit within 30 days of the date it is required to be paid under the tenancy agreement;
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> (b) the tenant is repeatedly late paying rent;
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> (c) there are an unreasonable number of occupants in a rental unit;
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> (d) the tenant or a person permitted on the residential property by the tenant has
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> (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
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> (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
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> (iii) put the landlord's property at significant risk;
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> (e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
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> (i) has caused or is likely to cause damage to the landlord's property,
>
> (ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or
>
> (iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;
>
> (f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

(g) the tenant does not repair damage to the rental unit or other residential property, as required under section 32 (3) *[obligations to repair and maintain]*, within a reasonable time;

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

(i) 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]*;

(j) the tenant knowingly gives false information about the residential property to a prospective tenant or purchaser viewing the residential property;

(k) the rental unit must be vacated to comply with an order of a federal, British Columbia, regional or municipal government authority;

(l) the tenant has not complied with an order of the director within 30 days of the later of the following dates:

(i) the date the tenant receives the order;

(ii) the date specified in the order for the tenant to comply with the order.

The landlord confirmed in the hearing that the tenants have not engaged in illegal activity. Section 47 of the *Act* does not allow a landlord to modify the above reasons. The entire section must apply, which in this case means that the tenants or their guests must have engaged in illegal activity that

ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

(iii) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;

As the landlord has failed to provide sufficient evidence to support that the tenants have engaged in illegal activity under the definition of the Act, I do not find that the landlord had justification to end the tenancy on the second and third grounds provided on the 1 Month Notice.

The landlord alleges that the tenants have engaged in behaviour that has seriously jeopardized the health or safety or lawful right of another occupant or the landlord. The landlord listed several issues, including smoking on the property, the tenants' failure to address the landlord's concerns about the state of the garage and the tenants' personal belongings, and other behaviours by the tenants which have put the landlord's property and health at risk such as the intentional or accidental spillage of hazardous or noxious materials inside the home.

The landlord testified that there is a significant smell of smoke on the property which they attribute to the tenants. The landlord provided a statement from the neighbour who believes that the smoke is originating from the tenants' rental unit. Although the tenants admit to having smoked on the property and inside the rental unit on at least two occasions, I am not satisfied that the landlord had provided sufficient evidence to support that the tenants or their guests continue to do so. In light of the disputed testimony, and the fact that there are other plausible reasons for why the landlord and other parties smell smoke. Although the tenants admitted to being smokers, the tenants testified that they have corrected their behaviour after being warned by the landlord.

The landlord also provided undisputed testimony that the tenants were responsible for a strong odour of kerosene, which the tenants attributed to an accidental spill that was cleaned up. Although I find the landlord's concern to be reasonable and justified as they had smelled the strong odour of potentially flammable substance, I am not satisfied that the evidence is sufficient to support that the tenants have engaged in behaviour that has seriously jeopardized the health or safety or lawful right of another occupant or landlord. For these reasons, I am not satisfied that the landlord has met the burden of proof to support that the tenancy should end on these grounds.

The landlord is also seeking an end of this tenancy for a breach of a material term of the tenancy agreement that was not corrected within a reasonable amount of time after written notice to do so. A party may end a tenancy for the breach of a material term of the tenancy but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the breach. It falls to the person relying on the term, in this case the landlord, to present evidence and argument supporting the proposition that the term was a material term. As noted in RTB Policy Guideline #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. The question of whether or not a term is material and goes to the root of the contract must be determined in every case in respect of the facts and circumstances surrounding the creation of the Agreement in question. It is entirely possible that the same term may be material in one agreement and not material in another. Simply because the parties

have stated in the agreement that one or more terms are material is not decisive. The Arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

Policy Guideline #8 reads in part as follows:

> *To end a tenancy agreement for breach of a material term the party alleging a breach…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…*

In this case, the landlord has maintained that the failure of the tenants to cease smoking on the property and the failure of the tenants to clean the garage constituted a breach of a material term of the Agreement. The landlord provided emails which show the landlords' concerns about these issues. As noted above, I am not satisfied that the landlord had provided sufficient evidence to support that the tenants continue to smoke on the property. On this basis, I am unable to find that the tenants have breached a material term of the tenancy by smoking.

Although undisputed that the tenants have not cleaned the garage to the satisfaction of the landlord, I am not satisfied that this would constitute a material breach of the tenancy agreement, or justification to end the tenancy on the basis of the grounds provided on the 1 Month Notice.

I find that the landlord had not provided sufficient evidence to demonstrate that this tenancy should end on the basis of the 1 Month Notice. Under these circumstances, I am allowing the tenants' application to cancel the landlord's 1 Month Notice, and this tenancy is to continue until ended in accordance with the *Act.*

Conclusion

I allow the tenant's application to cancel the 1 Month Notice, which is hereby cancelled. The 1 Month Notice dated January 25, 2021 is of no force or effect. This tenancy continues until 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 4, 2021

Residential Tenancy Branch