Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

The tenant filed an Application for Dispute Resolution (the "Application") on March 3, 2021 seeking an order to cancel the One Month Notice to End Tenancy for Cause (the "One Month Notice") and a reimbursement of the Application filing fee. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on June 10, 2021. In the conference call hearing I explained the process and offered each party the opportunity to ask questions.

Both parties attended the hearing. At the outset, each confirmed they received the prepared documentary evidence prepared by the other. On this basis, the hearing proceeded.

Issue(s) to be Decided

Is the tenant entitled to an order to cancel the One Month Notice pursuant to s. 47 of the *Act*?

If the tenant is unsuccessful in their Application, is the landlord entitled to an Order of Possession pursuant to s. 55 of the *Act*?

Is the tenant entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

Background and Evidence

Both parties provided a copy of the tenancy agreement in their evidence. It shows the tenant and landlord signed it on March 1st and 2nd, 2020. The rent was $2,300 per month. The tenant paid a $1,150 security deposit at the start of the tenancy.

Clause 22 in the agreement specifies that "the Tenant will peacefully and quietly have, hold, and enjoy the Property for the agreed term."

The tenant provided a copy of the One-Month Notice. This shows the landlord signed the document on February 25, 2021. The indication on page 2 is that the landlord served it by leaving a copy in the mailbox or mail slot of the rental unit. The landlord provided a copy of a text message where they informed the tenant of the document in the mailbox on that date.

On page 2 of the document, the landlord provided the reasons for giving the notice:

- □ Tenant or a person permitted on the property by the tenant has:
  - significantly interfered with or unreasonably disturbed another occupant or the landlord.

- □ 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 or the landlord

- □ 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.

On page 3 the landlord wrote more detail:

> The tenant . . . has breached the term of quiet enjoyment of our Residential rental agreement. The tenant has been notified on several occasions and we are still continuing to have noise complaints from neighbouring tenants.

In the hearing the landlord presented the tenant in the neighbouring unit below (the "neighbour") has an ongoing issue with the children of the tenant here. This involves video games, which gets them excited, making it loud for this neighbour. This began "pretty much from the beginning", exacerbated by the children staying at home through

the previous school year. The neighbour informed the landlord that she messaged this tenant directly a few times about the issue.

This neighbour works at the hospital and maintains different working hours. They were described as a “light sleeper.”

The landlord provided videos made by the tenant that have them recording the sounds as they are hearing them in the adjacent unit. There are also text messages from the tenant to the landlord. This describes the children, who “yell back at me when I knock on the walls and ceiling” and some explanation that “they’re just being loud cause they’re gaming.” Another message, undated, shows they is “audible in the whole house for upwards of 5-8 hours a day at the very least”.

A message from the tenant to the landlord in August 2020 provides that the neighbour had sent an audio file to the tenant. The tenant informs the landlord that they are “looking into options to try and reduce the noise transmissions down the stairs.”

By January, the landlord gave the tenant a “breach letter”. Though a copy of this letter was not in the evidence, the landlord informed the tenant via text that the letter contains the provision that the noise must abate by February 25, 2021. Otherwise, the landlord will have to issue a notice to end the tenancy.

On February 25, the landlord reported to the tenant that the neighbour did not find improvement. The neighbour “agreed that while [the tenant is] at home the noise doesn’t seem to be too much of an issue and if it is they can hearing that you bring the noise to the boys’ attention.” The bigger problem is when the tenant is not home. The landlord refers to the children “yelling back through the floor or stomping back at the tenant” and equates this to “disregard for the downstairs tenants comfort.”

In their evidence, the tenant presented a letter that sums up their submissions. This includes the following points:

- the first text message they received from their neighbour on March 30, 2020 states they were trying for over 1 year to find a solution to the noise issue
- they received 3 text messages regarding the concerns of the neighbour; however no formal warnings in writing
- the construction of the home including flooring makes “increased sound transfer especially from the upstairs”

- after the first few messages, the tenant began exploring solutions: afternoon only game time; separate gaming time for each child; separate game systems into each child's bedroom; limited game time to just when the tenant is also at home.
- the children are at the rental unit only "2 weeks out of 4 and for 5 of those days they are at school 6 hours a day."
- video game time is limited to weekends 2-3 hours after 12:00 noon, and weekdays 1.5 hours after 3:30 – 4, and only when the tenant is also home.

In the hearing the tenant reiterated the piece about the construction of the flooring in the home. They also stated that initially the problem continued over multiple days for long hours when school was not in-person learning. This was combined with each child's impulse control issues. They also state they are attempting to alleviate complaints by having someone present at home with the children if the tenant is not able to do so personally.

Analysis

The *Act* s. 47(1) sets out each subsection (d)(i), (e)(ii), which the landlord indicated on the One-Month Notice.

The *Act* s. 47(1)(h) provides that a landlord may end a tenancy if the tenant has failed to comply with a material term of the agreement, and not corrected the situation within a reasonable amount of time.

In this matter, the onus is on the landlord to provide they have cause to end the tenancy. The landlord spoke to the reasons in oral testimony; however, I find there is not sufficient evidence to show the One Month Notice is valid.

For s. 47(1)(e)(ii), there is no illegal activity described in the landlord's evidence or their oral testimony. I find the landlord provided this indication on the One-Month Notice in error.

For s. 47(1)(h), I accept the tenant's submission that there was no formal written notice. No such notice appeared in the landlord's evidence, although it receive mention in one text message to the tenant.

A material term is one that the parties both agree is so important that the most trivial breach of the that term gives the other party the right to end the agreement.

The Residential Tenancy Branch developed a Policy Guideline 8, on *Unconscionable and Material Terms* that gives a statement of the policy intent of the legislation. This provides that 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 must be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

From the evidence presented, I find the landlord's reliance on this subsection (h) to end the tenancy is not valid where they did not identify the tenant's noise issue as a breach of a tenancy agreement material term. Further, there is no evidence to show the landlord gave notice of this to the tenant in writing, with a deadline in place.

For s. 47(1)(d)(i), the landlord's evidence shows significant interference with another occupant. This was ongoing noise from the tenant's children playing games, and responding in an inappropriate manner to the neighbour. The landlord's evidence bears this out to some degree, and the tenant fully acknowledges the difficulties the loud gaming presents; however, there is no record of a consistent pattern. The landlord presented a series of text messages both to/from the neighbour and to/from the tenant directly, yet there is no timeline to show a string of incidents that point to a pattern of repeated behaviour.

The sound files show the level and nature of the noise which the neighbour must bear. However, this is not matched with a description that bears this out to a significant degree that shows significant interference over the entirety of the tenancy thus far, something that would warrant an end of the tenancy. Based on what the landlord submitted here, I am not satisfied of the severity of the problem being ongoing in nature.

I weigh this against the tenant's own statements that acknowledge the seriousness of the problem, and their list of steps they have taken to alleviate or halt the problem. This is a restrictive schedule on the amount of game time available and separating the two children. It is not known whether these measures are effective, or whether these steps were provided to the neighbour, who appears to keep an open channel of communication with both the tenant and the landlord.

In sum, the nature of the problem prior to the landlord issuing the Two-Month Notice is not illustrated with sufficient evidence that shows a recurring problem over some length of time. Text messages are not capturing the dates, times and level of noise that are causing interference with the neighbour.

The landlord indicated the tenant's actions were a breach of a material term of the tenancy agreement. The *Act* section 47(1)(h) specifies there must be a written notice from the landlord to the tenant identifying this breach. Minus a record of that in the evidence, this reason for issuing the One-Month Notice is not valid.

For these reasons, the landlord has not met the burden of proof to show the One-Month Notice is valid. I order that the One Month Notice is cancelled.

As the tenant was successful in this application, I find the tenant is entitled to recover the $100.00 filing fee paid for this application. I authorize the tenant to withhold the amount of $100.00 from one future rent payment.

Conclusion

For the reasons above, I order the One-Month Notice issued on February 25, 2021 is cancelled and the tenancy remains in full force and effect.

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

Dated: June 14, 2021

Residential Tenancy Branch