



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MOLE HILL COMMUNITY HOUSING
SOCIETY and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

CNC, OPC, FFL, FFT

Introduction

This hearing was convened in response to cross applications.

The Tenant filed an Application for Dispute Resolution, in which the Tenant applied to set aside a One Month Notice to End Tenancy for Cause and to recover the fee for filing an Application for Dispute Resolution.

The Agent for the Tenant stated that he does not know how the Tenant's Dispute Resolution Package was served to the Landlord. The female Agent for the Landlord stated that it was received by registered mail, although she is uncertain of the date it was received.

The Landlord filed an Application for Dispute Resolution, in which the Landlord applied for an Order of Possession and to recover the fee for filing an Application for Dispute Resolution.

The female Agent for the Landlord stated that on July 26, 2021 the Landlord's Dispute Resolution Package was posted on the door of the rental unit and it was sent to the Tenant by email. The Agent for the Tenant acknowledged receipt of these documents, although he does not know how they were received.

The Agent for the Tenant stated that he does not know how the evidence the Tenant submitted to the Residential Tenancy Branch in August of 2021 was served to the Landlord. The female Agent for the Landlord stated that it was received by registered mail, although she is uncertain of the date it was received. As the Landlord

acknowledged receipt of this evidence, it was accepted as evidence for these proceedings.

The female Agent for the Landlord stated that on August 30, 2021 the Landlord's evidence was emailed to the Tenant. The Agent for the Tenant acknowledged receipt of 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 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

Should the One Month Notice to End Tenancy for Cause, served pursuant to section 47 of the *Residential Tenancy Act (Act)*, be set aside or should the Landlord be granted an Order of Possession?

Background and Evidence

The Landlord and the Tenant agree that:

- This tenancy began on June 01, 2015;
- Rent is due by the first day of each month;
- The Tenant received a letter, dated July 20, 2021, in which the Landlord requested proof that the Tenant was residing in the rental unit;
- The letter of July 20, 2021 reminds the Tenant of the term in the tenancy agreement, which declares, in part, that the Landlord may end the tenancy if the Tenant is eligible for a rent subsidy and the Tenant is absent for three consecutive months or longer, without the written consent of the Landlord, the Landlord may end the tenancy;
- The letter of July 20, 2021 reminds the Tenant of the term in the addendum to tenancy agreement, which declares, in part, that the unit is to be used for providing licensed family childcare in addition to being used as the Tenant's residence;

- The July 20, 2021 letter directed the Tenant to provide proof of residency by July 23, 2021;
- The July 20, 2021 letter did not clearly declare the Tenant that her tenancy would end if she does not provide the proof of residency requested;
- A One Month Notice to End Tenancy for Cause was posted on the door of the rental unit on July 26, 2021 and it was emailed to the Tenant on that date;
- The One Month Notice to End Tenancy for Cause declared that the Tenant must vacate the unit by August 31, 2021; and
- The rental unit has not been vacated.

The Agent for the Tenant stated that when the Tenant received the July 20, 2021 letter, the Tenant understood that the Landlord wanted the Tenant to reside in the rental unit on a full-time basis.

The One Month Notice to End Tenancy for Cause declared that the Landlord wished to end the tenancy because the Tenant has breached a material term of the tenancy that was not corrected within a reasonable time after receiving written notice to do so.

The male Agent for the Landlord stated that the Tenant breached several terms of the tenancy agreement, including:

- The term in the tenancy agreement which declares, in part, that the Landlord may end the tenancy if there is a change in the number of occupants;
- The a term in the tenancy agreement which declares, in part, that the Landlord may end the tenancy if the Tenant is eligible for a rent subsidy and the Tenant is absent for three consecutive months or longer, without the written consent of the Landlord, the Landlord may end the tenancy;
- The term in an addendum to the tenancy agreement, which declares, in part, that the Landlord may end the tenancy if the Tenant is absent for three consecutive months or longer, without the written consent of the Landlord; and
- The term in an addendum to the tenancy agreement which declares, in part, that both parties intend for the unit to be used for providing licensed family childcare in addition to being used as the Tenant's residence.

The Landlord submits that the Tenant has breached the aforementioned terms of the tenancy agreement/addendum because she has not lived in the rental unit for an extended period of time.

The Agent for the Tenant stated that he can personally attest to the fact the Tenant is currently residing in the rental unit on a full-time basis, as his child recently stayed overnight with the Tenant. He stated that:

- The Tenant owns another residential property in the community;
- He is aware she spent some of her time living in that property in 2020 and 2021;
- The Tenant has been living in the rental unit, on a full time basis, since at least August 16, 2021;
- The tenancy agreement for the property owned by the Tenant, which was submitted in evidence, shows her property was rented to a third party, for a fixed term that begins on August 16, 2021;
- Any mistake on the tenancy agreement the Tenant entered into for the property she owns, in regard to the fixed term, does not negate the Tenant's submission that her property has been rented to a third party;
- The fact the Tenant did not submit the addendum to the tenancy agreement she entered into for the property she owns is not relevant to the effectiveness of the lease; and
- The Tenant has corrected any alleged breaches by living in the rental unit on a full-time basis.

The male Agent for the Landlord stated that:

- The Tenant has provided no evidence that she moved back into the rental unit, on a full time basis, on August 16, 2021;
- He does not know if the Tenant has been living in the unit, on a full-time basis, since August 16, 2021;
- The tenancy agreement for the property owned by the Tenant does not comply with the *Residential Tenancy Act (Act)*, because it declares that the Tenant might/will move back into the property she owns at the end of the fixed term of the tenancy; and
- The Tenant has not provided the addendum to the tenancy agreement she submitted for the property she owns.

Analysis

Section 47(1)(h) of the *Act* permits a landlord to end a tenancy by giving notice to end the tenancy if 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.

Residential Tenancy Branch Guideline 8, with which I concur reads, in part:

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.

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.*

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

Even if I accepted that the Tenant breached terms of the tenancy agreement and associated addendums because she did not live in the rental unit for extended periods of time and even if I accepted that the terms she breached were material terms of the tenancy, I would conclude that the Landlord does not have the right to end this tenancy pursuant to section 49 of the *Act*.

Even if I accepted that the letter dated July 20, 2021 served as proper written notice to the Tenant that her tenancy would end if she did not correct the alleged breaches, I find that the Tenant corrected the alleged breaches within a reasonable time of receiving that letter.

In concluding that the Tenant corrected any alleged breach within a reasonable time, I was influenced, in part, by the testimony of the Agent for the Tenant, who stated that

although the Tenant had periodically stayed in residential property she owns elsewhere in the community, she is now living in the unit on a full-time basis.

In concluding that the Tenant corrected any alleged breach within a reasonable time, I was influenced, in part, by the tenancy agreement submitted in evidence, which shows the property owned by the Tenant was rented to a third party, for a fixed term that begins on August 16, 2021. In my view, the evidence that shows the residential property that is owned by the Tenant is no longer available for her to occupy supports the Tenant's submission that she has been living in the rental unit, on a full time basis, since on, or before, August 16, 2021.

In adjudicating this matter, I have placed no weight on the Landlord's submission that the tenancy agreement for the property owned by the Tenant does not comply with the *Act*, because it declares that the Tenant might/will move back into the property she owns at the end of the fixed term of the tenancy. Regardless of whether or not this particular term of the tenancy agreement the Tenant has with a third party is enforceable, I find the tenancy agreement still grants the third party the right to live in the Tenant's property.

In adjudicating this matter, I have placed no weight on the Landlord's submission that the Tenant did not provide the addendum to the tenancy agreement for the property she owns. I find that the absence of the addendum does not suggest that a tenancy was not created.

In adjudicating this matter, I have placed no weight on the male Agent for the Landlord's testimony that he does not know if the Tenant has been living in the unit, on a full-time basis, since August 16, 2021. In light of the evidence that indicates the Tenant began living in the unit on the full-time basis on, or before, August 16, 2021 and in the absence of any evidence to show that she is not, I am satisfied that the Tenant began living in the unit on a full-time basis on, or before, August 16, 2021.

In concluding that the Tenant corrected the alleged breaches within a reasonable time of receiving the July 20, 2021, I find that she corrected the alleged breaches in less than one month. I find this a reasonable amount of time to find a tenant for her property and to move her personal property from the property she owns to the rental unit.

As the Landlord has failed to establish grounds to end the tenancy pursuant to section 49(1)(h) of the *Act*, I grant the Tenant's application to cancel the One Month Notice to End Tenancy for Cause and I dismiss the Landlord's application for an Order of Possession.

I find the Tenant's Application for Dispute Resolution has merit and that the Tenant is entitled to recover the fee for filing an Application for Dispute Resolution.

I find that the Landlord has failed to establish the merit of their Application for Dispute Resolution and I dismiss their claim to recover the fee for filing an Application for Dispute Resolution.

Conclusion

The application for an Order of Possession is dismissed. The One Month Notice to End Tenancy for Cause is set aside.

The Tenant has established a monetary claim, in the amount of \$100.00, in compensation for the fee paid to file this Application for Dispute Resolution and I grant the Tenant a monetary Order in this amount. This Order may be served upon the Landlord, filed with the Province of British Columbia Small Claims Court, and enforced as an Order of that Court.

In the event the Tenant does not wish to enforce the monetary Order through the Province of British Columbia Small Claims Court, the Tenant may withhold \$100.00 from one monthly rent payment, pursuant to section 72(2) of 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: September 17, 2021

Residential Tenancy Branch