Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ACT Mercantile Corp. d.b.a. ANK Properties and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, CNC, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") to cancel a One Month Notice to End Tenancy for Cause dated January 25, 2021 ("One Month Notice"); for an order directing the landlord to comply with the Act, regulation, or tenancy agreement, and to recover the $100.00 cost of their Application filing fee.

The Parties have at least three other Applications and possibly court files associated with the tenancy between the Landlord ("Primary Landlord") and the primary Tenant, A.K. ("Primary Tenant"), and a sub-tenancy between the Primary Tenant and the sub-tenant, N.R. ("Sub-tenant") ("Sub-lease").

The Parties had asked to cross these applications; however, I found that they are distinct matters with unique issues that must be determined on their own. The other applications are all between the primary Tenant and the Sub-tenant. The Application before me is by the Primary Tenant applying to cancel an eviction notice for cause issued by the Primary Landlord. I find that the applications have different issues. I find that the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules") address this matter. Rule 2.11 states: "The issues identified in the cross-application must be related to the issues identified in the application being countered or responded to." Accordingly, and pursuant to Rule 2.11, I find that this Application contains different issues than those addressed in the other applications. As such, this Application will not be crossed with any others.

The Tenant's agent, T.K. ("T's Agent"), Counsel for the Tenant, T.A., and S.S. ("T's Counsel"), the Landlord's agent, K.N. ("L's Agent"), and counsel for the Landlord, A.H. ("L's Counsel") appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask

questions about the hearing process. One witness for the Landlord, N.R., was also present in the third hearing and provided affirmed testimony.

In addition, ahead of the first hearing, the Landlord obtained permission for an accredited court reporter to record the hearing(s). However, the court reporter did not attend the first hearing. The second hearing was recorded by a court reporter, L.A., and the third hearing by a court reporter, K.B.

During the hearing the Primary Tenant and the Primary Landlord were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Rules; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing. Further, in the hearing, L's Counsel confirmed that service is not in dispute.

Preliminary and Procedural Matters

The Parties provided their email addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately (aside from the approved court reporter(s)).

The L's Counsel argued that the Primary Tenant and not her agent should have attended the hearings for this proceeding. On page 45 of the Landlord's evidence is a copy of an email dated April 30, 2019, to the Landlord from the Tenant, A.K., authorizing her son, T.K., to be the primary contact for the Landlord regarding the rental unit. However, in response, the L's Agent communicated the following to the Tenant:

> Dear [Tenant],

> Your [*sic*] granting of full authority for [T.K.] to decide on your behalf must be cleared and unambiguous as you are the only signatory to the Residential Tenancy Agreement. You said in your email that your son 'has full authority to exercise our rights as residence [*sic*] of [rental unit #]' is unacceptable because it does not clearly say that you agree to be bound by his actions. Therefore, until such time you have a clear agreement to be bounded by [T.K.'s] action, I am afraid I am not at liberty to deal with him.
>
> Thank you for your kind attention
>
> Regards,
> [K.N.]
> Property Manager

I find for the purposes of this administrative hearing that the T's Agent is an authorized agent for the Tenant. I find that it is in the nature of agency that the rights and obligations of the primary flow to the agent, and that the primary is bound by her agent's actions. I find the Landlord's position in their email is unreasonable in the circumstances and inconsistent with the rules of agency. I find that the T's Agent is a valid agent acting on the Tenant's behalf at her direction, and that the Primary Tenant is accountable for the actions and decisions of the T's Agent.

The Primary Tenant applied for an Order for the Landlord to Comply with the Act or tenancy agreement; however, she did not explain the nature of this claim, other than to say in the Notice of Hearing: "The lease agreement started on April 15, 2019 and continued on a month-to-month basis." The T's Agent did not expound on this claim in the hearings, and I find that it is integrally related to the other issues before me; as such, I have not identified it as a separate issue before me.

Section 55 of the Act states that if a tenant's application to cancel an eviction notice is unsuccessful and is dismissed, and I am satisfied that the eviction notice complies with the requirements under section 52 of the Act, I must grant the landlord an order of possession.

Issue(s) to be Decided

- Should the One Month Notice be cancelled or confirmed?
- Is the Primary Landlord entitled to an order of possession?
- Is the Primary Tenant entitled to recovery of the $100.00 Application filing fee from the Landlord?

Background and Evidence

The Parties agreed that the fixed-term tenancy began on April 15, 2019 and ran to April 30, 2021, and then operated on a month-to-month basis, with a monthly rent of $8,800.00, due on the first day of each month. They agreed that the Tenant paid the Landlord a security deposit of $4,400.00, and no pet damage deposit.

L's Counsel advised that the Primary Landlord served the Primary Tenant with the One Month Notice via registered mail on or about January 25, 2021, although the Parties agreed that service of the One Month Notice is not a contested issue. The One Month Notice in front of me was signed and dated January 25, 2021, it has the rental unit address, it has an effective vacancy date of February 28, 2021, and it was served on the grounds that the Tenant or a person permitted on the property by the Tenant has engaged in illegal activity that has or is likely to jeopardize a lawful right or interest of another occupant or the landlord; and because the Tenant has assigned or sublet the rental unit without the Landlord's written consent.

L's Counsel said that it is the Landlord's position that the Tenant had an illegal Sub-lease with [N.R.]. They say that the Landlord did not give the Primary Tenant authority to sublet the rental unit on the terms and conditions of the Sub-lease between the Primary Tenant and the Sub-tenant.

T's Counsel directed my attention to an email at page 21 of the Primary Tenant's affidavit. This email is dated October 31, 2019 and is from the L's Agent to the T's Agent, and it addresses a credit check for the Sub-tenant that the T's Agent found for the rental unit. The second paragraph of this email states:

> You prefer sublet instead of assign that landlord must not unreasonably withhold consent. If the credit report of the applicant is qualified compare with the one of [the Tenant], we can prepare paperwork for [the Tenant] to sublet the remaining Tenancy Agreement. At the end of 30 April 2021, the tenancy will continue on a month-to-month basis. The landlords rejected the request of further fixed term extension.
>
> Best regards,
>
> [K.N.]
>
> Property Manager

Given that the Parties had reached this stage of the Sub-lease approval process, I find

that it demonstrates that the Landlord knew about the Sub-lease before the end of October 2019.

Further, the T's Counsel directed my attention to page 48 of the T's Agent's affidavit, which is a text message dated October 24, 2019, from the L's Agent to the T's Agent. In this text, the L's Agent gives the T's Agent permission to sublet the rental unit, as follows:

> The landlords have no problem with sublet or assignment of the tenancy agreement according to the RTA. They instructed me to make sure two things. The new tenant must have similar credit background as [the Tenant]. Secondly, the rent to be increased upon expiration of the current fixed term means April 30th 2021. We will serve the official notice of rent increase as per the allowable percentage for year 2021. We shall run the credit report at [credit agency] of the applicant like we did for [the Tenant]. The landlords and [their property manager] will not charged any fee. But you must pay the [credit agency] by cheque directly or pay my company the credit check cost back together with the tenancy application form.
> Also credit report is high confidential and private document. We will only give copy to the applicant. It is up to her to share info with you.
>
> [A.]
>
> [reproduced as written]

L's Counsel said that this text indicates that "…the [Primary] Landlord has no problem with the sub-lease, but they want to make sure there is a similar rent background."

The Primary Landlord submitted a copy of a sub-lease they drafted ("L's sub-lease") that they say was not the one used by the Tenant and the Sub-tenant for the Sub-lease. The L's sub-lease is dated for reference November 1, 2019. Clauses 5(c) through 7 of the L's sub-lease states:

> 5. Subject to consent from the Head Landlord,
>
> **. . .**
>
> (c) the Sub-Tenant agrees to **vacate the Rental Unit by APRIL 29, 2021,** which is one (1) day before the expiry date of the Term.
>
> 6. Attached to this Sublease is a copy of the Head Lease, including the addendum of five (5) pages from the Head Landlord's property agent [property manager].

7. All terms, conditions, rules and regulations of the Head Lease, including Those set out in the addendum of five (5) pages from the Head Landlord's property agent [property agent], shall apply to this Sublease, save and except for the expiry date of the Head Lease.

   [emphasis in original]

L's Counsel said that this was the sub-lease that was approved by the Landlord, not the one that the T's Counsel has submitted into evidence.

Further, the L's sub-lease has the Primary Tenant's and Sub-tenant's signatures on the last page (prior to the addendum), which was executed on November 1, 2019. The Primary Landlord has alleged that the T's Agent forged the Sub-tenant's signature on the L's sub-lease. The L's Counsel also argued that the Primary Tenant used a numbered company to act as the Sub-landlord without the Primary Landlord's approval.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Rule 6.6 sets out the standard of proof and the onus of proof in dispute resolution proceedings, as follows:

> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy. .
>
> [emphasis added]

Section 47 (1) (e) states that a landlord may end a tenancy by giving notice to the end the tenancy, if the tenant has engaged in in illegal activity that has caused or is likely to jeopardize a lawful right or interest of another occupant or the landlord. However, based on the evidence before me overall, and pursuant to my analyses below, I find that the Primary Landlord has not provided sufficient evidence to find that the Primary Tenant

committed any illegal acts related to the tenancy pursuant to section 47 (1) (e). As such, I find that this is not a valid ground to support the One Month Notice.

Further, section 47 (1) (i) applies 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.

Guidance can be found for this ground in RTB Policy Guideline 19 ("PG #19"), which states:

> This Policy Guideline addresses the assignment of a tenancy agreement and the subletting of a rental unit or manufactured home site.
>
> **A. LEGISLATIVE FRAMEWORK**
>
> The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* (the Legislation) allow a tenant to assign their tenancy agreement and to sublet their rental unit or manufactured home site. In most circumstances, unless the landlord consents in writing, a tenant must not assign or sublet (there are exceptions to this for manufactured home parks). A tenant who assigns their tenancy agreement, or sublets their rental unit, without obtaining the written consent of the landlord, may be served with a One Month Notice to End Tenancy (form RTB-33), pursuant to the Legislation.
>
> **. . .**
>
> **C. SUBLETTING**
>
> **Sublets as contemplated by the *Residential Tenancy Act***
>
> 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. .

[emphasis added]

. . .

Unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. While the sublease can be very similar to the original tenancy agreement, the sublease must be for a shorter period of time than the original fixed-term tenancy agreement – even just one day shorter. The situation with month-to-month (periodic) tenancy agreements is not as clear as the Act does not specifically refer to periodic tenancies, nor does it specifically exclude them. In the case of a periodic tenancy, there would need to be an agreement that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy.

The sub-tenant's contractual rights and obligations are as set out in the sublease agreement. Generally speaking, the sub-tenant does not acquire the full rights provided to tenants under the Act. For example, if the landlord ends the tenancy with the original tenant, the tenancy ends for the sub-tenant as well. The sub-tenant would not be able to dispute the landlord ending the tenancy with the original tenant; it would be up to the original tenant to dispute the notice.

. . .

While the *RTA* does not specify what the rights and responsibilities of the original tenant and subtenant are, the common law, pursuant to s. 91 of the *RTA,* may apply. In the event of uncertainty around the rights and responsibilities of parties to a sublease agreement, an arbitrator will consider the individual circumstances and evidence of each case in making a determination.

The sub-tenant typically pays rent to the original tenant; but even if he or she fails to do so, the original tenant's responsibility to pay rent to the landlord is unaffected and the original tenant can be evicted if rent is not paid. Again, it should be noted that there is no contractual relationship between the original landlord and the sub-tenant. In the event of a dispute, the sub-tenant may apply for dispute resolution against the original tenant, but likely not the original landlord, unless it can be shown there has been a tenancy created between the landlord and sub-tenant.

Where an individual agrees to sublet a tenancy for the full period of the tenancy,

> and does not reserve some period of time at the end of the sublease, the agreement likely amounts in law to an assignment of the tenancy rather than a sublease; an arbitrator may make that determination in a hearing. .
>
> [emphasis added]

I find that the question before me pursuant to section 47 (1) (i) of the Act is whether the Tenant obtained the Landlord's written consent to sublet the rental unit. Based on the evidence before me overall, I find that the Landlord was aware that the Tenant wanted to sublet the rental unit, and that the Landlord approved of this, as evidenced by the written communications between the Parties, as noted above.

The essence of the Landlord's dispute with the subletting is that the Sub-tenant paid almost double what the Tenant was paying for the rental unit. The Landlord argues that the permission to sublet was granted on the condition that the terms and conditions of the Sub-tenancy were the same as those of the tenancy – that the monthly rent would be the same, for example.

However, the Primary Landlord does not have a contractual relationship with the Sub-tenant pursuant to the law of contract, and pursuant to PG #19. Further, section 91 of the Act states: "Except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia." Accordingly, I find that the Landlord has not proven on a balance of probabilities that they have the authority to dictate the terms of the sublease agreement, since they are not party to that contract. I can understand the Landlord wanting to ensure that the primary Tenant was able to comply with the Tenant's obligations under the head tenancy agreement. I find the Landlord achieved this understanding by having obtained a credit check of the Sub-tenant.

The Landlord alleged that the Primary Tenant had forged the sub-tenant's signature on the sub-tenancy agreement; however, I am not an expert in analyzing signatures and the Landlord did not direct me to any expert opinion in this regard. Regardless, I find that this matter is irrelevant to the issues that are before me, and I reject this allegation as pertinent to this proceeding.

When I consider the evidence before me overall, I find that the Landlord has not proven that the Tenant did not obtain the Landlord's written consent to sublet the rental unit, as required by section 34 of the Act. Section 34 states:

> **Assignment and subletting**
>
> **34** (1) Unless the landlord consents in writing, a tenant must not assign a

> Tenancy agreement or sublet a rental unit.
>
> (2) If a fixed term tenancy agreement has 6 months or more remaining in the term, the landlord must not unreasonably withhold the consent required under subsection (1).
>
> (3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

I find that the Landlord gave the Tenant permission to sublet the rental unit pursuant to the text message from the L's Agent to the T's Agent on October 24, 2019, in which the L's Agent said: "The landlords have no problem with sublet or assignment of the tenancy agreement according to the RTA."

Based on the evidence before me overall, I find on a balance of probabilities that the Tenant sublet the rental unit with the Primary Landlord's written consent and pursuant to the Act. Accordingly, I find that the Primary Landlord has not provided sufficient evidence to meet their burden of proof to on a balance of probabilities, and to support the validity of the One Month Notice. I find the Primary Tenant is successful in this Application, and as such, I cancel the One Month Notice dated January 25, 2021. Accordingly, I find that the tenancy continues until ended in accordance with the Act.

Given her success in this Application, I award the Primary Tenant with recovery of her $100.00 Application filing fee from the Primary Landlord pursuant to section 72 of the Act. Pursuant to section 67 of the Act, I grant the Tenant a Monetary Order of **$100.00** that must be served on the Landlord as soon as possible.

Conclusion

The Primary Tenant is successful in her Application to cancel the One Month Notice, as the Primary Landlord provided insufficient evidence to meet their burden of proof to establish the validity of the One Month Notice on a balance of probabilities. The One Month Notice is cancelled. The tenancy continues until ended in accordance with the Act.

Further, I grant the Tenant a **$100.00** Monetary Order from the Landlord for recovery of the Tenant's Application filing fee. This Order must be served on the Landlord by the Tenant and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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: October 13, 2021

Residential Tenancy Branch