Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPC
Tenant: CNC, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking to cancel a notice to end tenancy and the landlord's Application for Dispute Resolution seeking an order of possession. The hearing was conducted via teleconference and was attended by the tenant, her advocate and the landlord.

At the outset of the hearing the landlord testified that she had not served the tenant with the landlord's Application for Dispute Resolution and that the evidence she had uploaded to that file were duplicates of what she had served to the tenant and uploaded to the tenant's Application file. The tenant confirmed that she had not received the landlord's Application. As the landlord has failed to serve the tenant with her Application, I dismiss the landlord's Application for Dispute Resolution seeking an order of possession based on the One Month Notice to End Tenancy for Cause issued by the landlord on June 18, 2021, without leave to reapply.

While the parties agreed at the start of the hearing that they had received each other's evidence and that they were prepared to proceed, it became apparent later in the hearing that there was at least one piece of evidence that the landlord had not sent to the tenant. I find, the evidence entitled "Letter To Your Hornor: The basement suit occupants will do same giant thing in this house area" [reproduced as written] was not served to the tenant and I have not considered any of it in adjudicating this Application.

I note that because the remaining Application for Dispute Resolution to be adjudicated was submitted by the tenant seeking to cancel a notice to end tenancy issued by the landlord, Section 55 of the *Residential Tenancy Act (Act)* requires I issue an order of possession to the landlord if the landlord's notice complies with Section 52 of the *Act* and I either dismiss the tenant's application or uphold the landlord's notice to end tenancy.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a One Month Notice to End Tenancy for Cause and to a monetary order to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 47, 67, and 72 of the *Act.*

Should the tenant be unsuccessful in cancelling the Notice to End Tenancy it must be determined if the landlord is entitled to an order of possession pursuant to Section 55 of the *Act*.

Background and Evidence

Both parties submitted the following documentary evidence:

- A copy of a document entitled "#4502 RENTAL AGREEMENT for Upper Level and Main level of the House" outlining the tenant and landlord names and that the rental agreement is for the rental of the main and upper level rental of the subject property. The agreement stipulates that rent is in the amount of $2,700.00 but states that rent is either due on the first day of each month or in the amount of 3 months' payments on the first day of each of 4 terms. In the hearing the parties clarified that rent was due on the 15th of each month. The agreement also outlined a deposit of $2,700.00 was paid but it also mentions "one of the two month deposit will do the last one month rent payment in this lease contract" [reproduced as written]. In the hearing, the parties confirmed the tenant had paid the landlord a security deposit of $2,700.00.
- A copy of a One Month Notice to End Tenancy for Cause issued on June 18, 2021 with an effective vacancy date of July 18, 2021 citing the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord and the tenant was in breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. The Notice included the following details of the cause:

    - "Tenant J didn't get agreement from landlord and she builded up her huge trampoline in this shared house #4502 backyard then into front yard since on January 2021 till today, June 18, 2021. Tenant J rejected to pack up her trampoline when landlord gave her seven warnings to pack up notices on May 21, May 24, May 31, June 01, June 03, June 04, June 05, 2021. J failed to correct this breach of a material term of a lease contract within a reasonable time after written notice to do so (she didn't pack up her trampoline on three due dates: May 21, May 23, May 28, June 12th 2021.) The trampoline packing up takes half day or one day. J's rental space are only main & upper levels as on said in the lease contract. The tenants have to respect the quiet enjoy right of other tenants who living in the basement suit. The tenants are not allowed to build up huge things in this shared house's public yard without landlord's agreement." [reproduced as written, except tenant's name has been changed to "J"]

The landlord submitted that the tenant had installed a trampoline in "common areas" of the residential property contrary to provisions outlined in clauses 4-3 a) and b). As a result, the landlord alleges the tenant has breached a material term of the tenancy

agreement and has failed to correct the breach within a reasonable time and because the tenant has refused to move the trampoline the tenant has unreasonable disturbed another occupant, neighbouring houses, and the landlord.

The subject clauses read as follows [reproduced as written]:

- 4-3 a) “Party is not allowed in this house. Tenants must not disturb other neighbour in the house. Keep the noise level down and respect other people’s space.”
- 4-3 b) Tenant must keep shared spaces* clean, tidy and free of personal belongings.

The landlord relies also on the preamble to the tenancy agreement which states the tenant is renting “Upper level and main level of house [address]. Basement suit is not included in this lease contract). There are three rooms (included Room A & B & C) in the upper level.”

I note other relevant clauses include the following:

- Clause 1 – Tenants will be responsible of
  - Summer: Mow the grass job around the all house area;
  - Winter: Snow remove job around all the house area;
  - The daily Garbages collecting job around all the house area;
  - J will clean & collect leaves from the property which includes the surrounding boulevards;
  - Tenant who rented the upper level and main level will help to keep the front garden and back garden area clean, remove the snow and mow the grass when they are needed;
  - The garage at the back yard is a shared space; and
  - The tenant will share the garage with the tenant who live at the basement suit.
- Clause 4-2 b) – Tenant will be assigned a certain number of shelves in the kitchen, space in the fridge and washroom shelf. Tenants must only use the space they are assigned to store personal items, do not use space that is not yours.

The parties agree that despite the landlord living in the basement from February 4, 2021 the tenant was first provided a notice from the landlord regarding the trampoline by email on May 21, 2021. This email was submitted into evidence and states:

> “Trampoline and 3 pots are blocking the path.
> (including those empty pots have to move away from the grasses)
> They are not allowed to stay there.
> They have to be moved away from these spots to avoid blocking the path and the view of backyard this week.” [reproduced as written]

In follow up emails, submitted into evidence by both parties, the landlord reiterates the need to move the 3 plant pots and trampoline as they are still blocking the path. In some of these warnings the landlord states that if the job is not completed by a certain date the landlord will call people to have it moved and she will charge the tenant with the costs to remove.

The landlord submitted that it is obvious from the tenancy agreement that all the yard space is common space to all occupants of the residential property. The tenant submitted that there is no reference in the tenancy agreement to the outdoor yard space other than the obligations that the tenant has under Clause 1 to maintain the entire yard and that the garage is the only section outside of the main building that is specifically identified as shared. The landlord submitted that the tenant was given a reduced rent from $3,500.00 to $2,700.00 to take on the yard work but that did not change the fact that the yard was common space.

The tenant also held that Clause 4-2 b) is specific to tenancies, other than the subject tenancy, where the landlord may rent specified rooms of the residential property to individual tenants, such as students. As it does not allow for the tenant to use portions of the space that she is renting, the clause in this tenancy appears to have no effect.

The tenant submitted that as a result, there is no specific term in the tenancy agreement with regard to the use of outdoor space that could be considered a material term. The tenant also points to Residential Tenancy Policy Guideline #1 which outlines the obligations and responsibilities of landlords and tenants, specifically the section on property maintenance.

In addition, the tenant submitted that even if the terms are material to the agreement, the landlord has failed to follow the required process as outlined in Residential Tenancy Policy Guideline #8.

The process outlined in the Policy Guideline requires the landlord must provide a notice in writing that there is a problem; that they believe it is a breach of a material term; provide a deadline to correct the breach; and if the breach is not corrected that they landlord will end the tenancy. The tenant submitted that none of the correspondence from the landlord indicates either the requirement to remove the trampoline was based on a breach of a material term or that the tenancy was in jeopardy.

As to disturbances the landlord submitted that she had a complaint from a neighbour (not an occupant of the residential property) that having a trampoline on her front lawn was dangerous and that she could be sued if anyone was injured using the trampoline. She testified in the hearing that as a result of this complaint she cannot sleep and worries about her liability if anything should happen. She confirmed this was her primary disturbance.

She also stated that the tenant's children use the trampoline at least 3 hours per day at least 3 days per week. The landlord testified to one day, when she was so tired from not getting sleep because she was so worried from the neighbour's complaint, that she was trying to sleep in the afternoon, but she couldn't because of the noise of the children playing on the trampoline. The landlord provided into evidence 3 videos of the same day with children playing on the trampoline.

The tenant testified that there is no way that her children are on the trampoline as much as the landlord stated. Specifically, she stated the children are in bed each evening between 7 and 8 p.m.; that they spend weekends with their father from Saturday morning to Monday evening; and that when school was on they were in school throughout the day. I note the Notice to End Tenancy was issued in June prior to the ending of the last school year.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if, among other reasons, one or more of the following applies:

a) The tenant or a person permitted on the residential property by the tenant has
    i. Significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
b) 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.

Section 47(2) states that a notice under this section must end the tenancy effective on a date that is not earlier than one month after the date the notice is received, and the day before the day in the month, that rent is payable under the tenancy agreement.

Section 47(4) allows a tenant to dispute a notice under Section 47 by making an application for dispute resolution within 10 days after the date the tenant **receives** the notice. As such, I find the tenant had until June 28, 2021 to submit an Application for Dispute Resolution seeking to cancel the One Month Notice. The tenants' Application was submitted on June 23, 2021. As such, I find the tenant has submitted her Application within the allowable time frames.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In the case before me, I find the landlord has failed to provide sufficient evidence that the noise of children playing on the trampoline was an unreasonable disturbance.

While the landlord asserted that the children were playing as often as 3 hours per day 3 days per week, she provided no details as to the specific dates and/or times the children were using the trampoline. The landlord did provide one recording of one event of children playing on the trampoline, however, I find one recording fails to establish an ongoing or unreasonable disturbance.

In regard to the landlord losing sleep because she was worried about the complaint from the neighbour, I point out the *Act* does not consider disturbances to neighbours in a community outside of those who reside on the residential property as cause to end a tenancy. In addition, I find the tenant cannot be help responsible for the landlord losing sleep because she is worried about something that should be a common concern for any landlord such as questions of liability when they rent out their property.

Based on the above, I find the landlord has failed to establish the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.

Residential Tenancy Policy Guideline #8 defines a material term as one 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 guideline goes on to say that an Arbitrator will focus on the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It is, however, incumbent on the party relying on the term to present evidence supporting their position that the term was material to the agreement.

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.

In alignment with Policy Guideline 8, I find that because of the test that the parties must agree at the start of the tenancy on what terms are material, it is incumbent on the landlord to ensure that a term is written in such a manner that it is clear and to the point. In this case, the landlord relies on her belief that because the tenancy agreement **does not** mention the outside space being a part of the tenancy then it is not a part of the tenancy and therefore shared space.

I find that as a result, it is unclear whether or not any or all of the outside space is common space or included in the tenancy. I also find that since the terms relied upon by the landlord are so vague, and in some spots, non-existent it is not possible for the landlord to establish that the parties agreed before the tenancy started that even the most insignificant breach of this term would result in ending the tenancy.

Furthermore, despite the landlord being aware of the trampoline's existence in the yard since February 4, 2021 she made no attempts to end the tenancy or inform the tenant that the trampoline was even a problem for almost 4 months – clearly not even the landlord felt that the breach was significant enough to end the tenancy.

Residential Tenancy Policy Guideline #1 outlines the basic and normal responsibilities for landlords and tenants of residential properties. Specifically, the requirements for property maintenance include the following points **[emphasis added]**:

> 1. The tenant must obtain the consent of the landlord prior to changing the landscaping on the residential property, including digging a garden, where no garden previously existed.
> 2. Unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate.
> 3. **Generally the tenant who lives in a single-family dwelling is responsible for routine yard maintenance, which includes cutting grass, and clearing snow. The tenant is responsible for a reasonable amount of weeding the flower beds if the tenancy agreement requires a tenant to maintain the flower beds.**
> 4. **Generally the tenant living in a townhouse or multi-family dwelling who has exclusive use of the yard is responsible for routine yard maintenance, which includes cutting grass, clearing snow.**
> 5. The landlord is generally responsible for major projects, such as tree cutting, pruning and insect control.
> 6. **The landlord is responsible for cutting grass, shovelling snow and weeding flower beds and gardens of multi-unit residential complexes and common areas of manufactured home parks.**

I prefer the tenant's submissions in regard to the ambiguity in the tenancy agreement regarding the use of outdoor space for the following reasons:

1. The landlord has written the tenancy agreement in a manner that does specifically identify common and shared spaces, such as the garage and the shelves and fridge spaces. As such, I find the landlord was, or should have been, aware, at the time of drafting the tenancy agreement, of the importance of specifying common spaces. In addition, Clause 4-3 b) specifically requires a tenant to "keep shared spaces clean, tidy and free of personal belongings.";

2. I accept the tenant's position that the terms of the tenancy agreement requiring the tenant to maintain the yard are not any different than those outlined in Policy Guideline #1. Specifically, that the section on property maintenance, clearly indicating the fact the tenant is required to maintain the property in a similar manner to that of a townhouse or multi-family dwelling where a tenant has exclusive use of the yard being responsible for all of the yard maintenance specified in this tenancy agreement; and
3. I am not satisfied that a reduction in rent as compensation for completing the yard maintenance would nullify the obligations noted in Policy Guideline #1 or that in the case before me any such arrangement was made by the parties.

As a result, I find, not only that the landlord has not established that the tenant breached a material term of the tenancy agreement, but that there is absolutely no term in the tenancy agreement that restricts the tenant's full and exclusive access to both the front and back yards.

Furthermore, I concur with the tenant's position that even if I had found that a material term had been breached the landlord had failed to inform the tenant of the breach in a manner that is consistent with the requirements set out in Policy Guideline #8 to make a notice given for breach of a material term effective.

For the above noted reasons, I find the landlord has failed to establish breach of a material term of the tenancy agreement as a cause to end this tenancy.

Conclusion

Based on the above, I order the One Month Notice to End Tenancy for Cause issued by the landlord on June 18, 2021 is cancelled and is of no force or effect.

I find the tenant is entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **$100.00** comprised of the fee paid by the tenant for this application. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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: October 14, 2021

Residential Tenancy Branch