



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

Avmatter regarding CRYSTAL RIVER COURT LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **FFT, OLC**

Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- An order to cancel a One Month Notice to End Tenancy for Cause pursuant to section 40;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

This is a continuation of a hearing which began on October 27, 2021 and was adjourned after 97 minutes until November 8, 2021. The continuation lasted 92 minutes for a total hearing time of three hours and nine minutes.

The tenant attended throughout. The agent GB joined the hearing on November 8, 2021 after 75 minutes and remained in the hearing until conclusion. The landlord's agent JN ("the landlord") attended throughout.

Both parties had opportunity to provide affirmed testimony, present evidence and make submissions. No issues of service were raised. The hearing process was explained.

Preliminary Matter - Prohibition Against Recordings

The parties were cautioned that recordings of the hearing were not permitted pursuant to Rule 6.11 of the *Residential Tenancy Branch Rules*. Both parties confirmed their understanding of the requirement and further confirmed they were not making recordings of the hearing.

Preliminary Issue: Evidence Submitted After October 27, 2021

The October 27, 2021 hearing was adjourned by the terms in my Decision of that date.

One term was that the parties were not permitted to file additional evidence. Evidence submitted after that date will not be considered in this Decision.

Preliminary Issue: One Month Notice

The parties agreed this hearing concerns an application by the tenant to cancel a One Month Notice and not an application to order the landlord to comply with the Act as stated in error in the information of the RTB. The parties agreed to the amendment of all records to correctly reflect the matter in dispute as stated above.

The parties agreed as follows with respect to the One Month Notice in dispute:

INFORMATION	DETAILS
Type of Notice	One Month Notice
Effective Date of Notice	July 31, 2021
Method of Service	Attaching copy to door
Service	Acknowledged
Reasons for Issuance	1. Tenant has not done required repairs

	2. Breach of a material term that was not corrected within a reasonable time of written notice
Application for Dispute Resolution filed - date	Dispute filed June 25, 2021 within allowable time

Issue(s) to be Decided

Is the tenant entitled to an order cancelling the One Month Notice and to reimbursement of the filing fee?

Is the landlord entitled to an Order of Possession?

Background and Evidence

The parties submitted substantial conflicting testimony in a hearing that lasted more than three hours. Each party filed evidence including written, indexed submissions, some of which was contradictory. I have reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch Rules of Procedure (Rules). However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

The parties submitted a copy of the tenancy agreement, addendum and Park Rules. They agreed as follows:

1. The tenancy agreement began on March 29, 2013 for a monthly pad rent of \$442.00.
2. The tenant owns a mobile home located on the pad.
3. The landlord issued a One Month Notice, described above, claiming breach of a material terms and failure by the tenant to carry out repairs.

4. The effective date of the Notice was July 31, 2021 and the tenant submitted a Application for Dispute Resolution within the allowed period after service.
5. The tenant acknowledged receipt of the landlord's Park Rules.

No witnesses were called.

The landlord testified as follows. The landlord warned the tenant repeatedly about the requirement in the Agreement and Park Rules to get approval in writing for any construction, modification, or repair of structural elements (such as the shed and fencing). As well, the landlord warned the tenant about not complying with multiple Park Rules including the type and appearance of materials and the mobile home. The tenant did not attend to repairs and maintenance of a fence, drainage pipes, and the front yard. The tenant did not follow the Park's requirement to comply with building and short sidewalk and garbage enclosure. The tenant repeatedly ignored the landlord's verbal and written requests and warnings. The landlord has taken all reasonable steps to "work with" the tenant and resolve the problems to no avail. Any claim by the tenant of recent compliance was self-serving and unreliable.

The tenant testified as follows. The tenant has put "thousands of dollars" into her home and wants to live in compliance with Park Rules. The landlord is complaining about issues already resolved, authorized by the Manager HK, the landlord's agent, or currently undergoing repair. The tenant denied that any of the alleged breaches are serious enough to be a breach of a material term. The tenant testified she is ready and willing to comply with all reasonable Park Rules and management directives or has already done so. Any warning letters were few and far between. The One Month Notice was issued as retaliation for the tenant's involvement with a tenants' group and issued as retribution.

Breach of a Material Term

The landlord testified that the tenant has violated several terms of the tenancy and Park Rules with respect to repairs and the requirement to obtain written approval of the Park management prior to repairs or construction, the totality of which amounts to breach of a material term.

The tenant replied as follows. They received the landlord's approval for two of the items, so they are compliant. They have resolved some of the breaches, are working on others or are unable to comply with the other Park directives right now. The tenant said none of the matters complained of by the landlord are serious or substantial enough to warrant eviction. The tenant asserted they are willing to comply with all reasonable repair directives to the best of their ability.

The landlord specified seven categories of breaches as set out below.

Landlord's Claim for Alleged Breaches

The landlord summarized the alleged breaches with corresponding dates of occurrence as follows:

	ITEM	DATE
1.	Unauthorized shed construction	2013
2.	Non-complaint fencing installed	2013
3.	Failure to construct garbage enclosure, access by 8' sidewalk	2020
4.	Exterior unauthorized storage including wood waste	2021
5.	Non-complaint rainwater gutters and downspout	2021
6.	Non-compliant railings and pickets on front deck	2013
7.	Unacceptable front yard appearance	2013

The landlord submitted photographs showing noncompliance. The tenant submitted photographs that the issues were either resolved, being fixed, insignificant or unreasonable. All matters were the subject of a Notice of warning dated March 5, 2021 warning the tenant they would be evicted if the issues remained unresolved. The tenant acknowledged receipt.

Each issue is addressed:

1. Unauthorized shed construction 2013

The parties agreed the tenant constructed a shed beside her unit shortly after she purchased the mobile home in 2013. The landlord stated this is the most serious of the alleged breaches.

The tenant testified as follows. The tenant submitted undated hand drawings of the shed and the signature of the park manager WK thereon which indicated his approval on behalf of the landlord. The tenant testified that WK helped her with the design and approved of the construction. The tenant did not realize that the approval of WK was not sufficient under the agreements and Rules.

The landlord stated that WK was the manager from 2010 to 2018. However, WK did not have authority to approve the construction of the shed. The landlord denied that WK's signature was authentic or that WK approved of the construction.

The landlord stated they first noticed the shed in 2015 and warned the tenant in writing.

2. Non-complaint fencing installed 2013

The landlord stated that the tenant installed fencing without requesting written permission as required in the Park Rules. As well, the fencing was noncompliant structurally and aesthetically.

The parties agreed the tenant had earlier removed the lattice at the top of the fencing as required.

However, the landlord stated that the breach continued: there was lack of approval for the installation and noncompliance with the required appearance and style. As well, the fence required repairs.

The tenant testified as follows. The tenant stated that they obtained the approval of WK, then Park manager, prior to installation of the fencing. WK helped her with the fencing project. The tenant did not realize that the approval of WK was not sufficient. Any noncompliance with respect to appearance and style are inconsequential and the

fencing was not too high as alleged. Repairs were ongoing for damages caused by animals. The tenant was willing to comply with any reasonable directives for repairs or maintenance.

3. Failure to construct garbage enclosure and access by 8' sidewalk 2020

The parties agreed that all residents of the Park were notified in 2020 that they were required by the municipality to construct enclosures for garbage. The landlord stated that the tenant had not done this and acknowledged that many other tenants had not yet done so.

The tenant stated that the enclosure was constructed properly contrary to the landlord's assertions of noncompliance. They also asserted that most Park occupants were currently noncompliant as the directive was recent.

The tenant acknowledged that the walkway to the enclosure was not yet constructed and that they intended to do it in the spring when the snow melted. The tenant denied that any noncompliance was a breach of a material term but instead was a matter of ongoing maintenance.

The landlord acknowledged that no inspection had been conducted recently but he believed the tenant was still in noncompliance.

4. Exterior unauthorized storage including wood waste 2021

The landlord testified that the unit had ongoing unauthorized storage in the front yard including wood waste as a recurring issue which continues.

The tenant stated that any such unauthorized storage, debris and wood waste was the result of ongoing construction projects and that they were now in compliance. The landlord acknowledged that no inspection had been conducted recently but he believed the tenant was still in noncompliance.

5. Non-compliant rainwater gutters and downspout

2021

The landlord testified that the tenant had not complied with requirements to install proper rainwater gutters and downspouts. Noncompliance is recurring and ongoing.

The tenant testified as follows. They acknowledged that they had not yet fully complied with this requirement. However, they intended to do so and stated they would complete the matter as soon as possible. The tenant denied that any noncompliance was a breach of a material term but instead was a matter of ongoing maintenance.

6. Non-compliant railings and pickets on front deck

2013

The landlord stated that railings and pickets on the tenant's front deck were installed without proper approval and are noncompliant with Park Rules.

The tenant testified that WK had approved of the items when they were installed in 2013 and therefore the landlord cannot complain about any noncompliance which is minor in any event. . The tenant did not realize that the approval of WK was not sufficient and is willing to comply with all reasonable requirements of the landlord to the best of her ability.

7. Unacceptable front yard appearance

2013

The landlord testified that shrubs and plantings of the tenant do not comply with Park Rules. This is an ongoing problem, and the tenant has failed to comply with requirements.

The tenant stated that she had removed the offending plants and was currently in compliance. The tenant testified she was willing to follow all reasonable Rules and directives of the landlord.

The landlord acknowledged that they had not inspected the unit recently to determine compliance. The tenant denied that any noncompliance was a breach of a material term but instead was a matter of ongoing maintenance.

Summary

The tenant stated that she is substantially in compliance with the agreements and Rules; any breach does not constitute failure to carry out repairs or meet the threshold of a breach of material terms.

The landlord requested an Order of Possession effective December 31, 2021.

Analysis

While I have turned my mind to the documentary evidence and the testimony of the parties, not all details of the parties' submissions and arguments are reproduced here. The lengthy hearing included divergent perspectives, each party calling two witnesses, and both submitting many documents including photographs. The relevant and important aspects of the claims and my findings are set out below.

One Month Notice: Grounds

Section 40(1) of the Act allows a landlord to end a tenancy for cause for any of the reasons cited in the section.

Section 40 of the Act states as follows:

Landlord's notice: cause

40 (1) *A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:*

[...]

(f) the tenant does not repair damage to the manufactured home site, as required under section 26 (3) [obligations to repair and maintain], within a reasonable time;

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

Ground: Breach of Material Term

As noted in *RTB Policy Guideline #8 – Unconscionable and Material Terms*, 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 Guideline provides that to determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement. 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.

The Guideline further states that the question of whether 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. The same term may be material in one agreement and not material in another. Applications are decided on a case-by-case basis. 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 the clause is material.

The party claiming a breach of a material term must establish that the breach makes it impossible for the tenancy to continue.

RTB Policy Guideline #8 – Unconscionable and Material Terms 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...*

The landlord must now show on a balance of probabilities, which is to say, it is more likely than not, the tenancy should be ended for the reasons identified in the Notice.

I find that the landlord has not met the burden of proof on a balance of probabilities that the terms complained of were material terms. I find the tenant provided believable testimony with supported evidence; I give greater weight to her evidence.

I find the tenant was credible when she testified that she believed she had the authority of the Park to construct the shed in 2013. While the tenant acknowledged warning letters in 2015 and later, I find the delay after construction to indicate the construction was either approved by the Park or insignificant.

Similarly, I find the tenant was credible that they believed they had the authority of the Park to construct the fencing in 2013. While the tenant acknowledged warning letters in 2015 and later, I find the delay after construction to indicate the fencing was either approved by the Park in the first place or any breach was not significant. The parties acknowledged the tenant removed the offending lattice portion of the fencing, which I find indicates a willingness to comply with the Park instructions.

I accept the tenant's credible explanation that they have constructed the required garbage enclosure and intend to build a sidewalk when the weather permits. I find that many Park residents have not yet built the enclosure and I find that it is premature for the landlord to assert that the tenant has failed to comply.

I accept the tenant's credible explanation that from time to time there has been debris and wood waste in her yard and that the yard is currently compliant although not inspected recently by the landlord.

I find, as acknowledged by the parties, the tenant has not complied with drainage requirement of the park regarding gutters and downspouts. However, I accept the tenant's testimony that she intends to attend to these outstanding issues as soon as possible.

I accept the tenant's credible testimony that she believed the noncompliant railings and pickets on the front deck were approved by the Park when they were installed in 2013. While the tenant acknowledged warning letters in 2015 and later, I find the delay after construction to indicate the fencing was either approved by the Park or was not significant. I find that in the circumstances, any noncompliance is not a breach of a material term.

I accept the tenant's credible testimony that any noncompliance with debris and wood waste in the yard has been satisfactorily resolved although not inspected by the landlord. I find, that in the circumstances, any noncompliance is not a breach of a material term.

In summary, I find the individual alleged breaches do not meet the threshold required for a breach of a material term. I also find that the landlord has not established material breach by "the cumulative actions of the tenant".

Therefore, in consideration of the evidence and the balance of probabilities, I find the landlord has not established grounds for the issuance of the One Month Notice for reason of breach of a material term.

Failure to Carry Out Repairs

The landlord's second ground for the issuance of the One Month Notice is that the tenant does not repair damage to the manufactured home site, as required under section 26 (3) [*obligations to repair and maintain*], within a reasonable time.

Section 26(3) of the Act provides:

Landlord and tenant obligations to repair and maintain

26 (3) A tenant must repair damage to the manufactured home site or common areas that is caused by the actions or neglect of the tenant or a person permitted in the manufactured home park by the tenant.

As discussed above, I find the tenant believed she had the authority of the property manager WK to construct the shed, install the fencing, and install the railings on the deck. I also accept their explanation that they are now compliant with the enclosure construction, front yard debris and plantings, and intend to comply with the requirement to install an enclosure sidewalk and drainage pipes.

The tenant has acknowledged that there are some repairs to take place. However, I find they are more in the nature of ongoing maintenance than repairs warranting eviction for failure to carry out. I find that the outstanding matters do not reach the threshold required to evict a tenant under this ground.

I therefore find the landlord has not met the burden of proof with respect to the second reason for issuance of the One Month Notice.

However, the tenant is warned that wilful and repeated noncompliance with the agreements with respect to maintenance and repairs, may be grounds for a future One Month Notice.

Filing fee

As the tenant has been successful in this application, I award the tenant reimbursement of the \$100.00 filing fee which I direct that they may deduct from rental on a one-time basis only.

Conclusion

The One Month Notice is dismissed, and the tenancy shall continue until ended in accordance with the Act and agreements.

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: November 9, 2021

Residential Tenancy Branch