



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: Tenant: FFT, CNC, OLC, LRE, MNDCT
Landlord: OPC, FFL

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlord requested:

- an Order of Possession for cause pursuant to section 55; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- cancellation of the landlord’s 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to suspend or set conditions on the landlord’s right to enter the rental unit pursuant to section 70;
- a monetary order for compensation for loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

Both parties confirmed receipt of each other's applications for dispute resolution hearing package ("Applications") and evidence, including the tenant's amendment. In accordance with sections 88 and 89 of the *Act*, I find that both the landlord and tenant duly served with the Applications and evidence.

The tenant confirmed receipt of the 1 Month Notice dated July 5, 2021. The landlord testified that they served the tenant with a second 1 Month Notice dated July 30, 2021, which the tenant does not recall being served with. The tenant testified that they were served with a 10 Day Notice to End tenancy for Unpaid Rent, which was dealt with, and is no longer in effect. The landlord submitted a signed proof of service to show that the second 1 Month Notice was served on the tenant in person on July 30, 2021, as witnessed by a third party. I find that the landlord had provided sufficient evidence to support that this second 1 Month Notice was served on the tenant. Accordingly, I find the tenant duly served with both 1 Month Notices to End Tenancy.

Preliminary Issue – Priority Claims

Residential Tenancy Branch (RTB) Rule of Procedure 2.3 states that claims made in an Application for Dispute Resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claims regarding the two One Month Notices to End Tenancy are not sufficiently related to the tenant's other claims. The hearing commenced at 11:00 a.m. and ended at 11:49 a.m. As the time allotted was not sufficient to allow the tenant's other claims to be heard along with the application to cancel the 1 Month Notices to End Tenancy, I exercised my discretion to dismiss the tenant's other applications with leave to reapply. Liberty to reapply is not an extension of any applicable timelines.

Issues

Should the landlord's 1 Month Notices be cancelled? If not, is the landlord entitled to an Order of Possession?

Are the parties entitled to recover the filing fee for their applications?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applications and my findings around it are set out below.

This month-to-month tenancy originally began on August 2, 2012. Monthly rent is current set at \$610.00, payable on the first of the month. The landlord collected a security deposit in the amount of 280.00, which they still hold. The tenant continues to reside in the rental unit.

The landlord served the tenant with a 1 Month Notice to end tenancy dated July 5, 2021 providing the following grounds:

1. The tenant or a person permitted on the property by the tenant have significantly interfered with or unreasonably disturbed another occupant or the landlord;
2. The tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk.

The landlord served the tenant with a second 1 Month Notice on July 30, 2021 providing the following grounds:

1. The 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; and
2. 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.

The landlord provided the following reasons for why they are seeking an Order of Possession on the grounds provided on the 1 Month Notices.

The landlord testified that has caused significant damage to the rental unit, and continues to do so despite the landlord having expressed their concerns. The landlord testified that the tenant had unplugged the bathroom fan, and failed to report water damage in the bathroom, which resulted in water penetrating the walls and floors, causing significant damage. The landlord testified that they had to perform numerous repairs to the rental unit, and the physical damage is continuous and ongoing. The landlord testified that the closet door was broken and removed, the crisper in the new refrigerator was cracked, and there was damage to the walls in the rental unit.

In addition to the damage, the landlord testified that the tenant fails to keep the rental unit in a reasonably clean and hygienic condition. The landlord testified that there is a stench of rotten food, which the landlord is concerned would attract a pest infestation. The landlord submitted photos of the rental unit, which they state were taken during inspections. The landlord testified that all inspections were done in accordance with the *Act*. The landlord testified that the tenant had removed light switches, and had allowed grease to build up, causing a fire hazard. The landlord testified that when they had attempted to address these issues with the tenant, the tenant responded that “it is a guy thing” and “I pay rent”. The landlord is concerned that the tenant is destroying the rental unit.

The landlord served the tenant with a second 1 Month Notice as the landlord believes that that the tenant smokes on the premises, as evidenced by the photo of the tenant holding packages of cigarettes, the yellowing of the ceiling, can of used cigarette butts beside the tenant’s bed, and observations of the landlord and other tenants. The landlord feels that this is a material breach of the tenancy agreement as smoking is prohibited in the suite and in the common areas. The landlord also believes that the tenant has been engaged in the sale of drugs on the property, which has caused the other tenants in the building to feel unsafe. The landlord submitted a written and signed witness statement from other tenants who state that they could smell smoke in the corridor outside the tenant’s rental unit, and that the smell was absent when the tenant was out of the country. The tenants also write that they had witnessed the tenant “in and out the door 13 times”, which the tenants attribute to illegal drug activity.

The tenant disputes all the claims, and states that the landlord has engaged in what they consider a “witch hunt”. The tenant disputes smoking on the property, and engaging in any illegal activity.

The tenant testified that the fan was not working, and they were using an alternate fan in the bathroom. The tenant testified that the landlord was aware that the fan was not working. The tenant admits that there was some damage in the rental unit such as the holes caused by equipment, and that the tenant had paid to have repaired.

The tenant testified that the landlord would perform excessive inspections without the tenant’s consent, and that the photos were taken when the tenant was out of the country. The tenant testified that the 1 Month Notices were served on the tenant when the tenant had confronted the landlord about the illegal entry into the tenant’s rental unit.

The tenant feels that the landlord has been bullying the tenant, and that the water leak was from an upper unit. The tenant denies causing the damage to the bathroom. The tenant feels that the reasons provided by the landlord for ending the tenancy are not justified, and denies that the rental unit has been damaged or kept in a state that is unhygienic.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

I find that the tenant has failed to file an application for dispute resolution in relation to the second 1 Month Notice dated July 30, 2021. Accordingly, I find that the tenant is conclusively presumed under section 47(5) of the *Act* to have accepted the 1 Month Notice dated July 30, 2021.

In order for an Order of Possession to be granted pursuant to a 1 Month Notice to End Tenancy, the 1 Month Notice must comply with section 52 of the *Act* in form and content, and be valid.

Section 52 of the *Act* states the following:

52 *In order to be effective, a notice to end a tenancy must be in writing and must*

(a) be signed and dated by the landlord or tenant giving the notice,

(b) give the address of the rental unit,

(c) state the effective date of the notice,

(d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy, and

(e) when given by a landlord, be in the approved form...

As noted above, the landlord provided the following reasons for serving the tenant with the second 1 Month Notice:

1. The 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; and
2. 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.

RTB Policy Guideline #32 speaks to the meaning of “Illegal Activity”, and what may constitute "illegal activity" and circumstances under which termination of the tenancy should be considered

The Meaning of Illegal Activity and What Would Constitute an Illegal Activity

The term "illegal activity" would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw.

In considering whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy, consideration would be given to such matters as the extent of interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects the landlord or other occupants.

I have considered the evidentiary materials submitted by the landlord, as well as the testimony and witness statements for this hearing. The burden of proof falls on the landlord to support their claims when applying for an Order of Possession pursuant to a 1 Month Notice. In this case the onus is on the landlord to demonstrate that the tenant's or behaviour of the tenant's guests would be considered illegal, and whether this illegal activity is serious enough to warrant the termination of this tenancy.

Although there is reference to “illegal activity” as observed by other parties, I am not satisfied that sufficient evidence had been submitted to support this. Although the tenant has been observed exiting their rental unit on numerous occasions, and which could be considered to be frequent, as observed by other parties, this action is not considered illegal. I find the observations to be purely speculative, and in the absence of evidence to support the sale or exchange of drugs for money, or such illegal activity, I am not

satisfied that the tenant or their guests have engaged in illegal activity. Accordingly, I do not find the 1 Month Notice valid on these grounds.

The landlord is also seeking an end of this tenancy for a 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. A party may end a tenancy for the breach of a material term of the tenancy, but the standard of proof is high. To determine the materiality of a term, an Arbitrator will focus upon the importance of the term in the overall scheme of the Agreement, as opposed to the consequences of the breach. 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. As noted in RTB Policy Guideline #8, 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 question of whether or not 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. It is entirely possible that the same term may be material in one agreement and not material in another. 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 or not the clause is material.

Policy Guideline #8 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...*

In this case, the landlord testified that the tenant smokes on the property, which constitutes a breach of a material term of the Agreement. In consideration of the disputed evidence before me, although the landlord had submitted evidence to support that the tenant is indeed a smoker, I am not satisfied that the landlord had provided sufficient evidence to support that the tenant smokes on the property. On this basis, I am unable to find that the tenant has breached a material term of the tenancy by smoking.

Lastly, although the landlord testified that the second 1 Month Notice was served as the tenant has failed to maintain reasonable health, cleanliness, and sanitary standards, I am not satisfied that this would constitute a material breach of the tenancy agreement, nor am I satisfied that the landlord had provided sufficient evidence to support that the photos submitted depict the true state of the rental unit. Although the landlord referenced a breach of health and safety standards, and although the landlord expressed concern about the potential for rodent or pest infestations, I do not find that evidence supports that this is in fact the case.

I find that the landlord had not provided sufficient evidence to demonstrate that this tenancy should end on the basis of the 1 Month Notice dated July 30, 2021. Under these circumstances, I dismiss the landlord's application for an Order of Possession pursuant to the 1 Month Notice dated July 30, 2021.

The tenant filed an application to dispute the first 1 Month Notice, which was served on the tenant on July 6, 2021. As the tenant filed their application disputing the 1 Month Notice dated July 5, 2021 within the required time limit, and having issued a notice to end this tenancy, the landlord has the burden of proving that they have cause to end the tenancy on the grounds provided on the 1 Month Notice dated July 5, 2021.

The landlord testified that they had served the first 1 Month Notice due to the continuous and extensive damage caused by the tenant, as well as the disturbing nature of the tenant's and tenant's guests' behaviour. In consideration of the evidence and testimony before me, I find that the tenant provided credible evidence in dispute of the claims by the landlord, including the fact that the damage caused in the bathroom can be attributed to other factors other than the tenant's behaviour. I am not convinced that the damage was caused by the negligent or intentional acts of the tenant. Furthermore, although the landlord referenced other issues and concerns related to the state of the rental unit, such as the damage and condition of observed by the landlord, the tenant expressed concern that these observations and evidence was gathered during excessive inspections which the tenant characterized as a "witch hunt". In consideration of the fact that the tenant has been residing in the rental unit for over nine years, and although the tenant is responsible for maintaining the rental unit in a state that complies with health and safety standards, I am not convinced that the tenant has failed to do so given the age and associated wear and tear of the building and rental unit.

I find that the landlord had not provided sufficient evidence to demonstrate that this tenancy should end on the basis of the 1 Month Notice as stated above. Under these circumstances, I am allowing the tenant's application to cancel the landlord's 1 Month Notice dated March 4, 2019, and this tenancy is to continue until ended in accordance with the *Act*. I am not convinced that the tenant has put the landlord's property at significant risk, nor am I satisfied that the tenant or a person permitted on the property by the tenant have significantly interfered with or unreasonably disturbed another occupant or the landlord. Accordingly, I allow the tenant's application to cancel the 1 Month Notice dated July 5, 2021. The tenant is to continue until ended in accordance with the *Act*.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. Accordingly, I allow the tenant to recover the filing fee for their application. I dismiss the landlord's application to recover the filing fee for their application without leave to reapply.

Conclusion

The landlord's entire application is dismissed without leave to reapply.

I allow the tenant's application to cancel the 1 Month Notice dated July 5, 2021. The 1 Month Notice dated July 5, 2021 is of no force or effect. This tenancy continues until ended in accordance with the *Act*.

I allow the to recover the filing fee. I allow the tenant to implement a monetary award of \$100.00 by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenant is provided with a Monetary Order in the amount of \$100.00, and the landlord must be served with **this Order** as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

I dismiss the remainder of the tenant's application with leave to reapply. Liberty to reapply is not an extension of any applicable timelines.

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 8, 2021