Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Chilliwack Kiwanis Society and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC
OPC, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenant (the Tenant's Application) on August 31, 2021, under the *Residential Tenancy Act* (the *Act*), seeking:

- Cancellation of a One Month Notice to End Tenancy for Cause (the One Month Notice); and
- An order for the Landlord to comply with the *Act*, regulation, or tenancy agreement.

This hearing also dealt with a Cross-Application for Dispute Resolution filed by the Landlord (the Landlord's Application) on September 16, 2021, under the *Act*, seeking:

- An Order of Possession based on the One Month Notice; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call at 11:00 A.M. (Pacific Time) on January 10, 2022, and was attended by the Tenant, the Tenant's support person, an agent for the Landlord T.P. (the Agent), and M.V., the vice president of the society named as the Landlord (the Vice President). All testimony provided was affirmed. As the Tenant and Agent acknowledged receipt of the Notice of Dispute Resolution Proceeding Packages from one another, which included copies of the parties respective Applications and the Notice of Hearing, and raised no concerns with regards to the dates or methods of service, I therefore find that the parties were sufficiently served for the purposes of the *Act*. The hearing therefore proceeded as scheduled. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

The parties were advised that pursuant to rule 6.10 of the Rules of Procedure, interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over me and one another and to hold their questions and responses until it was their opportunity to speak. The Parties were also advised that pursuant to rule 6.11 of the Rules of Procedure, recordings of the proceedings are prohibited, except as allowable under rule 6.12, and confirmed that they were not recording the proceedings.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the *Act* and the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided by them in their respective Applications.

Preliminary Matters

Preliminary Matter #1

In their Application the Tenant sought remedies under multiple unrelated sections of the *Act*. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

As the Tenant applied to cancel a One Month Notice, I find that the priority claim relates to whether the tenancy will continue or end. I find that that the Tenant's claim for an order for the Landlord to comply with the *Act*, regulation, or tenancy agreement is not sufficiently related to the One Month Notice and as a result, I exercise my discretion to dismiss it with leave to reapply.

As a result, the hearing proceeded based only on the Tenant's Application seeking cancellation of a One Month Notice and the Landlord's Application seeking an Order of Possession based on the One Month Notice, and recovery of the filling fee by the Landlord.

Preliminary Matter #2

The ability to know the case against you and to submit evidence in your defense is fundamental to the dispute resolution process. The Rules of Procedure therefore require that parties exchange, in advance and in the manner(s) specified by the *Act*, the documentary evidence that they intend to rely on at the hearing. At the hearing the Tenant acknowledged that they did not serve any of the documentary evidence before me for consideration on the Landlord. As a result, I have excluded the documentary evidence before me from the Tenant from consideration as it was not provided to the Landlord, and I therefore find that it would be a breach of the Rules of Procedure and the principles of administrative fairness and natural justice to accept them for consideration.

Although the Agent stated that they served four packages on the Tenant by registered mail, and provided me with the registered mail tracking numbers for these packages, the Tenant acknowledged receipt of only three packages on December 23, 2021, December 24, 2021, and either January 3, 2021, or January 5, 2021.

Rule 3.14 of the Rules of Procedure states that evidence from or on behalf of the Landlord related to the Landlord's own Application needed to be served on the Tenant no later than December 26, 2021,14 days prior to the hearing. Rule 3.15 of the Rules of Procedure states that evidence from or on behalf of the Landlord related to the Tenant's Application needed to be served on the Tenant no later than January 2, 2022, 7 days prior to the hearing. Although Canada Post shows that the third and fourth registered mail packages sent by the Landlord or their agent were sent on December 29, 2021, one shows that it was delivered on January 3, 2021, and one shows that it was delivered on January 5, 2021. Despite this tracking information, the Tenant stated that they only ever received three evidence packages from the Landlord.

Based on the above, I find that the evidence packages sent by the Landlord or their agent on December 29, 2021, were sent after the evidence service deadline set out in rule 3.14 of the Rules of Procedure. Further to this, I am satisfied that neither package was either served on the Tenant or deemed served on the Tenant pursuant to section 90(a) of the *Act*, prior to January 2, 2022, the latest date upon which the Landlord was entitled to serve any documentary evidence on the Tenant.

Although the Agent argued that rule 3.17 should apply, I disagree. At the hearing I asked the Agent to provide me with details regarding when each of the individual documents before me on behalf of the Landlord was served on the Tenant. In doing so I

determined that all of the documentary evidence in the 3rd and 4th packages sent on December 29, 2021, was either already acknowledged as sufficiently served by the Tenant, or significantly pre-dated either the date of service or the date of the Application, with several documents being dated in 2020. The Agent argued that they did not know until December 29, 2021, when they receive a call from another government agency suggesting that another person may be residing in the rental unit, that these documents would be necessary. However, I do not accept this argument as the late documents either relate directly to the grounds for ending the tenancy listed by the Landlord or their agent in the One Month Notice signed and dated August 23, 2021, which is the subject of both Applications, or they appear to me to be questionably relevant to the proceedings.

Further to this, I am satisfied given the dates on the evidence that all of the documentary evidence existed either prior to the date of the Landlord's Applications or before the evidence service deadlines set out in the Rules of Procedure. As a result, I find that it does not meet the definition of new evidence. Further to this, I find that the acceptance of this late evidence would likely have significantly prejudiced the Tenant as they would have had on only a few days to review and consider it prior to the hearing.

Based on the above, I therefore excluded the following documentary evidence from the Landlord from consideration:

- A letter from T.P. dated November 3, 2020;
- A letter from T.P. dated November 20, 2020;
- A letter from L.P. dated May 4, 2020;
- An email dated September 17, 2020;
- An email dated July 18, 2021;
- An email dated October 4, 2020.

Issue(s) to be Decided

Is the Tenant entitled to cancellation of the One Month Notice?

If not, is the Landlord entitled to an Order of Possession pursuant o section 55 of the *Act*?

Is the Landlord entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the periodic (month to month) tenancy commenced on September 1, 2017, in the rent-geared-to-income/subsidized housing complex. The tenancy agreement states that rent in the amount of $635.00 is due on the first day of each month, lists only the Tenant T.R. as a tenant, and lists three occupants, all of whom are minor children of the Tenant.

The Agent stated that they believe that the Tenant has an unreasonable number of occupants residing in the rental unit for the following reasons:

- There are multiple bicycles on the property which they believe to be too big for the Tenant's children;
- They believe there are bicycles being repaired frequently on the property and they do not believe that the Tenant, who is a person with disabilities, is capable of completing bicycle repair;
- There are too many possessions on the property, in the opinion of the Agent, for the Tenant and their children to be the only ones living there; and
- Two unnamed men were present at the property during an inspection by an agent for the Landlord on November 2, 2020.

When I asked the Agent to provide names or details for the persons they believe are residing there as unpermitted occupants, they stated that they "can't be that specific" and could not provide me the name(s) or descriptions of the persons they believe to be residing there or any details about how long they have been residing there.

The Agent stated that the Tenant is also in breach of the guest policy set out under term 11 of the tenancy agreement, which they believe to be a material term, as a result of the additional occupants. Finally, the Agent stated that the Tenant, an occupant, or a guest of the rental unit also breached term 21(e) of the tenancy agreement, which they believe to be a material term, by completing auto-repairs on a motorcycle in the carport of the rental unit, contrary to the tenancy agreement, which ultimately resulted in the vehicle catching fire.

As a result of the above, the Agent stated that the One Month Notice was placed in the Tenants mailbox on August 23, 2021, and the Tenant acknowledged receiving it that date. Records at the Residential Tenancy Branch show that the Tenant filed their Application seeking cancellation of the One Month Notice on August 31. 2021.

The One Month Notice in the documentary evidence before me is on the current version of the form, is signed and dated August 23, 2021, contains the address for the rental unit, and states that the reason for ending the tenancy is because the Tenant has allowed an unreasonable number of occupants in the unit and has breached a material term of the tenancy agreement, which they have failed to correct within a reasonable time after being given written notice to do so by the Landlord. In the details of cause section of the form it states that despite numerous letters and verbal conversations, the Tenant will not comply with the terms of their tenancy agreement, specifically term 21(e), which prohibits vehicle maintenance and repair, and term 11, which requires that the Tenant get written permission from the Landlord for guests.

The Tenant denied that anyone resides in the rental unit other than themselves and their three permitted minor children. Although the Tenant acknowledged that they do sometimes have guests, and that they have babysitters over to watch and care for their children, and helpers to assist them as they are a person with disabilities, they do not believe they are in breach of section 11 of the tenancy agreement, nor do they think it is fair for their Landlord to require written permission for guests. The Tenant stated that although they are happy to get written permission for guests staying for 14 or more consecutive days, the Landlord wants written permission from them for all guests. Although the Tenant stated that they were not home at the time of the alleged vehicle maintenance and fire, they question whether this occurred, as the vehicle in question, which belongs to their friend/babysitter, does not look as though there was a fire. The Tenant also provided an explanation for the number of bicycles at the rental unit and denied that they belonged to anyone but their children.

When asked why they believe that term 11 and term 21(e) of the tenancy agreement are material terms, the Agent stated because the Tenant read and agreed to them. Neither party seemed aware of how a material term of a tenancy agreement is different from all other terms. I advised the parties about Residential Tenancy Policy Guideline #8 and read out the sections relating to material terms of a tenancy agreement. I asked the Agent again if there was anything they intended to rely on to establish that the above noted terms are material terms and they simply reiterated that the Tenant had read and agreed to them. The Tenant denied any awareness of what a material term is and denied that either term 11 or 21(e) are material terms of the tenancy agreement.

Analysis

Based on the documentary evidence and affirmed testimony before me for consideration, I am satisfied that a tenancy to which the *Act* applies exists between the

parties. I am also satisfied that the Tenant was served with the One Month Notice, on August 23, 2021, and that they disputed it within the legislative time period set out under section 47(4) of the *Act*. As a result, I am satisfied that conclusive presumption does not apply.

Section 47(1)(h) of the *Act* states that a landlord may 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. Policy Guideline #8 defines a material term as 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. It goes on to say that in order 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 and that it falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.

At the hearing the Agent provided no evidence or testimony as to how they determined that the terms relied upon by them for ending the tenancy agreement as set out in the One Month Notice (terms 21(e) and 11), were material terms of the tenancy agreement, other than to state that the Tenant had read an agreed to all the terms in the tenancy agreement. The tenancy agreement before me makes no mention that there are any material terms of the tenancy agreement, let alone that terms 11 or 21(e) of the tenancy agreement are material terms. Further to this, the Tenant denied awareness of any material terms and it appeared to me that neither party had an understanding of what a material term to a tenancy agreement was, prior to the hearing.

Based on the above, I find that the Agent has failed to satisfy me on a balance of probabilities, that either term 11 or term 21(e) of the tenancy agreement are material terms. As a result, I find that the Landlord does not have cause to end the tenancy pursuant to section 47(1)(h) of the *Act*. Further to this, I find that term 11 of the tenancy agreement, which requires the Tenant to seek written approval from the Landlord for any guest who stays at the rental unit for more than 14 days in any 12 month period, regardless of whether the 14 days are consecutive, to be an unreasonable restriction on the Tenant's rights under section 30(1)(b) of the *Act*. As a result, and pursuant to sections 5 and 62(3) of the *Act*, I therefore find term 11 of the tenancy agreement to be of no force or effect.

Having made these findings, I will now turn my mind to whether I am satisfied by the Landlord that there are an unreasonable number of occupants in the rental unit.

I find the evidence and testimony submitted by the Landlord and its agents to be woefully insufficient to establish that there are occupants residing in the rental unit, other than the Tenant and their children, let alone to establish that the number of occupants in the rental unit is in any way unreasonable. The Agent could not provide me with any details regarding how many people, other than the Tenant and the Tenant's minor children (all of whom are permitted to reside in the rental unit) they believe to be residing in the rental unit or their names, and their arguments appear to be both speculative in nature, and based on prejudicial assumptions about what the Tenant, who they state is a person with disabilities, is capable of. Based on the above, and as the Tenant denied that any occupants reside in the rental unit aside from themselves and their minor children as permitted under the tenancy agreement, I therefore find that the Landlord has failed to satisfy me that they have grounds to end the tenancy pursuant to section 47(1)(c) of the *Act*.

As I am not satisfied that the Landlord has grounds to end the tenancy under either section 47(1)(c) of the *Act* or 47(1)(h) of the *Act*, the only grounds listed on the One Month Notice, I therefore find that the Landlord does not have grounds to end the tenancy as set out in the One Month Notice and I therefore grant the Tenant's Application seeking its cancellation. I therefore order that the One Month Notice dated August 23, 2021, is cancelled and that the tenancy continue in full force and effect until it is ended by one or both of the parties in accordance with the *Act*.

The Landlord's cross-application seeking enforcement of the One Month Notice and recovery of the filing fee is therefore dismissed in its entirety, without leave to reapply.

Conclusion

The Tenant's Application seeking cancellation of the One Month Notice is granted. I order that the One Month Notice dated August 23, 2021, is cancelled, and that the tenancy continue in full force and effect.

The Landlord's Application is dismissed without leave to reapply.

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: January 18, 2022

Residential Tenancy Branch