



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LADYSMITH FREEHOLDERS CORP and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT

Introduction

On September 4, 2021, the Tenant applied for a Dispute Resolution proceeding seeking to cancel a One Month Notice to End Tenancy for Cause (the “Notice”) pursuant to Section 47 of the *Residential Tenancy Act* (the “Act”) and seeking recovery of the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing. R.R. attended the hearing as the owner/Landlord (the “Landlord”), with S.R. attending as an agent for the Landlord. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, all parties in attendance provided a solemn affirmation.

As S.R. was an agent for the Landlord, her name was removed as one of the Respondents on the Style of Cause on the first page of this Decision.

The Tenant advised that she served S.R. and a different agent of the Landlord with a separate Notice of Hearing and evidence package by email on or around September 19, 2021. S.R. confirmed that she received this package and that she was prepared to respond to this package. Despite these packages being served contrary to Section 89 of the *Act*, as S.R. was prepared to respond, I am satisfied that the Landlord has been

duly served with the Notice of Hearing and evidence package. As such, I have accepted all of the Tenant's documentary evidence that was served in this package, and will consider it when rendering this Decision.

The Tenant advised that she served additional evidence to the Landlord on January 5, 2022 by email. S.R. confirmed that she received this; however, as it was late, she did not have sufficient time to respond to it. The Tenant stated that S.R. referenced the Tenant's evidence in the Landlord's evidence package. S.R. then acknowledged that she did make reference to the Tenant's late evidence, but she did not have ample time to respond to it thoroughly.

Given that the Tenant made this Application in September 2021, the Tenant had adequate time to serve this evidence in accordance with the timeframe requirements of Rule 3.14 of the Rules of Procedure (the "Rules"). As it is not clear why the Tenant chose to wait so late to serve and submit this evidence, I am not satisfied that she has complied with the Rules. As such, I find that it would be prejudicial to the Landlord to accept this evidence. Consequently, I have excluded this late evidence and will not consider it when rendering this Decision.

S.R. advised that she served the Landlord's evidence to the Tenant by email on January 7, 2022 and the Tenant confirmed that she received this evidence. Based on this undisputed testimony, I am satisfied that the Landlord's evidence has been served in accordance with the timeframe requirements of Rule 3.15 of the Rules. As such, I have accepted all of the Landlord's documentary evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

- Is the Tenant entitled to have the Notice cancelled?
- If the Tenant is unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on January 1, 2019, that rent is currently established at \$1,367.15 per month, and that it is due on the first day of each month. A security deposit of \$650.00 was also paid. A copy of the written tenancy agreement was submitted as documentary evidence.

They also agreed that the Notice was served to the Tenant by email on August 25, 2021. The reason the Landlord served the Notice is because the “Tenant has assigned or sublet the rental unit/site without landlord’s written consent.” The Notice indicated that the effective end date of the tenancy was September 30, 2021.

S.R. advised that she was contacted by the property manager on July 2, 2021 and informed that the Tenant appeared to be moving out of the rental unit. She stated that she spoke with another resident who confirmed that two new occupants had then moved in. She submitted that the Landlord attended the rental unit in early August 2021 and spoke with the new occupants, who confirmed that the Tenant had moved out. She testified that after this interaction, the Tenant sent an email stating that she was staying primarily with her mother. She stated that despite not living in the rental unit, the Tenant has continued to pay the rent. She referenced documentary evidence submitted to support this position that the Tenant has moved out of the rental unit and sublet to other people without the Landlord’s written consent.

The Landlord confirmed that he went to the rental unit in early August 2021 and spoke with two people who claimed to live there as the Tenant had moved out. He stated that

he offered to begin a new tenancy with these occupants, but they did not respond to him.

The Tenant advised that she still lives in the rental unit and had only been helping her mother for approximately a week. She stated that there is not sufficient space at her mother's home for her to move in there. She claimed that she refinished furniture as a business and that this furniture was moved, in August 2021, to her mother's house in order to make space in the rental unit for her significant other to move in. She submitted that she still lives in the rental unit, that her property is still in the rental unit, and that she has been paying the rent. She also stated that the other person that the Landlord saw in the rental unit did not live there.

She refuted the allegation that the two people that the Landlord met in August 2021 stated that she had moved out of the rental unit. As well, she confirmed that she was aware from this interaction that the Landlord did not approve of anyone else living in the rental unit without the Landlord's written consent, and she acknowledged that she did not have the Landlord's consent to have any additional occupants live there. She stated that she "did not think to discuss" this with the Landlord and that it "did not occur to her that it would be a problem" as her previous landlord did not care what she did in the rental unit.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

In considering this matter, I have reviewed the Landlord's Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

I find it important to note that a Landlord may end a tenancy for cause pursuant to Section 47 of the *Act* if any of the reasons cited in the Notice are valid. Section 47 of the *Act* reads in part as follows:

Landlord's notice: cause

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

(i) 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 [assignment and subletting];

Policy Guideline # 19 defines an assignment as:

Assignment is the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord.

Furthermore, this policy guideline defines a sublet as:

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.

Finally, this policy guideline states the following:

Occupants/roommates Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate, with no rights or responsibilities under the Residential Tenancy Act.

The use of the word 'sublet' can cause confusion because under the Act it refers to the situation where the original tenant moves out of the rental unit, granting exclusive occupancy to a subtenant, pursuant to a sublease agreement. 'Sublet' has also been used to refer to situations where the tenant remains in the rental unit and rents out space within the unit to others. However, under the Act, this is not considered to be a sublet. If the original tenant transfers their rights to a subtenant under a sublease agreement and vacates the rental unit, a landlord/tenant relationship is created and the provisions of the Act apply to the parties. If there is no landlord/tenant relationship, the Act does not apply. Roommates and landlords may wish to enter into a separate tenancy agreement to establish a landlord/tenant relationship between them or to add the roommate to the existing tenancy agreement in order to provide protection to all parties under the legislation.

Example: John returns from his stay overseas and moves back into his rental unit and the subletting agreement between himself and Susan ends. Susan needs more time to find somewhere else to move to and asks John if he will rent a portion of the unit for her exclusive possession until she is able to move. John, without getting the written consent of the landlord, agrees. The landlord finds out about this arrangement and issues John a One Month Notice to End Tenancy (form RTB-33) for John's failure to obtain the landlord's written consent to sublet. At a hearing, an arbitrator determines that since John remained in the rental unit and allowed Susan to stay as an occupant/roommate, this wasn't a sublet as contemplated by the Act. The notice to end tenancy is cancelled.

Example: John's original tenancy agreement with the landlord contained a term that he and the landlord agreed that John would not allow other occupants to move into the rental unit without first obtaining the landlord's written consent. When Susan asked John if she could stay longer as a roommate, John didn't talk to the landlord and get his written consent to have a roommate. Upon discovering the situation, the landlord issued a One Month Notice to End Tenancy (form RTB-33) for a breach of a material term, i.e. John got a roommate without first obtaining the landlord's consent. John challenges the notice but at the hearing, an arbitrator determines that the term of the tenancy agreement was enforceable and upholds the notice to end tenancy.

With respect to the reason on the Notice, 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. Given the contradictory testimony and positions of the parties, I must also turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

To reiterate, the burden of proof is on the Landlord to present persuasive and compelling evidence that supports his position for ending the tenancy. Regarding the reason the Landlord checked off on the Notice, as the Tenant has continued to pay the rent to the Landlord, there is no evidence to support that the tenancy has been assigned to another party. As such, I am not satisfied that the Landlord has submitted sufficient evidence to support serving of the Notice under this ground.

With respect to whether or not the Tenant sublet the rental unit, while the Landlord has submitted documentary evidence that appears to indicate that the Tenant has seemingly moved out of the rental unit, I am not satisfied on a balance of probabilities that this is the case with certainty. In addition, given that there is no evidence that the Tenant engaged into a sub-tenancy with this other person where this other person pays rent to her, I do not find there to be sufficient evidence that the Tenant sublet the rental unit as per this policy guideline.

In my view, it appears as if the Tenant has moved a person into the rental unit as her occupant, without the Landlord's consent. Given that I am not satisfied that the Tenant has assigned or sublet the rental unit, I do not find that the Landlord has checked off the appropriate ground for ending the tenancy on the Notice. Ultimately, I am not satisfied of the validity of the Notice, and as a result, the Notice is cancelled and of no force and effect.

As a note of caution, the consistent and undisputed evidence is that the Tenant moved an occupant into the rental unit without the Landlord's consent, that she "did not think to discuss" this with the Landlord, that it "did not occur to her that it would be a problem", and that she was aware on or around August 23, 2021 that the Landlord opposed this. As she has done nothing to correct the issue after being made aware of the problem, it is possible that the tenancy could end by way of another One Month Notice to End Tenancy for Cause for a different reason noted on the Notice. Furthermore, in my view, it appears as if the Tenant has simply decided to live in the rental unit in any manner that she deems to be appropriate, and this type of conduct may lend weight to the justification of a reason to end her tenancy with a Notice.

Moreover, there was mention of repeated late payments of rent, which could also potentially be another reason for service of a new Notice. Regardless, it should be noted that the Tenant is cautioned that any inappropriate future actions, or those of her guests, may potentially result in the jeopardization of her tenancy.

As another aside, the Tenant brought up an issue that she believes she is being discriminated against, and this issue was part of the reason why the Notice was served. However, there is no indication that the reason for which the Tenant claims to have been discriminated against was ever brought to the attention of the Landlord, or the agents of the Landlord, prior to when the Notice was served. As such, I find that there is no basis for this claim in relation to the Notice being served. In addition, this causes me to question the integrity and credibility of the Tenant. The Tenant is strongly cautioned about making suggestive comments of this nature when the facts do not appear to be consistent with the timeline of events regarding the Notice.

Despite the Notice being cancelled, I do not find that the Tenant is entitled to recover the \$100.00 filing fee paid for this Application.

Conclusion

Based on the above, I hereby Order that the One Month Notice to End Tenancy for Cause of August 25, 2021 to be cancelled and of no force or effect. The tenancy shall continue until ended in accordance with the *Act*.

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 19, 2022

Residential Tenancy Branch