Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BELMONT PROPERTIES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT

Introduction

On September 21, 2019, the Tenant made an Application 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 to recover the filing fee pursuant to Section 72 of the *Act*.

On February 25, 2021, this Application was rescheduled to be reheard on September 27, 2021 at 9:30 AM, as the matter was remitted back to the Residential Tenancy Branch. The Tenant's Application was subsequently adjourned twice, for reasons set forth in the Interim Decisions dated October 4, 2021 and December 10, 2021. This Application was then set down for a final, reconvened hearing on January 12, 2022 at 1:30 PM.

The Tenant attended the final, reconvened hearing, with D.K. attending as her counsel and C.S. attending as a witness. B.M. and A.F. attended the final, reconvened hearing as agents for the Landlord. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, neither party 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, the parties 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, with the exception of D.K. and A.F., provided a solemn affirmation.

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 complies 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 April 1, 2013, that rent was currently established in the amount of $765.00 per month, and that it was due on the first day of each month. A security deposit of $362.50 was also paid. Copies of the available tenancy agreements were submitted as documentary evidence. In those tenancy agreements, an addendum containing additional terms was attached, which stated in part: “Any other person[s] taking up residency with tenant[s] at a later date must be approved by management in writing. Such person[s] will then be included on the tenancy agreement. This will increase the rental payment by twenty-five [$25.00] per month. Any other person[s] is/are guests, and may stay with the tenant(s) for a period of up to two [2] weeks during the calendar year. Any longer period of stay must be permitted in writing by management, only.”

All parties also agreed that the Notice was posted on the Tenant's door on September 13, 2019. The reason the Landlord served the Notice is because of a "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 indicated that the effective end date of the tenancy was October 31, 2019.

A.F. advised that the Landlord purchased the property on December 5, 2018 and inherited this tenancy. On April 7, 2019, an accidental fire occurred which displaced the residents for approximately two months. The Landlord housed these residents in a hotel until the repairs to the property were completed. It is the Landlord's position that the Tenant's mother resided with her at the hotel, and then when the Tenant was permitted to return to the rental unit, on June 1, 2019, her mother moved in with her.

On June 3, 2019, the Landlord received a written complaint from another resident stating that the Tenant's mother has been living in the rental unit for the last four years. This resident provided three more complaints about this activity, citing the Tenant's mother's use of a key to enter the building. Additionally, 11 complaints were received from June 19 to November 25, 2019 from other residents confirming that the mother had been observed letting herself into the building with her own key, bringing in groceries, checking the mail, answering the door of the rental unit, and harassing other residents. These support the Landlord's belief that the mother has been living with the Tenant for more than two weeks, thereby breaching a material term of the tenancy agreement.

The Landlord issued a warning letter on June 20, 2019 about this unauthorized tenant, which was contrary to the tenancy agreement, and the Tenant was provided the option to have this person vacate or to have this person complete an application to be added to the agreement. The Tenant denied that this was the case and on July 2, 2019, an inspection of the rental unit was conducted. The Tenant's mother participated in the inspection where it was discovered that a cot was set up for her. Following the results of this inspection, another letter was sent to the Tenant on July 4, 2019, reminding her that this was a breach of the tenancy agreement; however, the Landlord would waive the additional rent increase if her mother was approved as a suitable tenant to be added to the agreement. The Tenant continued to deny that her mother was living with her, but did acknowledge that her mother stayed over at least two nights per week. While the Tenant claimed to have permission for this from the previous landlord, she did not submit any documentary evidence to corroborate this. The Landlord has never agreed to such terms, which is supported by the warning letters. Also submitted were affidavits

which confirmed that no permission for this was ever provided by the former landlord or the current Landlord.

A final warning letter was served to the Tenant on July 31, 2019 about this situation. Even though she was advised that it would not cost extra money to add the mother to the tenancy agreement, the Tenant denied that her mother stayed there more than two weeks or had moved in. Documentary evidence has been submitted to support the Landlord's position, as well as video evidence that shows the mother frequently accessing the building and engaging in regular activities as if she were a resident of the property.

A.F. submitted that after the fire, it was crucial for the Landlord to determine who exactly was living in the building. In the past, the Tenant had actively sought to change the names of the tenants on her tenancy agreement, when parties moved in or out of the rental unit. This supports the Landlord's position that the Tenant was aware of the importance of noting who was on the tenancy agreement and that the number of occupants in the rental unit was a material term of the tenancy. She advised that the Tenant has failed to provide sufficient documentary evidence to corroborate that the mother lives elsewhere. When all of the evidence is considered, on balance of probabilities, the mother was more likely than not living in the rental unit. Regardless, given the Tenant's own admission, her mother had stayed overnight for more than two weeks total in a calendar year which is a breach of a material term of the tenancy. There is no ambiguity in the addendum as the word "consecutive" is not used.

In addition, A.F. advanced the argument that the tenancy continued while the Tenant was staying in the hotel. As the Tenant's mother was also living with the Tenant in the hotel, the terms of the tenancy agreement would similarly apply to the hotel stay.

D.K. advised that the material term that the Landlord relies on has been determined to be unconscionable, and he cited a recent Decision of the Residential Tenancy Branch that determined that a term such as this would not be valid as it is a breach of the *Act*. He submitted that in this current situation, the Tenant's mother is not a "traditional occupant" but a "re-occurring guest". It is his position that the determination of a person staying for either 14 days consecutively, or in total per year, is irrelevant as it was determined that the stipulation of 14 days was unconscionable as it created an unreasonable amount of conflict.

He submitted that due to the Tenant's ailing health, it was necessary for her safety and well-being to have someone stay to assist her. The Tenant's mother was simply retrieving the Tenant's mail and bringing her groceries, and the cot was only for occasional overnight use.

The Tenant advised of her chronic, long-term health issues that have resulted in her becoming a shut-in. She confirmed that her mother is only there to assist her with day-to-day tasks to accommodate for her disabilities, as she would be unable to complete these in a reasonable time. She submitted that her mother used to live nearby but she moved to a further municipality in February 2016. Since that time, her mother would stay over at least two nights per week, and on occasion three nights per week, until September 2019; however, she did not stay over every single week. She stated that her mother has lived far away since 2016 and cannot stay long term as she has a dog to care for. The Tenant did not submit any documentary evidence to corroborate her mother's primary residence somewhere else.

The Tenant's mother, C.S., advised that she moved in with her brother in February 2016 and that she would come into town to assist the Tenant with general day-to-day tasks. She stated that she would visit every week, that she would generally stay for two nights, that she occasionally stayed for three nights, and that the reason she slept overnight was because it was a long way to travel from her home. She indicated that she receives some of the Tenant's joint bank account mail at the rental unit, but most of her mail is sent to her primary residence. However, she did not submit any documentary evidence to substantiate that. She also denied living with the Tenant full-time at the hotel.

D.K. submitted that it is not relevant how long C.S. stayed at the hotel with the Tenant as the hotel was a different address than that of the dispute address. Thus, any breach of the hotel terms would not constitute a breach of the tenancy agreement.

The Tenant suggested that any copies of her tenancy agreements were stolen by agents of the Landlord when the rental unit was uninhabitable due to the fire. Thus, she does not have proof of being allowed to have her mother reside in the rental unit. Regardless, it is her belief that she had a verbal agreement with an agent of the Landlord that permitted her mother to stay there. Subsequent to receiving the Notice, she claimed to have offered to add her mother to the tenancy agreement.

She referred to submitted documentary evidence whereby two witnesses, who had previously provided statements to support the Landlord's position that C.S. was living in

the rental unit, were now recanting their statements. It is her position that agents of the Landlord are conspiring to have her evicted. She stated that she has had other guests stay with her for longer than 14 days in the past and she was never notified of any issues. She also testified that she did not know that there was a term in the tenancy agreement regarding new tenants or the length of stays of guests, let alone that these were material terms.

Both parties were provided with sufficient and equal opportunities to make submissions, as the hearings lasted over eight hours in total. Settlement agreements were discussed, and at one point a settlement was nearly reached; however, all of the proposed terms and conditions could not be mutually agreed upon.

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.

Section 52 of the *Act* requires that any notice to end tenancy issued by the Landlord must be signed and dated by the Landlord, give the address of the rental unit, state the effective date of the notice, state the grounds for ending the tenancy, and be in the approved form.

I have reviewed the Landlord's One Month Notice to End Tenancy for Cause to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. I am satisfied that the Notice meets all of the requirements of Section 52.

Section 47 of the *Act* indicates that the Landlord may end a tenancy for cause pursuant to 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:*
>
> *(h)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;*

I note that 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.

I also find it important to note that the BC Court of Appeal provided recommended direction, in the Oral Reasons for Judgement of 2021 BCCA 265 (the "Appeal") involving these parties, on the correct determination of this matter. As part of this direction, the first determination must be whether or not C.S. was residing with the Tenant.

Firstly, with respect to this point, I reject A.F.'s assertion that the terms of the tenancy continued at the hotel when the rental unit was uninhabitable. While I agree that the tenancy did not end, I do not agree that the terms of the tenancy would still be in effect at a different address. By accepting this argument, this would allow for claims under the *Act* to be sought by the Tenant against the hotel, and vice versa. Clearly this is not reasonable, as no Landlord/Tenant relationship between the Tenant and the hotel was ever created to support this assertion. Obviously, the terms of the tenancy agreement were suspended until the rental unit was deemed habitable again and the Tenant returned to the rental unit. As a result, I also reject A.F.'s position that any alleged full-time residency of C.S. at the hotel would constitute a breach of the tenancy agreement.

However, I do acknowledge the implication that this alleged behaviour could demonstrate a pattern that would be consistent with the Landlord's position that C.S. lived in the rental unit. This intimation was not taken into account when rendering this part of the Decision though.

When reviewing the totality of the evidence before me, the consistent and undisputed evidence is that there was a cot set up for C.S. in the rental unit. I also accept that the Tenant likely suffers from a number of health issues where aid and assistance would be of great value. I note that the number of videos on various days and times demonstrates

the frequency with which C.S. was in the building, and reveals her apparent free and unfettered access to the building. I find this also lends more weight to the allegations that C.S. appeared to conduct herself as if a permanent resident of the building.

Moreover, I note that neither the Tenant, nor C.S., provided any documentation that C.S. maintained a primary residence elsewhere. While the Tenant and C.S. had slightly different, but mostly similar, submissions about how often C.S. stayed overnight, I find that easily accessible evidence could have been provided to establish definitively that C.S. did not reside in the rental unit, and only stayed there a couple of nights per week. In assessing the evidence on a balance of probabilities, I find that I prefer the Landlord's evidence that C.S. had, more likely than not, been residing with the Tenant prior to service of the Notice.

According to the direction provided in the Appeal, I must now apply Policy Guideline #8 to determine whether the first part of the addendum is material. This Policy Guideline outlines a material term as follows:

> 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.
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> 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. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
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> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

As well, this Policy Guideline states that "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."

When considering whether the first part of the addendum is a material term of the tenancy, I find it important to note that the policy guideline states that "it is possible that the same term may be material in one agreement and not material in another." I find that this means that determining what would be considered a material term is based on the fact pattern of each specific scenario and that it is up to the Arbitrator in each case to evaluate the evidence presented to make a determination on this matter. This is essentially echoed in the direction provided in the Appeal, which indicated that the intentions of the Tenant and her original landlord at the time they entered the tenancy agreement would need to be examined.

When reviewing the evidence relevant to this examination, the Tenant stated in point four of her affidavit that "I understood from those discussions that the guest clause in my addendum prohibited any guest from staying more than two consecutive weeks in a row." Complicating these matters is that the agent that the Tenant alleged to have had these discussions with is now deceased and cannot speak to veracity of the Tenant's submission. However, I do note that the Landlord submitted a statutory declaration of the previous landlord where it was stated that, "At no time during her tenancy, was [the Tenant] given permission by me in writing or orally to have her mother stay with her for two nights a week or for any amount of time that exceeded the more than two weeks in a calendar year permitted under Section 4 of the Additional Terms to her Tenancy Agreement." As well, the previous landlord stated, "At no time did I convey to [the Tenant] that guests were permitted to stay for more than two weeks provided that their stay was not consecutive."

Moreover, and more crucially, I find it important to note that the Tenant testified during the hearing that she did not know that there was a term in the tenancy agreement regarding new tenants or the length of stays of guests, let alone that they were material terms. I find this to be contradictory to her affidavit of being aware that there was a clause in her tenancy agreement regarding guests, and the potential lengths that those guests could stay. These inconsistent and conflicting submissions cause me to cast doubt on the credibility and reliability of the Tenant. Furthermore, I find her claims that she was robbed of the only evidence that would corroborate her claims of having a

documented arrangement with this now deceased agent of the Landlord to be suspect, especially given that there is insufficient evidence of any reported theft of property to the police.

As the only consistent evidence before me is the statutory declaration of the previous landlord, I find it more likely than not that the intentions at the start of the original tenancy were aligned with what is contained within this statutory declaration. In addition, I find that this is supported by the Tenant amending previous tenancy agreements to add or remove people that resided with her in the past. Why she elected not to do so with C.S. is not clear, even though she was provided with that opportunity to, multiple times, at no cost to herself prior to service of the Notice. Furthermore, given that she offered to have this done after the Notice was served, I find that this adds more weight to the conclusion that the Tenant was cognizant that she had previously erred in judgement and was now attempting to correct that behaviour.

When reviewing the totality of the evidence before me, I am satisfied, on a balance of probabilities, that the intentions of the original landlord and the Tenant, at the time that they entered the initial tenancy agreement, was that the term of “any other person[s] taking up residence with tenant[s] at a later date must be approved by management in writing” was a material term of the tenancy. Given the direction in the Appeal, the Notice must be upheld as C.S.’s residency was not approved in writing by the Landlord.

Consequently, I uphold the Notice and find that the Landlord is entitled to an Order of Possession pursuant to Sections 47 and 55 of the *Act*. As such, the Landlord is provided with an Order of Possession that takes effect on **February 28, 2022 at 1:00 PM** after service on the Tenant.

As the Tenant was not successful in this Application, I find that the Tenant is not entitled to recover the $100.00 filing fee paid for this Application.

Conclusion

The Landlord is provided with a formal copy of an Order of Possession effective on **February 28, 2022 at 1:00 PM** after service on the Tenant. Should the Tenant or any occupant on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia

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: February 12, 2022

Residential Tenancy Branch