



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Tenant's application submitted on December 15, 2021: OLC, FFT
Tenant's application submitted on December 27, 2021: CNC, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied on December 15, 2021 for:

- an order for the landlord to comply with the Act, the Residential Tenancy Regulation (the Regulation) and/or tenancy agreement, under section 62; and
- an authorization to recover the filing fee for this application, under section 72.

The tenant applied on December 27, 2021 for:

- cancellation of the One Month Notice to End Tenancy for Cause (the Notice), pursuant to section 47; and
- an authorization to recover the filing fee for this application, under section 72.

Tenant CM (the tenant) and landlord BL (the landlord) attended the hearing. The tenant was assisted by KH and the landlord was assisted by LL. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant stated that he is known as MA and that he is changing his legal name. On the date of the hearing, the tenant's legal name is the name on the cover page of this decision.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Preliminary Issue – service

The tenant served the notice of hearing for the application submitted on December 15, 2021 in person on January 09, 2022 and the evidence in person on January 25, 2022.

The tenant served the notice of hearing for the application submitted on December 27, 2021 in person on January 12, 2022 and emailed the evidence on the same date.

The landlord confirmed that he received the notices of hearing and the evidence for both applications.

Based on the undisputed testimony, I find the tenant served the notices of hearings for both applications and the evidence for the application submitted on December 15, 2021 in accordance with section 89(1)(a) of the Act.

Based on the undisputed testimony, I find the tenant sufficiently served the evidence for the application submitted on December 27, 2021, in accordance with section 72(2)(b) of the Act.

The landlord served the response evidence for both applications in person. The landlord does not recall when he served the response evidence.

The tenant stated he did not receive the response evidence.

The landlord's testimony was vague. Based on the tenant's convincing testimony, I find the landlord did not serve the response evidence for the tenant's applications. I do not accept the landlord's response evidence.

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.

Preliminary Issue- Unrelated Claims

Residential Tenancy Branch 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 claim regarding the cancellation of the Notice and the continuation of this tenancy is not sufficiently related to any of the tenant's other claims to warrant that they be heard together.

The tenant's other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the notice. I exercise my discretion to dismiss all of the tenant's claim with leave to reapply except the cancellation of the notice to end tenancy which will be decided upon.

Preliminary Issue – Update of the tenancy and the tenant's addresses

At the outset of the hearing the tenant corrected the tenancy and tenant's addresses.

Pursuant to section 64(3)(a) of the Act, I have amended the tenant's application submitted on December 15, 2021.

Issues to be Decided

Is the tenant entitled to:

1. Cancellation of the Notice?
2. An authorization to recover the filing fee?
3. If the tenant's application is dismissed, is the landlord entitled to an order of possession?

Background and Evidence

While I have turned my mind to the evidence of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlord's obligation to present the evidence to substantiate the Notice.

Both parties agreed the tenancy started in September 2018. Monthly rent is \$1,800.00, due on the first day of the month. At the outset of the tenancy a security deposit (the deposit) of \$900.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It indicates the tenants are CM and NI.

Both parties agreed the landlord served the Notice and the tenant received it on December 27, 2021. The tenant continues to occupy the rental unit.

The Notice was submitted into evidence. It is dated December 27, 2021 and the effective date is January 31, 2022.

The reason to end the tenancy is: the tenant has assigned or sublet the rental unit without landlord's written consent.

The details of the cause are: "Tenant has advertised to sublet without prior notice to landlord for agreement or consent. Premises is now occupied by another tenant without our consent."

The tenant affirmed the rental unit is a 3-bedroom, 1,400 square feet house.

The tenant stated NI was his partner and she moved out in May 2021. The tenant testified his current partner KH moved to the rental unit in November 2020.

The tenant had a roommate from August 01 to October 01, 2021.

On October 01, 2021 the tenant posted an advertisement online for a new roommate. Both parties agreed the advertisement states:

Hey friends! Looking for a roommate possibly as soon as Oct 1st, 15ht of Nov 1st (700\$ + utilities for one person, open to couples. Inquire) [1400 sq ft house] We recently replaced out roommate, but the person we replaced them with we have had too many problems with in a very short period of time and has made us not feel safe in our own home via aggressive behaviour. Me and my partner are looking for a shorter term occupant to join us till Jan (possible open to longer) but we are expecting our baby due Jan 5th.

The tenant had a new roommate from October 15 to December 01, 2021. The tenant said that both roommates were his friends, they had a verbal agreement and the tenant received rent from them. The tenant affirmed that the two roommates occupied a bedroom in the rental unit temporarily while they were looking for a permanent living arrangement.

The tenant stated that since December 01, 2021 the only occupants of the rental unit are the tenant, his partner KH and their baby.

The landlord testified he did not know that KH moved to the rental unit, the tenant never asked and the landlord never gave consent for the tenant to assign or sublet the rental unit or part of the rental unit. The landlord did not know that the tenant had roommates.

The tenant said he always occupied the rental unit, and he did not sublet the rental unit. The tenant communicated to the landlord that KH moved to the rental unit.

Analysis

I accept the undisputed testimony that the landlord served the Notice and the tenant received it on December 27, 2021. I find the tenant's application was submitted before the ten-day deadline to dispute the Notice, in accordance with Section 47(4) of the Act.

Pursuant to Rule of Procedure 6.6, the landlord has the onus of proof to establish, on a balance of probabilities, that the notice issued to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct and sufficient cause to end the tenancy.

Section 47(1)(i) of the Act states:

A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

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];

Section 34 of the Act states:

(1) Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit.

(2) If a fixed term tenancy agreement has 6 months or more remaining in the term, the landlord must not unreasonably withhold the consent required under subsection (1).

(3) A landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease under this section.

Residential Tenancy Branch Policy Guideline 19 states:

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.

(emphasis added)

Based on the tenant's convincing testimony and the advertisement, I find the tenant has been occupying the rental unit since the outset of the tenancy, the tenant had occupants occupying one bedroom from August 01 to October 01 and October 15 to December 01, 2021, his partner KH has been an occupant since November 2020 and the baby has been an occupant since January 2022.

I find that, as the tenant remained in the rental unit, the tenant did not sublet the rental unit. The tenancy agreement and the Act do not require the tenant to obtain the landlord's consent before an occupant moves to the rental unit. Thus, the landlord failed to prove the tenant's actions.

As such, I find the landlord failed to prove, on a balance of probabilities, the ground of the Notice. Accordingly, the Notice is cancelled and of no force or effect.

I authorize the tenant to recover the filing fee for this application, as the tenant was successful.

As the tenant's application for an order for the landlord to comply with the Act was dismissed with leave to reapply, I authorize the tenant to recover the filing fee for the application for an order for the landlord to comply with the Act.

Conclusion

The Notice dated December 27, 2021 is cancelled and of no force or effect. This tenancy will continue in accordance with the Act.

Pursuant to section 72(2)(a) the tenant is authorized to deduct \$200.00 from the next rent payment to recover the filing fees for both applications.

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 16, 2022

Residential Tenancy Branch