Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT, CNC, OLC**

Introduction

This hearing dealt with an application by the tenant pursuant to the *Residential Tenancy Act* ("the Act") for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause ("1 Month Notice") pursuant to section 47 *Act;*
- a return of the filing fee pursuant to section 72 of the *Act;* and
- an Order for the landlord to comply with the *Act.*

Both the tenant and the landlord attended the hearing. All parties present were given a full opportunity to be heard, to present their sworn testimony and to make submissions under oath.

The tenant confirmed receipt of the landlord's 1 Month Notice to End Tenancy for Cause ("1 Month Notice"). The landlord confirmed receipt of the tenant's application for dispute. Both parties confirmed receipt of each other's evidentiary package. I find both parties were served with all applicable documentation in accordance with sections 88 and 89 of the *Act*.

Both parties confirmed they were not recording the hearing pursuant to the Rule of Procedure 6.11.

Issue(s) to be Decided

Can the tenant cancel the Notice to End Tenancy?
Is the landlord entitled to a return of the filing fee?

Background and Evidence

The tenant testified that this tenancy began on April 1, 2018. Rent is $1,325.00 per month and a security deposit of $660.00 paid at the outset of the tenancy continues to be held by the landlord.

On October 1, 2021 the landlord issued the tenant with a 1 Month Notice. The reasons cited on the Notice are listed as follows:

- Tenant has engaged in illegal activity that has, or is likely to adversely jeopardize a lawful right or interest of another occupant or the landlord

- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The landlord explained that the tenant had been growing marijuana plants in the backyard despite several requests not to do so. The landlord detailed six plants being in place, saying he previously had twelve. The landlord explained that while marijuana plants are legal, she understood the limit to be four. The landlord confirmed there had been no police or municipal involvement regarding enforcement of these plants, however, she stated she would contact the police regarding the plants if they continued to be present on the property.

The landlord also cited the tenant's breach of a material term as reason for ending the tenancy. The landlord explained the tenant had placed a number of items around the home and was refusing to remove them from the premises. The landlord said the tenant was initially allowed to store items from his work on the property, however, it was her understanding that these items would be removed after an unspecified amount of time. The landlord said these items have been present on the property for 2.5 years and had become bothersome. As part of her evidentiary package, the landlord supplied various photos displaying various household items such as doors and windows present on her property.

As part of her evidentiary package, the landlord supplied a copy of their tenancy agreement and the signed addendum. Section 15 and 16 are highlighted by the landlord and note as follows:

> 15 – STORAGE. All luggage, excess materials, vehicles, or other property of the tenant, stored on the residential property, shall be kept in safe condition in proper storage areas and shall be at the tenant's risk for loss, theft or damage from any cause whatsoever. Only vehicles listed in the

> tenancy application (and no other vehicles) may be parked not stored on the residential property. The parking area are to be occupied by vehicles which are in operating condition, currently licensed, and insured. You cannot store vehicles which are, for example, on blocks or are not in operating condition. Bicycles are to be stored in the designated areas only. In addition, no hazardous or dangerous items shall be kept or stored on the residential property or residential premises.
>
> 16 RUBBISH. No rubbish, boxes or papers shall be placed or left in the corridors, parking areas or other common areas of the residential property, except those areas designated for disposal (summarized).

I note that in addition to the two sections highlighted by the landlord, the tenancy agreement contains a section marked as follows –

> 20. COMMON AREAS. The tenant shall not misuse common areas of the residential property, but shall use them prudently, safely and equitably and shall conform to all notices, rules or regulations posted on or about the residential property concerning the use of common areas, including, the use of laundry room, front yard, backyard, parking areas and storage.

Further, the landlord has supplied in evidence several demand letters instructing the tenant to remove the items from the backyard.

On July 8, 2021 the landlord emailed the tenant with a lengthy document that included the following direction.

"…I allowed you to store some stuff around my house. I need all garbage cans, your table and your plants to be remove(d) from my property including marijuana plants. Your green house has to be removed as is all tables and selves around my house. All doors, windows and building material you have stored around my house on both sides of the house needs to be removed and moved off my property."

"…in our agreement I am renting you 2 bedroom basement apartment with no agreement on any storage area. I will still allow you to use storage area below my office. All other stuff belongs to you please remove until September 1st, 2021. If you refuse, I will call garbage removal co to remove and sent to dump."

In a letter dated July 16, 2020 the landlord wrote the following direction:

"I expect all your stuff around the house removed, dismembering of green house, removal of garbage cans, windows and doors building materials, marijuana plants should be removed until Sept 1st of 2020."

On July 19, 2021 the landlord emailed the tenant with the following direction.

"…I will expect all you stuff around house to be removed until Sept 1st 2021including removal of all your marijuana and all other stuff around your green house and removal of your green house and garage to be cleared until the end of Jul 31 of 2021…"
On August 25, 2021 the landlord wrote a formal caution notice to the tenant. It states that the incidents have occurred since June of 2021 and details the tenant's refusal to remove his "building materials, doors, window, garbage cans, tables, green house, marijuana plants, other plants placed around my house. I am giving you notice until Sept 15 to remove your stuff that you decide to place around my house…"

The tenant acknowledged items remained on the premises but stated he and the landlord had an oral agreement that the items could be stored on the property. The tenant testified that the items were neatly organized and did not present a nuisance.

A July 20, 2021 letter written by the tenant to the landlord wrote as follows:

> I told you it was a nice place – but I needed Storage because a (sic) had a small Handyman Business – and I needed storage for my Tools/ladders/some building materials like 4 vinyl glass doors/small wood pcs – this is a material term of the tenancy.
>
> You said I could share the garage storage with you – If I could find room I just have to organize my stuff to one side and I could use the back and side for my stuff (you showed me the garage) this is a material term of the tenancy.
>
> You then said I could also use the storage space under your office with a (sic) outside entrance I just have to clean it up and move her left over construction material to one side. This is a material term of the tenancy.

Analysis

Rule 6.6 of the *Act* states, "the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy."

In this case, the landlord has issued a 1 Month Notice for Cause. The landlord cited two reasons why this tenancy should end:

- Tenant has engaged in illegal activity that has, or is likely to adversely jeopardize a lawful right or interest of another occupant or the landlord

- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

I will begin by analysing the portion of the 1 Month Notice related to a breach of a material term.

A party may end a tenancy for the breach of a material term 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.

The tenant has stated in his evidence that storage of items on the property is a material term of the tenancy. The landlord argued that the storage of items was done through an oral agreement and meant to be for a limited period of time. Section 20 of the tenancy agreement speaks directly the responsibilities of the parties as they relate to storage and the use of the backyard. This section notes, “The tenant shall not misuse common areas of the residential property, but shall use them prudently, safely and equitably and shall conform to all notices, rules or regulations posted on about…the backyard and storage.

After having reviewed the tenancy agreement and following a consideration of the testimony provided at the hearing by the parties, I find that storage is not a material term of the tenancy agreement. While the tenant has clearly noted in his written correspondence with the landlord that he considers storage to be a material term, I find the agreement between the parties regarding storage to be vague and without sufficient detail. There is no specific designation in the tenancy agreement concerning which portion of the home/yard is to be used for storage, nor is there an addendum directing the tenant to follow specific rules around storage. I find that storage cannot be considered a material term. I therefore find that this portion of the landlord's notice to end tenancy is dismissed.

The second portion of the 1 Month Notice concerns alleged illegal activity. The issue of illegal activity is explored in detail in Policy Guideline #32. It states as follows:

> The Residential Tenancy Act and the Manufactured Home Park Tenancy Act provide that a landlord may terminate a tenancy for illegal activity that meets one or more of the following requirements:
> • has caused or is likely to cause damage to the landlord's property
> • has adversely affected or likely to adversely affect the quiet enjoyment, security, safety or physical wellbeing of another occupant of the residential property
> • has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord
>
> ... 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.

I find the landlord's arguments related to the presence of marijuana plants in the backyard to fall well-below the threshold described above as to what may be considered 'illegal activity.' I find the plants mere existence unlikely "to adversely affect the quiet enjoyment, security, safety or physical wellbeing" of any person using the backyard and therefore dismiss this portion of the 1 Month Notice.

The tenant was successful in cancelling the landlord's 1 Month Notice for Cause. This tenancy shall continue until it is ended in accordance with the *Act*. The tenant may recover the filing fee pursuant to section 72 of the *Act*.

Conclusion

The landlord's 1 Month Notice for Cause dated October 1, 2021 is cancelled. The tenant was successful in his application and this tenancy shall continue until it is ended in accordance with the *Act*.

The tenant may withhold $100.00 from a future rent payment on **ONE** occasion in total satisfaction for a return of the filing fee.

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 23, 2022

Residential Tenancy Branch