



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Pattony Investment Company
Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, LRE, AS, OLC, MNDCT, 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 for:

- cancellation of the One Month Notice to End Tenancy for Cause (the Notice), pursuant to section 47;
- an order to restrict or suspend the landlord's right of entry, under section 70;
- an order for the landlord to allow an assignment or sublet when permission was unreasonably denied, pursuant to section 65;
- an order for the landlord to comply with the Act, the Residential Tenancy Regulation (the Regulation) and/or tenancy agreement, pursuant to section 62;
- a monetary order for compensation for damage or loss under the Act, the Regulation or tenancy agreement, pursuant to section 67; and
- an authorization to recover the filing fee for this application, under section 72.

Both parties attended the hearing. The landlord was represented by property manager NZ. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

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."

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the Act.

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 claims with leave to reapply except cancellation of the notice to end tenancy which will be decided upon.

Issues to be Decided

Is the tenant entitled to:

1. Cancellation of the Notice?
2. An authorization to recover the filing fee?

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 and the testimony 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 on June 01, 2017. Monthly rent is \$1,845.00, due on the first day of the month. The tenant was authorized by the Residential Tenancy Branch to reduce rent to \$1,545.00 in October 2021. At the outset of the tenancy a security deposit of \$875.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It states:

14 ADDITIONAL OCCUPANTS The person listed in Clause 2 above shall be the only permanent occupant(s) of the premises. When a guest remains for a continuous period in excess of two (2) weeks, he/she shall be deemed to be a permanent occupant under this Agreement. Such additional permanent occupant is not acceptable to the Landlord unless permission is given in writing. Without such permission, this agreement will be breached and the landlord may then issue termination notice.

[...]

23 ASSIGN OR SUBLET: The tenant shall not assign or sublet the Premises without the written consent of the Landlord. If the Tenancy agreement is for a term of six months or more, such consent shall not be unreasonably withheld by the landlord. Under an assignment, the new tenants takes the Premises on an "as-is, where-is" basis as must assume all the rights and obligations under the Agreement.

Both parties agreed the landlord served the Notice and the tenant received it on October 20, 2021. The tenant submitted this application on October 25, 2021 and continues to occupy the rental unit.

The Notice was submitted into evidence. It is dated October 20, 2021 and the effective date is November 30, 2021.

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 subleased the unit without the landlord written permission."

The tenant has been occupying the rental unit since the outset of the tenancy. The tenant affirmed he had a roommate occupying the second bedroom of the 2-bedroom suite until July 2021. A new roommate moved in on August 25 and moved out at the end of December 2021. The current roommate moved in on March 01, 2022 and is currently occupying the second bedroom. The tenant affirmed he did not notify the landlord in writing about the roommates that moved in August 2021 and March 2022 because he forgot that the landlord needs to provide written permission for the roommate.

The landlord affirmed she provided written authorization for the roommates that moved in prior to August 2021. The landlord affirmed she conducts a background check for all the occupants of the rental building.

The landlord affirmed she learned about an unauthorized roommate in October 2021 and verbally warned the tenant about breaching the tenancy agreement. The landlord does not remember when she warned the tenant. Later the landlord affirmed she also warned the tenant in writing.

The tenant affirmed he was not warned in writing or verbally about breaching the tenancy agreement. The tenant confirmed he received the October 20, 2021 letter together with the Notice:

Management has been notified that your suite has been sublet without the landlord's written permission. As per your tenancy agreement
23 ASSIGN OR SUBLET: The tenant shall not assign or sublet the Premises without the written consent of the Landlord. If the Tenancy agreement is for a term of six months or more, such consent shall not be unreasonably withheld by the landlord. Under an assignment, the new tenants takes the Premises on an "as-is, where-is" basis as must assume all the rights and obligations under the Agreement. This is the final warning; no further notice will be provided regarding this matter. Management will conduct an in-suite inspection on Friday October 22nd 2021, you do not have to be home for this inspection. Thank you for your attention and cooperation. If there are any changes in your situation, please contact [landlord]

The tenant affirmed the parties had a prior application for dispute resolution hearing on October 19, 2021 and the Notice was served for retaliation. The landlord affirmed she received the decision of the prior application on October 25, 2021 and the Notice is not related to the prior application.

Analysis

I accept the undisputed testimony that the landlord served the Notice and the tenant received it on October 20, 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 and undisputed testimony, I find the tenant has been occupying the rental unit since the outset of the tenancy, the tenant has had occupants occupying the second bedroom and the tenant did not ask the landlord to authorize the occupants of the second bedroom that moved in August 2021 and March 2022.

I find that, as the tenant remained in the rental unit, the tenant did not sublet the rental unit. Thus, I find 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 warn the tenant that, per clause 14 of the tenancy agreement, the tenant must obtain the landlord's written consent for occupants of the rental unit.

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

Conclusion

The Notice dated October 20, 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 \$100.00 from the next rent payment to recover 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: March 10, 2022