Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act") to cancel a One Month Notice to End Tenancy for Cause dated October 19, 2021 ("One Month Notice"); and to recover the $100.00 cost of their Application filing fee.

The Tenants and the Landlord appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it. During the hearing the Tenants and the Landlord were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. The Landlord said he had received the Application and the documentary evidence from the Tenants and had reviewed it prior to the hearing. The Landlord confirmed that he had not submitted any documentary evidence to the RTB or to the Tenants.

Preliminary and Procedural Matters

The Tenants provided their email address in the Application and they confirmed it in the hearing. The Landlord provided his email address in the hearing. The Parties also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in

the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

When a tenant applies to cancel an eviction notice issued by a landlord, section 55 of the Act requires me to consider whether the landlord is entitled to an order of possession. This is the case, if I dismiss the application, and if the eviction notice is compliant with section 52 of the Act, as to form and content.

Issue(s) to be Decided

- Should the One Month Notice be cancelled or confirmed?
- Is the Landlord entitled to an order of possession?
- Are the Tenants entitled to Recovery of their $100.00 Application filing fee?

Background and Evidence

The Parties agreed that the periodic tenancy began on September 1, 2013, with a current monthly rent of $936.33, due on the first day of each month. The Parties agreed that the Tenants paid the Landlord a security deposit of $450.00, and no pet damage deposit. The Landlord confirmed that he still holds the security deposit.

The onus to prove their case is on the person making the claim. Usually, this is the person applying for dispute resolution. However, in some situations 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 an eviction notice. As such, I started by asking the Landlord why I should confirm the One Month Notice and give him an order of possession, rather than cancelling it, as the Tenants have requested. The Landlord said:

> Basically, they are not allowing my rights of the landlord to use the property as I wish. Specifically, there are three units in the home, and the car port area that is a common area that they've been using for many years. Now I'm renovating the home and having either to sell it or do something with the property. So the car port is access to the upper deck and is more of a common area. There is clutter and everything outside the house.
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> I clearly stated "no storage" included in the rental agreement. I finally said you have to move the stuff and fix it up. People need to access the stairs to the deck; it's a hazard.

> I had interest from someone in renting that area as storage, but that didn't go, because the have it filled up and wouldn't remove it. They are eliminating my right to use the property the way I want it. They are claiming a silent agreement, because I never wanted it at first. I'd like the eviction not be upset.

The Tenants responded, as follows:

> Well, we've got fairly comprehensive evidence. Essentially, our main dispute is that for eight years of our tenancy we have had use of that car port to store our bicycles. See pictures of the carport area.

The Tenants then described the photos they included in their evidence, which I have reviewed. They continued their testimony:

> Essentially, we would like - as in our objectives section - the eviction noticed overturned, because he is evicting us for a breach of a material term, but we've been using it for eight years, and we wouldn't have rented the space if we didn't have access to the car port. We have a parking spot in our lease. When we did have vehicles, we stored them there. We use the recycling bins, which we inherited from the previous tenant. We also use it as a sitting area and to store a few gardening supplies
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> Also, I'd like to note that [the Landlord] is going to rent our only entrance way for boat storage. We had issues with our right to quiet enjoyment, and our . . . he ignored our concerns and then turned to ultimatums and threats.
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> We put in a large section of text to outline our argument, and also section 3 is a quick reference timeline showing the context surrounding this. Initially, it started by [the Landlord] texting us and asking us to move out in two months, because he was going to rent it out. Figures 1 – 5 are documents of all the email exchanges. The timeline from section 3 can give you a quick reference as to when emails were sent and by who, and a quick summary of the email contents.
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> This material term was not a material term for eight years. And it only became a material term when we were evicted by text without supporting documents.
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> Also, I'd like to note that our use of the carport doesn't interfere with any other tenants in any way. No doors for their units in the car port; the upstairs tenants are perfectly able to walk up their balcony stairs, and have no problem with the

way we have the car port.

The Landlord responded:

Their use of the carport might not hinder current tenants, but if new tenants or a new owner of the property move in, it might hinder them. Just because it doesn't hinder anyone now, does not mean it isn't able to hinder new tenants or a new owner.

My communication regarding selling or renovating, I had thoughts of selling it; I was negotiating with parties on purchasing the house, but plans changed, so I didn't initiate that further eviction notice. But that has nothing to do with this eviction. Them taking away my rights to do with the common areas of the property that they don't rent.

They refused to remove their items from the car port area and limited my rights as a landlord. They say I was threatening them. Someone from RTB told me that I was able to remove items from the car port. I can just move the stuff, but where do I put it? They want to sue me – 'you're going to have to evict them', I was told from a representative. I could physically move their stuff, but I just left it.

It's a large driveway, and I never directed that parking is in the car port area. If you look of the images - big plywood boxes of storage. We are thinking of selling our house and moving in there. When you rent something out, you might be okay if they use it, but it eventually starts to bug you.

Clearly where it says I don't include furniture, towels, and sheets - it doesn't show storage. When you don't include storage and someone starts to build storage boxes on the property. What's included in the tenancy agreement? If it's not included, it means you can't start building storage. . ..

Maybe they're needing a larger place with storage; but you can't start fitting the property as your storage. They've been using it since the beginning – that doesn't mean that they cannot move it when I say. I'm a little passive; I don't like confrontation. The rights are the rights.

The Tenants said:

We would like to stress that we have a parking spot and we don't have a car, and

> our bicycles are taking the space of a car. We aren't using it for "storage"; they are items that are used daily.
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> As far as material terms go in the Policy Guidelines, I'm pretty sure it is so important that it gives . . . we must stress that the Landlord has been aware that we have been using this for several years. He comes to do yard work about once a year and to pick up rent cheques from tenants. He has known about this.

The Landlord responded:

> They don't have a car now, but what if they get a car? It doesn't mean that they're not getting a car. Basically, they're taking my rights away as the landlord. It's the same thing they told me at the RTB – use that common area as I wish.

The Tenants said:

> Part of the reason we're here is the continual disregard from [the Landlord] to our rights as tenants. In many emails, we try to provide him with the information and proper procedures, and then we hear nothing. There is a lot of that in the email.
>
> Actually, I would like to specify that we were not threatening to sue him, but pointing out the reminder that you must not move tenants' property. If he had moved out items and he had caused damage, we would have included that here.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Section 47 of the Act sets out the grounds on which a landlord may end a tenancy for cause. The Landlord has asserted that the Tenants should be evicted because they significantly interfered with or unreasonably disturbed another occupant or the landlord; and that they breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Breach of a Material Term

The Landlord argues that the Tenants breached clause 3 (b) of the tenancy agreement where it states:

b) **What is included in the rent**: The landlord must not terminate, or restrict a service or facility that is essential to the tenant's use of the rental unit as living accommodation, or that is a material term of the tenancy agreement.

The items checked off as being included in the rent do not include the "storage" option. The Landlord said that the Tenants are using the car port for storage, which they are not allowed to do, according to the tenancy agreement.

The Landlord implied with his testimony that this clause makes it a material term that the Tenants are not provided with any storage space according to the tenancy agreement.

However, RTB Policy Guideline 8 states:

Material Terms

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.

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.

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.

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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

I find that there is no evidence before me that the Parties considered the lack of storage space to be a material term of the tenancy agreement. I find that the statement in clause 3 (b) of the tenancy agreement simply refers to material terms that the Parties may have in the tenancy agreement. It does not make the list of inclusions and exclusions material terms.

I find that the Tenants have not breached a material term of the tenancy agreement by storing items in the car port for the last eight years.

Law of Equity

The Landlord also asserts that the Tenants significantly interfered with or unreasonably disturbed another occupant or the Landlord. However, he did not specify how they are disturbing other occupants or the Landlord. Rather, the Landlord said that the Tenants' use of the car port does not hinder anyone currently.

The Landlord maintains that the Tenants have taken away his right as a landlord to do what he wishes with the property. However, the Landlord's delay in asserting his right to use the car port as he wishes is extinguished by the law of equity.

The law of equity entails justice being administered according to fairness, as contrasted with the strictly formulated rules of common law.

The "Doctrine of Laches" is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with the lapse of time, causing prejudice to the adverse party, operates as a bar in court of equity.

In the situation before me, I find that the Landlord has not been vigilant in asserting his right to use the car port space free of the Tenants' belongings. I find that by allowing this to go on for nearly a decade, the Landlord has, in effect, granted this storage space to the Tenants according to the law of equity.

I find that the Landlord neglected to assert his rights in this regard for an unreasonable and unexplained length of time. This neglect or omission to assert a right, as taken in conjunction with lapse of time, causes prejudice to the Landlord. This neglect or omission to do what one should do, warrants the presumption that he has abandoned the right or claim.

Estoppel means that the party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct, and has acted accordingly. In the case before me, the Landlord is estopped or prevented from claiming a right to the car port, because he allowed the Tenants to believe that they could use the car port for their bicycles and other storage for eight years.

Accordingly, given the finding of there not being a material term that was breached, and the Landlord's failure to assert his right pursuant to the tenancy agreement, I find that the Tenants are successful in their Application to cancel the One Month Notice.

I find that the Landlord has failed to provide grounds for confirming the validity of the One Month Notice on a balance of probabilities, and therefore, I find that the One Month Notice must fail, pursuant to section 62 of the Act. I cancel the One Month Notice and find that it is void and unenforceable. The tenancy continues until ended in accordance with the Act.

Given their success, I award the Tenants with recovery of their **$100.00** Application filing fee from the Landlord, pursuant to section 72 of the Act. The Tenants are authorized to deduct $100.00 from one upcoming rent payment in complete satisfaction of this award.

Conclusion

The Tenants are successful in their Application to cancel the One Month Notice, as the Landlord failed to provide sufficient evidence to establish grounds for the eviction.

The One Month Notice is cancelled and is void and unenforceable. The tenancy will continue until ended in accordance with the Act.

The Tenants are awarded recovery of their $100.00 Application filing fee from the Landlord, pursuant to section 72 of the Act. The Tenants are authorized to deduct **$100.00** from one upcoming rent payment in complete satisfaction of this award.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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 08, 2022

Residential Tenancy Branch