Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

The Tenants apply to cancel a One-Month Notice to End Tenancy signed January 29, 2022 (the "One-Month Notice") pursuant to s. 47 of the *Residential Tenancy Act* (the "*Act*"). They also seek the return of their filing fee pursuant to s. 72 of the *Act*.

C.B. and C.K. appeared as Tenants. J.Z. and R.Z. appeared as Landlords.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

J.Z. advised that the Landlords served the Tenants with the One-Month Notice by placing it in the mail slot for the rental unit on January 29, 2022. The Tenants acknowledge receiving the One-Month Notice on January 29, 2022. I find that the Landlords served the One-Month Notice in accordance with s. 88 of the *Act* and it was received on January 29, 2022 as acknowledged by the Tenants.

The Tenants advise that the Notice of Dispute Resolution and their evidence was served on the Landlord by way of two registered mail packages sent on February 11, 2022. The Landlords acknowledged receipt of the Tenants' application materials. I find that the Tenants served their application materials in accordance with s. 89 of the *Act* and was acknowledged to have been received by the Landlords.

The Landlords advise that their response evidence was served on the Tenants by way of registered mail though could not remember the specific date it was sent. The Tenants acknowledge receipt of the Landlords' response evidence. I find that pursuant to s.

71(2) of the *Act* the Tenants were sufficiently served with the Landlords' response evidence. I make this finding based on their acknowledged receipt of the same.

Issue(s) to be Decided

1) Should the One-Month Notice be cancelled? If not, is the Landlord entitled to an order for possession?
2) Are the Tenants' entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenants took occupancy of the rental unit on July 1, 2014.
- Rent of $2,095.00 is due on the first day of each month. I am told that rent was increased with the amount listed taking effect May 1, 2022.
- A security deposit of $937.50 is held by the Landlords in trust for the Tenants.

A written copy of the tenancy agreement was put into evidence by the parties, which confirm these details barring rent currently payable as several rent increases have been made since the tenancy began. The tenancy agreement has an addendum, which was also in evidence.

J.Z. indicates that the One-Month Notice was issued on the basis that the Tenants have breached the tenancy agreement, specifically highlighting clause 4 of the addendum, which states the following:

> Residents – only the tenants named in this Agreement will live in the upper level of the home; Tenants will not allow anyone else to live in the home.

J.Z. advised that he received a text message from C.K. on July 16, 2021 asking whether her daughter's friend could move into a vacant room within the rental unit. A copy of the text message exchange was put into evidence. The text indicates that the room had been occupied by C.B.'s daughter but that she recently moved out. The Tenants

confirmed that C.B.'s daughter moved out in August 2021 and that she had lived in the rental unit since 2014.

In response, J.Z. texted that "If it's temporary, that should be ok [C.K.]". The text goes on to state that J.Z. would need the friends name and contact number for "safety and protocol reasons".

At the hearing, J.Z. advised that he was concerned with respect to insurance for the property as he had previously needed to inform his insurer with respect to additional occupants within the rental unit. J.Z. further stated that it was his understanding that "temporary" meant several days and indicates that there was no correspondence between the parties where "temporary" was defined.

In response to the Landlord's request for contact information on July 16, 2021, C.K. replied "Ok no worries". J.Z. stated at the hearing that he never received a reply with the friend's name and contact number and had assumed that this meant the individual had not moved into the rental unit. J.Z. emphasized at the hearing that consent to the friend was conditional on the contact information being provided and that, to date, the contact information has not been provided.

C.K. advised that the daughter's friend moved into the rental unit on October 15, 2021. She stated that by the point the friend moved into the rental unit, the point with respect to the contact information had slipped her mind. It was explained at the hearing that the friend is a minor whose parents are from another country. C.K. and C.B. permitted the friend to move into the unoccupied room after her parents had to go back to their home country so that the friend could continue to attend school locally. The Tenants advise that the friend's parents own a home within the community and are planning on returning in June or August 2022.

J.Z. indicates that he first learnt the friend had moved into the rental unit on November 28, 2021 when he observed an unknown person walking into the rental unit when he was in the area. He indicates that he called C.K. about this on the 28th and that it was confirmed that the friend had moved into the rental unit.

On November 29, 2021, J.Z. spoke with C.B. by way of phone call. At the hearing, J.Z. says that on that call he told C.B. that the friend would have to vacate the rental unit within the week. The Landlord admits no written warning or demand with respect to the purported breach of clause 4 of the addendum had been made.

On January 29, 2022, the Landlords confirmed they attended the rental unit and pointedly asked whether the friend was still living within the rental unit. I am told that on that occasion, the Tenants confirmed the friend was still at the rental unit. The Landlords then issued the One-Month Notice, which included a written letter of the same date. Both the One-Month Notice and the January 29, 2022 letter were put into evidence by the parties.

J.Z. indicated that clause 4 was a material term of the tenancy agreement when I asked whether it was, though made no specific submissions with respect to the materiality of clause.

The Tenants emphasized that they were permitted to have guests and that the Landlords could not restrict them from having guests. The Tenants further emphasized that the friend was there temporarily and would be moving back with her parents when they return in June or August 2022. The Tenants took temporary to mean not permanent. The Tenant C.B. submitted that the present circumstances were the result of a series of miscommunication between the parties.

Analysis

The Tenants apply to cancel the One-Month Notice.

Pursuant to s. 47 of the *Act*, a landlord may end a tenancy for cause by serving a one-month notice to end tenancy on the tenant. A tenant may dispute a one-month notice to end tenancy by filing an application with the Residential Tenancy Branch within 10 days of receiving the notice. If a tenant disputes the notice, the burden for showing that the one-month notice was issued in compliance with the *Act* rests with the landlord.

The One-Month Notice under the present circumstances was issue pursuant to s. 47(1)(h) of the *Act*, which permits a landlord to end a tenancy where a tenant has breached a material term of the tenancy agreement and has failed to correct the breach within a reasonable time after receiving a written notice from the landlord to do so.

Policy Guideline 8 provides guidance with respect to the content of the written demand, namely it must inform the other party:

a. that there is a problem;

b. that they believe the problem is a breach of a material term of the tenancy agreement;
c. that the problem must be fixed by a deadline included in the letter and that the deadline be reasonable; and
d. that if the problem is not fixed by the deadline, the party will end the tenancy.

J.Z. advised that warning came by way of verbal conversation that took place during the phone calls of November 28th and 29th, specifically imposing a deadline of a week in the phone call of November 29th. The Landlord admits no written demand was ever provided before the One-Month Notice was issued on January 29, 2022. The Landlords indicate that the letter of January 29, 2022 was served with the One-Month Notice.

I find that the Landlords have failed to issue a written warning of the purported breach of clause 4 as required by s. 47(1)(h) of the *Act*. I make this finding based on the Landlord's admission on this point. I accept that the Landlord had conversations with the Tenants on November 28th and 29th. However, the wording in the *Act* is explicit, notice of the breach must be written. By failing to issue the written warning, the Landlord did not have the right to issue the One-Month Notice under s. 47(1)(h).

As no written notice was issued, I find that the One-Month Notice is of no force or effect. I grant the Tenants application to cancel the One-Month Notice. The tenancy shall continue until it is ended in accordance with the *Act*.

I would further note that I would have granted the Tenants application even had the Landlords issued a written notice for breach of clause 4 of the addendum.

Not all breaches of a tenancy agreement will justify the end to a tenancy under s. 47(1)(h) of the *Act*. The breach must be with respect to a material term of the tenancy agreement. Policy Guideline #8 states the following with respect to 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.
>
> (emphasis added)

I would note that, under the circumstances, the Landlords hold the evidentiary burden of proving that a term is material to the tenancy agreement. The Landlords did not do so under the circumstances, only confirming their view that clause 4 was a material term after I had asked whether it was. The Landlords provided no direct submissions with respect to the parties' intention and would not have discharged their evidentiary burden to prove clause 4 was material in any event.

Further, the Tenants indicate that C.B.'s daughter lived in the rental unit from 2014 until August 2021. This point was not disputed by the Landlords. The wording of clause 4 is restrictive and, on its face, only permits occupation to "tenants named in this Agreement". I have reviewed the tenancy agreement and nowhere does it list C.B.'s daughter (or C.K.'s daughter for that matter) as a tenant or an occupant. Presumably the daughters would have fallen afoul the wording of clause 4 of the addendum. Clearly, the parties could not have intended clause 4 to be material as the daughters would have immediately breached it upon their occupation of the rental unit. However, in the case of C.B.'s daughter, she occupied the rental unit for seven years with her father. C.K.'s daughter continues to reside within the rental unit. The Landlords only chose to rely upon clause 4 some years into the tenancy, which indicates that neither party viewed the term as one in which that even a trivial breach would give the other right to end the agreement.

Conclusion

The Landlords failed to issue a written notice as required by s. 47(1)(h) of the *Act* before serving the One-Month Notice. As a written notice was not given as required by the *Act*, the One-Month Notice was not property issued. Accordingly, the One-Month Notice is of

no force or effect. I grant the Tenants' application and cancel the One-Month Notice. The tenancy shall continue until it is ended in accordance with the *Act*.

As the Tenants were successful in their application, I find that they are entitled to the return of their filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Landlords pay the Tenants' $100.00 filing fee. Pursuant to s. 72(2) of the *Act*, I direct that the Tenants retain $100.00 from rent owed to the Landlords on **one occasion** in full satisfaction of their 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: May 02, 2022

Residential Tenancy Branch