Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing dealt with the tenants' applications pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 1 Month Notices to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover the filing fees for both applications from the landlord, pursuant to section 72 of the *Act.*

JS attended the hearing for the landlord as well as JP. JP testified that although they were not named as a landlord on the applications, JP is also a landlord, and was attending the hearing as one. I have accepted JP's testimony that they are also a landlord for this tenancy. As only one landlord was named in both disputes, the reference to "landlord" shall refer to both landlords. Both tenants attended the hearing.

Both parties were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing by the attending parties. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenants' applications for dispute resolution ("Applications"). In accordance with section 89 of the *Act*, I find the landlord duly served with the tenants' Applications. Both parties confirmed receipt of each other's evidentiary materials, which were duly served in accordance with section 88 of the *Act*.

The tenants confirmed service of a 1 Month Notice dated January 28, 2022, as well as a second 1 Month Notice dated March 28, 2022. Accordingly, I find both 1 Month Notices duly served on the tenants in accordance with section 88 of the *Act.*

Issues

Should the landlord's 1 Month Notices be cancelled? If not, is the landlord entitled to an Order of Possession?

Are the tenants entitled to recover the filing fees?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applications and my findings around it are set out below.

This month-to-month tenancy originally began on or about August 31, 2015, with monthly rent currently set at $1,641.40 , payable on the first of the month. The landlord collected a security deposit in the amount of $775.00, and a pet damage deposit in the amount of $387.50, which the landlord still holds.

The landlord served the tenants with a 1 Month Notice dated January 28, 2022 providing the following grounds:

1. *Tenant has assigned or sublet the rental unit/site without landlord's written consent.*
2. *Tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk.*

The tenants were served with a second 1 Month Notice dated March 28, 2022 for the following reason:

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

The landlord provided the following reasons for why they are seeking an Order of Possession on the grounds provided on the 1 Month Notices. The landlords submit that the home was rented to the two tenants and their children. The intention was for only the family to reside there. The landlords testified that they were empathetic towards the tenants in 2018 when they were faced with a family emergency, and accommodated a

temporary arrangement where other parties may stay there. Both landlords testified in the hearing that no permission was ever requested or granted to sublet the rental unit, or for additional occupants or roommates to stay there. The landlords testified that they had discovered that the tenants took advantage of their empathy, and had allowed multiple parties to live there over the years, including international students, and a current occupant SR who has been residing there for some time. At a certain point SR's sister also resided there.

The landlords testified the tenants had never communicated any of this to them, and that although they were aware of SR's occupancy there, they did not consent to the allowance of additional occupants or roommates, nor did they agree to a sublet.

The landlords grew concerned after they had to do perform substantial repairs to the bathroom due to what they believe was water damaged caused by a lack of care and attention by the tenants or other occupants, and excess wear and tear caused by too many occupants in the rental unit. The landlords testified that they believe that the humidity and moisture levels in the rental unit contributed to the degradation of the drywall, which should have been managed with proper use of the shower curtain and fan. The landlords believed that this was avoidable damage caused by the tenants and occupants in the rental unit. The landlords submitted communication by the attending plumbing confirming the landlords' statement that "we discussed possible causes and remedies, it was conceivable that the shower curtain was being used too high and that moisture humidity was not being managed, such as through fan use, to the point that the ceiling was damaged, the crack that was in the ceiling was further letting moisture into the drywall and into the structure". The plumber had responded that the "statement is a completely accurate review of the events".

On February 22, 2022, the landlords served the tenants with a warning that they were in breach of a material term of the tenancy agreement, specifically clause 13 which states: "Only those persons listed in clauses 1 and 2 above may occupy the rental unit or residential property. A person not listed in 1 or 2 above who without the landlord's prior written consent, resides in the rental unit or on the residential property in excess of fourteen cumulative days in a calendar year will be considered to be occupying the rental unit or residential property contrary to this Agreement. If the tenant anticipates an additional occupant, the tenant must apply in writing for approval from the landlord for such person to become an authorized occupant. Failure to obtain the landlord's written approval is a reach of a material term of this Agreement, giving the landlord the right to end the tenancy on proper notice". The landlords gave the tenants 30 days to correct the breach.

The landlords followed up with another 1 Month Notice on March 28, 2022 for Breach of a Material Term on March 28, 2022 when the tenants replied on March 26, 2022 that they do not agree with the landlords as SR had been residing there for two years with no issue.

The tenants disputed both 1 Month Notices. The tenants testified that although they did not obtain written permission for SR to reside there, they were of the understanding that the landlords had implied consent as the landlords were well aware that SR had been residing there two years, and nothing had been said to the tenants or SR for that time. The tenants testified in the hearing that at a point in time they did have international students residing there for a semester as well.

The tenants dispute that they had caused significant damage to the property, and deny being responsible for the damage in the bathroom. The tenants noted that they had lived there for almost seven years, and that they had always used the fans, and opened windows for circulation. The tenants argued that the duty to repair and maintain the property is on the landlords, and that they have not done any unreasonable damage to the property beyond regular wear and tear, and not to the extent that justifies the end of this tenancy.

The tenants also deny a sublet situation. The tenants testified that SB does travel quite a lot, but has not temporarily moved out in order to sublet the space. The tenants testified that they did request permission for a roommate in 2018, and permission was granted without a time limit. The tenants argued that not only were the landlords aware of SR residing there, but the landlords had also paid SR to assist with the landscaping and yard work. The tenants expressed confusion over why the landlords' tolerance had changed.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. As the tenants had filed their applications within the required period, and having issued a notice to end this tenancy, the landlords have the burden of proving that that they have cause to end the tenancy on the grounds provided on the 1 Month Notices.

The landlords'1 first 1 Month Notice dated January 28, 2022 was issued on the grounds that the tenants had sublet the rental unit without written authorization, and that the tenants have put the landlords' property at significant risk.

Although the term “sublet” is used by the landlords in this dispute, I must note that RTB Policy Guideline #19 states the following:

“C. SUBLETTING
Sublets as contemplated by the Residential Tenancy Act

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant’s tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the “landlord” of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.”

RTB Policy Guideline #19 states the following about assignment of tenancy agreements:

B. ASSIGNMENT
Assignment is the act of permanently transferring a tenant’s rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord. When either a manufactured home park tenancy or a residential tenancy is assigned, the new tenant takes on the obligations of the original tenancy agreement, and is usually not responsible for actions or failure of the original tenant to act prior to the assignment. It is possible that the original tenant may be liable to the landlord under the original agreement.

For example:

- *the assignment to the new tenant was made without the landlord’s consent;*
- *or the assignment agreement doesn’t expressly address the assignment of the original tenant’s obligations to the new tenant in order to ensure the original tenant does not remain liable under the original tenancy agreement.*

Although the term “sublet” is used by the landlords in this dispute, I must note that RTB Policy Guideline #19 clearly provides the definition of a “sublet” versus a “roommate” situation, which 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…”*

By the above definition I find that an additional occupant in this rental unit cannot be considered a “sublet”, but a roommate, as the tenants still resided there. Despite the occasional absence due to travel or family matters, I am not satisfied that any of the tenants had moved out or vacated the rental unit. As such I find that the tenants have not sublet or assigned the rental unit, and therefore the landlords do not have the right to end the tenancy for this reason.

The landlords also allege that the tenants have put the landlords’ property at significant risk. Although the landlords have valid concerns about the impact that an increased number of occupants has on the rental unit, I find the landlords have not met the burden of proof to support that this is in fact the case. As the tenants have pointed out, damage due to wear and tear is unavoidable. Within a long-term tenancy, one must take in account many factors when assigning blame. Useful life is taken in consideration as per section 40 of the *Residential Tenancy Policy Guideline* when assessing wear and tear at the end of a tenancy. In this case, the tenants deny that they and the other occupants have been neglectful or negligent in their actions. As noted in the communication between the landlords and the plumber, there was a discussion of possible causes and remedies. I am not satisfied that this is equivalent to a conclusive report about the actual reason for the damage. In light of the evidence and testimony before me, I find that the landlords have failed to provide sufficient evidence that the tenants or the occupants have put the landlord’s property at significant risk, especially to the extent that justified the ending of this tenancy. For the above reasons, I allow the tenants’ application to cancel the 1 Month Notice dated January 28, 2022.

The 1 Month Notice dated March 28, 2022 is for a material breach of the tenancy agreement which was not corrected within a reasonable amount of time after written notice to do so. A party may end a tenancy for the breach of a material term of the tenancy, 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.

Policy Guideline #8 reads in part as follows:

> *To end a tenancy agreement for breach of a material term the party alleging a breach…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…*

Although it was undisputed that the landlords did provide written warning to the tenants on February 22, 2022 that the allowance of an additional occupant without written permission of the landlords constituted a breach of a material term of the tenancy agreement, I am not satisfied that the SR is an unauthorized occupant, nor am I satisfied that there has been a breach of a material term of the tenancy agreement. I note that although the tenants had admitted to allowing other occupants to reside there in the past, the written warning was served on the tenants after these occupants had

already vacated the rental unit, and accordingly the material breach would only apply to SR as an unauthorized occupant.

I find that the SR has been residing at the rental address for some time. SR's statement states that they had known the landlord since sometime in September 2020. The testimony of the tenants is that the landlords not only had full knowledge of this arrangement, but had interacted with SR directly in order to employ SR for landscaping services at the property. I find that the legal principle of estoppel applies in this case. Estoppel is a legal doctrine that holds that one party must be strictly prevented from enforcing a legal right to the detriment of the other party if the first party has established a pattern of failing to enforce this right, and the second party has relied on that conduct and has acted accordingly. To return to strict enforcement of their right, the first party must give the second party notice (in writing) that they are changing their conduct, and are now going to strictly enforce the right previously waived or not enforced.

Although the tenancy agreement states that allowing additional occupants without written permission of the landlords would constitute a material breach of the tenancy agreement, I find that the landlords were well aware of SR's occupancy at the suite, but did not express disapproval of this arrangement until recently. Although there is insufficient evidence to support that the landlords were apprised of the details of past occupants such as the international students, I find that that the landlords have known about SR since 2020. Not only did the landlords know of SR, they had interacted directly with SR. I find it highly reasonable and plausible for the tenants and SR to interpret these positive interactions as an implied waiver of clause 13 of the tenancy agreement. After almost two years, the landlords are now attempting to end the tenancy for this conduct. Even in the absence of an amended or new tenancy agreement, I find that over time the landlords had implied that the tenants had permission to allow SR to reside there.

Although the landlords may consider this arrangement to be a material breach, I am not satisfied that the landlords have sufficiently supported this position. Accordingly, I allow the tenants' application to cancel the 1 Month Notice dated March 28, 2022. The tenancy is to continue until ended in accordance with the *Act.*

As the tenants were successful with their applications, I allow the tenants to recover the fling fee for both applications.

Conclusion

The tenants' applications to cancel the landlords' 1 Month Notices are allowed. The landlords' 1 Month Notices, dated January 28, 2022 and March 28, 2022, are cancelled

and are of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I allow the tenants to recover the $100.00 filing fee for both applications. I allow the tenants to implement a monetary award of $200.00 by reducing a future monthly rent payment by that amount. In the event that this is not a feasible way to implement this award, the tenants are provided with a Monetary Order in the amount of $200.00, and the landlords must be served with **this Order** as soon as possible. Should the landlords fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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 12, 2022

Residential Tenancy Branch