Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing dealt with the Tenant's application under the *Residential Tenancy Act* (the "Act") for:

- cancellation of a One Month Notice to End Tenancy for Cause dated January 25, 2022 (the "One Month Notice") pursuant to section 47; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72.

The Landlord's agent BV, the Tenant, and the Tenant's niece CG attended the hearing. They were each given a full opportunity to be heard, to present affirmed testimony, and to make submissions.

All attendees at the hearing were advised the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") prohibit unauthorized recordings of dispute resolution hearings. They confirmed that they were not recording this dispute resolution hearing.

The parties did not raise any issues with respect to the service of documents. BV confirmed the Landlord's receipt of the Tenant's notice of dispute resolution proceeding package and evidence. BV confirmed the Landlord will be relying on the documents submitted by the Tenant and did not submit further documentary evidence.

Issues to be Decided

1. Is the Tenant entitled to cancellation of the One Month Notice?
2. Is the Landlord entitled to an Order of Possession?
3. Is the Tenant entitled to recover the filing fee from the Landlord?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony presented, only the details of the respective submissions and arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of this application and my findings are set out below.

The Tenant submitted a copy of the tenancy agreement into evidence. The parties agreed as to the following particulars of the tenancy:

- The tenancy commenced on August 1, 2009 for a fixed term ending on July 31, 2010, and continued thereafter on a month-to-month basis.
- Rent is currently $1,206.51 per month, due on the first day of each month.
- The Tenant paid a security deposit of $497.50, which is held in trust by the Landlord.

BV confirmed the Landlord purchased the building and assumed the tenancy agreement in 2015.

BV testified he received a call from the Tenant in October 2021 about a family emergency which required the Tenant to be out of the country “for a short period of time”. BV stated he was told that the Tenant’s niece CG would be looking after the Tenant’s affairs.

BV testified there was no conversation about CG living in the unit. BV stated his understanding was that this was a “short, not an indefinite thing”, and would be “at most a few months”, with CG “checking up on the place”.

BV testified he began noticing that the Tenant’s absence was becoming more prominent—he heard the Tenant sold her vehicle, and it had become “clear” that someone was living in the rental unit “all the time”. BV stated he also heard that CG’s vehicle is always parked at the rental property, and that CG is receiving mail at the rental unit.

BV testified there was never permission asked for someone else to live in the rental unit, and that the Landlord never gave permission for another “occupant”.

BV testified the One Month Notice was issued due to what he saw as dishonesty on the part of the Tenant.

A copy of the One Month Notice is included in the Tenant's evidence. The One Month Notice is dated January 25, 2022 and has an effective date of February 28, 2022.

The One Month Notice indicates the following reasons for issuance:

1. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.
2. Tenant has assigned or sublet the rental unit/site/property/park without the landlord's written consent.

In addition, the One Month Notice provides the following details of cause:

> *Tenant has either assigned or sublet the rental unit or has allowed additional occupants without consent contrary to sections 16 and 13 of the residential tenancy agreement*
>
> *Tenant notified landlord in October 2021 that she would be out of the country temporarily and would be leaving the unit vacant, however it has since become clear that two other individuals have been living in the unit since November 2021*

BV acknowledged that the Landlord did not give the Tenant any warning prior to issuing the One Month Notice. In addition, BV conceded he doesn't believe there were in fact two other unauthorized people living at the rental unit as stated in the One Month Notice, only CG.

The Tenant testified she has been a tenant of the building for 21 years, and in her current suite since 2009. The Tenant acknowledged CG received a copy of the One Month Notice in person on January 31, 2022.

In her written submissions, the Tenant stated:

> *My niece is currently taking care of my affairs in [dispute city], including staying in my suite to take care of my plants, sending me mail, and assisting me with my affairs and life I still have in [dispute city]. I spoke with my landlord verbally on the phone on October 12th, 2021, letting him know very clearly that my niece would*

> *by staying there while I attend to a family emergency in [another country]. He said this was fine as I've always been a respectful tenant who pays on time.*
>
> […]
>
> *I have been an excellent tenant for 2 decades. I am clean, quiet, kind, and pay my rent on time. We have not had any issues for the past 21 years. My belongings are in my unit, and I just renewed my Shaw services for a 2-year contract. I have full intention of returning to my apartment. The landlord will see I have been paying the rent every month, and I have attached copies of my bills in my name, at my address, including my landline phone number of 20+ years that I still have in [dispute city].*

The Tenant submitted copies of her BC Hydro and Shaw invoices in support. The Tenant also submitted screenshots of a text message that she sent to the Landlord dated October 27, 2021, which states that CG will be looking after the Tenant's affairs while the Tenant is away.

During the hearing, the Tenant confirmed that CG is staying at the rental unit to look after her affairs. The Tenant disputed that selling her car meant she doesn't intend to return to the rental unit. The Tenant confirmed she intended to return to the rental unit, but was unable to specify a precise return date. The Tenant indicated there is uncertainty due to her elderly parent's condition.

CG acknowledged she is currently living in the rental unit "full-time". CG testified the Tenant's plants require daily maintenance. CG stated she works remotely and has stepped in to help the Tenant while the Tenant is away.

CG argued the Landlord did not give a "firm line around dates" for the acceptable length of her stay. CG argued that the One Month Notice issued without warning "seems very punitive in hindsight".

Analysis

1. Is the Tenant entitled to cancellation of the One Month Notice?

Section 47 of the Act permits a landlord to end a tenancy for cause upon one month's notice to the tenant. Section 47(1) describes the situations under which the landlord will have cause to terminate the tenancy.

Section 47(3) of the Act requires a notice to end tenancy for cause given by the landlord to comply with section 52, which states:

> **Form and content of notice to end tenancy**
> 52 In order to be effective, a notice to end a tenancy must be in writing and must
> (a) be signed and dated by the landlord or tenant giving the notice,
> (b) give the address of the rental unit,
> (c) state the effective date of the notice,
> (d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy,
> (d.1) for a notice under section 45.1 *[tenant's notice: family violence or long-term care]*, be accompanied by a statement made in accordance with section 45.2 *[confirmation of eligibility]*, and
> (e) when given by a landlord, be in the approved form.

Section 47(2) further requires that the effective date of a landlord's notice under section 47 must be:

(a) not earlier than one month after the date the notice is received, and
(b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

In this case, the One Month Notice is dated January 25, 2022 and has an effective date of February 28, 2022. I have reviewed a copy of the One Month Notice and find that it complies with the requirements set out in sections 52 and 47(2) of the Act.

Based on the parties' evidence, I accept that a copy of the One Month Notice was given to CG in person at the rental unit on January 31, 2022. Therefore, I find that the Tenant was served with the One Month Notice on January 31, 2022, in accordance with section 88(e) of the Act.

Section 47(4) of the Act permits a tenant to dispute a one month notice to end tenancy for cause with 10 days of receiving such notice. Therefore, the Tenant had until February 10, 2022 to dispute the One Month Notice. Records of the Residential Tenancy Branch disclose that the Tenant submitted this application on February 9,

2022. I find the Tenant made this application within the 10-day dispute period required by section 47(4) of the Act.

The standard of proof in this 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.

Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus shifts to the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

In this case, the Landlord has issued the One Month Notice to end the tenancy on two grounds:

1. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.
2. Tenant has assigned or sublet the rental unit/site/property/park without the landlord's written consent.

With respect to the first ground, section 47(1)(h) of the Act states as follows:

> **Landlord's notice: cause**
> 47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
>
> […]
>
> (h) the tenant
>
> (i) has failed to comply with a material term, and
>
> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

The One Month Notice indicates that the Tenant breached paragraphs 13 and 16 of the tenancy agreement. I reproduce these paragraphs below:

> 13. **ADDITIONAL OCCUPANTS.** No person, other than those listed in paragraph 2 above, may occupy the rental unit. A person not listed in paragraph 2 above who resides in the rental unit for a period in excess of fourteen cumulative days in any calendar year will be considered to be occupying the rental unit contrary to this Agreement and without right or permission of the landlord. This person will be considered a trespasser. A tenant anticipating an additional person to occupy

> the rental unit must promptly apply in writing for permission from the landlord for such person to become an approved occupant. Failure to apply and obtain the necessary approval of the landlord in writing is a breach of a material term of this Agreement, giving the landlord the right to end the tenancy after proper notice.
>
> […]
>
> 16. **ASSIGNMENT OR SUBLET.** The tenant may assign or sublet the rental unit to another person with the written consent of the landlord. If this tenancy agreement is for a fixed length of 6 months or more, the landlord must not unreasonably withhold consent. Under an assignment a new tenant must assume all of the rights and obligations under this tenancy agreement, at the same rent. The landlord must not charge a fee or receive a benefit, directly or indirectly, for giving this consent. If a landlord unreasonably withholds consent to assign or sublet or charges a fee, the tenant may apply for dispute resolution under the Act.

During the hearing, BV did not make any express arguments relating to the materiality of these terms. I understand the Landlord's position is that the paragraphs 13 and 16 are material terms of the tenancy agreement, and that the Tenant did not comply with these terms because CG has been living at the rental unit without the Landlord's written consent.

Section 47(1)(h) contains a two-part test for establishing cause for ending the tenancy. Based on the evidence before me, I find it is not necessary for me to address the first branch of the test, namely, whether the Tenant has failed to comply with a material term under section 47(1)(h)(i). This is because I am satisfied the Landlord has clearly not met the second branch of the test under section 47(1)(h)(ii).

Section 47(1)(h)(ii) requires the landlord to establish that a tenant "has not corrected the situation within a reasonable time after the landlord gives written notice to do so". BV acknowledged the Landlord did not give any notice or warning to the Tenant before issuing the One Month Notice. Thus, I find the Landlord did not give written notice to the Tenant as required under section 47(1)(h)(ii).

Based on the foregoing, I conclude that the Landlord has not established cause under section 47(1)(h) of the Act.

Next, I turn to the issue of whether the Landlord has established cause under the second ground stated in the One Month Notice.

With respect to the second ground, section 47(1)(i) of the Act states:

> **Landlord's notice: cause**
> 47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
>
> […]
>
> (i) 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*];

I first address the issue of whether the Tenant has purported to assign the tenancy agreement to CG without first obtaining the Landlord's written consent.

Residential Tenancy Policy Guideline 19. Assignment and Sublet ("Policy Guideline 19") defines an "assignment" as "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."

In this case, I find the Tenant has not purported to permanently transfer her rights under the tenancy agreement to CG. I accept the Tenant's written submissions and verbal testimony confirming her intention to return to the rental unit. I accept the following undisputed testimony of the Tenant, which I find persuasive as evidence of the Tenant's intention to return:

- the Tenant continues to pay rent and utilities in her name;
- the Tenant's personal belongings remain in the rental unit;
- the Tenant continues to receive mail at the rental unit;
- the Tenant recently renewed her home phone and internet service with Shaw under a 2-year fixed contract.

I find the fact that the Tenant sold her car is not conclusive evidence of a lack of intention to return to the rental unit.

I do note that as of the date of this hearing, the Tenant has been away for at least 6 months. While I find this length of time to be substantial, I am not satisfied at this point that this proves the Tenant intends to permanently give up her home of over 11 years.

In addition, I accept that it is difficult for the Tenant to give a precise return date given her elderly parent's condition and the current climate for international travel.

While it is undisputed that CG has moved into the rental unit, I find there is insufficient evidence to suggest that CG has permanently assumed the rights and responsibility of the Tenant under the tenancy agreement. I accept CG's testimony that she is living at the rental unit to help the Tenant with managing the Tenant's affairs.

Based on the above, I find on a balance of probabilities that the Tenant has not assigned or purported to assign the tenancy agreement to CG.

Next, I turn to the issue of whether the Tenant has sublet or purports to sublet the rental unit to CG without the Landlord's written consent.

Policy Guideline 19 states:

> 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.
>
> […]
>
> Unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. While the sublease can be very similar to the original tenancy agreement, the sublease must be for a shorter period of time than the original fixed-term tenancy agreement – even just one day shorter. The situation with month-to-month (periodic) tenancy agreements is not

> as clear as the Act does not specifically refer to periodic tenancies, nor does it specifically exclude them. In the case of a periodic tenancy, there would need to be an agreement that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy.
>
> […]
>
> 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.

In this case, I also do not find sufficient evidence to suggest that the Tenant and CG have entered into a sub-tenancy relationship. Based on the evidence before me, I do not find the Tenant to be acting like a sub-landlord towards CG. Firstly, there is no evidence of a written sublease agreement between the Tenant and CG. Secondly, I am unable to find the existence of a verbal sublease agreement—I find there is insufficient evidence to suggest that monetary consideration flows from CG to the Tenant in exchange for the right to stay in the rental unit. The Tenant and CG's evidence is simply that CG is staying in the rental unit to help the Tenant with her affairs while the Tenant is away. The Tenant wrote in her submissions that "The landlord will see I have been paying the rent every month". Elsewhere in her application, the Tenant wrote: "As you can see, I am still paying for my wifi and home phone number of 21 years". I find this arrangement to be possible because CG is an extended family member of the Tenant.

Furthermore, I find the evidence suggests that, although the Tenant has been out of the country for some time, she still considers the rental unit to be very much her "home". The Tenant's personal belongings remain in the unit; mail and telephone calls to the Tenant are still being directed to the rental unit. I find the Tenant has not moved out of

the rental unit so as to grant “exclusive occupancy” to CG. In my view, a sublet arrangement between the Tenant and CG would require the Tenant to respect CG’s quiet enjoyment of the rental unit as a sub-landlord, during the term of the sub-tenancy. In this case I do not find there to be an intention, on the Tenant’s part, to transfer her rights under the tenancy agreement to CG in a way that would require the Tenant to give up her own rights to the rental unit, even on a temporary basis.

Thus, I conclude the Tenant has not sublet the rental unit to CG. Rather, I find that the Tenant has permitted CG to become an additional occupant of the rental unit.

Under the Act, there is a distinction between sub-tenants and occupants. Residential Tenancy Policy Guideline 13. Rights and Responsibilities of Co-tenants (“Policy Guideline 13”) states as follows:

> **H. OCCUPANTS**
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> If a tenant allows a person to move into the rental unit, the new person is an occupant who has no rights or obligations under the tenancy agreement, unless the landlord and the existing tenant agree to amend the tenancy agreement to include the new person as a tenant. Alternatively, the landlord and tenant could end the previous tenancy agreement and enter into a new tenancy agreement to include the occupant.
>
> Before allowing another person to move into the rental unit, the tenant should ensure that additional occupants are permitted under the tenancy agreement, and whether the rent increases with additional occupants. Failure to comply with material terms of the tenancy agreement may result in the landlord serving a One Month Notice to End Tenancy for Cause. […] (emphasis added)

In the present circumstances, I find the Tenant believed she had received verbal permission for CG to stay at the rental unit, based on her conversation with BV on October 12, 2021. I also accept BV’s testimony that he understood CG would be checking on the rental unit and not living there. I find that there likely was no meeting of the minds between the Tenant and BV during that conversation.

In any event, it is undisputed that the Tenant has permitted CG to occupy the rental unit without first requesting the Landlord’s permission in writing and without having first obtained the written consent of the Landlord. In addition, I find on a balance of

probabilities that CG has lived at the rental unit for more than 14 cumulative days in a calendar year. Accordingly, I find that the Tenant has breached paragraph 13 of the parties' tenancy agreement. However, I note the last sentence in paragraph 13 states: "Failure to apply and obtain the necessary approval of the landlord in writing is a breach of a material term of this Agreement, giving the landlord the right to end the tenancy after proper notice" (emphasis added). I find that "proper notice" requires the Landlord to first give notice in writing to the Tenant of the breach and give the Tenant reasonable time to correct the breach, before issuing a one month notice to end tenancy. In my view, this interpretation is consistent with the requirements in section 47(1)(h) of the Act.

For the reasons given above, while I find the Tenant has permitted CG to occupy the rental unit contrary to paragraph 13 of the tenancy agreement, I do not find the Tenant to have assigned her tenancy agreement or sublet the rental unit to CG. I conclude the Landlord has not established the second ground for ending the tenancy stated in the One Month Notice, pursuant to section 47(1)(i) of the Act.

In sum, I find the Landlord has not met the onus of establishing either of the two grounds stated on the One Month Notice. Accordingly, I order that the One Month Notice be set aside.

The Tenant is cautioned that a written application to and written approval from the Landlord is required for CG or any other person to occupy the rental unit. The Tenant may apply to have an additional occupant in accordance with paragraph 13 of the parties' tenancy agreement.

I note that if the status quo persists, the Landlord is at liberty to issue written warnings to the Tenant pursuant to paragraph 13 of the tenancy agreement and section 47(1)(h) of the Act.

I further note that the Tenant is at liberty to apply to the Landlord for permission to assign or sublet. I remind the parties that the prohibition against landlords unreasonably withholding consent applies to an assignment or sublet of fixed term tenancies with 6 months or more remaining, pursuant to section 34(2) of the Act and paragraph 16 of the parties' tenancy agreement. That prohibition does not apply here because the parties' tenancy is month-to-month.

Policy Guideline 19 provides the following guidance on assignments:

> Under s. 34 of the Residential Tenancy Act, a tenant must not assign a tenancy agreement unless the landlord consents in writing. A landlord must not unreasonably withhold consent if the tenancy agreement has six months or more remaining in the fixed term. (By implication a landlord has the discretion to withhold consent, without regard to reasonableness, in the case of a fixed term tenancy agreement with less than six months remaining). The Act does not specifically refer to month-to-month (periodic) tenancies. (emphasis added)
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> An arbitrator may find that a landlord has acted reasonably for withholding consent to assign a periodic tenancy, unless the tenant can demonstrate a compelling reason why the landlord should agree to the assignment. The circumstances of each case would have to be examined. (emphasis added)

2. Is the Landlord entitled to an Order of Possession?

Section 55(1) of the Act states:

> **Order of possession for the landlord**
> 55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
>
> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

As I have set aside the One Month Notice for the reasons stated above, I find that the Landlord is not entitled to an Order of Possession under section 55(1) of the Act.

3. Is the Tenant entitled to recover the filing fee from the Landlord?

Although I have set aside the One Month Notice, I have also determined that the Tenant breached paragraph 13 of the tenancy agreement.

Accordingly, I decline to award the Tenant reimbursement of her filing fee pursuant to section 72(1) of the Act.

Conclusion

The One Month Notice dated January 25, 2022 is set aside.

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: June 15, 2022

Residential Tenancy Branch