Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants April 13, 2022 (the "Application"). The Tenants applied as follows:

- To dispute a One Month Notice to End Tenancy for Cause dated April 06, 2022 (the "Notice")
- For reimbursement for the filing fee

The Tenants and Landlord appeared at the hearing. I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the "Rules"). The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I confirmed service of the hearing package and evidence, and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the relevant evidence provided. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?

2. If the Notice is not cancelled, should the Landlord be issued an Order of Possession?

3. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted, and the parties agreed it is accurate. The tenancy started July 01, 2020, and is a month-to-month tenancy. There is an addendum attached to the tenancy agreement.

The Notice was submitted. The grounds for the Notice are:

1. Breach of **a material term of the tenancy agreement** that was not corrected within a reasonable time after written notice to do so. (emphasis added)

The Notice is dated April 06, 2022.

The Landlord testified that the Notice was put in the mail slot at the rental unit. The Tenants testified that they received the Notice April 07, 2022.

The issue between the parties is access to, and use of, a balcony at the back of the house that the rental unit is in. The issue is the right or ability of other tenants of the house to access and use the balcony. The balcony is off of the rental unit in that there is a door to the balcony from the rental unit. The Tenants have items on the balcony such as patio furniture, a BBQ and plants. The Tenants do not take issue with other tenants of the house accessing and using the balcony, the issue is the Landlord's request that the Tenants remove all of their belongings from the balcony.

I asked the Landlord if there is a term in the written tenancy agreement about use of the balcony. The Landlord testified that they verbally told the Tenants the balcony is a shared space when they first met the Tenants. The Landlord said they guess they did not put a term about this in the written tenancy agreement.

The Tenants testified that there is no term in the written tenancy agreement about use of the balcony. The Tenants denied that there was a verbal agreement reached between the parties about use of the balcony at the start of the tenancy and denied that there is a verbal term in the tenancy agreement about use of the balcony. The Tenants acknowledged the parties discussed the balcony at the start of the tenancy; however, the Tenants said the Landlord did not make it seem like it was a term of the tenancy agreement, and it was not included as a term in the written tenancy agreement.

In reply, the Landlord testified that their workman was present at the start of the tenancy and was clear with the Tenants that the balcony is a shared space. The Landlord also said they did not tell the Tenants the balcony is not a shared space.

The Landlord did not rely on any documentary evidence to support their position when asked and simply referred to a discussion they had with an Information Officer at the RTB.

I have reviewed the documentary evidence submitted; however, I don't find it necessary to outline it here.

Analysis

The Notice was issued pursuant to section 47(1)(h) of the *Residential Tenancy Act* (the "*Act*") which states:

> (h) the tenant
>
> (i) has failed to comply **with a material term**, and (emphasis added)
>
> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

The Tenants had 10 days from receiving the Notice to dispute it pursuant to section 47(4) of the *Act*. I accept that the Tenants received the Notice April 07, 2022, given the Notice is dated April 06, 2022. The Tenants disputed the Notice April 13, 2022, within time.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

RTB Policy Guideline 08 deals with material terms in a tenancy agreement and states:

> 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…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…
>
> 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**…
>
> (emphasis added)

I told the parties my decision during the hearing so they understood why I was not hearing further about the Tenants' items on the balcony. The full reasons for my decision are as follows.

There is no term in the written tenancy agreement about use of the balcony which tends to support that the parties did not agree on a term about use of the balcony at the start of the tenancy. If the parties had come to an agreement about use of the balcony at the start of the tenancy, and meant the agreement to be binding, I would expect to see such a term in the written tenancy agreement.

The Landlord submitted that there is a verbal term in the tenancy agreement about use of the balcony. The Tenants deny that there is a verbal term in the tenancy agreement about use of the balcony. The Landlord has the onus to prove there is a verbal term in the tenancy agreement about use of the balcony. The Landlord did not point to any

compelling evidence to support their position about there being a verbal term in the tenancy agreement about use of the balcony. Further, I find it unlikely that the parties would have agreed on verbal terms of the tenancy agreement when the tenancy agreement was written. It does not accord with common sense that the parties would write down some terms of the tenancy agreement but not others. In the absence of further evidence, I am not satisfied there is a verbal term in the tenancy agreement about use of the balcony.

Given there is no term in the written tenancy agreement about use of the balcony, and I am not satisfied there is a verbal term in the tenancy agreement about use of the balcony, I am not satisfied the tenancy agreement between the parties includes a term about use of the balcony. The Notice was issued for breach of a material term of the tenancy agreement. Use of the balcony is not a term of the tenancy agreement, let alone a material term. The Landlord did not have grounds to issue the Notice based on breach of a material term when there is no term about use of the balcony in the tenancy agreement.

I also note that, even if the Landlord had proven that use of the balcony is a term in the tenancy agreement, the Landlord would then have to prove it is a **material term** of the tenancy agreement. I cannot see how a term could be a material term of the tenancy agreement if the parties did not even choose to write it into the written tenancy agreement. Again, it does not accord with common sense that the parties would write some terms into the tenancy agreement but leave out a **material term**, a term they agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.

Given the above, I am not satisfied the Landlord has proven the grounds for the Notice. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

Given the Tenants were successful in the Application, I award them reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, the Tenants are permitted to deduct $100.00 from one future rent payment as reimbursement for the filing fee.

Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

The Tenants are permitted to deduct $100.00 from one future rent payment as reimbursement for 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 *Act*.

Dated: August 22, 2022

Residential Tenancy Branch