Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 583230 BC LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT

Introduction

On August 31, 2022, the Tenant applied for a Dispute Resolution proceeding seeking to cancel a One Month Notice to End Tenancy for Cause (the "Notice") pursuant to Section 47 of the *Residential Tenancy Act* (the "*Act*") and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing with M.A. attending as an advocate for the Tenant. A.K. attended the hearing as the owner of the company, and B.B. attended the hearing as an agent for the Landlord. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, to please make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also advised that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

The Tenant advised that the Landlord was served with the Notice of Hearing package by registered mail on September 14, 2022, and A.K. confirmed that this package was received by the Landlord. Based on this undisputed evidence, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was duly served the Notice of Hearing package.

She also advised that her evidence was served to the Landlord by registered mail on December 17, 2022, and that she did not check to see if the Landlord could view her digital evidence, pursuant to Rule 3.10.5 of the Rules of Procedure (the "Rules"). A.K.

stated that the Landlord did not receive this package. Regardless, this evidence package was deemed to have been received on December 22, 2022, and this would have been served late, as it did not comply with the timeframe requirements of Rule 3.14 of the Rules. Given that the Tenant had sufficient time to serve this evidence, and as she should have served as much evidence as was available with the Notice of Hearing package, in accordance with Rule 2.5 of the Rules, I am satisfied that the Tenant, and/or M.A., more likely than not intentionally attempted to wait until the last possible moment to serve this evidence. By doing so, the Tenant inadvertently did so too late, and as a result, I have excluded this evidence and will not consider it when rendering this Decision.

A.K. advised that the Landlord's evidence was served to the Tenant by hand on January 4, 2022, and he provided a number of reasons why he, or an employee of the Landlord, was unable to serve this evidence any sooner. Given that the Landlord was aware of this hearing for approximately three months, it is not clear to me why this evidence was not served sooner. As this evidence was served late, and not in accordance with the timeframe requirements of Rule 3.15 of the Rules, I have excluded this evidence and will not consider it when rendering this Decision.

Both parties were afforded with the opportunity to provide testimony in relation to the evidence that was submitted, but not accepted, however.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that complies with the *Act*.

Issue(s) to be Decided

- Is the Tenant entitled to have the Notice cancelled?

- If the Tenant is unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on April 1, 2016, that rent is currently established at $1,485.00 per month, and that it was due on the first day of each month. A security deposit of $675.00 and a pet damage deposit of $675.00 were also paid. A copy of the signed tenancy agreement was submitted as documentary evidence for consideration.

As well, all parties agreed that the Notice was served to the Tenant's roommate by hand on August 31, 2022. The reasons the Landlord served the Notice are because:

- Tenant or a person permitted on the property by the tenant has:
    - seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

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

The effective end date of the tenancy was noted as September 30, 2022, on the Notice.

At this point, A.K. exited the hearing as he had to attend a medical appointment. As such, B.B. advised that the Notice was served because the Tenant stored furniture and other property in the common areas of the building. As a result, she stated that she received multiple complaints from other residents of the building. When she asked the Tenant about this property, she stated that the Tenant denied that it was hers. She testified that she had been employed by the Landlord for approximately two years, and that she reported this issue, roughly a year and a half ago, to the person that was in charge of the building. However, she has no idea what became of this, although she believed that someone informed the Tenant that this was not acceptable.

She then submitted that the Tenant was given a written warning on March 8, 2022, to remove her personal property from the common areas of the building within 24 hours. However, the Tenant and the Landlord negotiated an extended deadline of March 16, 2022. She stated that the Tenant removed most of her property by March 16, 2022, and she reported this to the Landlord fairly immediately. She is unsure why the Landlord waited until August 31, 2022, to serve the Notice for this issue.

M.A. advised that the Landlord was disorganized and does not conduct required duties appropriately. He submitted that the Tenant was not given any verbal warnings, and only received the written warning on March 8, 2022. He stated that in response to this written warning, the Tenant had everything cleaned up, except for a bin in storage, by spring or summer. He advised that this was not a pressing issue as other residents and the Landlord also stored property in the common areas of the building. As well, he stated that many of the items in the Landlord's documentary evidence did not belong to the Tenant.

The Tenant advised that she was allegedly promised storage by the Landlord; however, she acknowledged that storage was not included as part of her tenancy agreement. As a result, she confirmed that she started storing her personal property in the common areas of the building approximately around the end of December 2020. She stated that B.B. offered to buy some of the items that the Tenant had placed in the common areas. She confirmed that she received the Landlord's written warning on March 8, 2022, and that she negotiated with the Landlord to have this deadline extended until March 16, 2022. She advised that it was her understanding that this warning pertained to furniture primarily, so she removed her property by March 16, 2022, with the exception of a bicycle and a tote. She stated that B.B. visited the area on or around March 17, 2022, and stated that it looked "ok". She then claimed that she continued to leave the bicycle and the tote in the common areas until finally removing them in August 2022.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

In considering this matter, I have reviewed the Landlord's Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52

of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 55 and I find that it is a valid Notice.

I find it important to note that a Landlord may end a tenancy for cause pursuant to Section 47 of the *Act* if any of the reasons cited in the Notice are valid. Section 47 of the *Act* reads in part 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:*
>
> > *(d) the tenant or a person permitted on the residential property by the tenant has*
> >
> > > *(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant,*
> >
> > *(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;*

Regarding the validity of the reasons indicated on the Notice, I find it important to note that the onus is on the party issuing the Notice to substantiate the reasons for service of the Notice. However, in this case, there is no documentary evidence that can be relied on from either party.

As well, I note that when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Given the contradictory testimony and positions of the parties, I may also turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

When reviewing the totality of the evidence before me, the consistent and undisputed evidence is that storage was not included as part of the Tenant's tenancy agreement, so it is not clear to me why the Tenant believed it would be appropriate to then store her

property in whatever common areas of the building that she believed was suitable. As well, it is undisputed that the Tenant received a warning letter on March 8, 2022, requiring her to remove her property from the common areas of the building, and that this was to be completed by March 16, 2022. However, despite this warning letter, the Tenant acknowledged that she still left some of her property in the common areas until finally clearing this out in August 2022.

With respect to M.A.'s submissions, I give little weight to his submissions as the details provided of what was removed, and when, were not entirely consistent with the Tenant's testimony. In addition, I found that his submissions provided negligible value to the Tenant's defence.

Given this, I accept that the Tenant conducted herself in a manner that she herself deemed was appropriate, and then did not comply with the Landlord's request to remove her property from the common areas of the building by March 16, 2022. However, as the onus is on the Landlord to prove that the Tenant acted in a manner to warrant service of the Notice, I do not find that the Landlord has made compelling or persuasive arguments, or submitted any documentary evidence, to support a conclusion that by the Tenant leaving property in common areas of the building, this would have **seriously jeopardized** the health or safety or lawful right of another occupant or the Landlord. Had the Landlord checked off the box indicating that the Tenant significantly interfered with or unreasonably disturbed another occupant or the Landlord, it is possible that the Tenant's non-compliance with the Landlord's written notice would have resulted in an end to this tenancy.

Furthermore, I find it important to note that Policy Guideline # 8 outlines a material term as follows:

> 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.

As well, this policy guideline states that "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."

With respect to the reason on the Notice of a breach of a material term, the Landlord failed to point me to anywhere in the tenancy agreement that indicated that there was a term prohibiting storing property in the common areas of the building. Furthermore, there was no testimony or documentary evidence provided to indicate that if there was this specific term in the tenancy agreement, that the most trivial breach of that term gave the Landlord the right to end the agreement. Moreover, there was no evidence submitted to support a finding that the Landlord warned the Tenant, in writing, that it was the Landlord's belief that the Tenant's actions of storing property in common areas of the building was a breach of a material term of the tenancy agreement. Finally, and most importantly, if the Landlord truly considered the Tenant's actions to be so significant and egregious that it was a breach of a material term of the tenancy, it is not clear to me why he would have then waited over five months to serve the Notice.

When reviewing the totality of the evidence before me, I am not satisfied that the Landlord has substantiated that what they are attempting to rely on as a material term of the tenancy would meet the definition of a material term. As such, I do not find that the Tenant's actions, while potentially worthy of a different reason on the Notice, would constitute a breach of a material term of the tenancy, nor would they be justification to warrant the Notice being issued under the reason of a breach of a material term.

As I am not satisfied that the Landlord has properly substantiated the grounds for ending the tenancy under the reasons that the Tenant "*seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant,*" or that she has

“breach(ed) a material term of the tenancy agreement”, I am not satisfied of the validity of the Notice. Ultimately, I find that the Notice is cancelled and of no force and effect.

While the Notice is cancelled because the Landlord did not successfully justify the reasons for service of the Notice, as I am satisfied that the Tenant’s actions were responsible for the Notice being served, I find that the Tenant is not entitled to recover the $100.00 filing fee paid for this Application.

Conclusion

Based on the above, I hereby order that the One Month Notice to End Tenancy for Cause dated August 29, 2022, to be cancelled and of no force or effect.

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: January 5, 2023

Residential Tenancy Branch