



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

A matter regarding CASTLEBROOK INCOME PROPERTIES
LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: Tenant: CNC
Landlord: OPC, FFL

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlord requested:

- an Order of Possession for cause pursuant to section 55; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

The tenant requested:

- cancellation of the landlord’s 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47.

AG (“landlord”) appeared for the landlord in this hearing. Both parties attended the hearing and 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.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch’s teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties confirmed that they understood.

Both parties confirmed receipt of each other’s applications for dispute resolution hearing package (“Applications”) and evidence. In accordance with sections 88 and 89 of the *Act*, I find that both the landlord and tenants duly served with each other’s Applications and evidence.

The tenant confirmed receipt of the 1 Month Notice, which was posted on their door on September 14, 2022. In accordance with sections 88 and 90 of the *Act*, I find that the 1 Month Notice deemed served to the tenant on September 17, 2022, 3 days after posting.

Issues

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

Is the landlord entitled to recover the filing fee for their application?

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 fixed-term tenancy originally began on December 15, 2021 with monthly rent currently set at \$1,915.00, payable on the first of the month. Parking and utilities are not included in the monthly rent. The landlord collected a security and pet damage deposit in the amounts of \$957.50 for each deposit, which they still hold.

The landlord served the tenant with a 1 Month Notice dated September 14, 2022, providing the following grounds:

1. The tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord;
2. The tenant or a person permitted on the property by the tenant has jeopardized the health or safety or lawful right of another occupant or the landlord.
3. 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 tenant disputed the 1 Month Notice on September 21, 2022, and is still residing at the rental address. The landlord confirmed that the tenant continues to pay rent for the rental unit, and the landlord has not informed the tenant that the payments were for use

and occupancy only. The landlord is requesting an Order of Possession for the rental unit.

The landlord provided the following reasons for why they are seeking an Order of Possession on the grounds provided on the 1 Month Notice. The agent for the landlord testified that they have received numerous complaints from multiple residents living at the complex about the tenant's guests. The landlord testified that the other residents feel unsafe due to the incidents that have taken place which involve parties who are known to the tenant.

These complaints include guests trespassing through patios and limited common areas, disturbing other residents, and also the attempted solicitation of a 21 year old female for paid sex work. The landlord testified that despite the issuance of multiple warning letters on January 4, 2022, January 10, 2022, May 17, 2022, August 25, 2022, August 27, 2022, and August 28, 2022, the tenant has not taken steps to resolve the problem. The landlord submitted copies of the complaints and letters in their evidentiary materials, which the landlord testified was served to the tenant in person by the resident manager.

The tenant disputes receiving the warning letters from the landlord until October 25, 2022, after the 1 Month Notice was served on the tenant. The tenant testified that they were the victim of an attempted break and enter from a violent ex-partner, as supported by the videos submitted by the tenant of the attempt, as well as their request to the police for a restraining order.

The tenant testified that their ex-partner would attend the complex uninvited and cause a significant disturbance as they attempted to break into the tenant's suite and get the tenant's attention. The tenant testified that this behaviour was unwanted, and the tenant was terrified of this individual. The tenant testified that they had informed the party that they were not welcome to be there, but the party does not like the word "no". The tenant testified that they did try to appease their ex-partner, but now realizes that it is not their job to fix them. The tenant testified that the offender is now in jail, and the matter took some time for the police address.

The tenant denies knowing the other parties, and testified that they were not the tenant's guests.

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 tenant filed their application within the required period, and having issued a notice to end this tenancy, the landlord has the burden of proving the landlord has cause to end the tenancy on the grounds provided on the 1 Month Notice.

It was undisputed by both parties that the tenant had paid rent after the effective date of the 1 Month Notice, which was accepted by the landlord. It was also undisputed that the landlord did not indicate to the tenant that this payment was for “use and occupancy” only.

Residential Tenancy Policy Guideline #11 discusses the Amendment and Withdrawal of Notices, specifically what happens when payment is accepted after the effective date of a Notice is given.

“Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

Intent may also be established by evidence as to:

- *whether the landlord specifically informed the tenant that the money would be for use and occupancy only;*
- *whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and*
- *the conduct of the parties”.*

By accepting payment after the effective date of the Notice, and without indicating that this payment was for use and occupancy only, I find that the landlord faces the issue of whether they had implied that the 1 Month Notice was withdrawn, and the tenancy was to continue.

In this case, the landlord did file their own application for an Order of Possession related to the 1 Month Notice on December 23, 2022, and made it clear in the hearing that they were not withdrawing the 1 Month Notice.

I will now consider whether the landlord has grounds for ending the tenancy pursuant to that 1 Month Notice. In light of the testimony and evidence before me, although I find the events that have transpired to be significantly disturbing to the landlord and the other residents in the complex, I do not find there is sufficient evidence to show that the offending parties are guests of the tenant.

I note that there is one party that the tenant does acknowledge to know, and that party appears to be an offender who has been terrorizing the tenant despite their pleas for help from the police. I find that the tenant has provided credible testimony, which is supported by evidence, to show that this party is not only violent, but someone whom the tenant fears and does not welcome. I find that the tenant is a victim in this matter, and the evidence clearly shows that the party attended on the property against the tenant's wishes. I am not convinced that any of the offending parties are guests of the tenant, and for this reason, I do not find that the landlord has established that this tenancy should end on the grounds that the tenant or their guests have significantly disturbed the landlord or other tenants, or that they have jeopardized their health, safety, or lawful right.

The landlord also alleged a material breach of the tenancy agreement. 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...*

The tenant testified that they have addressed the loud stereo noise complaint, which I would not consider a material breach of the tenancy agreement. I find that the majority of the cautionary notices issued to the tenant pertain to alleged guests of the tenant. As noted above, in light of the disputed evidence and testimony, I am not satisfied that the landlord has established that these parties are indeed guests of the tenant, or parties invited onto the property by the tenant. I do not find that the landlord has established that the tenant has breached a material term of the tenancy agreement.

For the reasons cited above, I find that the landlord has not met their burden of proof in establishing that they have cause to end this tenancy on the grounds provided on the 1 Month Notice, and accordingly I am allowing the tenant's application for cancellation of the 1 Month Notice dated September 14, 2022. The tenancy will continue until ended in accordance with the *Act* and tenancy agreement.

I dismiss the landlord's entire application without leave to reapply.

Conclusion

I allow the tenant's application to cancel the 1 Month Notice dated September 14, 2022. The 1 Month Notice of is of no force or effect This tenancy is to continue until ended in accordance with the *Act*.

The landlord's entire application is dismissed without leave to reapply.

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: March 02, 2023