



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDCT, OLC, FFT

Introduction

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

- cancellation of the One Month Notice to End Tenancy for Cause (the "Notice"), pursuant to section 47;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67;
- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Per section 95(3) of the *Act*, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Both parties confirmed their email addresses for service of this Decision.

Preliminary Issue- Service

Both parties agree that the tenants served the landlord with their application for dispute resolution via registered mail. The tenants entered into evidence a registered mail receipt dated December 8, 2022. I find that the landlord was served with the tenants' application for dispute resolution in accordance with section 89 of the *Act*.

The landlord testified that the tenants were served with the landlord's evidence via email on April 6, 2023. The tenants testified that they received the landlord's evidence on April 6, 2023 and were able to review that evidence. I find that pursuant to section 71(2)(b) of the *Act* the tenants were sufficiently served, for the purposes of this *Act*, with the landlord's evidence on April 6, 2023 as receipt was confirmed on that date.

Preliminary Issue- Severance

Pursuant to Rule 2.3 of the Residential Tenancy Branch Rule of Procedure I am permitted to sever claims that require me to consider facts not germane to the central issue, which in this case is the validity of the Notice. In the hearing I only considered the tenants' claim to cancel the Notice and the tenants' claim to recover their filing fee from the landlord. The remaining issues were severed and dismissed with leave to reapply.

Issues to be Decided

1. Are the tenants entitled to cancellation of the Notice, pursuant to section 47 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Evidence/ Analysis

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' and landlord's claims and my findings are set out below.

Both parties agreed to the following facts:

- this tenancy began approximately eight years ago with a different landlord,
- monthly rent in the amount of \$900.00 is payable on the first day of each month,

- a security deposit of \$500.00 was paid by the tenants to the previous landlord.

The landlord testified that the tenants were served with the Notice on December 1st or 2nd of 2022 via regular mail. The tenants testified that they received the Notice at the beginning of December 2022. The tenants filed to dispute the notice on December 2nd of 2022. I find that the tenants were served with the Notice in accordance with section 88 of the act.

The Notice was entered into evidence, is signed by the landlord, is dated November 25, 2022, gives the address of the rental unit, states that the effective date of the notice is December 31, 2022, is in the approved form, #RTB-33, and states the following grounds for ending the tenancy:

- Tenant has allowed an unreasonable number of occupants in the unit/site.
- Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely jeopardize a lawful right or interest of another occupant or the landlord.
- Tenant has assigned or sublet the rental unit/site without the landlord's written consent.

The Details of Cause section of the Notice states:

Tenants have allowed an unauthorized occupant to live in the property for 1 month. [Name redacted] has been staying regularly overnight and has been receiving mail at the property since October 20th 2022. Tenants have not received permission. Tenants have given a key to the property to the unauthorized occupant.

Both parties agree that the tenants had a family member stay in the subject rental property from mid October 2022 to December 2022. The landlord testified that the tenants did not have permission to have another occupant live at the subject rental property for that time.

Both parties agree that the subject rental property is a two-bedroom basement suite and that the landlord resides in the main portion of the house above the tenants. The tenants testified that they are a married couple and share a bedroom. The tenants testified that their guest was a family member newly arrived in Canada and they allowed him to stay in their spare bedroom while he looked for his own place to live. Both parties

agree that while the tenants' guest stayed in the subject rental property, he received mail and packages at the subject rental property.

Section 47(1)(c) of the *Act* states:

47 (1)A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

(c)there are an unreasonable number of occupants in a rental unit;

I find that a married couple sleeping in one bedroom and another person sleeping in the second bedroom is not an unreasonable number of occupants for a two-bedroom rental property. I find that the above arrangement is not unusual or greater than the number of occupants a two bedroom unit can reasonably accommodate. I therefore dismiss the first ground of eviction cited by the landlord in the Notice.

Section 47(1)(i) of the *Act* states:

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*];

Residential Tenancy Branch Policy Guideline #19 (PG#19) states:

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 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 subtenant 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....

Based on the testimony of both parties, I find that the tenants did not move out of the subject rental property. As stated in PG #19, because the tenants did not move out, this is not a true sublet or an assignment and is therefore not grounds for eviction under section 47(1)(i) of the *Act*.

Section 47(1)(e)(iii) stated that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord.

The term "illegal activity" includes a serious violation of federal, provincial or municipal law, whether or not it is an offence under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw.

In considering whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy, consideration would be given to such matters as the extent of interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects the landlord or other occupants.

The landlord testified that the exhaust for ventilation of the stove and cookware is not working properly. The landlord testified that the tenants' cooking smells and smoke permeate the upper unit.

The tenants testified that there is nothing wrong with the stove or ventilation. The tenants testified that their smoke alarms are working properly and do not go off. The tenants testified that sometimes they like to cook fish and this may cause additional smells. The tenants testified that sometimes they cook outside and perhaps the smell from the outdoor cooking is entering the landlord's home.

The landlord testified that the tenants unplug their stove and use the 240 Volt plug to plug in and charge their electric vehicle. The landlord testified that the charging cord goes through a window to connect to the tenants' electric vehicle. The tenants testified that they unplug their stove at night to use the 240 Volt plug to charge their electric vehicle.

I find that the landlord has failed to prove that the alleged ventilation issues and charging of the tenants' electric vehicle is a breach of any federal, provincial, or municipal law as no such laws were presented in the hearing. As such I find that the landlord is not entitled to evict the tenants pursuant to section 47(1)(e)(iii) of the *Act*.

Since the landlord has not proved any of the grounds to end tenancy listed on the Notice, I find that the notice is invalid and of no force or effect. This tenancy will continue on in accordance with the act.

As the tenants were successful in their application for dispute resolution, I find that the tenants are entitled to recover the \$100 filing fee from the landlord pursuant to section 72 of the act.

Section 72(2) of the *Act* states that if the director orders a landlord to make a payment to the tenant, the amount may be deducted from any rent due to the landlord. I find that the tenants are entitled to deduct \$100.00, on one occasion, from rent due to the landlord.

Conclusion

The Notice is cancelled and of no force or effect.

The tenants are entitled to deduct \$100.00 in rent due to the landlord on one occasion.

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: April 13, 2023

Residential Tenancy Branch