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 concerning an application made by the tenants seeking an order cancelling a One Month Notice to End Tenancy For Cause and to recover the filing fee from the landlord for the cost of the application.

The landlord and both tenants attended the hearing, and each gave affirmed testimony. The parties were given the opportunity to question each other and to give submissions.

The parties agree that all evidence has been exchanged, all of which has been reviewed and the evidence I find relevant to the application is considered in this Decision.

Issue(s) to be Decided

Has the landlord established that the One Month Notice to End Tenancy For Cause dated October 29, 2023 was issued in accordance with the *Residential Tenancy Act*?

Background and Evidence

The landlord testified that this fixed-term tenancy began on November 1, 2015 and expired on October 31, 2016, and the tenants still reside in the rental unit. Rent in the amount of $1,100.00 was payable on the 1st day of each month, which was increased to $1,130.00 effective February 1, 2017, and increased again. Rent is currently $1,278.00 per month and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenants in the amount of $550.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is one

of 5 suites in a house, all of which are currently tenanted, and the landlord does not reside on the rental property.

A copy of the tenancy agreement made at the commencement of the tenancy has been provided for this hearing. A copy of Rental Renewal Agreement has also been provided, which is signed by the landlord and both tenants on October 1, 2016. The tenancy agreement contains an Addendum with a term that states: "The unit is rented for the use of the persons entering into the rental agreement, only, in this case 2 persons. No additional person(s) living in the unit are allowed." That term, as well as other terms, are initialled by the parties.

The renewal document states:

> **2016 Suite Rental Renewal**
>
> "The parties agree that the terms of the 2016 suite rental renewal will be as per the "Residential Tenancy Agreement" form and "Supplemental Rental Terms" signed between the parties on October 1, 2015 (copy attached), except for the following sections that are updated:
>
> **Residential Tenancy Agreement** Document:
>
> - Page 2 / LENGTH OF TENANCY: rental term will be from November 1, 2016 to January 31, 2018.
> - Page 2 / RENT: rent will continue at $1,100.00/per month until January 2016, and will increase to $1,130/month as of February 1, 2017.
>
> **Supplemental Rental Terms** Document:
>
> The following clause is added:
>
> - Tenants are not permitted to rent or sublet suite on a short term basis (Airbnb or similar)."

The landlord further testified that when the tenancy began, there was a clear understanding that the landlord wanted to manage the number of people in the rental building, and the tenants agreed that only the 2 tenants would reside in the rental unit. The hot water tank only manages a certain amount of people, and has an effect. The landlord pays for the water, and additional people use up the water and sewer.

There are now 3 people living in the rental unit; the tenants had a baby. The landlord is easy to approach, but was never informed about a pregnancy until toward the end of the tenant's pregnancy. The baby will be 2 years old in May.

The main concern is that no additional people are permitted to live in the rental unit. The landlord tried to be accommodating by agreeing to have the tenants move out before a 2nd baby, but the tenants won't tell the landlord if they are expecting again. The tenants said they would be in the rental unit for 1 more year and have property to move to on the Sunshine Coast.

On October 29, 2023 the landlord served the tenants with a One Month Notice to End Tenancy For Cause (the Notice) by placing it in the tenant's mailbox. A copy of the Notice has been provided for this hearing and it is dated October 29, 2023 and contains an effective date of vacancy of January 31, 2024. The reason for issuing it states: Tenant has allowed an unreasonable number of occupants in the unit/site/property/park.

The rental building is a 95 year old house. Three single people live in 3 of the units. Another unit contains a family, which has been rented for 17 years, prior to the landlord taking possession of the building, and the landlord is legally required to abide by the 17 year tenancy agreement, although not in writing. This Notice to end the tenancy has nothing to do with the other family.

The first tenant (JD) testified that the tenants do not believe the Notice was given in good faith because when the tenants moved in there was a family with a baby and over the years they had another baby. The tenants informed the landlord while the tenant was expecting and nothing was mentioned until the landlord threatened to serve the Notice if the tenants didn't give an exact date to vacate. The tenants told the landlord's husband during the 2nd trimester in person, who is the person usually at the rental building and the main contact for most landlord interactions.

The landlord started a conversation by asking about the tenants' future intentions. The tenants said they didn't' want to stay if they had a 2nd child, and emailed the landlord saying that the tenants would agree to move out if they had a 2nd child, which would be 1 or 2 years. The landlord expressed that the landlord didn't want that to happen.

The tenants do not believe a baby is an unreasonable number of occupants, particularly when another unit of the same size has 2 children. The lease term is for other adults or tenants. There are a total of 10 people in the building, including children.

The tenants have also provided a copy of a Decision of the Residential Tenancy Branch dated November 27, 2019. The Decision states that 2 clauses in that tenancy agreement prohibit additional occupants. It also states that the parties had signed a mutual agreement to end the tenancy, ending the tenancy on May 31, 2018, but the landlord chose not to seek an order of possession because the tenant had recently had a baby and the landlord felt it would be cruel to enforce the mutual agreement, and the tenancy continued. The Arbitrator found that the term restricting occupants is unenforceable, unconscionable, and that the number of occupants is not unreasonable, due to 2 children of the tenants aged 2 and 6 years, who were not authorized by the landlord to occupy the rental unit. The Notice to end the tenancy in that case was cancelled.

The second tenant testified that the tenant fails to see how a baby is an unreasonable number of occupants when the neighbour is not considered to have an unreasonable number of occupants.

SUBMISSIONS OF THE LANDLORD:
Specific terms in the tenancy agreement are there for a purpose, and is legally binding. The tenants have had 2 years to move out, and the landlord was not unreasonable. The landlord has given the tenants opportunities and never raised rent when the landlord could have. The landlord purposely gave the Notice with an effective date of vacancy of 3 months after service.

SUBMISSIONS OF THE TENANTS:
The tenants intend to move to the Sunshine Coast before they have any more kids, but that takes significant time and the tenants want the freedom to do so on their terms.

Analysis

Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was given in accordance with the *Residential Tenancy Act*, which can include the reason(s) for issuing it. I have reviewed the Notice and I find that it is in the approved form and contains information required by the *Act.* The reason for issuing it is in dispute.

I have also reviewed the Decision of November 27, 2019, however I am not bound by that. Policy Guidelines may be revised and updated. The Decision sets out certain sections of the *Residential Tenancy Act* and Policy Guideline 8. It also states that the children are dependents of the tenant and cannot be ‘trespassers’ as defined by term 13

of the tenancy agreement, and the arbitrator found that the strict observation of terms 13 and 19 in the tenancy agreement are unconscionable.

Those terms are not terms in this tenancy agreement; the term states: "The unit is rented for the use of the persons entering into the rental agreement, only, in this case 2 persons. No additional person(s) living in the unit are allowed."

In this case, the landlord's position is that the term regarding additional occupants is a material term, while the tenants' position is that the term is unconscionable.

I refer to the current Residential Tenancy Policy Guideline #8 – Unconscionable and Material Terms which describes an unconscionable term as a term that is oppressive or grossly unfair to one party, and a term may be found to be unconscionable when one party took advantage of another party. The burden of proving a term is unconscionable is upon the party alleging unconscionability.

It also states that, "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." It also states that, "It is possible that the same term may be material in one agreement and not material in another." It also states that I must look at the true intention of the parties in determining whether the clause is material to the tenancy.

This tenancy began on November 1, 2015 and the tenants had no children at that time. The landlord testified that the water bills are paid by the landlord, and additional occupants, even babies or children affect the water bills, and I agree. The parties also agree that the rental unit has 1 bedroom. In the circumstances, I cannot find that the term is unconscionable. The tenants clearly entered into the tenancy agreement knowing that the term was a term of the tenancy agreement. The landlord's position is that the term is material to the tenancy agreement, meaning that the landlord would not have entered into the tenancy agreement if that term was not included.

I also refer to case law, in particular:

> In *Worth* and *Murray v. Tennenbaum*, unreported decision, B.C. Supreme Court, August, 18,1980, Vancouver Registry A801884, His Honour Judge Spencer considered a decision of a Rentalsman's Officer finding that a clause allowing only one occupant was a reasonable material term of the agreement, the breach of which gave rise to termination of the agreement. Judge Spencer found that the term was not "material" and set aside the decision. He states at page 5:

> As a matter of law the various terms of the tenancy agreement may or may not be material to it in the sense that they justify repudiation in case of a breach. It is wrong to say that simply because the covenant was there it must have been material.

The Courts have also found that to determine whether or not a term is material to the tenancy agreement, I must consider the wording in the tenancy agreement. In this case, the Addendum states: "The unit is rented for the use of the persons entering into the rental agreement, only, in this case 2 persons. No additional person(s) living in the unit are allowed." Four other terms are also contained in the Addendum, worded as follows: "Pets are not allowed;" "Smoking is not permitted;" "Portable washing machines and/or dishwashers are not permitted;" "The owners will inspect the unit every 2 months in order to comply with the property's insurer requirements." Each term is individually initialed by the parties.

In the circumstances and the evidence, I am satisfied that the term of no additional occupants is a material term of the tenancy agreement. It's clear to me that the tenants have no intention of complying with the terms, having testified that they want to move out on their own terms.

Therefore, I dismiss the tenants' application to cancel the Notice to end the tenancy.

The law also states that where I dismiss a tenant's application to cancel a notice to end a tenancy given by a landlord, I must grant an order of possession in favour of the landlord, so long as the Notice given is in the approved form. Having found that it is in the approved form, I grant an order of possession in favour of the landlord effective January 31, 2024. The tenants must be served with the order of possession, which may be filed for enforcement in the Supreme Court of British Columbia.

Since the tenants have not been successful with the application, the tenants are not entitled to recover the filing fee from the landlord.

Conclusion

For the reasons set out above, the tenants' application is hereby dismissed in its entirety without leave to reapply.

I hereby grant an order of possession in favour of the landlord effective at 1:00 p.m. on January 31, 2024.

This order is final and binding and may be enforced.

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: December 19, 2023

Residential Tenancy Branch