Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Plan A Real Estate Services Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: CNC, FF
OPC

Introduction

This hearing was scheduled in response to the tenant's application for cancellation of a 1 month notice to end tenancy for cause / and recovery of the filing fee. Both parties attended and gave affirmed testimony.

During the hearing the landlord's agents confirmed that the landlord seeks an order of possession in the event the tenant's application does not succeed.

Issue(s) to be Decided

Whether either party is entitled to the above under the Act, Regulation or tenancy agreement.

Background and Evidence

The unit which is the subject of this dispute is located in a 3 ½ storey building constructed in the 1950s, wherein there are a total of 23 separate units.

Pursuant to a written tenancy agreement the initial fixed term of tenancy is from July 01, 2012 to June 30, 201[3]. The tenancy agreement provides that at the end of the fixed term the tenancy will continue on a month-to-month basis, "or another fixed length of time, unless the tenant gives written notice to end the tenancy at least one clear month before the end of the term." In this case, the fixed term has continued on a month-to-month basis following the end of the fixed term.

Monthly rent of $1,150.00 is due and payable in advance on the first day of each month. The tenancy agreement documents that a security deposit also in the amount of $1,150.00 was collected.

On May 26, 2014, the tenant emailed the building manager, "MB," informing him that her friend "M" "is going to share [my] unit." In part, the tenant further states:

> ["M"] .....will settle and look for a job soon. For next few weeks you may see her during the day so I wanted to let you know she is not a stranger!

By email reply of the same date, "MB" informs the tenant that he will be away until June 18th, and asks her to direct her information to the attention of another resident, "J" who resides "across the hallway.....as he is now managing the building."

Three days later, by email dated May 29, 2014 the tenant informs "J," in part, that "M"

> shares my unit from this week. You may see her during the day so I wanted to let you know that she is not a stranger!

By email reply dated May 29, 2014, "J" responds, "Thanks for the heads up!"

Thereafter, the ownership of the building changed on August 5, 2014. Within days after the change of ownership the new and present landlord corresponded with the tenant by letter dated August 14, 2014. In the letter the landlord states, in part:

> Your roommate has been living with you on a permanent basis for more than 14 cumulative days in the current calendar year and you do not have the landlord's written permission for their occupancy.
>
> This is your final notice that you have only two options:
>
> 1) Before August 31st, 2014, your roommate must permanently move out of your unit as they are not an authorized occupant.
>
> 2) Before August 31st, 2014, you need to apply for a new lease with [landlord's name] which will allow your roommate to legally reside at your unit. If your application is approved, your roommate may legally live with you. This will not result in any increase in rent. You can contact [landlord's contact particulars] if you choose this option.
>
> If you fail to properly execute either of these two options by August 31st, 2014 we will immediately commence eviction proceedings against both you and your roommate.

In this letter the landlord makes reference to provisions in the tenancy agreement concerning “additional occupants.” In this regard, clause 13 of the tenancy agreement provides as follows:

> 13. ADDITIONAL OCCUPANTS. Only those persons listed in clauses 1 or 2 above may occupy the rental unit or residential property. A person not listed in 1 or 2 above who, without the landlord’s prior written consent, resides in the rental unit or on the residential property in excess of fourteen cumulative days in a calendar year will be considered to be occupying the rental unit or residential property contrary to this Agreement. If the tenant anticipates an additional occupant, the tenant must apply in writing for approval from the landlord for such person to become an authorized occupant. Failure to obtain the landlord’s written approval is a breach of a material term of this Agreement, giving the landlord the right to end the tenancy on proper notice.

Pursuant to section 47 of the Act which speaks to **Landlord’s notice: cause**, the landlord then issued a 1 month notice to end tenancy dated August 18, 2014. The notice was served by way of posting on the unit door on that same date. A copy of the notice was submitted in evidence. The date shown on the notice by when the tenant must vacate the unit is September 30, 2014, and the reason identified on the notice in support of its issuance is as follows:

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

In her written submission the tenant claims that the above notice was accompanied by the letter from the landlord dated August 14, 2014, as above.

On August 20, 2014, the tenant provided the landlord with copies of the above email exchanges between her and the previous landlord. The tenant then filed an application to dispute the notice on August 21, 2014, and she continues to reside in the unit.

On August 27, 2014, the landlord conducted an inspection of the tenant’s unit. During the inspection the landlord concluded that the unit “was being occupied by an additional occupant as the living room had been converted to a bedroom.”

The tenant takes the position that by way of the email exchanges set out above, and in view of the absence of any follow up by the previous landlord, implicitly she obtained the previous landlord’s permission for her friend “M” to occupy the unit. The present landlord points out that the tenancy agreement clearly identifies that failure to obtain

"the landlord's written approval is a breach of a material term" of the tenancy agreement, and argues that the email exchanges can neither be interpreted as an application in writing for approval, nor the granting of approval. Rather, the landlord takes the position that the email exchanges merely reflect the previous landlord's acknowledgement of information provided by the tenant about "M." Further, the landlord argues that the tenant's initial emails convey the impression that "M's" stay will be temporary and limited "[to the] next few weeks."

The landlord asserts that the improper manner in which "M" has become an occupant in the building puts the security of other residents and the building at risk; in other words, the landlord has been deprived of a formal opportunity to screen / assess "M" as a potential authorized occupant. Finally, the landlord states that the previous landlord's records reflect that the "vast majority" of tenants have undertaken the proper procedures for seeking / obtaining approval for additional authorized occupants to reside in the building.

While there was some discussion during the hearing around a potential resolution of the dispute, a mutually agreeable settlement was not achieved.

Analysis

The full text of the Act, Regulation, Residential Tenancy Policy Guidelines, forms and more can be accessed via the website: www.gov.bc.ca/landlordtenant

Residential Tenancy Policy Guideline # 13 speaks to "Rights and Responsibilities of Co-Tenants," in part:

> **Occupants**
>
> Where a tenant allows a person who is not a tenant to move into the premises and share the rent, the new occupant has no rights or obligations under the tenancy agreement, unless all parties agree to enter into a tenancy agreement to include the new occupant as a tenant.

Section 9 in the Schedule of the Regulation addresses **Occupants and guests**:

> 9 (1) The landlord must not stop the tenant from having guests under reasonable circumstances in the rental unit.

(2) The landlord must not impose restrictions on guests and must not require or accept any extra charge for daytime visits or overnight accommodation of guests.

(3) If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end tenancy. Disputes regarding the notice may be resolved by applying for dispute resolution under the *Residential Tenancy Act.*

Section 14 of the Act addresses **Changes to tenancy agreement**, and provides in part:

14 (2) A tenancy agreement may be amended to add, remove or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment.

Section 6 of the Act addresses **Enforcing rights and obligations of landlords and tenants,** in part:

6 (3) A term of a tenancy agreement is not enforceable if

(a) the term is inconsistent with this Act or the regulations,

(b) the term is unconscionable, or

(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Residential Tenancy Policy Guideline # 8 speaks to “Unconscionable and Material Terms,” in part:

Unconscionable Terms

Under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

Material Terms

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 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 hearing, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.

Section 47 of the Act addresses **Landlord's notice: cause**, and provides in part as follows:

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

(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;

Section 55 of the Act addresses **Order of possession for the landlord**, in part:

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,

(a) the landlord makes an oral request for an order of possession, and

(b) the director dismisses the tenant's application or upholds the landlord's notice.

Additionally, I note the provision in the tenancy agreement at clause # 19 which speaks to OCCUPANTS AND INVITED GUESTS. In short, this clause sets out provisions which are virtually identical to the provisions in section 9 of the Schedule in the Regulation, also referenced earlier above.

Based on the documentary evidence and testimony, and in consideration of the above statutory and Guideline provisions, I find that the requirements set out in clause 13 of the tenancy agreement concerning "additional occupants," are not unconscionable, that is, they are not "oppressive or grossly unfair to one party." I also find that clause 13 clearly identifies what I find is a material term of the tenancy agreement. In particular, I find that the security of other residents and the building are put at risk in the absence of an opportunity by the landlord to consider a tenant's written application for approval for an "additional" occupant to become an "authorized" occupant.

While a literal reading of clause 13 may lead reasonably to a conclusion that approval had neither been sought by the tenant, nor given by the previous landlord, on balance I find that the previous landlord was disinclined toward a strict application of clause 13. In concert with that view, I find that it was not unreasonable for the tenant to conclude that by way of the email exchanges the parties had complied at least with the spirit of the clause. Clearly, the present landlord takes a different view around the importance of enforcing the clause. Specifically, the current landlord notified the tenant in writing of its view that a material term of the tenancy agreement had been breached, and gave notice to the tenant to correct the situation.

As previously noted, related evidence includes a letter from the landlord to the tenant dated August 14, 2014. It is not entirely clear whether the landlord's letter was delivered to the tenant before service of the 1 month notice dated August 18, 2014, or whether they were both attached to the tenant's door at the same time on August 18, 2014. Conceivably, the letter was delivered before August 18, 2014 and then again in combination with the 1 month notice on August 18, 2014. Again, in the tenant's written submission she states that the letter and the notice were posted to her door on August 18, 2014. In any event, prior to being given a full opportunity to respond to the deadline of August 31, 2014 set out in the landlord's letter of August 14, 2014, the landlord proceeded to issue the 1 month notice 4 days later on August 18, 2014.

Further to filing her application to dispute the 1 month notice on August 21, 2014, the tenant has not undertaken to comply with either of the "two options" identified in the landlord's letter of August 14, 2014. In this regard, I find it reasonable for the tenant to conclude that the landlord's instructions were suspended pending the outcome of the hearing.

Following from all of the above, the 1 month notice to end tenancy for cause is hereby set aside, and the month-to-month tenancy presently continues in full force and effect.

As the tenant has succeeded with her application, I find that she has established entitlement to recovery of the **$50.00** filing fee. I **ORDER** that the tenant may withhold this amount from the next regular payment of monthly rent.

Finally, the parties are instructed of two additional **ORDERS**, as follows:

1. The "two options" set out in the landlord's letter to the tenant by date of August 14, 2014 are hereby set aside.

2. The deadline for the tenant's compliance with the following specific provision in clause 13 of the tenancy agreement is **October 10, 2014:**

   If the tenant anticipates an additional occupant, the tenant must apply in writing for approval from the landlord for such person to become an authorized occupant.

Conclusion

The notice to end tenancy is set aside, and the tenancy continues uninterrupted.

The tenant is **ORDERED** that she may withhold **$50.00** from the next regular payment of monthly rent in order to recover the filing fee for this application, and 2 additional **ORDERS** are hereby issued, as above.

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: September 22, 2014

Residential Tenancy Branch