



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

FINAL DECISION

Dispute Codes:

AAT, OLC, CNC, OPC, OPB, FF

Introduction

On August 10, 2016 the tenant applied requesting an order the landlord comply with the Act and that the tenant or the tenants' guests be allowed access to or from the rental unit. The hearing was scheduled for October 4, 2016. On October 4, 2016 an interim decision was issued in which the matters on that application were joined with applications set to be heard on November 1, 2016. Both parties had made additional applications which involved the same set of facts. The October 4, 2016 interim decision set out instructions for service of evidence on the matters before the arbitrator; all of which was to be given no later than October 24, 2016.

On September 8, 2016 the tenant submitted an application in which the tenant applied to cancel a Notice ending tenancy for cause. That application was scheduled to be heard on November 1, 2016.

On September 8, 2016 the landlord applied requesting an order of possession for cause and breach of a material term of the tenancy agreement and to recover the filing fee costs. This application was set to be heard on November 1, 2016.

The hearing convened at 9:00 a.m. on November 1, 2016. All parties who attended the hearing held on October 4, 2016; were present. The parties were reminded that they continued to provide affirmed testimony. The tenant was unable to be present at that hearing. Therefore an adjournment was granted to November 09, 2016.

On November 9, 2016 the hearing reconvened. All parties were present and reminded they continued to provide affirmed testimony. The tenant was affirmed.

Preliminary Matters

The parties confirmed receipt of hearing documents and evidence within the required time limits.

The applications were reviewed. On August 10, 2016 the tenant applied requesting orders that the landlord comply with the Act and that access be allowed by the tenant or guests. Section 2.3 of the Rules of Procedure was applied:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Therefore the August 8, 2016 application was dismissed with leave to reapply.

The issue of access for guests is a matter to be considered.

Issues to be Decided

Should the one month Notice ending tenancy for cause issued on August 29, 2016 be cancelled or is the landlord entitled to an order of possession?

Should the landlord be ordered to allow access to and from the unit by the tenant or the tenants' guests?

Background and Evidence

The tenancy commenced on May 1, 2015. Subsidized rent is due in advance on or before the first day of each month. The rental is a small one bedroom unit.

The parties confirmed that no later than August 31, 2016 the tenant received a one month Notice to end tenancy for cause that was posted to the tenants' door. The Notice provided three reasons for ending the tenancy:

Tenant has allowed an unreasonable number of occupants in the unit;

Tenant or a person permitted on the property by the tenants has significantly interfered with or unreasonably disturbed another occupant or the landlord; and Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The tenancy agreement includes clause 12 which references occupants and invited guests:

- a) *The landlord has selected the tenant on the basis of the number of occupants among other criteria. The tenant agrees that only those persons listed as tenants and occupants are allowed to live in the residential premises during the term of the tenancy, guests may be accommodated for no more than three days. Any change in the number of occupants is material and of great importance to the landlord and entitled the landlord at its discretion to end this tenancy agreement. The tenant agrees to notify the landlord promptly of any change in the occupants. Failure to comply with these provisions entitled the landlord to end this tenancy agreement...*

The term continues to set out the right to have guests:

- b) *The landlord may not stop the tenant from having guests in the residential premises under reasonable circumstances not to extend past three days. If*

the number of permanent occupants is unreasonable, the landlord may discuss the issue with the tenant and may serve a Notice to End a Residential Tenancy. Disputes regarding the notice may be resolved through arbitration under the Rental Tenancy Agreement.

Term c) of clause 12 requires the tenant to notify the landlord if the tenant is away and guests remain in the unit. The tenant is required to provide the date, name, and suite number and number of occupants.

The landlord submitted that the tenant has allowed an additional person to move into the unit. The landlord set out dates where a male individual has been seen at the property, including evidence of his vehicle parked at the property or nearby to the property. The landlord stated that this person, (identified as L.B., the tenants' witness) stays over at the unit and is residing in the unit.

In relation to unreasonable number of occupants the landlord copies of calendars dated from January to April 2016 where the landlord documented the presence of L.B. and/or his vehicle.

The landlord submitted three letters issued to the tenant. On December 8, 2015 the landlord wrote that the tenant was in violation of the tenancy agreement, quoting "line 10" and payment of rent. The tenant was warned that she had not disclosed information to the landlord and that the tenant had been selected on the basis of the number of occupants and that the tenant must inform the landlord "if there is to be extra." The tenant was informed this was a matter of "serious concern of safety and money" and must be resolved by December 31, 2015.

On February 1, 2016 the landlord wrote that they had four to six discussions with the tenant in relation to compliance with the tenancy agreement. The landlord set out concerns regarding the number of occupants. If the tenant had someone living with her due to medical issues the tenant was asked to provide a note from the health authority or family doctor.

On March 12, 2016 the landlord wrote that they had had six discussions with the tenant. The same issues were set out and the tenant was informed the tenancy would end by April 30, 2016. The landlord issued the tenant a letter directing the tenant to vacate. The tenant disputed that letter and a hearing was held with a decision issued on August 11, 2016. The landlord then understood they must issue Notice ending the tenancy, in the approved form; which occurred on August 29, 2016.

The building manager lives close by and is at the building on an almost daily basis. The building manager constantly sees L.B.'s vehicle at the unit or on the street. The vehicle is there late at night and early in the morning.

The landlord stated that the tenant has another occupant in a unit that was rented to the tenant with a subsidy and that the tenant is breaching the material term of the tenancy

agreement by allowing an unreasonable number of occupants in the unit. After written warnings the tenant has continued to have an additional occupant in the unit.

The tenant responded that L.B. does not reside with her. L.B. is a constant guest who has been assisting the tenant with serious medical issues. L.B. drives the tenant to appointments; he shops for the tenant and helps with housework. L.B. is not at the unit on a daily basis.

The tenant referenced notes issued by her family doctor on February 20 and June 12, 2016. The doctor outlined the health challenges currently faced by the tenant and that she required assistance with housework and shopping and meal preparation. A letter dated September 26, 2016 by the family physician indicated that home care was insufficient to meet the tenants' needs and so an old family friend would assist with extra work.

The tenant has family friend L.B. at her home at least three days each week, to provide her with assistance. Even though the tenant and L.B. do not have a relationship as a couple the tenant investigated the right to have a spouse reside in the rental unit. A call was placed to BC Housing and the tenant was told if she was married, a spouse could reside with her. The tenant said she made this enquiry out of desperation; she does not want to marry L.B. but requires his assistance.

L.B. provided affirmed testimony that he resides in Victoria. L.B.'s landlord issued a letter dated September 26, 2016 that was supplied as evidence. The letter indicated that L.B. has lived in a bedsitting room with that family since March 2015. L.B. pays monthly rent. A phone number was provided for the landlord. The tenant supplied a copy of L.B.'s vehicle insurance information that included the same address in Victoria where he currently resides.

There was no dispute that L.B. made an application with BC Housing for subsidized rent. L.B. stated that he made the application for housing as the home he lives in will be sold and he is about to become homeless.

The advocate pointed out that dates on the calendar supplied by the landlord were not consistent with a separate spreadsheet of dates supplied.

The landlord said if the tenants' needs help she should obtain home care. L.B. is residing with the tenant virtually free of cost, in a unit the tenant agreed would be occupied by only one person. The tenants' advocate said that there are exceptional circumstances set out in the Act that would allow more than one occupant.

In relation to significant interference or unreasonable disturbance, the landlord stated that the tenants' occupant has interfered with the ability of other occupants to do laundry and that he has moved laundry from machines. During the hearing it was explained that this reason, as indicated on the Notice ending tenancy, would not be supported. There was no evidence before me that any significant interference or unreasonable

disturbance was being caused by the tenant or her guest. A tenant may not be evicted for an inconvenience.

Analysis

The landlord has issued a Notice to end tenancy pursuant to section 47 of the Act. The Notice provides three reasons for ending the tenancy. When a tenant disputes a Notice ending tenancy the burden of proving the reasons given on the Notice falls to the landlord.

During the hearing it was explained that there was no evidence of any significant interference or unreasonable disturbance. Issues related to laundry do not meet the standard that would support ending a tenancy for this reason.

The tenancy agreement signed by the parties contains a term limiting occupation to the tenant alone. I will first deal with the landlords' intention to end the tenancy due to the presence of L.B. at the rental unit.

There is no dispute that L.B. spends a considerable amount of time at the rental unit. L.B. does so in order to assist the tenant with medical issues that were well documented by the tenants' family doctor. To expect the tenant to arrange home care rather than have a family friend care for her is what I find an unusual and ill-placed expectation of a landlord. The tenant is free to have anyone of her choosing provide care and assist her with day-to-day needs.

Residential Tenancy Branch policy defines occupant as:

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.

From the evidence before me I find that up to the time of the hearing L.B. has resided elsewhere. This was supported by the letter issued by his landlord and the insurance papers which reflect his residential address. This convinced me, on the balance of probabilities that L.B. does not reside with the tenant. L.B. may spend a significant amount of time visiting the tenant in order to provide her with support, but I find that L.B. has not moved into the premises.

Therefore, I find that the Notice is not supported for the reasons of additional occupants or a breach of a material term of the tenancy agreement.

I have considered section 30 of the Act, which provides, in part:

Tenant's right of access protected

30 (1) *A landlord must not unreasonably restrict access to residential property by*

(a) the tenant of a rental unit that is part of the residential property, or

(b) a person permitted on the residential property by that tenant.

The Act does not provide any restriction on a tenant in relation to having guests enter their rental unit. However, the landlord has included a term in the tenancy agreement signed at the start of the tenancy, which places a restriction on visitors, by imposing a three day time-limit for guests, or what the term also refers to as occupants. I have considered clause 12 of the tenant agreement and have applied section 5 of the Act; which provides:

This Act cannot be avoided

5 (1) *Landlords and tenants may not avoid or contract out of this Act or the regulations.*

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

In order to enforce a clause of a tenancy agreement the terms must comply with the legislation. Section 6 of the Act sets out enforcement of tenancy agreement terms:

Enforcing rights and obligations of landlords and tenants

6 (1) *The rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant under a tenancy agreement.*

(2) A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58 (1) [determining disputes].

(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.

(Emphasis added)

As the tenancy agreement includes limits on guests (also referred to as occupants) I find that the term fails to comply with section 30 of the Act and that, pursuant to section 5 of the Act, the term is an attempt to contract out of the Act.

A tenant cannot be barred from having guests and, by any reasonable standard; a tenant is not barred from having guests beyond three days at a time. Therefore, as the term is not consistent with the Act, I find pursuant to section 6(3) of the Act that clause 12 of the tenancy agreement is not enforceable.

A tenant is not required to notify a landlord of the presence of guests, how many guests are present or any other personal information.

Therefore, I find that the landlords' application is dismissed.

The tenants' application has succeeded. The Notice ending tenancy for cause issued on August 29, 2016 is cancelled. The tenancy will continue until it is ended in accordance with the Act.

Conclusion

The landlords' application is dismissed.

The one month Notice ending tenancy for cause issued on August 29, 2016 is cancelled.

Clause 12 of the tenancy agreement is unenforceable.

The tenants' application made on August 10, 2016 is dismissed with leave to reapply.

This final decision should be read in conjunction with the interim decisions issued on October 04, 2016 and November 01, 2016.

This decision is final and binding and 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: November 10, 2016

Residential Tenancy Branch