Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC FF

Introduction

This hearing dealt with an application by the tenant pursuant to the *Residential Tenancy Act* ("the Act") for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause ("1 Month Notice") pursuant to section 47 *Act;* and
- a return of the Filing Fee pursuant to section 72 of the *Act*.

Both the landlord and the tenant attended the hearing. All parties present were given a full opportunity to be heard, to present their sworn testimony and to make submissions under oath.

The landlord stated that a 1 Month Notice to End Tenancy for Cause ("1 Month Notice") was posted on the tenant's door on March 30, 2017. The tenant confirmed receipt of this 1 Month Notice but could not recall the exact date it was received. Pursuant to sections 88 and 90 of the *Act* the tenant is found to have been served with the landlord's 1 Month Notice on April 2, 2017.

The landlord confirmed receipt of the Tenant's Application for Dispute Resolution package ("Tenant's Application") disputing the 1 Month Notice and evidentiary package by way of Canada Post Registered Mail. In accordance with sections 88 and 89 of the *Act*, I find that the landlord was duly served with both of these packages.

Issue(s) to be Decided

Is the tenant entitled to cancel a 1 Month Notice to End Tenancy?

Can the tenant recover the filing fee?

Background and Evidence

Sworn testimony was provided by the landlord that this tenancy began on February 1, 2014. Rent is $600.00 per month and a security deposit of $300.00 continues to be held by the landlord.

On March 30, 2017, a 1 Month Notice was placed on the tenant's door. The landlord explained that a 1 Month Notice was issued to the tenant for two reasons:

The tenant has:

i) not done required repairs of damage to the unit/site

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

The landlord explained that when the tenant moved into the rental unit, an agreement was reached between the parties whereby the tenant would be permitted to keep a deep freezer on the balcony. This freezer would be allowed to occupy the balcony until all of the food products inside of it had been consumed. The landlord testified that her understanding of the arrangement was that the freezer would be removed from the balcony following the consumption of all of the food in the freezer. After several years, the freezer continues to occupy the balcony and the relationship between the landlord and the tenant has broken down over this matter.

During the course of the hearing, the landlord provided detailed testimony outlining her concerns with the freezer. Specifically, the landlord explained that she had an understanding with the tenant that the freezer would be removed from the property once he had finished with the food items inside of it. The tenant has not done this and the landlord stated that this was a violation of the tenancy agreement. In addition, the landlord said that the tenant's continued use of this freezer concerned her because of the extra power that it consumed.

The tenant maintained during the hearing that no such agreement to remove the freezer existed between himself and the landlord. He maintained that when he first signed the tenancy agreement, he dealt exclusively with witness S.W. The tenant explained that it was his understanding that he was permitted to keep the freezer on the balcony due to the limited physical size of the apartment. In addition, the tenant testified that he pays

the landlord an extra $10.00/month to reflect any extra hydro that is consumed by the freezer.

S.W. testified during the hearing confirming that he in fact did originally allow the tenant to keep the freezer on the balcony; however, it was his understanding that this was not to be an on-going event.

The tenant explained that no part of the signed tenancy agreement between the parties explicitly prohibits him from storing his freezer on the balcony. In addition, the *Rules and Regulations* provided to the tenant as part of his tenancy agreement note, “all patios and balconies must be kept tidy and not cluttered.” The tenant argued that his unit is small and the freezer does not affect the aesthetics of the balcony. In addition, other tenants are permitted to store different items on their balconies and do not face the same issues with the landlord as he does.

As part of the tenant’s evidentiary package submitted to the hearing, the tenant supplied a letter from the Chief Administrative Officer of the municipality that confirms he is not contradicting any bylaws, regulations or orders originating from the Village and that the Village has not issued any orders against the property regarding the storage of personal items on balconies. This letter continued , “I can confirm that the property at ### *** Avenue is not the subject of any current complaint about unsightly accumulation and there have been no orders issued to the property owner relating to the storage of personal items.”

Analysis

Section 47(1) of the *Act* allows a landlord to end a tenancy for cause for any of the reasons cited in the landlord’s 1 Month Notice.

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…*

In regard to the landlord's allegation that there has been a breach of a material term of the tenancy agreement, I find the acknowledgement of an agreement that the freezer be permitted on the balcony for a time by both parties contributes to the uncertainty about whether there is in fact a breach by the tenant. The burden of proof rests with the landlord to provide proof that there is in fact a breach. I find that the landlord is relying heavily on a disputed oral agreement and a list of rules and regulations that do not specifically prohibit the storage of items on a balcony. I find that the landlord has not met the burden of proof demonstrating that the tenant has breached a material term of this tenancy. Furthermore, a breach of an agreement permitting a freezer to remain on the balcony is not a breach of a material term. As discussed previously, a material term is one where both agree it is so important that the most trivial breach of that term gives the other party the right to end the Agreement.

The landlord had also sought to end the tenancy on the basis of the tenant not performing required repairs of damage to the unit or site. Little evidence or testimony was provided by the landlord detailing how failing to remove a freezer from a balcony qualifies as being a repair of damage. I am not satisfied that the presence of the freezer is a breach of a material term of this tenancy, nor am I satisfied that the tenant has failed to perform a required repair.

For the reasons cited above, I find that the landlord has failed to demonstrate to the extent required that the tenant has contravened section 47 of the *Act*, and accordingly I allowing the tenant's application to cancel the 1 Month Notice. The tenancy will continue as per the current tenancy agreement.

As the tenant was successful in his application to cancel the landlord's 1 Month Notice, he may recover the $100.00 filing fee from the landlord. In lieu of a Monetary Order, the

tenant, pursuant to section 72 of the *Act*, may withhold $100.00 from a future rental payment.

Conclusion

The landlord's 1 Month Notice to End the Tenancy is cancelled and of no continuing force, with the effect that this tenancy continues until ended in accordance with the *Act*.

The tenant may withhold $100.00 from a future rent payment for recovery of the filing fee pursuant to section 72 of the *Act*.

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: May 17, 2017

Residential Tenancy Branch