Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CORONET REALTY LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC, FF

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The landlord gave sworn testimony that he posted the 1 Month Notice on the tenants' door on July 31, 2017. The tenant provided sworn testimony and written evidence maintaining that she did not receive the 1 Month Notice, which the landlord claimed to have posted on her door in July. She maintained that the first time she became aware of the landlord's issuance of the 1 Month Notice was on September 8, 2017, when the landlord sent her an email requesting an update on her plans to vacate the rental unit in accordance with the August 31, 2017 effective date identified on the 1 Month Notice. The tenant provided undisputed sworn testimony and written evidence that the landlord attached a copy of the 1 Month Notice to his September 8, 2017 email. She also confirmed that she received a physical copy of the 1 Month Notice posted on her door at 3:00 p.m. on September 25, 2017.

Although section 88 of the *Act* allows a landlord to post a 1 Month Notice on the door of a rental unit, the only evidence I have before me that the landlord took this action in July 2017 was the landlord's sworn testimony that this was so. In the absence of any

confirming sworn testimony from a witness or any signed Proof of Service document, I am not satisfied that the 1 Month Notice was duly served to the tenants until September 8, 2017, the date when the tenant confirmed she received the 1 Month Notice. I make this determination in accordance with paragraph 71(2)(c) of the *Act*, as I find that the 1 Month Notice was sufficiently given or served for the purposes of the *Act* on September 8, 2017.

After having received the 1 Month Notice, the tenants filed their application for dispute resolution on September 18, 2017, and within the 10-day time period for doing so. As the landlord confirmed that he received the tenants' dispute resolution hearing package and written evidence, I find that the landlord was duly served with these documents in accordance with sections 88 and 89 of the *Act*.

At the commencement of this hearing, the landlord's representative (the landlord) confirmed late written evidence he submitted in which he advised the Residential Tenancy Branch (the Branch) and the tenants that the landlord was no longer pursuing an end to this tenancy on the basis of the 1 Month Notice to End Tenancy for Cause (the 1 Month Notice.) The landlord's 1 Month Notice is hereby cancelled. As such, the Tenant DA (the tenant) advised that she was no longer asking for an order requiring the landlord to comply with the *Act*. The sole remaining issue before me was whether the tenants were entitled to recover their filing fee from the landlord.

At the hearing, the parties referred to a previous dispute resolution decision stemming from the tenants' application for a monetary award which was concluded in October 2017. I advised the parties that after having read that decision, it was clear to me that the remaining issue before me was distinct from those considered during the course of the tenants' previous application.

Issues(s) to be Decided

Are the tenants entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This periodic tenancy began on February 24, 2015. Although rent was initially set at $1,095.00, payable in advance on the first of each month, the parties agreed that the current monthly rent is $1,126.00. The landlord continues to hold the tenants' $547.50 security deposit paid in February 2015.

Although the landlord withdrew the 1 Month Notice, he said that the tenants' application to cancel that Notice would not have been necessary had they complied with the provision in Clause 14 of the Residential Tenancy Agreement (the Agreement) requiring the tenants to provide proof of having obtained tenants' insurance. He said that it did not become apparent that the tenants had failed to abide by this provision of the Agreement until the tenants made a claim against the landlord in another application for dispute resolution in which they outlined their losses that were not covered by an insurance policy. The landlord said that his company asked the tenants to produce proof of a tenants' insurance policy a number of times before the 1 Month Notice was issued. The 1 Month Notice sought an end to this tenancy because the tenants had allegedly breached a material term of the Agreement. Once the landlord received a copy of a tenants' insurance policy from the tenants with the tenants' written evidence package on November 6, the landlord advised the tenants and the Branch that the landlord was no longer seeking an end to this tenancy for the alleged breach identified on the 1 Month Notice.

The tenant maintained that she should be entitled to the recovery of her filing fee because the landlord was no longer pursuing the 1 Month Notice, which was not properly served to her. She gave undisputed sworn testimony that no one from the landlord's company requested proof that the tenants had taken out renter's insurance until the tenants learned on September 8, 2017, that the landlord had issued the 1 Month Notice for this alleged breach of a material term of their Agreement. The tenant also gave undisputed sworn testimony that there were four separate references in provisions of the Agreement to potential tenant contraventions that the landlord considered to be breaches of a material term of the Agreement. She correctly noted that the clause pertaining to tenants' insurance (i.e., clause 14) contained no such mention that a contravention would be considered to be a breach of a material term of the Agreement. Since the landlord had taken such care to specifically identify so many of the other potential contraventions as possible grounds for ending the tenancy on the basis of a breach of a material term of the Agreement, the tenant maintained that she reasonably understood that a breach of Clause 14 would not constitute a breach of a material term of the Agreement. She said that she took action to address this contravention shortly after receiving the 1 Month Notice. She entered into written evidence a copy of the tenant's renter's insurance covering the period from September 13, 2017 to September 13, 2018, which she subsequently included in the tenants' written evidence provided to the landlord.

Analysis

Section 72 of the *Act* reads in part as follows:

> ***72*** *(1) The director may order payment or repayment of a fee under section 59 (2) (c)* [starting proceedings]…*by one party to a dispute resolution proceeding to another party…*
>
> *(2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other, including an amount under subsection (1), the amount may be deducted*
>
> *(a) in the case of payment from a landlord to a tenant, from any rent due to the landlord,…*

In this case, both parties made strong cases for their positions regarding the tenants' application to recover the $100.00 filing fee paid by the tenants. The burden of proof in all applications for monetary awards rests with the Applicant, in this case, the tenants.

The landlord correctly noted that had the tenants complied with the requirement outlined in Clause 14 of the Agreement they signed in February 2015, there would have been no need for the landlord to have issued the 1 Month Notice. Once the landlord received confirmation that the tenants had taken out a renter's insurance policy, the landlord discontinued actions to end this tenancy for cause, as the landlord no longer considered the tenants to be in breach of a material term of the Agreement. The landlord's swift action in this regard does add weight to the landlord's assertion that the tenants could have avoided the expense of applying to cancel the 1 Month Notice by complying with the request to provide proof that they had secured a renter's insurance policy.

The landlord was clearly still seeking an end to this tenancy when the landlord sent the tenants an email on September 8, 2017. Once they received the 1 Month Notice, the tenants understood that providing evidence to demonstrate that they were not in breach of a material term of the Agreement was not an option available to them if they wanted to continue their tenancy. Once the tenants realized that the landlord had issued a 1 Month Notice they had not received in July 2017, the only option available to them was to apply to cancel the 1 Month Notice.

I find that there is an element of validity to the tenants' claim that the landlord failed to signal to them that a contravention of Clause 14 of the Agreement would constitute a breach of a material term of that Agreement. On this point, I should note that the

landlord's identification of specific terms in the Agreement as material terms that could not be breached has little bearing on whether an arbitrator appointed under the *Act* would find that those terms were in fact material terms of the Agreement. Parties signing an Agreement stating that certain provisions constitute material terms of that Agreement do not make them so. Section 5 of the *Act* prevents parties from contracting out of the *Act. S*ection 6(3) of the *Act* provides further direction regarding the unenforceability of certain types of provisions of an agreement. Whether a tenant agrees to a provision that contravention of a term constitutes a breach of a material term of an agreement may not necessarily lead to a finding by an arbitrator that a contravention of that term does in fact constitute a breach of a material term of the Agreement. That having been said, I find that the tenants were not acting unreasonably in concluding that the landlord had carefully chosen not to include Clause 14 in the landlord's list of potential contraventions that could lead to an end to this tenancy for the breach of a material term.

In weighing the evidence presented, I find that the landlord's position would have been stronger had the landlord presented evidence to support his claim that the landlords had requested the tenants produce proof of their possession of a renter's insurance policy on a number of occasions. Similarly, the landlord did not meet the standard of proof required regarding the date when the 1 Month Notice was posted on the tenants' door. The landlord's only evidence on these matters was his sworn testimony. He produced no copies of emails, letters or witnessed proof of service documents to support his testimony. The landlord made no reference to specific meetings or telephone conversations with the tenants regarding the request for proof of renter's insurance. While the tenant's claim that no such requests were made of the tenants is also difficult to corroborate, the action taken by the tenants to obtain renter's insurance within five days of receiving the 1 Month Notice does lend support to the tenant's claim that they would have taken measures to address this problem had they known that the landlord considered this to be a material term of their Agreement.

The tenants could not be certain that the landlord would withdraw the 1 Month Notice once they received proof five days later that they had taken out renter's insurance, the only issued identified in the 1 Month Notice. The significant time lag between the July 28, 2017 date of the 1 Month Notice and the tenants' receipt of even an emailed version of that Notice, would also no doubt have added a level of discomfort to the tenants in deciding whether to apply to cancel the 1 Month Notice.
Under these circumstances and based on a balance of probabilities, I find that the tenants acted reasonably in applying to cancel the 1 Month Notice and incurring the $100.00 cost of their filing fee. As they wished to continue their tenancy, they had little option at that point but to file an application for dispute resolution with the Branch, even

after addressing the landlord's request to produce proof that they had secured renter's insurance. On this basis, I find that the tenants are entitled to recover their $100.00 filing fee from the landlord.

Conclusion

The landlord's 1 Month Notice is cancelled. This tenancy continues until ended in accordance with the *Act*.

I issue a monetary award of $100.00 in the tenants' favour, to recover the tenants' filing fee from the landlord. To implement this award and as this tenancy is continuing, I order the tenants to reduce the amount of their next scheduled monthly rent payment by $100.00. Their monthly rent returns to its regular amount on the month following this one-time rent reduction.

The tenants' application for an order requiring the landlord to comply with the Act is withdrawn.

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: November 20, 2017

Residential Tenancy Branch