Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on October 5, 2018 (the "Application"). The Tenant applied to dispute a One Month Notice to End Tenancy for Cause dated September 26, 2018 (the "Notice").

The Tenant and Landlord appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties had submitted evidence prior to the hearing. I addressed service of the hearing package and evidence. The Landlord confirmed he received the hearing package and Tenant's evidence. The Tenant advised that he did not receive the Landlord's evidence. The Landlord testified that the evidence was served on the Tenant's roommate. The Tenant testified that he had been out of town and had not heard from his roommate about this or received a copy of the evidence. I reviewed the items submitted by the Landlord with the Tenant who agreed that there was no issue with admission of the evidence given the nature of it. I therefore admitted the evidence despite the Tenant not having received a copy.

The parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. I have considered all documentary evidence submitted and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?

2. If the Notice is not cancelled, should the Landlord be issued an Order of Possession?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. It is between the Landlord and Tenant in relation to the rental unit. The tenancy started June 1, 2016 and was for a fixed term of 12 months. The tenancy then became a month-to-month tenancy. The parties agreed rent is currently $805.00 per month. Rent is due on the first day of each month.

The tenancy agreement includes the following terms:

> 20. …and the Tenant shall not use barbecues.
>
> 25. Dangerous materials, such as gasoline or propane, shall not be stored inside of the rental unit or on balconies.

Two One Month Notices to End Tenancy for Cause were submitted as evidence. I confirmed which notice was served on, and received by, the Tenant and heard from the parties in relation to the Notice.

The Notice is addressed to the Tenant and refers to the rental unit. It is signed and dated by the Landlord. It has an effective date of October 29, 2018. The grounds for the Notice are as follows:

1. Tenant has engaged in illegal activity that has, or is likely to, adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord.

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

The Landlord testified that the Notice was served on the Tenant by the building manager. The Tenant confirmed he received the Notice September 26, 2018 in person from the building manager.

The Landlord testified about numerous issues in relation to the Tenant and him breaching the tenancy agreement. However, the Landlord confirmed during the hearing that the only basis for the Notice is the Tenant having a barbeque on the balcony of the rental unit. Therefore, I will only outline the testimony of the parties in relation to the barbeque issue.

The Landlord testified as follows in relation to the barbeque issue. The Tenant has a barbeque on his balcony. Back in 2008, there was an issue with another tenant who almost set the building on fire. The other tenants in the building are worried about the barbeque on the balcony and the fire risk involved. The barbeque makes other tenants and the Landlord feel uncomfortable. Further, the Landlord told his insurance provider that there are no barbeques on

the property and showed them the tenancy agreements for the rental units at the property in this regard. The Tenant has been given numerous verbal warnings about the barbeque and one written warning on September 22, 2018.

The Landlord submitted that the Tenant having a barbeque on his balcony is "illegal activity" because it is a breach of the tenancy agreement.

The Landlord submitted that the Tenant is breaching term 20 and 25 in the tenancy agreement by having a barbeque on his balcony.

The Landlord testified that the relevant terms of the tenancy agreement were specifically reviewed with the Tenant upon signing; however, he then seemed to indicate that he told the Tenant to read the tenancy agreement, to take his time to review it and to take it home to review if necessary.

I asked the Landlord why the relevant terms are material terms of the tenancy agreement. He said he did not know there were different types of terms in a tenancy agreement. He said it should depend on how serious the violation is, and the barbeque violation is serious.

The Tenant acknowledged that he had a barbeque on his balcony. He testified that the Landlord told him at the start of the tenancy that it was fine for him to have a barbeque on his balcony. He said he has text messages in relation to this. When asked why he did not submit these, he said he did not think they would be relevant.

The Tenant testified that he was surprised when he got the warning about removing the barbeque from the Landlord. The Tenant denied that he had been given numerous verbal warnings about the barbeque issue. The Tenant said the Landlord changed his position about allowing barbeques because he put up vinyl siding.

The Tenant testified that he tried to resolve the issue with the Landlord when he received the warning but that the Landlord did not respond to his request about leaving the barbeque on the balcony without a propane tank. The Tenant said the Landlord served the Notice on him four days later and that four days was not sufficient for him to remove the barbeque. When asked why four days was not sufficient, the Tenant said he was sick for two of the days. The Tenant testified that he did remove the propane tank but not the barbeque because he was waiting for the Landlord to respond to his request to keep the barbeque on the balcony without the propane tank.

The Tenant testified that he just signed the tenancy agreement when it was provided. He again testified that the Landlord told him he could have a barbeque. The Tenant took the position that the relevant terms are not material terms of the tenancy agreement.

In reply, the Landlord testified that he did not tell the Tenant he could have a barbeque at any point.

The Landlord testified that the Tenant continues to bring the propane tank out and use the barbeque when necessary and denied that the Tenant has addressed the issue.

The Tenant denied that he continues to use the barbeque.

The September 22nd warning letter was submitted as evidence.

Analysis

The Landlord was permitted to serve the Notice based on the grounds noted pursuant to sections 47(1)(e) and 47(1)(h) of the *Act*. The Tenant had 10 days from receiving the Notice to dispute it under section 47(4) of the *Act*.

There was no issue that the Tenant received the Notice September 26, 2018. Based on our records, I find the Tenant disputed the Notice October 5, 2018, within the time limit set out in section 47(4) of the *Act*.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules of Procedure. The standard of proof is on a balance of probabilities meaning it is more likely than not that the facts occurred as claimed.

In relation to the first ground for the Notice, Policy Guideline 32 deals with the meaning of "illegal activity" set out in section 47(1)(e) of the *Act* and states the following at page one:

> The term "illegal activity" would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property. [emphasis added]

The Landlord submitted that the "illegal activity" here is the Tenant having a barbeque on his balcony which is a breach of the tenancy agreement. A breach of a tenancy agreement alone is not necessarily "illegal activity". The Landlord did not submit that the Tenant having a barbeque on his balcony is a violation of any federal, provincial or municipal law and I do not find that it is. In the circumstances, the Landlord has failed to prove that the Tenant has engaged in illegal activity as that term is used in section 47(1)(e) of the *Act*.

In relation to the second ground for the Notice, Policy Guideline 8 deals with material terms and states as follows at page one to two:

> 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.
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> To determine the materiality of a term…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.
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> 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…During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material.
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> …
>
> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof…

I am not satisfied based on the evidence or submissions of the Landlord that term 20 or 25 of the tenancy agreement are material terms as defined in Policy Guideline 8. The tenancy agreement does not state that these are material terms. The Landlord was not aware of the meaning of a material term. The Landlord testified that the relevant terms were specifically reviewed with the Tenant at the start of the tenancy but then seemed to indicate that him telling the Tenant to review the tenancy agreement carefully and to take his time was sufficient in this regard. The Tenant testified that he "just signed" the tenancy agreement. I do not accept that the relevant terms were specifically discussed between the parties when the tenancy agreement was entered into given the lack of compelling evidence or testimony on this point. The Tenant denied that the relevant terms are material terms of the tenancy agreement. It is the Landlord who has the onus to satisfy me that the relevant terms are material terms of the tenancy agreement. I am not satisfied that they are.

In the circumstances, I am not satisfied the Landlord has proven the grounds for the Notice. The Notice is therefore cancelled. The tenancy will continue until ended in accordance with the *Act*.

Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with 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 *Act*.

Dated: November 19, 2018

Residential Tenancy Branch