



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the “Application”) that was filed by the Tenants under the *Residential Tenancy Act* (the “Act”), seeking:

- Cancellation of a One Month Notice to End Tenancy for Cause (the “One Month Notice”);
- An order for the Landlord to comply with the *Act*, regulation or tenancy agreement; and
- Recovery of the filing fee.

I note that section 55 of the *Act* requires that when a tenant submits an Application seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with section 52 of the *Act*.

The hearing was convened by telephone conference call and was attended by the Tenants, the Landlord and an agent for the Landlord (the “Agent”), all of whom provided affirmed testimony. The Agent confirmed receipt of the Application, Notice of Hearing, and the Tenant’s documentary evidence and the Tenants confirmed receipt of the Landlord’s documentary evidence. Although the Landlord stated that they did not receive the Tenant’s documentary evidence, the Agent confirmed receipt and neither the Agent nor the Landlord objected to the acceptance of this evidence in the hearing. As a result, I accepted all the documentary evidence before me from both parties for consideration.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the “Rules of Procedure”); however, I refer only to the relevant facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses confirmed in the hearing.

Preliminary Matters

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the “Branch”) under Section 9.1(1) of the *Act*.

Issue(s) to be Decided

Are the Tenants entitled to cancellation of the One Month Notice?

If the Tenants’ Application seeking cancellation of the One Month Notice is dismissed, is the Landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Are the Tenants entitled to an order for the Landlord to comply with the *Act*, regulations, or tenancy agreement?

Are the Tenants entitled to recovery of the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

The tenancy agreement in the documentary evidence before me lists the applicants as the tenants, states that the tenancy agreement is for a fixed term beginning on October 15, 2019, and ending on October 15, 2020, after which the tenancy will become month-to-month, and that rent in the amount of \$2,850.00 is due on the first day of each month. Three addendums to the tenancy agreement regarding smoking, pets and additional occupants, and the use and growth of cannabis were also submitted for my consideration. The tenancy agreement and addendums were electronically signed and although the Tenants stated that they never received copies, they did not dispute signing the tenancy agreement or addendums in the hearing. In the hearing the parties agreed that the Tenants rent an entire single family home from the Landlord, which contains an upper and a lower unit, but disagreed about whether the lower unit is a legal suite and whether the Tenants were authorized to allow occupants outside of their immediate family to occupy any portion of the home.

The Landlord and Agent stated that the Tenants have sublet the basement unit without the Landlord’s consent and in contravention of the city bylaws and their tenancy

agreement. As a result, a One Month Notice was served on the basis that the Tenants have assigned or sublet the rental unit without the written consent of the Landlord.

The One Month Notice in the documentary evidence before me is signed and dated January 30, 2020, states that it was personally served on the Tenants on January 30, 2020, has an effective date of March 1, 2020, and states that the reason for the One Month Notice is because the Tenants have assigned or sublet the unit/site without the Landlord's written consent. The Tenants acknowledged receipt of the One Month Notice on January 30, 2020, and filed their Application seeking cancellation of the One Month Notice on February 7, 2020.

The Agent stated that they first became aware that the Tenants had sublet the lower portion of the home when the home was put up for sale and photographs of the rental unit were being taken for this purpose. The Agent and the Landlord stated that an addendum to the tenancy agreement prohibits the Tenants from allowing other occupants to reside in the rental unit without the Landlords written consent. Further to this, the Landlord stated that the city bylaws prevent the rental of the lower unit in the home unless the upper unit of the home is occupied by the owner, which it is not, and that as a result, bylaw officers attended the rental unit and the stove for the lower unit was removed on or shortly after February 29, 2020, to comply with the city bylaws.

The Tenants acknowledged that a friend of theirs moved into the property in December of 2019 but stated that they were told before entering into the tenancy agreement that they could rent out the lower suite to a friend or family member, which is why they rented the property as they were not looking for a rental unit that large. In any event, the Tenants stated that they have not sublet the property or assigned their tenancy as they rent the entire home from the Landlord and have never moved out. Further to this, the Tenants stated that their friend is an occupant or roommate, not a subtenant under a sublease agreement as there is no written or formal agreement, they pay no set rent amount and simply contribute what they can, when they can, and that they share all portions of their home with the other occupant, especially the kitchen, as there is now no stove downstairs. As a result, the Tenants sought cancellation of the One Month Notice. The Tenants also sought an Order for the Landlord to comply with the terms of their tenancy agreement and allow additional occupants as they stated they were given approval by the Agent to rent the basement of the home to friends or family both before and at the time of signing the tenancy agreement.

The Agent denied ever advising the Tenants that they could rent out any portion of the home as that would violate the city bylaws. The Agent pointed to an addendum to the

tenancy agreement that states that as a material term of the tenancy agreement, the Tenants agreed that any additional occupants needed to be approved by the Landlord, and that as a result, it doesn't make sense that they would tell the Tenants that they could simply rent out the lower portion of the home. The Landlord also stated that the only reason that there was a stove downstairs is that the previous occupants who lived there for five years were a very large family and wanted more than one stove and that bylaw enforcement had attended the home twice during that tenancy to verify that the units were not being rented separately.

The Tenants stated that the upper and lower portions of the home were initially available for rent separately and that they only rented the entire home as they were advised by the Agent that they would appear as more suitable applicants by doing so and could rent out the lower suite. The Agent denied this testimony stating that the upper and lower units of the home were never available for rent separately as this is in violation of the city bylaws and that perhaps the Tenants are confused as they initially applied to rent a different rental unit.

The parties agreed that rent for the month of April has been paid in full and as a result, the Landlord and Agent requested that if an Order of Possession is granted to the Landlord, that it be effective April 30, 2020.

Analysis

In the hearing the Tenants acknowledged personally receiving the One Month Notice on January 30, 2020. As a result, I find that they were personally served on that date.

Rule 6.6 of the Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities and that when a tenant disputes a notice to end tenancy, the landlord bears the onus to prove that the notice to end tenancy is valid. As a result, I find that it was incumbent on the Landlord to satisfy me during the hearing that the One Month Notice is valid.

Section 47 of the *Act* states that a landlord may end a tenancy by giving notice to end the tenancy if the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 [*assignment and subletting*] of the *Act*. Although there was no dispute among the parties that the Tenants have another person living in the rental unit, the parties disagreed about whether the Tenants were authorised to allow additional occupants and

whether this person's presence in the rental unit constituted a sublet agreement without the Landlord's consent contrary to section 34 of the *Act*.

The *Act* defines a sublease agreement as a tenancy agreement under which the tenant of a rental unit transfers the tenant's rights under the tenancy agreement to a subtenant for a period shorter than the term of the tenant's tenancy agreement, and the subtenant agrees to vacate the rental unit at the end of the term of the sublease agreement, and that specifies the date on which the tenancy under the sublease agreement ends.

Based on the testimony of the parties and the documentary evidence before me, I am not satisfied that a sublease agreement as defined by the *Act* exists. The parties are in agreement that the Tenants rent an entire single-family home and there is no dispute that the Tenants have continually maintained residence in at least some portion of this single-family home throughout the tenancy. As a result, I find that the Tenants have not transferred their rights under the tenancy agreement to a subtenant as argued by the Landlord and the Agent, simply by having another person move into the rental unit, regardless of what portion of the rental unit this person occupies. Further to this, there is no evidence before me that any form a written or verbal agreement exists for the new occupant to reside in the rental unit for a period shorter than the length of the fixed-term tenancy agreement in place between the Tenants and the Landlord or for the occupant to vacate the rental unit at the end of the fixed-term.

Residential Tenancy Policy Guideline (the "Policy Guideline") #13 states that where a tenant allows a person who is not a tenant under the tenancy agreement 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. Further to this, Policy Guideline #19 states that where a tenant who is not acting as an agent for the landlord remains in the rental unit and allows another party to occupy a room or space within the rental unit, the third party would be considered an occupant or roommate, not a subtenant, as the original tenant has not moved out or granted exclusive possession of the entire rental unit to the third party. Policy Guideline #19 also specifically states that in the circumstances described by the parties in this matter, a sub tenancy does not exist.

As a result, I find that the person the Tenants have allowed to occupy the rental unit with them qualifies as a roommate or an occupant, not a subtenant under the *Act*. Based on the above, I am therefore not satisfied that the Landlord had cause to serve the One Month Notice for the stated purpose and I grant the Tenants' application

seeking cancellation of the One Month Notice. I order that the One Month Notice is cancelled and of no force or effect.

I will now turn my mind to the Tenants' Application seeking an order that they were permitted by the Landlord or Agent to have additional occupants in the rental unit. As this is the Tenants claim, I find that it was incumbent upon the Tenants to satisfy me in the hearing that they either had approval from the Landlord to move in the additional occupant, or that there is no requirement in the tenancy agreement or addendums to seek the Landlord's approval for additional occupants, in order to be successful in this portion of their Application pursuant to rule 6.6 of the Rules of Procedure.

Although the Tenants argued that they were advised by the Agent that they could have additional occupants or rent out portions of the rental unit to friends or family, the Landlord and Agent categorically denied that the Tenants were entitled to rent out the basement or to allow additional occupants without the Landlord's consent and the Tenants submitted no documentary evidence to support that they were ever granted approval to allow additional occupants. Further to this, the Landlord and Agent submitted an addendum to the tenancy agreement for my consideration, which appears to have been electronically signed by the Tenants and the Landlord on October 8, 2019, wherein the parties agreed that the Tenants required the Landlord's permission to allow additional occupants in the rental unit, other than their children, and that failure to obtain the Landlord's approval for additional occupants constitutes a breach of a material term of the tenancy agreement. Although the Tenants stated in the hearing that they never received copies of the tenancy agreement or addendums after signing them electronically, they did not dispute signing them. As a result, I find that the Tenants signed them.

Policy Guideline #19 states that while terms restricting the number of occupants or requiring prior consent of the landlord for additional occupants are not standard terms of a tenancy agreement under the *Act*, the parties may include such clauses. As a result, I find that the terms in the addendum requiring the Tenants to have the Landlord's approval for any occupants are not in breach of the *Act*. Further to this, the Tenants made no arguments that these terms are in any way unconscionable, and as a result, I do not find that they are unconscionable. As a result, I find that the parties are therefore bound by terms of the addendum as written.

Based on the above noted addendum, I am satisfied that the Tenants require the Landlord's approval to have any occupants, other than their two children, in the rental unit. Given the conflicting testimony of the parties on whether the Tenants were ever

advised that they could have additional occupants in the rental unit, and the lack of evidence corroborating the Tenants' testimony that they were allowed to have additional occupants, I am not satisfied that the Tenants ever received the Landlord's approval to have any additional occupants in the rental unit. I therefore dismiss the Tenants' Application seeking an order from the Branch that they have permission to have additional occupants in the rental unit, without leave to reapply, and I order the parties to comply with the terms of the tenancy agreement and addendums as written in relation to additional occupants.

As the Tenants were successful in cancelling the One Month Notice, I grant them recovery of the \$100.00 filing fee pursuant to section 72 of the *Act*. The Tenants are authorised to deduct \$100.00 from the next months rent in recovery of the filing fee, or to serve and enforce the attached Monetary Order on the Landlord (but not both).

Conclusion

I dismiss the Tenants' Application seeking an order from the Branch stating that they have permission to have additional occupants in the rental unit, without leave to reapply.

I order the parties to comply with the terms of their tenancy agreement and addendums as written in relation additional occupants.

Pursuant to sections 67 and 72 of the *Act*, I grant the Tenants a Monetary Order in the amount of \$100.00. The Tenants are provided with this Order in the above terms and the Landlord must be served with this Order as soon as possible. Should the Landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court. In lieu of serving and enforcing this Monetary Order, the Tenants are authorised to withhold \$100.00 from the next months rent.

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 7, 2020

Residential Tenancy Branch