Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, FFT, LRE, CNC, RP, DRI

Introduction

This hearing was convened by way of conference call in response to an application for dispute resolution filed by the Tenants on January 31, 2020 (the "Application"). The Tenants applied as follows:

- For an order that the Landlord comply with the Act, regulation and/or the tenancy agreement;
- To suspend or set conditions on the Landlord's right to enter the rental unit;
- To dispute a One Month Notice to End Tenancy for Cause dated January 21, 2020 (the "Notice");
- For repairs to be made to the unit or property;
- To dispute a rent increase that is above the amount allowed by law; and
- For reimbursement for the filing fee.

The Tenants filed an amendment February 03, 2020 adding a claim for compensation for interference with the Tenants' right to quiet enjoyment.

The hearing for this matter took place April 06, 2020 and an Interim Decision was issued April 14, 2020. This decision should be read with the Interim Decision.

The Tenant appeared at the hearing with Legal Counsel. The Landlord appeared at the hearing with A.D. to assist.

All claims were dismissed with leave to re-apply in the Interim Decision other than the following:

- For an order that the Landlord comply with the Act, regulation and/or the tenancy agreement;

- To dispute a One Month Notice to End Tenancy for Cause dated January 21, 2020 (the "Notice"); and
- For reimbursement for the filing fee.

The Tenants were permitted by the Interim Decision to provide written submissions outlining how the request for an order that the Landlord comply with the Act, regulation and/or the tenancy agreement relates to the dispute of the Notice. The Tenants did not provide further written submissions. Therefore, I am not satisfied the request is sufficiently related to the dispute of the Notice. I dismiss the request with leave to re-apply pursuant to rule 2.3 of the Rules of Procedure (the "Rules").

I will therefore consider the following requests:

- To dispute a One Month Notice to End Tenancy for Cause dated January 21, 2020 (the "Notice"); and
- For reimbursement for the filing fee.

As stated, the hearing took place April 06, 2020. I heard from the Landlord and Tenant in relation to the dispute of the Notice at the hearing. I did not hear a reply from the Landlord as we ran out of time as explained in the Interim Decision. I allowed the parties in the Interim Decision to provide further written submissions outlining anything further they had wished to say at the hearing. The parties were provided deadlines for doing so. I have reviewed the file today. Neither party provided further written submissions as permitted. Therefore, I have made the decision based on the written submissions provided prior to the hearing, evidence provided prior to the hearing as well as the testimony and submissions provided at the hearing. I note that I have reviewed all evidence that was submitted prior to the hearing as well as the written submissions of both parties submitted prior to the hearing.

I note that the Tenant originally indicated at the hearing that she would be calling a witness; however, Legal Counsel confirmed at the end of the hearing that the witness did not need to be called.

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

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. As stated, I have reviewed all documentary evidence submitted, all written submissions provided and have considered all testimony and submissions provided during the hearing. 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?

3. Is the Tenant entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed this is the tenancy agreement between them. It is on the RTB form. The agreement started April 15, 2019 and is for a fixed term ending May 01, 2021. The agreement is signed by the Landlord and Tenants. It includes a one-page addendum.

A.D. submitted that the tenancy agreement is poorly drafted. He testified that the Landlord had wanted to change the tenancy agreement, but the Tenant refused. I understood A.D. to suggest or indicate during the hearing that perhaps there was not a tenancy agreement between the parties because of the issues with it.

The Notice was submitted as evidence. The parties confirmed that the only ground for the Notice is as follows:

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

The parties agreed the Notice was posted to the door of the rental unit on January 21, 2020.

I asked the Landlord what term in the tenancy agreement the Tenant had breached. A.D. said it was terms 10 (2) (a) and (b). As stated, the tenancy agreement is on the RTB form. Terms 10 (2) (a) and (b) state:

10. REPAIRS

…

2) Tenant's obligations:

a) The tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access. The tenant must take the necessary steps to repair damage to the residential property caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant. The tenant is not responsible for reasonable wear and tear to the residential property.

b) If the tenant does not comply with the above obligations within a reasonable time, the landlord may discuss the matter with the tenant and may seek a monetary order through dispute resolution under the *Residential Tenancy Act* for the cost of repairs, serve a notice to end a tenancy, or both.

I referred to Policy Guideline 8 during the hearing and asked the Landlord to point to what he was relying on as a "breach letter". A.D. said the only document the Landlord was relying on as a "breach letter" is the letter submitted as document #17 by the Tenants. The letter is undated. It starts, "See attached documents concerning the maintenance of the grounds including parking areas and driveway…"

The "breach letter" raises issues with maintenance of the property including failure to keep the parking area and driveway free of snow and horse manure.

A.D. testified as follows. The Tenant was served with the "breach letter". The Landlord received communications indicating the Tenant was not going to comply with the requests in the "breach letter" in relation to maintaining the property. The Tenant was then served the Notice.

A.D. further testified as follows. The Tenant refuses to maintain the property. In winter, snow built up on the driveway which was an urgent issue because it became slippery. The Landlord had to clear the driveway. The Landlord was 100% under the belief that the Tenant would take care of the property given she is renting the main house on the property. There is a small carriage house on the property rented by different tenants. The carriage house has a small parking area for these tenants.

A.D. acknowledged there was no written agreement between the Landlord and Tenants stating that the Tenants would deal with the snow on the driveway. He testified that there were verbal discussions about the Tenant taking care of this. I also understood the Landlord's position to be that the Tenant should maintain the driveway and parking area because she has possession of the majority of the property whereas the tenants in the carriage house only have possession of a small portion of the property. A.D. acknowledged that the tenants in the carriage house also use the driveway.

In relation to the manure issue, A.D. testified as follows. The Tenant walks her horses across the parking area. The horses track manure across the parking area. The Tenant does not clean up after the horses.

I asked the Landlord why term 10 (2) (a) and (b) are material terms of the tenancy agreement. A.D. testified as follows. It is unsafe to leave the property with a foot of snow on it. It is unsafe to have an accumulation of snow. The driveway can get slippery. It does not make sense for the Tenant not to maintain the property. The Tenant rents the property and needs to care for it.

Legal Counsel made the following submissions. There was an original tenancy agreement that was amended. There is nothing in either agreement about the Tenants clearing the driveway or parking area. The communications between the parties indicate the driveway and parking area are common areas. The Landlord continues to use the parking area for a trailer of his which is shown in the photos. The driveway is used by the Landlord and the tenants in the carriage house. The driveway is a common area. It is not the Tenants' responsibility to clear the driveway.

Legal Counsel advised that the Tenant disputes that she has left manure on the driveway or parking area.

The Tenant testified that she and the tenants in the carriage house use the same driveway. The Tenant testified that she clears snow from the pathways to and from the house and around the Tenants' vehicles. The Tenant testified that she does not clear snow from the common driveway and parking area. The Tenant denied that she agreed verbally to remove snow from the driveway. She denied that the parties discussed her clearing snow from the driveway.

The Tenant acknowledged she takes the horses across the driveway to the pasture. The Tenant denied that she ever agreed she would not take horses across the driveway. The Tenant testified that she picks up after the horses immediately if

necessary. The Tenant referred to receipts in evidence to show she has been maintaining the property. The Tenant testified that she does maintain the property as required.

Legal Counsel referred to prior RTB decisions about maintaining common areas of a rental property. Legal Counsel submitted that tenants are only responsible for maintaining common areas when they are the only ones benefiting from use of the area and that here the Landlord and tenants of the carriage house use the driveway and parking area. Legal Counsel submitted that the Landlord is responsible for maintaining common areas because here there are two units on the property and the driveway is shared.

A substantial amount of documentary evidence was submitted by the parties. As stated, I have reviewed all of the documentary evidence. I do not find it necessary to detail the documentary evidence here as I do not find that the documentary evidence adds to the testimony and submissions of the parties given the narrow issue before me. The most relevant documentary evidence are the tenancy agreements and addendums submitted. The tenancy agreement has been referred to above.

Analysis

I note at the outset that there is a tenancy agreement between the parties as set out in the written tenancy agreement signed by the Landlord and Tenants. It may be that the Landlord does not think the tenancy agreement covers the issues it should, but this does not invalidate the tenancy agreement or result in there being no tenancy agreement between the parties. I also note that the Tenants are not required to agree to changes to the tenancy agreement and any refusal to agree to changes does not invalidate the tenancy agreement.

The Notice was issued under section 47(1)(h) of the *Residential Tenancy Act* (the "*Act*").

The Tenants 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 January 21, 2020. The Application was filed January 31, 2020, within the time limit.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules.

Section 47(1)(h) of the *Act* states:

> 47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies…
>
> (h) the tenant
>
> (i) has failed to comply with a **material term**, and
>
> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;
>
> (emphasis added)

Policy Guideline 8 deals with material terms in a tenancy agreement and states:

> 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.
>
> To determine the materiality of a term during a dispute resolution hearing, 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.
>
> 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. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. 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…
>
> 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 Landlord's evidence or the testimony and submissions of A.D. that terms 10 (2) (a) or (b) of the tenancy agreement are material terms for the following reasons.

A.D. did not point to anywhere in the tenancy agreements or addendums submitted that states terms 10 (2) (a) or (b) are material terms of the tenancy agreement. Nor did he point to any documentation that states this. I cannot see anywhere in the tenancy agreements, addendums or documentation submitted that states this. If the parties had turned their minds to terms 10 (2) (a) or (b) being material terms of the tenancy agreement, I would expect the written tenancy agreement to state that these are material terms.

The Tenant did not acknowledge or agree that terms 10 (2) (a) or (b) of the tenancy agreement are material terms.

I specifically asked the Landlord to explain why terms 10 (2) (a) or (b) of the tenancy agreement are material terms. A.D. focused on the snow issue and the consequences of letting snow build up. He also made general statements about the Tenants being responsible to maintain the property. A.D. did not provide compelling testimony or submissions about the importance of the terms in the overall scheme of the tenancy agreement, the creation of the tenancy agreement or the intention of the parties in relation to terms 10 (2) (a) or (b).

A.D. did state that the Landlord was 100% under the belief that the Tenant would take care of the property given she is renting the main house and that there were verbal discussions about the Tenant maintaining the property. The Landlord's own belief does not speak to the understanding between the parties about whether terms 10 (2) (a) or (b) are material terms of the tenancy agreement. There is insufficient evidence before me as to what the verbal discussions were and this statement does not prove that terms 10 (2) (a) or (b) were material terms.

To be clear, I acknowledge that term 10 (2) (a) and (b) are terms of the tenancy agreement and that the Tenant is bound by them. However, not all terms of a tenancy agreement are material terms as is clear from Policy Guideline 8. A landlord can only end a tenancy under section 47(1)(h) of the *Act* for a breach of a material term.

I also note that it is not sufficient for a landlord to unilaterally state or assert that a term in a tenancy agreement is a material term after the parties have entered into a tenancy agreement. As noted in Policy Guideline 8, both parties must agree the term is so

important that the most trivial breach of that term gives the other party the right to end the agreement. As is clear from Policy Guideline 8, it is what the parties intended when they entered into the tenancy agreement that is important.

I am not satisfied based on the testimony or evidence provided that terms 10 (2) (a) or (b) of the tenancy agreement are material terms. This is a precondition to finding that the Landlord has grounds to end the tenancy under section 47(1)(h) of the *Act.* In the absence of a finding that the terms relied on are material terms, the Landlord has failed to prove the grounds for the Notice.

I acknowledge that term 10 (2) (b) refers to the Landlord being permitted to serve a notice to end a tenancy if the Tenant does not comply with term 10 (2) (a). However, to end the tenancy under section 47(1)(h) of the *Act*, the Landlord has to prove that terms 10 (2) (a) and (b) are material terms. Further, it may be that the Landlord has grounds to issue a notice to end tenancy under a different section of the *Act*; however, that is not the issue before me.

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

Given the Tenants were successful in the Application, I award them reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, the Tenants are permitted to deduct $100.00 from one future rent payment as reimbursement for the filing fee.

Conclusion

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

The Tenants are awarded reimbursement for the $100.00 filing fee. The Tenants are permitted to deduct $100.00 from one future rent payment as reimbursement for the filing fee.

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: May 06, 2020

Residential Tenancy Branch