Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

On April 7, 2021, the Tenants applied for a Dispute Resolution proceeding seeking to cancel a One Month Notice to End Tenancy for Cause (the "Notice") pursuant to Section 47 of the *Residential Tenancy Act* (the "*Act*") and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

Both Tenants attended the hearing. As well, both Landlords attended the hearing, with A.S. attending as an agent on behalf of the Landlords. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, all parties in attendance, with the exception of A.S., provided a solemn affirmation.

Tenant T.A. advised that they served each Landlord a Notice of Hearing package by registered mail on April 12, 2021 and the Landlords confirmed receipt of these packages. Based on this undisputed evidence, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlords were duly served with the Tenants' Notice of Hearing packages.

He then advised that they served their evidence to the Landlords by email on July 13, 2021. He stated that he did not check to see if the Landlord could view their video evidence, pursuant to Rule 3.10.5 of the Rules of Procedure. A.S. advised that the

Landlords received this evidence, and that they were able to view the digital evidence. Despite the evidence being served late, the Landlords were prepared to proceed. As such, I have accepted this evidence and will consider it when rendering this Decision.

Landlord J.Y. advised that he served their evidence to the Tenants on July 19, 2021 by hand. The Tenants confirmed that they received this evidence and that they were prepared to proceed. As such, I have accepted this evidence and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution 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 complies with the *Act*.

Issue(s) to be Decided

- Are the Tenants entitled to have the Notice cancelled?
- If the Tenants are unsuccessful in cancelling the Notice, are the Landlords entitled to an Order of Possession?
- Are the Tenants entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on August 15, 2019, that rent was currently established at $3,250.00 per month, and that it was due on the first day of each month. A security deposit of $1,500.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence.

Landlord E.Y. advised that the Notice was served to the Tenants by hand on March 31, 2021. The Tenants clearly received this Notice as they disputed it within the 10-day timeframe, on April 7, 2021. The reasons for the Notice being issued were because the "Tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk" and because of a "Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so." The effective end date of the tenancy was noted on the Notice as April 30, 2021.

A.S. advised that prior to the tenancy commencing, the Tenants had intended to operate a daycare from the rental unit, and the Landlords were fine with this as long as the Tenants acquired the applicable license and insurance. However, the Landlords discovered that the Tenants had been operating a daycare without their knowledge, and without the proper license or insurance. The Tenants eventually acquired the license but did not pay for the insurance.

She referenced what she considered to be a material term of the tenancy agreement, which stated the following:

> The tenant promises and agrees with the landlord not to do anything which may void or render violable the policy or policies of insurance covering the Residential Property and Premises, or which may cause the premiums in respect of the policies to be increased. If the premiums are increased as a result of a breach of this promise, the tenant undertakes to indemnify and save harmless the landlord against such increases in premiums and the indemnity will not prejudice the landlord's right to proceed against the tenant for breach of this covenant.

She submitted that the Tenants' operation of the daycare without the proper license or insurance was a breach of this material term. This voided the Landlords' insurance, and the Landlords were forced to pay for commercial insurance instead, as the only way to insure the property. As well, she submitted that the Tenants' actions leading to the voiding of the Landlords' insurance was another breach of this material term. Finally, she advised that the Tenants failed to compensate the Landlords for the increased cost of the required commercial insurance, and this was a third breach of this material term.

She stated that J.Y. first discovered that the Tenants had been operating this daycare on February 12, 2021 when he conducted a routine inspection of the rental unit. The Landlords then made many oral, email, and text message requests in February 2021 to the Tenants requesting that they provide their license and insurance information to the Landlords before the end of February, which the Tenants agreed to do. She referenced

a transcript of text messages from February 12, 2021 to February 26, 2021 where an agent for the Landlords made multiple requests, with deadlines, for the Tenants to provide their information that they acquired the proper license and insurance to operate the daycare. However, the Tenants did not provide this information until March 2021. As these documents were not produced in time, the Landlords insurance lapsed. She also referenced an insurance document dated March 12, 2021 that was submitted as documentary evidence. In this form, the Tenants indicated that their daycare had been in operation for nine months and that there were three children attending the daycare.

E.Y. confirmed that they first discovered that the Tenants were operating a daycare on February 12, 2021, that the Tenants only provided a copy of their Tenants' insurance on February 19, 2021, and that they never provided a copy of their liability insurance for the operation of the daycare. She stated that according to the tenancy agreement, it was the expectation that the Tenants would carry this liability insurance prior to starting the daycare; however, the Tenants only purchased the liability insurance after there was an incident involving the neighbour. She referenced a document submitted as evidence which indicated that the Landlords would get into trouble if the Tenants did not have liability insurance.

Tenant K.A. advised that they have their own Tenants' insurance; however, the tenancy agreement does not specifically indicate that they are required to purchase daycare insurance. She stated that she asked the licensing office if she was required to carry daycare insurance and she was informed that this was not necessary. She acknowledged that they rented this particular unit because it was their intention to start a daycare, but this business was not in operation from the start of tenancy to May 6, 2020. Moreover, while she obtained her daycare license on May 6, 2020, the daycare business only started in September 2020 as prior to this, the COVID pandemic made it impossible to operate.

She stated that at this point, she was only taking care of two children, which would not have been deemed a daycare, so she did not believe it was reasonable to purchase daycare insurance. In February 2021, she took on care for a third child and she did not purchase any daycare insurance as she feared that the COVID pandemic might force her to close this business. She confirmed that the Landlords informed her on February 12, 2021 that she was required to obtain the proper daycare insurance and that she was asked repeatedly by text to do so; however, she informed the Landlords that she required more time to "figure this out". She stated that they finally obtained this insurance on March 8, 2021. With respect to the reference to her admission to the

insurance company that her daycare had been in operation for nine months, she stated that she was asked by the insurance company when she first obtained her license, and this was her response.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

In considering this matter, I have reviewed the Landlords' Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

I find it important to note that a Landlord may end a tenancy for cause pursuant to Section 47 of the *Act* if any of the reasons cited in the Notice are valid. Section 47 of the *Act* reads in part as follows:

Landlord's notice: cause

47 *(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:*

(d) the tenant or a person permitted on the residential property by the tenant has

(iii)put the landlord's property at significant risk;

(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;

Furthermore, Policy Guideline # 8 outlines a material term as follows:

> 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.
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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. 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.

As well, this policy guideline states that "To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – 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."

I also find it important to note that when two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. Furthermore, given the contradictory testimony and positions of the parties, I must also turn to a determination of credibility.

With respect to the reason on the Notice of a breach of a material term, the policy guideline states that "it is possible that the same term may be material in one agreement and not material in another." I find that this means that determining what would be considered a material term is based on the fact pattern of each specific scenario and that it is up to the Arbitrator in each case to evaluate the evidence presented and make a determination on this matter.

In reviewing the testimony of the parties, it is clear that all parties understood that the Tenants intended to operate a daycare in the rental unit at some point during the

tenancy. While K.A. acknowledged starting her daycare operation in September 2020, according to her testimony, she did not require daycare insurance as she only cared for two children. This confirms that she was aware at that point that she required the appropriate insurance when she took on more than two children.

Moreover, despite this knowledge, she admitted that she took on a third child in February 2021, but she intentionally did not obtain the required daycare insurance because she believed it might be a waste of money should the COVID pandemic force her to close her business. In my view, it is clearly evident that K.A. was aware of the requirements to carry daycare insurance, but she neglected to do so because of financial concerns. This causes me to question the reliability of K.A. on the whole.

Furthermore, the consistent and undisputed evidence is that the Landlords and the Landlords' agent advised her in writing multiple times in February 2021 to produce proof of the required insurance prior to the end of February 2021 and her responses were clearly a delay tactic as she was already aware of her requirements to carry this insurance.

When this is considered in conjunction with the terms of the tenancy agreement, I am satisfied that all parties understood that operating a daycare business in the rental unit would require the Tenants to obtain the appropriate insurance coverage, as not doing so would affect the Landlords' insurance policy. Thus, I find that this would be considered a material term of the tenancy.

As it is clear to me that K.A. understood her obligation to purchase the required insurance prior to officially starting her daycare operation in February 2021, I am satisfied that she intentionally breached this material term of the tenancy agreement by electing not to purchase it. Furthermore, despite this knowledge, after being warned by the Landlords and agent multiple times in February 2021 and after being given multiple opportunities to obtain this insurance, I find that she failed to do so within a reasonable period of time.

Ultimately, I am satisfied that the Landlords have provided sufficient evidence to justify service of the Notice under the reason of a breach of a material term. As such, I find that the Landlords are entitled to an Order of Possession that takes effect **two days** after service of this Order on the Tenants. The Landlords will be given a formal Order of Possession which must be served on the Tenants. If the Tenants do not vacate the

rental unit **two days** after service of the Order, the Landlords may enforce this Order in the Supreme Court of British Columbia.

As the Tenants were not successful in this Application, I find that the Tenants are not entitled to recover the filing fee.

Conclusion

I dismiss the Tenants' Application and uphold the Notice. I grant an Order of Possession to the Landlords effective **two days after service of this Order** on the Tenants. Should the Tenants fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: July 30, 2021

Residential Tenancy Branch