Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

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

- cancellation of the One Month Notice to End Tenancy for Cause (the "**Notice**") pursuant to section 47;
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 10:24 a.m. in order to enable the tenant to call into this teleconference hearing scheduled for 9:30 a.m. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

Rule 7.1 of the Rules of Procedure [the "**Rules**"] stipulates that the hearing will commence at the scheduled time unless otherwise decided by the Arbitrator. The Arbitrator may conduct the hearing in the absence of a party and may decide or dismiss the Application, with or without leave to re-apply.

Relying on M.B.B v. Affordable Housing Charitable Association, 2018 BSCS 2418, the landlord must still prove the grounds to end tenancy when a tenant does not appear to present their application to cancel the notice.

> [27] I accept it was open to the arbitrator to proceed with the hearing or dispense with the hearing altogether and decide the matter in the absence of M.B.B., but in doing so, the arbitrator still had to resolve the issue raised by the application on the merits in some way. It was insufficient to dismiss the application solely on the grounds that M.B.B. had not dialed in to the hearing within the first ten minutes as she was supposed to have done.

I decided the hearing would proceed in the absence of the tenant.

I note s. 55 of the *Act* requires that when a tenant applies 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 or possession or a monetary order if the application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the *Act*.

The landlord testified that the tenant did not serve the landlord with the notice of dispute resolution form and supporting evidence package. The landlord found out about the hearing coincidentally in September when she called the Residential Tenancy Board [the "**RTB**"] to inquire about next steps if a tenant did not vacate on the "must leave" date. The landlord testified that she served the tenant with her evidence package.

At the outset of the hearing, I informed the landlord and her representative that recording of the hearing was prohibited and they were reminded to refrain from doing so. They acknowledged the term, and each provided a solemn affirmation.

Preliminary Matter #1- Representation

The Landlord authorized her daughter to represent her and speak on her behalf at the hearing.

Preliminary Issue #2- Application Dismissed

Rule #7.3 of the *Rules* provide as follows:

7.3 Consequences of not attending the hearing
If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of that party or dismiss the application, with or without leave to re-apply.

Further, Rules #2.5 details the evidence that must be submitted with an Application and Rule #7.4 summarizes what evidence may or may not be considered in the absence of a party to the dispute.

Rule 2.5 Documents that must be submitted with an Application for Dispute Resolution
To the extent possible, the applicant should submit the following documents at the same time as the application is submitted:

- *a detailed calculation of any monetary claim being made;*
- *a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and*
- *copies of all other documentary and digital evidence to be relied on in the proceeding, subject to Rule 3.17 [Consideration of new and relevant evidence]/*

Rule 7.4 Evidence must be presented
Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

Other than an initial application and page 2 of the Notice, the tenant failed to submit the above referenced documentation as per Rule 2.5 to support his claim and did not attend the hearing to present oral testimony as per Rule 7.4.

Accordingly, in the absence of attendance at this hearing by the applicant (tenant) or his agent, I order the tenant's application dismissed without leave to reapply. The tenant is not entitled to recover the filing fee from the landlord.

Preliminary Issue #3- Parties Not Served

The landlord testified that the tenant did not serve the Notice of Dispute and she found out about the hearing when she called the RTB on a related matter in September 2021 after the expiration of the "must leave date". The landlord confirmed she wanted to proceed with the hearing as scheduled.

Residential Tenancy Policy Guideline **12. Service Provisions** point **16. Parties Not Served** states, *"Where one or more parties on an application for dispute resolution have not been served, the Arbitrator's decision or order will indicate this. The matter may proceed, be adjourned, dismissed with or without leave to reapply".* In addition to the application, the only additional information submitted into evidence from the tenant was page 2 of the Notice, which the landlord included as part of their evidence package.

The purpose of serving documents is to notify the parties named in the dispute of the matters of the dispute and allow the other party to prepare their response for the hearing and gather documents they may need to serve and submit as evidence in support of their position.

I find that the landlord had sufficient time to prepare a response and submit evidence. The hearing will proceed as scheduled.

Issue to be Decided

Is the landlord entitled to an order of possession?

Background and Evidence

The landlord gave the following testimony. The parties entered into an oral month -to -month tenancy agreement starting twenty (20) years ago. Rent was and continues at $800.00 per month payable on the first of each month. There is no issue regarding timely payment of rent. The landlord did not request a security deposit when the agreement was established. The tenant occupies the rental unit with a co-tenant, who may or may not have moved out last spring.

The property was purchased by the landlord and her husband with the intention to move onto the property at some future date. After her husband died, the landlord spoke to the tenant and advised he could stay on but at some point, she would be selling the property.

The rental unit sits on five (5) acres of land, of which three (3) acres are sublet to a neighboring farm. The landlord approached that neighbor asking if he was interested in purchasing the entire parcel of land, including the dwelling. The neighbor was interested and in the course of negotiation, inspections, and mortgage approvals, it was brought to the landlord's attention that two people were living in a camper on the property. According to the landlord, these people had been living on the property for about a year. The landlord alleges the deal fell through because these people put the property at "significant risk". She submitted into evidence text messages between the potential buyer and herself.

In an undated text the potential buyer writes in part, *"…. we would like to offer 740,000 but I am just working in the financing."* [reproduced as written]

In a follow-up text the potential buyer writes, *"I put a date for acceptance as July 12th at 6:00. If she needs more time to sign and get it back to me. Please let me know. Once I have the signed acceptance then I can go to the bank with it."*

In a text message dated Tuesday, July 13, 2021, the potential buyer advises*, "Hi, I was about to send you an email. The inspection did not go well. Due to the state of the house I will not be able to get a loan for the $600,000.00. There are a lot of issues with the foundation, electrical, plumbing, and insulation. There is also a trailer with people living on the property and it's not hooked up to sewer….[X] said that [Y] told them they could stay there and it has nothing to do with [X]. There are some safety concerns as well with how to get into the basement and also how the water is being pumped out of the basement when the water table goes up in the spring."*

The landlord states this was the first they were made aware that people [a female and a male], other than the tenant and co-tenant, were living on the property and the tenant did not ask permission before allowing these people to live there. The landlord was absolutely unaware of the arrangement. The tenant was not collecting rent from these people and in the words of the landlord, the people were squatting.

There is conflicting information about who these people were and how they came to stay on the property. Some documentation indicates that the co-tenant gave permission to these people (her friends), while other information suggests that these people may be "guests" of the tenant.

When the landlord approached the people in the camper, the female told the landlord that she was interested in purchasing the property but needed a year to get the down payment together. The female wanted permission to continue to live on the property free of charge for the next year. When the landlord said "no", the female became belligerent.

On July 15, 2021, the landlord wrote the people in the camper and told them to leave the property immediately. The people responded saying they were not required to comply. The landlord went to the police, who told them to issue a Notice of Eviction and file with the RTB. The landlord also approached the tenant and told him to tell the people to leave the property. The tenant told the landlord that it was the co-tenant, not he who allowed them to stay.

The tenant has since told the landlord that the people have vacated the property. The landlord has not driven to the property since this last spring so cannot confirm or deny the veracity of the tenant's statement. If the people have vacated the property, she does not know as of when. She said that these people may be living in the house with the tenant, for all she knows.

On August 16, 2021, the landlord then issued the One Month Notice for Cause to the tenant. The Notice was delivered to the tenant by a Bailiff Service. Reasons for the Notice are:

1) tenant allowed an unreasonable number of occupants in the unit/site;
2) tenant or person permitted on the property by the tenant has put the landlord's property at significant risk;
3) breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;
4) Tenant has assigned or sublet the rental unit/site without landlord's written consent.

The landlord then stated she wanted the Notice of Possession because a "close family member" needed to live in the rental unit. When questioned about the family member, the landlord stated it was a "close family friend she grew up with and considered a brother"

The landlord also stated that she wanted possession of the property because at some point, they were planning to build a small cabin on the property for personal use.

Neither of these reasons is considered as grounds for ending a tenancy based on a 30-Day Notice.

Analysis

While I have considered the documentary evidence and the testimony of the parties, not all details of the parties' submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims, and my findings are set out below.

The *Act* specifies that a tenancy agreement exists even if it is not in writing and puts the onus on the landlord to ensure that tenancy agreements are in writing. In this case, the tenancy agreement was an oral agreement between the parties from twenty (20) years prior.

Section 47 lists the reasons a landlord may end a tenancy. This specifies *"if one or more of the following [reasons] applies".*

In this matter, the onus is on the landlord to provide sufficient evidence to show they have cause to end the tenancy. Having reviewed and considered the information provided, the landlord has provided insufficient evidence to prove the details identified on page 2 of the One-Month Notice. There is a lack of quality and quantity of necessary evidence to overcome the burden of proof required to end tenancy.

1. The tenant allowed an unreasonable number of occupants in the unit/site. ("site" refers to the terms found in the *Manufactured Home Park Tenancy Act)*

The word *"occupant"* in s. 47 of the *Residential Tenancy Act* and the Notice means a person who occupies the rental unit as their residence. By the landlord's own testimony, the two people were living in a camper on the property, free of charge. The landlord provided no evidence that the people lived in the rental unit. At the conclusion of her testimony, the landlord alluded to the possibility that these people may currently be living in the rental unit; however, this is mere conjecture unsupported with evidence. In view of the above, the landlord's testimony on this criterion is a mere assertion with insufficient evidence supporting an end to tenancy based on the tenant allowing an unreasonable number of occupants in the unit.

2. The tenant or person permitted on the property by the tenant has put the landlord's property at significant risk.

The landlord alleges the property was put at "significant risk". When asked how the property was at "significant risk" the landlord point out the sale of the property fell through stating it was because the people were living on the property. I am not satisfied that the presence of these people presented a *"significant risk*" to the sale of the property. Rather, the texts between the

potential buyer and landlord clearly show that the mortgage was not approved because of the condition of the house as described in the inspection report. Mention of the couple living in the camper/trailer on the property was more of an incidental or side comment and may or may not have contributed as a minor factor to the bank's decision to not finance the property. The inspection report was not included in the landlord's evidence package. Based on the evidence presented, there is insufficient evidence to conclude that the presence of these people on the property presented a significant risk to the landlord's property.

3. 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 argues that the tenant allowing the couple to live on the property without her consent was a breach of a "material term". Policy Guideline #8. **Unconscionable and Material Terms,** reproduced below, provides direction regarding the definition of "material term" and the landlord's obligations if a breach of a material term is identified.

Material Terms

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.

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.*

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. A party might not be found in breach of a material term if unaware of the problem.

Of significance in the Policy Guideline is the opening statement under "Material Terms". *"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 establish a breach of a material term has occurred, **the tenant and the landlord both must agree the term was "material**". In this case, the tenancy agreement was a verbal agreement. There is no evidence that the parties (the landlord and the tenant) agreed that a *material term* of the tenancy agreement prohibited people, other than the tenant and co-tenant, from staying on the property.

Also, even if it was determined that a material term existed and was breached, the landlord must notify the tenant **in writing** of the breach and provide the tenant with an opportunity to correct the breach. Not only is there insufficient evidence of a material term, but the landlord also failed to provide the tenant with written notice of the breach and an opportunity with a deadline to fix the problem. Based on the evidence submitted, there is insufficient evidence that a material term of the tenancy agreement was breached.

4. Tenant has assigned or sublet the rental unit without landlord's written consent.

The landlord has provided insufficient evidence to show that the tenant assigned or sublet the rental unit without the landlord's written consent. The only evidence of a "sublet" is the three (3) acres that the neighbor is renting, which the landlord is fully aware of. By the landlord's own admission, the two people in the camper were "squatting" on the property. Based on the landlord's testimony, there is insufficient evidence to support the tenant assigned or sublet the rental unit without the landlord's written consent.

The landlord also indicated that a friend (more akin to a brother) would occupy the rental unit and that at some point the landlord will build a cabin on the property for personal use. These arguments are not considered under the 30-Day Notice for Cause.

In conclusion, no reasons identified on page 2 of the One-Month Notice -either individually or collectively- ends the tenancy. The landlord did not provide sufficient information that would normally accompany the high standard of proof that is necessary to end a tenancy.

Conclusion

I dismiss the tenant' application wholly, without leave to reapply.

Pursuant to s. 55, the landlord is not entitled to an Order of Possession.

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: December 26, 2021

Residential Tenancy Branch