



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC, FFT, OLC, MNDCT**

Introduction

The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act*, (*the "Act"*) and the singular of these words includes the plural.

This hearing dealt with an application filed by the tenant pursuant the *Residential Tenancy Act* (the "*Act*") for:

- An order to cancel a 1 Month Notice to End Tenancy for Cause, pursuant to sections 47 and 55;
- Authorization to recover the filing fee from the other party pursuant to section 72;
- An order for the landlord to comply with the *Act*, regulations or tenancy agreement pursuant to section 62; and
- A monetary order for damages or compensation pursuant section 67.

The tenants attended the hearing, and the tenant MD was represented by his counsel, SM. The landlord attended the hearing and was accompanied by building manager, NH. As all parties were present, service of documents was confirmed. The landlord acknowledged service of the tenant's Notice of Dispute Resolution Proceedings package and the tenant acknowledged service of the landlord's evidence. Both parties stated they had no concerns with timely service of documents.

Preliminary Issue

Rules 2.3 and 6.2 of the Residential Tenancy Branch Rules of Procedure ("Rules") allow an arbitrator to consider whether issues are related and if they would be heard at the same time. I determined the issue of whether to cancel the landlord's one month notice to end tenancy for cause was unrelated to the tenants' other issues and dismissed the other issues with leave to reapply at the commencement of the hearing.

Issue(s) to be Decided

Should the landlord's notice to end tenancy be upheld or cancelled?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The landlord gave the following testimony. The tenant MD entered into a tenancy agreement with the landlord's agent for a tenancy to commence on July 31, 2014. The landlord testified that the copy before him was signed by the tenant and the landlord's agent, however the one provided to me by both the landlord and the tenant did not bear the signature of the landlord's agent.

The landlord points out that paragraph 1 of the tenancy agreement lists the tenant MD as the sole tenant in the rental unit and that the spots for providing the names of other tenants is crossed out. The landlord points out paragraphs 16 and 28 of the tenancy agreement which state

16. USE OF PREMISES. Tenant and guest shall use the premises for private residential purposes only and not for any illegal, unlawful or commercial or business purposes. No public meeting or assemblies shall be held on the premises. No business or commercial use shall be advertised or listed on or at the premises. Tenant drapes or curtains are not allowed without Landlord's permission. No animals, birds or pets of any kind shall be kept or sheltered on the premises (and birds shall not be fed from the premises) without prior permission from the Landlord.

28 . PETS. No pets of any kind may be within the premises without the prior written consent of the Landlord. Failure to observe this provision may result in a notice of eviction and a termination of tenancy.

The landlord testified that he became aware that the tenant had another person occupying the rental unit with MD in December 2021. The landlord testified that the

occupant living with the tenant also got a dog in 2021 and the landlord found out about the dog on December 14, 2021.

On December 15th, the landlord called the tenant. The landlord told the tenant that dogs were not allowed pursuant the tenancy agreement and that both the dog and the additional occupant had to leave. During this conversation, the tenant acknowledged he had another occupant and a dog and that he would look for another place to live. The tenant would give his notice to end tenancy to move out for the end of January. The tenant never gave the landlord a tenant's notice to end tenancy.

On December 15th, the landlord sent a handwritten letter to the tenant via regular mail from his home in Florida. In the letter, provided as evidence for this hearing, the landlord seeks to confirm the conversation he had with the tenant where the tenant's girlfriend did not sign the lease and that there has been a dog in the unit since 2021. He seeks to confirm the tenant's promise that the tenant would provide him with a notice to vacate the unit if the tenant's girlfriend and dog do not vacate. The letter ends with, *"This is your notice that unless your girlfriend and her dog do not vacate, I would issue a one month notice to end tenancy. The date stated by you was December 31, 2021."*

On January 17th or 18th, the landlord served the tenant with a 1 Month Notice to End Tenancy for Cause by posting a copy to the tenant's door. The tenant acknowledges receiving it on January 18th. A single reason for ending the tenancy was chosen on the notice: *"Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so"*.

Under "details of cause" the landlord wrote: *"Only one named tenant on the lease, MD. Only one person signed the lease, MD. There are two people living in the apartment. According to clause #16 on the lease: no pets allowed. MD purchased a pet in 2021"*.

The landlord served the tenant with another 1 Month Notice to End Tenancy for Cause on February 13, 2022. The same reason for ending the tenancy was chosen and the details of cause were similar.

The landlord's witness NH testified that she is a resident manager of the building. She did not lease the apartment to the tenant and was unaware of the tenant having another person living with him until the tenant and the roommate/girlfriend got the dog in December, despite having spoken to the tenant MD often.

For the tenant, counsel provided an unsworn affidavit that the tenant MD testified is true. In the affidavit, the tenant states that he and his long-time roommate met with the landlord's agent "M" and agreed to the tenancy agreement "M" asked MD to attend the unit to sign the tenancy agreement and upon attending, "M" told the tenant that the other occupant did not need to sign it. "M" told the tenant that the other occupant did not need to be included in the tenancy agreement and that pets would "not be a problem". Other tenants in the building have had pets without the landlord's permission, either, according to the tenant, however no documentary evidence of that was provided to corroborate this.

The tenant acknowledges the conversation with the landlord in December 2021. The landlord has allowed other tenants in the building to have pets, but both the tenant's roommate and the dog had to leave. The tenant states that the landlord voiced concerns that the roommate was unstable and would have a mental break. The tenant's affidavit states this was the only reason for the eviction given to the tenant. In the affidavit, the tenant acknowledges receiving the letter dated December 15, 2021 as evidence for this hearing and that he had never seen the document previously. The tenant submits that he did not receive any written notices of any kind that there was a concern with his tenancy.

The tenant argues that the other person living in the rental unit with him has been there for approximately 8 years. There is no behaviour to correct in seeking to end tenancy. When he moved in 8 years ago, the tenant had 4 birds and both "M" and the landlord were aware of them. There are also other tenants living in the building with pets.

The tenant also argues that paragraphs 16 and 28 of the tenancy agreement conflict. Whereas paragraph 16 is not specific on whether permission from the landlord must be in writing, paragraph 28 is.

Lastly, the tenant is adamant that he was not served with the landlord's "warning letter" dated December 15, 2021, until he received it as part of the landlord's evidence package for the hearing. The tenant further argues that even if it were sent from Florida by regular mail during the holiday season, it is unlikely to have been received by the tenant within a reasonable time for the tenant to take corrective measures.

The second notice to end tenancy served upon the tenant after the tenant filed an application to dispute the first one is identical to the original notice to end tenancy. The landlord cannot use the time awaiting the hearing of the first dispute as the "reasonable time after written notice to correct a material term of the tenancy".

Analysis

The parties agree that the tenant was served with the landlord's 1 Month Notice to End Tenancy for Cause on or about January 18, 2022. The tenant filed his application to dispute the notice on January 25, 2022, within the 10 days as required under section 47 of the Act.

As set out in the Residential Tenancy Branch Rules of Procedure 6.6 and as I explained to the parties in the hearing, if the tenant files an application to dispute a notice to end tenancy, the landlord bears the burden, on a balance of probabilities, to prove the grounds for the notice and that the notice is on the approved form and compliant with section 52 of the Act.

I have reviewed the landlord's notice to end tenancy and find it complies with the form and content provisions as set out in section 52.

The landlord seeks to end the tenancy for a breach of a material term of the tenancy.

Residential Tenancy Branch Policy Guideline PG-8 [Unconscionable and Material Terms] provides guidance to landlords and tenants regarding material terms of a tenancy. It states:

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.

In the case before me, there are two material terms identified by the landlord:

1. two occupants of the rental unit while only one signed the tenancy agreement;
and
2. obtaining a pet dog when the tenancy agreement states on pets are allowed without the landlord's written consent

As stated in the policy guideline, *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.* While it is clear that there is only a single named tenant on the tenancy agreement, the tenant testified that the landlord's agent, "M" met the other potential tenant, agreed to have her as a tenant and stated that it simply wasn't necessary for her to sign it. The landlord named on the application was not present when the tenancy agreement was being signed and cannot provide firsthand knowledge of what conversations took place between his agent and the tenants. On a balance of probabilities, I find the tenant's version of events to be true – that at the time the tenancy agreement was created, the landlord's agent "M" did not make the occupation of the rental unit by a second occupant a material term of the tenancy.

During the hearing, the landlord never testified as to why the presence of the second tenant occupying the rental unit was a material term of the tenancy. I accept that the other occupant has been living in the rental unit since the beginning of the tenancy and I find it unlikely that the building manager attending the hearing was unaware of her presence for the past 8 years. If there was an issue with space and the landlord had reason to believe that there are an unreasonable number of occupants in the rental unit, the landlord could have served the tenant with a notice to end tenancy under section 47(1)(c) but didn't. Instead, the landlord sought to end the tenancy under section 47(1)(h) for failure to comply with a material term of the tenancy that was not corrected within a reasonable time after the landlord gives written notice to do so. For the first material term as identified by the landlord, I find the presence of a second occupant in

the rental unit is not a material term of the tenancy. I do not uphold the landlord's notice to end tenancy for this reason.

The second material term as identified by the landlord is for the pet. Once again, I must turn to the facts and circumstances when the tenancy began. I accept the tenant's testimony that "M", the landlord's agent gave the tenant reason to believe that pets were acceptable in the building. The landlord did not dispute the tenant's testimony that when the tenancy commenced, the tenant had 4 birds, which are seemingly contrary to clauses 16 and 28 of the tenancy agreement. The tenant testified that there are other tenants in the building with pets and the landlord has allowed them. In his evidence package, the landlord provided an email from another tenant who states the misbehaviour of the tenant's dog "*puts all other tenants with permission to have dogs in jeopardy*". It appears to me that the landlord is inconsistent in enforcing the pet clauses in the building which leads me to **not** consider the pet clause to be a material term of the tenancy. I do not uphold the landlord's notice to end tenancy for this reason.

Lastly, PG-8 states:

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.

The landlord testified that he sent the tenant the December 15, 2021, warning letter via regular mail from Florida. While service of this document is recognized under section 88 of the *Act*, the landlord cannot meet the burden of proof to satisfy me it was actually served. The tenant denies receiving the warning letter until it was made available as part of the landlord's evidence package in response to the notice to end tenancy dispute. The landlord has not satisfied me the tenant was sufficiently served with the warning and advising the tenant:

- *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.*

In reading the landlord's warning letter, I note in particular that the landlord does not provide a reasonable deadline for the tenant to correct what the landlord believes to be the material terms of the tenancy that need to be addressed. I agree with tenant's

counsel that this error cannot be fixed by re-serving a new notice to end tenancy and use the delay in awaiting a hearing date as the reasonable time for correcting the alleged breach. Such a tactic would be, in my opinion, contrary to the principles of natural justice.

For the reasons stated above, I cancel the landlord's notice to end tenancy. This tenancy shall continue until it ends in accordance with the *Act*.

As the tenant's application was successful, the tenant is also entitled to recovery of the \$100.00 filing fee for the cost of this application. Pursuant to section 72, the tenant may reduce a single payment of rent due to the landlord by \$100.00.

Conclusion

The notice to end tenancy is cancelled and of no further force or effect.

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: April 27, 2022

Residential Tenancy Branch