

## **DECISION**

### **Dispute Codes:**

Tenant's application: CNC; FF

Landlord's application: OPC; OPB; MNDC; FF

### **Introduction**

This Hearing was convened to consider cross applications. The Tenant seeks to cancel the *One Month Notice to End Tenancy for Cause* issued December 28, 2011 (the "Notice"); and to recover the cost of the filing fee from the Landlord.

The Landlord seeks an Order of Possession; a Monetary Order for compensation for damage or loss under the Act, regulation or tenancy agreement (late fees and NSF fees); and to recover the cost of the filing fee from the Tenant.

The parties gave affirmed testimony at the Hearing.

I have considered all testimony and documentary evidence that met the requirements of the Rules of Procedure. However, only the testimony and documentary evidence **relevant** to the issues and findings in this matter are described in this Decision.

### **Preliminary Matter**

At the outset of the Hearing, the Landlord's agent AM testified that the Tenant had paid the late fees and NSF fees on January 16, 2012. Therefore, the Landlord's application for a Monetary Order was dismissed.

### **Issues to be Decided**

- Should the Notice be upheld or cancelled?

### **Background and Evidence**

The Landlord's agent AM provided the following testimony:

The Landlord's agent testified that the Tenant has an unauthorized dog in the rental unit. She stated that it is a material term of the tenancy agreement that no pets are allowed without authorization from the management. The Landlord provided a copy of the tenancy agreement in evidence.

The Landlord's agent testified that she became manager of the rental property in 2005 and that when she first became manager, she gave the Tenant verbal warning that she

was not allowed to have a dog without permission of the management.

The Landlord's agent stated that she gave the Tenant written notice on July 27, 2007, that she had 10 days to remove her dog from the rental unit. The Landlord provided a copy of the warning letter in evidence. The letter states, in part, "We understand that you have a German Shepherd in your suite. As per [Landlord's] pet policy, you must have authorization from management and we do not have a pet agreement for this. Monday, August 6, 2007, we will conduct a suite inspection and have you sign a form stating that you do not have a dog in your suite or we will issue a termination notice."

The Landlord's agent testified that a suite inspection was done on August 6, 2007, and that the suite was in good condition notwithstanding the Tenant had a large German Shepherd dog living with her. The Landlord's agent testified that "for years we were lenient because she was such a good tenant".

The Landlord's agent submitted that management has the right to limit the size, number and breed of dogs that their tenants have. She stated that there are 4 or 5 other tenants who currently have dogs, but they are small and weigh only 2 or 3 pounds. The Landlord's agent testified that the Tenant's dog, Angel, is normally well-behaved, but weighs approximately 100 pounds. The Landlord's agent testified that another tenant, who is new to the building and has his own small dog, complained on November 14, 2011, that the Tenant's dog acted aggressively towards him and his dog.

The Landlord's agent testified that she provided the Tenant another warning letter on November 22, 2011, a copy of which was provided in evidence. This warning letter states, in part, "We have received complaints that you have an aggressive dog in your suite. You have 30 days to remove your dog from your premises or we will proceed with an eviction process."

The Landlord's agent testified that she issued the Notice on December 28, 2011, and served the Tenant with the Notice by posting the Notice on the Tenant's door on December 28, 2011.

The Tenant provided the following testimony:

The Tenant testified that she has lived in the building for 22 years. She stated that the previous manager had given permission for her to have a dog, but that the agreement was not put in writing. The Tenant testified that she has had two dogs over the past 10 years. She stated that six months after her first dog "Zak" died, she got Angel. The Tenant testified that Zak weighed 130 pounds and that Angel weighs 69 pounds. She stated that Angel moved into the rental unit in May of 2007.

The Tenant testified that she was upset when she got the warning letter of July 27, 2007, so she went to speak to the Landlord's agent and asked if she was going to tell other tenants to remove their dogs from the building. She stated that no inspection took place on August 6, 2007, and that the only inspection that has taken place since was as a result of routine maintenance that was required (cupboards, deck and an ant problem). The Tenant testified that nothing further was said about her dog, and no further demand letters were written until November 22, 2011, when she got another warning that she had to get rid of Angel.

The Tenant testified that Angel is well trained and not aggressive. In evidence, the Tenant provided written statements from other occupants in the rental property. The Tenant testified that the neighbour who complained about her was in fact abusive towards her, using profanity, on November 14, 21, 23, 24 and 25. She stated that she also gave the Landlord a written complaint about the neighbour on November 14, 2011.

### **Analysis**

The Notice discloses the following cause to end the tenancy:

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

The onus is on the Landlord to prove, on the balance of probabilities, that the tenancy should end for the reasons provided on the Notice.

Paragraph 16 of the tenancy agreement states:

“PETS. No pets allowed. Feeding of birds or other animals from the premises is strictly forbidden”

I do not find that the “no pets” clause with respect to Angel is a **material term** of the tenancy agreement. Residential Policy Guideline 28 provides, in part:

In some cases a landlord may know of a pet being kept by a tenant in contravention of a pets clause and do nothing about it for a period of time. The landlord's mere failure to act is not enough to preclude him or her from later insisting on compliance with the pets clause. However, a delay may indicate that the pets clause is not considered by the landlord to be a material term of the tenancy agreement.

As well, if a landlord is aware of the breach of a pets clause and does not insist on compliance and does something which clearly indicates that the pet is acceptable, the landlord may be prohibited from ending the tenancy for that breach. This is

called "waiver". It is important to note that it is not a waiver of the pets clause itself, but only a waiver of the landlord's right to terminate the lease for that particular breach.

In this case, based on the testimony of both parties, I find that the Landlord gave the Tenant written warning in July, 2007, that she was in violation of a term of the tenancy agreement by having a pet. However, the Landlord did nothing further to enforce compliance with the "no pet" clause in the tenancy agreement until November, 2011.

Therefore, I find that the "no pet" clause is not a material term of the Tenant's tenancy agreement with respect to her dog, Angel. The Landlord's application for an Order of Possession is dismissed. The Tenant's application is granted. I hereby cancel the Notice and order that is of no force or effect.

The tenancy will continue until it is ended in accordance with the provisions of the Act.

### **Conclusion**

The Landlord's application is dismissed in its entirety.

The Tenant's application is granted. The Notice is cancelled. The tenancy will continue until it is ended in accordance with the provisions of the Act.

Pursuant to the provisions of Section 72 of the Act, the Tenant may recover the cost of the filing fee by deducting \$50.00 from future rent due to the Landlord.

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: January 18, 2012.

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Residential Tenancy Branch