



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards
Ministry of Housing and Social Development

Decision

Dispute Codes: CNC, FF, OPC

Introduction

This hearing dealt with an application from the tenants for cancellation of a 1 month notice to end tenancy for cause, and recovery of the filing fee for this application. One of the tenants, the landlord's agent and a witness for the landlord's agent participated in the hearing and gave affirmed testimony. During the hearing the landlord's agent made a verbal request for an order of possession in the event the application from the tenants does not succeed.

Issues to be Decided

- Whether the tenants are entitled to cancellation of a notice to end tenancy and recovery of the filing fee
- Whether the landlord is entitled to an order of possession

Background and Evidence

Pursuant to a written residential tenancy agreement, the term of tenancy is from September 1, 2008 to August 31, 2009. Rent in the amount of \$1,450.00 is payable in advance on the first day of each month, and a security deposit of \$725.00 was collected on or about August 21, 2008.

As a result of recurring complaints from other tenants in the building and adjacent to the building about tobacco smoke, marijuana smoke and noise coming from the unit, the landlord issued a 1 month notice to end tenancy for cause. A copy of the 1 month notice dated February 9, 2009 was submitted into evidence. The date shown on the notice by when the tenants must vacate the unit is March 31, 2009. The reasons identified on the notice for its issuance are as follows:

Tenant or a person permitted on the property by the tenant has:

- significantly interfered with or unreasonably disturbed another occupant or the landlord
- seriously jeopardized the health or safety or lawful right of another occupant or the landlord

Additional evidence submitted by the parties included a copy of the residential tenancy agreement, a copy of the notice to all tenants dated November 5, 2008 regarding "SMOKE SMELL COMPLAINT," copies of numerous e-mails setting out complaints about second hand smoke and / or noise from the unit, and copies of "warning letters" from the landlord's agent to the tenants dated November 10, 2008, December 16, 2008 and February 3, 2009. In each of the three warning letters directed specifically to these tenants, the following sentence is included in bold:

You are required to stop smoking in your suite and any area of the building immediately.

While all three warning letters focused on complaints about smoke, the third letter included identification of complaints about "loud noises from your patio disturbing the neighbour on January 31, 2009 around 4:00 a.m."

Witness for the landlord's agent (who is also the building manager) testified that he inspected the unit with the tenant on December 18, 2008 and discussed the concerns around smoking. The tenant and the building manager appear to have differing recollections as to whether a clear verbal message was given by the building manager to the tenant to the effect that smoking on the patio was not forbidden. The tenant takes the position that the building manager stated that smoking on the patio was acceptable. Into evidence the tenant submitted a letter from a person who was in attendance during the above conversation. In his letter the witness states, in part, they were advised during the conversation "that we would be in compliance with the rules if we were to smoke in the patio area."

As for the building manager, he recollects that in his conversation he provided a caution about potential concerns as a result of smoke drifting from the patio. In any event, the tenant states that after December 18, 2008 smoking was limited to the patio area and that it was only after the notice to end tenancy was served on February 9, 2009, that no further smoking occurred on the patio.

Analysis

Based on the documentary evidence and testimony of the parties, I find that the tenants were served with a 1 month notice to end tenancy for cause. The tenants disputed the notice by filing an application for dispute resolution within 10 days after receiving the notice.

Clause #18 in the tenancy agreement speaks to USE OF PREMISES and reads, in part, as follows:

....The tenants and guests shall not carry on any activity that shall be deemed a nuisance and shall abide by all relevant rules and by-laws.

Clause #19 in the tenancy agreement speaks to CONDUCT and provides, in part,

....the tenant and guest shall not disturb, harass, or annoy other occupants of the Residential Property, or neighbours.

This clause goes on to specify that:

The tenant or tenant's guest shall not cause or allow loud conversation, music, television, radio, or an irritating noise to disturb the peaceful enjoyment of other occupants at any time, and in particular between the hours of 10:00 p.m. and 9:00 a.m.

Clause #23 in the tenancy agreement reads:

SMOKING. This building complies strictly with the City / Municipal Bylaws which prohibits smoking in all common areas of the building. Smokers may find themselves liable for smoke related damages.

Section 47 of the Act speaks to **Landlord's notice: cause**, and states, in part:

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

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or...

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

(ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or...

(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;

Residential Tenancy Policy Guideline # 6 speaks to **Right to Quiet Enjoyment**, and states in part:

At common law, the covenant of quiet enjoyment "promis(es) that the tenant...shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interference with his or her tenancy."

The *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* (the Legislation) establish rights to quiet enjoyment, which include, but are not limited to:

- reasonable privacy
- freedom from unreasonable disturbance
- exclusive possession, subject to the landlord's right of entry under the Legislation, and
- use of common areas for reasonable and lawful purposes, free from significant interference.

Every tenancy agreement contains an implied covenant of quiet enjoyment. A covenant for quiet enjoyment may be spelled out in the tenancy agreement; however a written provision setting out the terms in the tenancy agreement pertaining to the provision of quiet enjoyment cannot be used to remove any of the rights established under the Legislation. If no written provision exists, common law protects the renter from substantial interference with the enjoyment of the premises for all usual purposes.

- **Basis for a finding of breach of quiet enjoyment**

Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.

The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he

stands idly by while others engage in such conduct, may form the basis for a claim of a breach of the covenant of quiet enjoyment.

The full text of the relevant legislation, the Residential Tenancy Policy Guideline, Fact Sheets and forms can be accessed at the website: www.rto.gov.bc.ca/

I have carefully considered the documentary evidence, the testimony of the parties and the relevant provisions set out in the legislation and guidelines. In the result, I accept that intermittently over a period of approximately three months, there were recurring complaints from other residents about second hand smoke and / or noise from the unit. The tenant does not dispute the legitimacy of these complaints. The 1 month notice to end tenancy was issued after a general notice to all tenants and three specific warning letters to these tenants. Accordingly, in spite of the tenant's claim that behaviours warranting complaints from neighbours have ceased subsequent to issuance of the notice, I find on a balance of probabilities that the landlord has met the burden of proof required in showing there was cause for issuance of the notice to end tenancy. I hereby dismiss the application from the tenants for cancellation of the notice to end tenancy and recovery of the filing fee, and I find that the landlord is entitled to an order of possession.

Conclusion

I hereby issue an order of possession in favour of the landlord effective not later than **1:00 p.m., Tuesday, March 31, 2009**. This order must be served on the tenants. Should the tenants fail to comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

DATE: March 26, 2009

Dispute Resolution Officer