Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

CNC

OLC

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a One-Month Notice to End Tenancy for Cause dated June 5, 2009 and purporting to be effective July 31, 2009 and an order to compel the landlord to comply with the Act.

The building manager represented the landlord. The tenant, 2 advocate/supporters assisting the tenant, and 3 witnesses for the tenant all appeared and gave testimony.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence are:

- Whether the landlord's issuance of the One-Month Notice to End Tenancy for Cause dated June 4, 2009 was warranted or whether it should be cancelled. This requires a determination of whether the tenant or persons permitted on the property by the tenant committed any one of the following:
    - seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
    - put the landlord's property at significant risk;

- engaged in illegal activity that 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
- failed to comply with a material term of the tenancy and has not corrected the situation within a reasonable time after the landlord gives written warning

- Whether or not the landlord is in violation of the Act and should therefore be ordered to comply.

The burden of proof is on the respondent/landlord to justify that the reason for the Notice to End Tenancy meets the criteria specified under section 47 of the Act.

The burden of proof is on the applicant/tenant to prove that the landlord is in violation of the Act and that an order compelling the landlord to comply with the Act is warranted.

Background and Evidence

The landlord's agent testified that she is the building manager of the complex and her job is to ensure that the health, safety of the residents in the complex is protected and that their concerns are addressed. The landlord testified that this tenancy began approximately 28 years ago. No copy of the tenancy agreement was submitted into evidence. However, the landlord testified that the tenancy agreement does not give the tenant permission to smoke in the building. The landlord testified that the building became a "smoke free" building approximately two years ago and all occupants were advised that smoking was banned. The landlord testified that it has issued numerous notices to all tenants stating, "*Warning smoking in the building will lead to eviction*". The landlord testified that the tenant has ignored the restriction on smoking and as such is in violation of the tenancy agreement. The landlord testified that complaints have been received from other residents about the smell of smoke emanating from the tenant's suite and that some tenants have medical issues including asthma that is affected by smoke in their environment .

The landlord had submitted into evidence a written statement dated June 29, 2009, which the landlord testified outlines the landlord's position. The landlord indicated that "*His smoking has put my other tenant's health at risk. Smoking including second hand smoke is proven to cause cancer*". The landlord testified that the landlord is "*responsible for 62 people all having the right to live smoke free."* (NOTE: all quotes are presented in this decision as originally written)

The landlord testified that a 24-hour written notice to inspect the suite was posted on the tenant's door and that, after knocking loudly, four members of the landlord's staff entered and called out the tenant's name with no response. The landlord testified that the tenant was found asleep in the suite and when the inspectors were not able to awaken him, the inspection continued. The landlord testified that the tenant slept through the entire inspection despite the fact that the staff tested the smoke alarm in the suite, which was found to be operational. The landlord testified that the inspection showed that the tenant was engaged in high-risk smoking in his suite. The landlord submitted five photographs taken during the inspection including the following:

- a close-up of a table top that appeared to have burn marks on it
- a mark on the carpet
- a table with a stereo, a large ashtray containing ashes and cigarette butts and a cigarette filter lying on the table.
- A photo showing the sleeping tenant reclined on a bed, alongside of which is a table with some items on it.
- A photograph showing the room with a partial view of the tenant on the bed

The landlord testified that the photographs show that the tenant has been smoking in the suite and failing to take due care as indicated by the burn marks on the table and rug, and the fact that the tenant even slept though the testing of the smoke alarm. The landlord considered this to be proof that he is a danger to others in the building.

The landlord testified that she had taken it upon herself to contact several individuals and organizations that she believed were involved with the tenant and spoke to them in regards to the level of support needed by the tenant and the risks posed by his conduct in smoking. The landlord's written submission indicated that she had telephoned community support and home care services as well as the Landlord Tenant Office and Meals on Wheels. The landlord's written submission indicated that, through one of these community support services contacted by the landlord contacted, "as a concerned citizen", the landlord was able to obtain specific information and discovered that, in fact, the tenant had a brain injury.

In explaining why she had "*gone way beyond a Building Managers role*", to investigate the tenant's circumstances, the landlord stated that it was because more information was needed for the landlord's file on the tenant. The submission states that the landlord informed the agency that she "*wanted to do a referral for* (the tenant)" *as I had no information on him, not even a next of kin to contact.*" When asked, the landlord did not explain why she did not simply request the data directly from the tenant, nor why a referral was required for a tenant who had resided in the complex for 28 years.

The landlord testified that smoking is not allowed and in particular, this tenant should not be smoking without supervision given his medical condition and age. The landlord's written submission contains the following testimony:

> *"My second realistic concern is that (the tenant) is a brain injury patient also a senior each needing special needs. Currently he has a case manager overseeing his care, meals on wheels worker, a house cleaner and a rehab worker. What this says to me is they already acknowledge he does not have the skills to cook his own meal, nor is he capable of cleaning his own home as well as needs continued support for his daily activities. Which stands to reason a man incapable of performing these functions poses a risk smoking unsupervised."*

The landlord testified that she would not want it on her conscience if the tenant's "high *risk smoking causes a fire resulting in danger to the other tenants, the building or himself because a decision was not made to relocate (the tenant)"* and concludes that, the landlord would be neglectful if it did not, "*move forward with this eviction*"

The tenant testified that there is absolutely no merit to the landlord's position and is seeking to have the One-Month Notice for Cause cancelled. The tenant was also alleging harassment on the part of the landlord. The tenant testified that the landlord's claim that his smoking was in breach of a material term of the tenancy and his failure to stop within a reasonable time after the landlord gave written notice to do so, has absolutely no basis in fact. The tenant pointed out that he has been a smoking tenant in the complex for over 27 years and his tenancy agreement with the landlord did not prohibit smoking. The tenant testified that, despite the fact that the landlord is fully aware that the tenant's tenancy agreement does not contain any restrictive term prohibiting smoking, the landlord has insisted upon bringing up this same matter time after time, regardless of it having been resolved and he has been repeatedly forced to engage in the same annoying dispute over and over again. The tenant testified that, typically the pattern followed is that, shortly after a new building manager is hired, renewed eviction proceedings are then commenced to terminate the tenancy for smoking or for some other unsubstantiated cause. It appears to the tenant that this is being done pursuant to the owner 's instructions. The tenant testified that in recent years there has been a succession of new building managers and with each one he has again been forced to defend his tenancy. The tenant testified that he considers the landlord's action to be a form of harassment. The tenant seeks to cancel the notice.

In regards to the other causes listed on the One-Month Notice, the tenant testified that, other than the landlord's stated assumptions evidently based solely on his disability, the landlord has offered no proof that he has seriously jeopardized the health or safety or a lawful right or interest of anyone, nor that he has ever placed the landlord's property at significant risk. The tenant testified that there was nothing in the photographs taken

while he was sleeping that showed dangerous conduct on his part. The tenant testified that the burn mark shown in one photo was already on the carpet at the time that the landlord transferred him from another suite in the complex to his current suite, which occurred several years ago.

The tenant testified that the landlord has also failed to provide any evidence to support the landlord's claim that he had engaged in illegal activity that adversely affected the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property.

In regards to the second issue in the application, the tenant testified that the landlord should be ordered to comply with the Act and cease this relentless campaign of harassment that has been occurring over a period of time, which has compromised the tenant's quiet enjoyment of the suite. Activities alleged by tenant that have been perpetrated by the landlord in violation of the Act include:

- Attempting to change terms in the tenancy agreement, including rescinding the use of storage lockers and parking without compensation and arbitrarily prohibiting smoking.
- Invading the tenant's privacy by contacting his service providers without his knowledge and permission to wrongfully obtain confidential personal and medical data and then using this information as evidence to try to justify an eviction of the tenant
- Intentional interference with the tenant's service providers and support network by imposing the landlord's views and opinions regarding the tenant's limitations and treatment.
- Excessive monitoring of the tenant's day-to-day activities and the persons with whom he associates and works with.
- Repeatedly scheduling suite inspections and then failing to show up at the appointed time. Also entering the tenant's home prior to the required 24-hours notice.

- Intrusion upon the tenant's right to personal enjoyment by conducting the inspections of the suite with an excessive number of inspection personnel and taking inappropriate liberties such as making unauthorized photographs of the tenant and his personal possessions while the tenant was asleep.
- Withholding services including not promptly responding to the tenant's concerns and neglecting to attend to necessary repairs requested by the tenant.
- Holding the tenant responsible to rectify, deficiencies in the suite, such as poor door seals that allow cigarette smoke to leak and bother other residents.
- Trying to evict the tenant or cause him to vacate by issuing repeated frivolous, unsubstantiated, Notices to End Tenancy, causing the tenant undue stress as well as taking up the tenant's time and resources and those of his service providers.
- Past transgressions of the Act, including attempts to prohibit the tenant from having overnight guests and blaming the tenant for a cockroach infestation.

The tenant's witnesses, that included 5 community and health service support personnel, all testified that the tenant has not violated his tenancy in any respect, is not a risk to others and does not need supervision to be able to smoke safely. One witness who testified that he has worked with this tenant for well over a decade, stated that it is evident, given the number of disputes, that this landlord is well aware of the tenant's rights under the Act and the landlord's responsibilities under the Act, yet persistently chooses to ignore the legislation and make unsubstantiated claims and applications. The witness testified that he believes that that the landlord instructs staff to take actions that he knows are in contravention of the Act. In fact, the witness is of the opinion that that the landlord's conduct warrants administrative penalties under the Act and he stated that he is ready to support the tenant in having this particular matter pursued. The witness testified that the tenant's human rights have also been violated and that his personal and private information had been improperly disclosed and acted upon.

All of the tenant's witnesses testified that the landlord's persistent persecution of the tenant and intentional misuse of legal processes to cause problems for the tenant, has inflicted additional grief and inconvenience that this tenant does not need nor deserve, given the other challenges in his life. Each witness felt that this must be stopped.

Analysis: Cancel One-Month Notice

The first issue in the tenant's application is the tenant's request for an order that the One-Month Notice to End Tenancy for Cause dated June 5, 2009, be cancelled.

Cause: Breach of Material Term Tenancy Agreement

One of the causes listed for ending the tenancy is that the tenant breached a term in the tenancy agreement. While I accept the evidence submitted by the landlord that details all of the health and fire risks of smoking including second-hand smoke, I find as a fact that that the practice of smoking does not in itself constitute a violation of the Residential Tenancy Act.

The tenant's actions of smoking inside the unit would meet the criteria under 47(1)(h), of the Residential Tenancy Act as a violation only if smoking was considered to be a material term of the tenancy. I find that, although a copy of the tenancy agreement is not in evidence before me, it is clear based on testimony from both parties, that there was no specific prohibition against smoking inside the unit contained in the agreement. I do not accept the landlord's stated position that the absence of a term permitting smoking in the agreement would therefore infer that there exists a prohibition against smoking.

Even if there was a written term in the agreement limiting smoking, in order to be considered a material term of the tenancy sufficient to end the tenancy, it must go to the root of the contract and be of such importance that a breach would justify the ending of the entire tenancy agreement.

According to section 12 of the Act, all tenancy agreements contain standard terms, whether or not these are present in written form. The parties are at liberty to negotiate and agree on additional terms such as restrictions on smoking, and under section 6(1) of the Act these terms can be enforced, unless the term is in conflict with other provisions in the Act, as set out in section 5 of the Act.

In this instance, I find that, had there been a specific provision in the agreement wherein the parties had both agreed that smoking would not be permitted, and where it was proven that both had also agreed that this was going to be considered as a material term of the tenancy, such a term could be considered as cause to end the tenancy and would have been forced as such.

However, I find that there was no such term in the tenancy agreement, material or otherwise, and nothing in the agreement relating to smoking. It follows that the tenant could not be in breach of a term that was not even in the agreement.

Moreover, that the tenant has been consistently smoking in the unit from the outset and for the duration of his 28-year tenancy, a fact which is not disputed by the landlord, serves as evidence to confirm that smoking was not prohibited from the time the agreement was made.

In regards to the landlord's assertion that the tenancy agreement was changed two years ago to include non-smoking as a material term, when the landlord decided to designate the complex as a "Smoke-Free Building", I find that section 14 of the Act states that a tenancy agreement may be amended to add, remove or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment. I find that the Act specifically forbids unilateral changes by either party to an existing agreement.

Based on the testimony, I find that the parties did not mutually agree to any new or amended terms in the tenancy agreement between them. I find that under the existing agreement, the tenant had the right to smoke without any interference or

limitation imposed by the landlord and this right remains unchanged, regardless of the landlord's subsequent edict.

During the hearing, the landlord had asked the tenant whether or not he would be willing to renegotiate the tenancy agreement. The tenant indicated that he did not want to alter the existing agreement and was not willing to enter into a new tenancy agreement.

Seriously Jeopardizing Health, Safety or Lawful Right

To support an allegation that the tenant's smoking has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or put the landlord's property at significant risk, the landlord must provide proof that this occurred and that it was of a magnitude sufficient to warrant an end to the tenancy for cause.

I find that the tenant's choice to smoke cigarettes in his suite, do not come close to meeting the criteria to sufficiently prove that the tenant had seriously jeopardized the health or safety or a lawful right or interest of other residents in the complex.

In fact, section 28 of the Act specifically provides that a tenant is entitled to quiet enjoyment including, but not limited to, the right to (a) reasonable privacy; (b) freedom from unreasonable disturbance; (c) exclusive possession of the rental unit, subject only to the landlord's right to enter the rental unit under section 29; and (d) use of common areas for reasonable and lawful purposes, free from significant interference. I find that this tenant's activities that take place within his own suite, or common areas, should not be open to gratuitous scrutiny by third parties, including the landlord, unless there is proof that these activities are, at the time, posing a significant risk to others besides the tenant himself.

I find that, if the cigarette smoke is not being adequately contained and is somehow able to penetrate into other suites in the building, as the landlord appears to be saying, this is likely due to a possible deficiency that would fall under the responsibility of the landlord to rectify under section 32(1) of the Act. Section 32 states that a landlord must provide and maintain residential property

in a state of decoration and repair that (a) complies with the health, safety and housing standards required by law, and, (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant. I find that, in a building where fumes from one unit can readily infiltrate hallways or adjacent units unchecked, there may be some remedial work required. At the very least, I find that the landlord has an obligation to take steps to properly investigate the cause of this infiltration. I note that the tenant had alerted the landlord to the fact that there are visible gaps around the entry door to his suite and as made a request that the landlord install a gasket to properly seal the door. Evidently the landlord has not yet taken action on this particular matter.

On the other hand, if the other residents in the complex are merely objecting to the *odour* of the cigarette smoke which tends to linger and accumulate over time, this objectionable smell is not necessarily a health issue. If this is the case, I find that the landlord has the option of addressing the problem through more intensive or frequent cleaning and the use of specialty disinfecting and odour-control products in the common areas.

I must also make the observation that the landlord's characterization of this complex as a "*smoke-free building*" in the numerous notices sent to all residents which warn that "*We will be evicting for smoking of any sort in the apartment*", may have served to create a false expectation for the other residents of a total absence of any smoking within the complex by occupants thereby generating complaints against the tenant. I find that the other residents were likely unaware that the ban on smoking would only apply to tenants who has signed a tenancy agreement containing the anti-smoking provision.

Illegal Activity Affecting Quiet Enjoyment, Safety, Security and Well Being

In regards to the tenant perpetrating an illegal activity that adversely affected the quiet enjoyment, security, safety or physical well-being of others the landlord must provide proof that activity in question is illegal, that the illegal action relates to the tenancy and prove that the illegal activity affects the quiet enjoyment, security, safety or physical well-being of other people. I find that the landlord has not proven any element contained in the criteria described above.

Given that the landlord has failed to sufficiently prove any of the three causes set out in the One-Month Notice to End Tenancy for Cause, I find that the threshold has not been met to support ending the tenancy for cause under section 47of the Act. The Notice is not valid and I find that the portion of the tenant's application requesting that the One-Month Notice be cancelled must be granted and I order that the Notice is permanently cancelled and of no further force nor effect.

Analysis: Order Landlord to Comply with Act

In his testimony and evidence, the tenant has put forth a significant number of examples in which the landlord has not complied with the Act, mainly in the realm of harassment. Moreover, I find that most of the tenant's claims have been confirmed by the *landlord's* evidence and testimony to be based on fact.

I find that the landlord has admitted to changing the terms of the tenancy involving the tenant's access to storage lockers and smoking which is in violation of the Act. I further find in the evidence and during the proceedings that the landlord freely admitted to contacting the tenant's service providers without his permission and to discussing the tenant's personal circumstances with third parties. I find that the landlord acknowledged that the tenant's visitors were being monitored by the landlord in order to determine with whom he was involved and for the purpose of gathering information.

I find as a fact that the landlord wrongfully attempted to evict the tenant based on the landlord's stated presumptions regarding the tenant's level of disability rather than the criteria and provisions contained in the legislation for ending a tenancy. I find that the landlord reached certain conclusions about the tenant's conduct being "high risk" after finding out the nature of the tenant's medical disability. I find that despite their not being supported by the facts, the landlord proceeded to act on these biased assumptions.

I note that the landlord testified that the landlord chose to unlock the tenant's door and enter the tenant's suite 24 hours after posting a written Notice to Inspect. I find that, under section 90 of the Act, a document served by attaching a copy of the document to

a door or other place is deemed to be served on the 3rd day after it is attached and section 29 of the Act provides that a landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless the tenant gives permission, or at least 24 hours and not more than 30 days before the entry, a written notice has been served on the tenant that states the reasonable purpose for entering, the date and the time of the entry, which must be between 8 a.m. and 9 p.m.

In this instance I find that, by inspecting the suite only 24 hours after posting the Notice, the landlord entered without adequate notification under the Act. I find that in order to comply with the Act, the landlord was required to wait three days until the posted document was deemed as served under section 90 of the Act, and then to wait a further 24 hours as required under section 29 of the Act. I also find that the landlord's manner of inspection was excessively intrusive. According to the landlord's evidence there were four inspectors brought into the suite. The landlord's evidence also confirms that, not only the building, but the tenant's personal effects were scrutinized and that photographs were taken of the tenant himself while he was asleep in the privacy of his own bed. I find that the landlord's practice of repeatedly scheduling suite inspections, then failing to show up at the appointed time, if true, would be disruptive to the tenant's daily activities on the appointed days. As previously discussed in this decision, section 28 of the Act specifically provides that a tenant is entitled to reasonable privacy and freedom from unreasonable disturbance. I find that the actions of the landlord were not contravened this section of the Act.

In regards to the allegation that the landlord failed to promptly respond to the tenant's concerns and requests for repairs, I find that there is evidence to support that the landlord has not been as diligent as it should have been in responding to written requests for repairs that were reasonable. It is not clear whether or not the landlord's motive for this inaction was based on retaliation as alleged by the tenant. However, regardless of the reason, a landlord is not permitted to ignore its obligation under section 32 of the Act in maintaining the rental property and should act to look into and rectify problems reported by a tenant.

I find that the landlord's violations of the Act are severe, both in terms of frequency and duration and that the nature was extreme enough to result in unreasonable disturbance

and significant interference of the tenant's quiet enjoyment of his suite and considerably devalued the tenancy from the tenant's perspective. I find as a fact that the landlord did willfully contravene the Act in perpetrating some of the transgressions described, when it knew, or ought to have known, that its actions were not sanctioned by the legislation and that this would cause undue stress and misery for this disadvantaged long-term tenant . I find that the landlord intentionally created an environment where the tenant would be made to feel that his tenancy was continually under threat. I find that it is clear that the landlord's conduct goes beyond mere insensitivity and ignorance to enter the realm of harassment.

Given the above, I accept that the tenant has been subjected to a course of harassment and interference by this landlord for a period of at least two years and I further find that the landlord must immediately desist in its vexatious conduct against this tenant. Accordingly, I find it necessary to make the following orders against the landlord:

1. The landlord is hereby ordered to cease contacting the tenant directly in verbal or written form and to henceforth channel all communications, correspondence, notices, or phone calls in regards to tenancy issues to the tenant's support worker: C/O NAME, #STREET, CITY

2. The landlord is hereby ordered to cease the practice of monitoring the tenant's activities and the comings and goings of the tenant's guests and to refrain from contacting service providers or agencies in regards to the tenant or support staff working with the tenant, except for the tenant's representative named above.

3. The landlord is hereby ordered to send any notices to inspect through the mail addressed care of the tenant's representative, Leonard Regan or designate, and in addition post the request to inspect on the tenant's door <u>one week in advance</u>. The Notice shall contain a date and proposed time for inspection and state the purpose of the inspection.

4. The landlord is hereby ordered not to enter the tenant's unit unless prior arrangements have been made to ensure that the tenant will be present, in addition to the tenant's representative, named above, or another support person designated by the tenant in attendance throughout the inspection.

5. Except in the event of an emergency that threatens life or property or express permission in writing granted by the tenant, the landlord is hereby ordered to restrict the frequency of inspections to not more than once every two months, with a maximum of two persons entering the suite on behalf of the landlord at any one time during the inspection and to restrict the inspection to electrical, plumbing, heating, appliances and structural matters. Should the landlord fail to show up for the bi-monthly inspection at the agreed-upon time, the landlord must then wait two months before rescheduling a subsequent inspection.

6. The landlord is hereby ordered to make arrangements with the tenant, through his representative, Leonard Regan or designate, to investigate and make repairs to deficiencies in the unit as reported by the tenant. In particular, the landlord is required to have a qualified tradesperson evaluate the entry door and look into installing seals that will help to block cigarette smoke from leaking through gaps into the common areas or other rental units.

7. The landlord is hereby ordered to comply with section 27 of the Act in regards to terminating or restricting services to the tenant, such as parking or storage, that were previously included as part of the tenancy.

While I accept that this landlord has repeatedly made overtures to terminate the tenancy that were found to have had no merit, I do not feel it appropriate to issue an order to restrict the landlord's right to issue Notices to the tenant under the Act if warranted . However, I caution the landlord about initiating any further Notices that are clearly without merit or that would be considered as spurious or bothersome.

Finally, while I have found that the tenancy has been significantly devalued by the past conduct of the landlord in contravention of the Act, which could otherwise justify the tenant's entitlement to monetary compensation, I decline to consider a monetary order in favour of the tenant at this time. I find that the tenant did not specify a monetary amount for damages or loss in the application and that it may not be amended to include monetary compensation. However, the tenant is still at liberty to make a future application for dispute resolution on the matter of compensation for loss of quiet enjoyment or any other losses, as he sees fit to do.

However, I grant both of the tenant's requests in the application; an order cancelling the One Month Notice to end Tenancy for Cause and specific orders compelling the landlord to comply with the Act as well as restricting the landlord's access to the suite and contact with the tenant.

Conclusion

Based on evidence and testimony above, I order that the One-Month Notice to End Tenancy for Cause of June 5, 2009 is hereby cancelled and of no force or effect.

Based on the evidence and testimony above I have issued orders that the landlord comply with the Act and special restrictions in regards to the landlord's access to the rental unit as described above. These Orders must be served on the Landlord and may be enforced.

July 2009 _____

Date of Decision Dispute Resolution Officer