



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes OPR, CNR

Introduction

This matter dealt with an application by the Landlord for an Order of Possession and an application by the Tenants to cancel a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities.

Issue(s) to be Decided

1. Does the Landlord have grounds to end the tenancy?

Background and Evidence

This month-to-month tenancy started on July 1, 2010. The economic rent is \$1,342.00 per month however when the Tenants are eligible for a subsidy, their rent is \$604.00 per month. Rent is due in advance on the 1st day of each month. The rental unit is an attached townhouse with a common roof and attic area.

On January 3, 2011, the Landlord's agent served the Tenants in person with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 3, 2011. The Landlord's agent (S.W.) said it is a term of the Parties' written tenancy agreement that a breach of a material term will result in the Landlord revoking the Tenants' rent subsidy. The Landlord's agent claimed that the Tenants breached a material term of the tenancy agreement which prohibited smoking in the rental unit. Consequently, the Landlord gave the Tenants a Notice dated December 15, 2010 that their subsidy would be revoked and that effective January 1, 2011, the Tenants would have to pay the full, economic rent of \$1,342.00. The Landlord's agent said the Tenants paid \$604.00 of this amount on or about December 17, 2010 but that the balance remains outstanding.

The Parties agree that during an application interview, the Landlord's agent(s) advised the Tenants that smoking was prohibited and that if they were found to be in breach of that rule, they would be evicted. The Landlord's agents said they did an inspection of the rental unit on December 15, 2010 and could detect a strong odour of marijuana smoke. The Landlord's agent (G.D.) said the Tenant (M.F.) admitted that he had been smoking. M.F. denied that he or anyone else was smoking in the rental unit and also denied making an admission to G.D. Instead, M.F. said he asked the Landlord's agent how he knew the smell was emanating from the rental unit when occupants of

neighbouring units smoked. M.F. claimed that the smell of smoke from other units drifted into neighbouring units. However, the Landlord's agents claimed they also inspected the neighbouring units on December 15, 2010 and there was no smell of smoke. The Landlord's agent (G.D.) argued that the Tenant (D.F.) also admitted to smoking because he asked her why she did not spray air freshener and she responded that she had.

The Landlord's agents also claimed that other residents of the rental property had complained about the Tenants smoking in the rental unit. The Landlord's agents said they could not identify these complainants because they feared reprisal from the Tenants. The Tenant's advocate argued that this was unusual given that the Landlord had provided a number of written complaints about other matters from other residents who did identify themselves. The Tenants' advocate said the Tenants had 24 hours' notice about the date and time of the inspection and therefore she argued that it would be unreasonable for the Tenants to smoke inside just prior to the scheduled inspection and jeopardize their tenancy. The Tenants' advocate also claimed that one of the Tenants (M.F.) does not smoke and is asthmatic while the other Tenant (D.F.) has a smoking area on the porch outside of the rental unit.

Analysis

In this matter, the Landlord has the burden of proof and must show (on a balance of probabilities) that the Tenants breached a material term of the tenancy agreement by smoking in the rental unit and that as a result, the Landlord was entitled to charge the Tenants the full economic rent for January 2011. This means that if the Landlord's evidence is contradicted by the Tenants, the Landlord will generally need to provide additional, corroborating evidence to satisfy the burden of proof.

RTB Policy Guideline #8 says at p. 2 that,

“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.” “Simply because the parties have put in the agreement that one or more terms are material is not decisive. The arbitrator will look at the true intention of the parties in determining whether or not the clause is material.”

I find that prior to entering into the tenancy agreement the Parties discussed the fact that smoking was prohibited in the rental unit and that a breach of this policy would result in the tenancy ending. I find that the Tenants agreed to this term prior to entering the tenancy agreement. Consequently, I conclude that the term of the parties' tenancy agreement that prohibits smoking in the rental unit is a material term of the tenancy agreement.

The Landlord's agents claim they could smell a strong odor of marijuana smoke in the rental unit on December 15, 2010 during a site inspection. The Landlord's agents also claim that the Tenants admitted to smoking (or allowing others to smoke) in the rental

unit. The Tenants deny that they were smoking in the rental unit or that they made any admissions to the Landlord's agents to that effect. The Tenants claim that the smell of smoke came from somewhere else on the rental property (which the Landlord's agents denied) and that it would have been unreasonable for them to smoke in the rental unit just prior to a scheduled site inspection.

Both Parties provided corroborating evidence which was not helpful. In particular, I cannot not give any weight to the Landlord's agents' evidence that they received complaints from other residents about the Tenants' smoking. Those alleged complainants were not identified at the hearing and gave no evidence and as a result, I find that it is simply hearsay evidence and unreliable. Similarly, I cannot give any weight to the Tenants' advocate's argument that caretakers of the Tenants' children would have complained to the Landlord had they smelled smoke in the rental unit. None of these people gave evidence at the hearing or supplied witness statements.

Given the contradictory evidence of the Tenants and in the absence of any reliable corroborating evidence from the Landlord's agents, I find that there is insufficient evidence to conclude that the Tenants were smoking in the rental unit or that they breached a material term of the tenancy agreement (on this basis). Consequently, I find that the Tenants were not responsible for the full economic rent for January 2011 and the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 3, 2011 is cancelled.

As a final note, the Landlord's agent (S.W.) claimed during the hearing that as of December 15, 2010 the Tenants were on "probation" for other matters and were given a written warning that any breach of the tenancy agreement would result in their subsidy being revoked. However, this is not what the written warning said. The written warning dated September 28, 2010 listed specific conduct that was in issue (which did not include smoking) then went on to say "failure to comply with **these terms** during a 90 day period would result in the Tenants' subsidy being withdrawn. Consequently, I find that the fact that the Tenants were given a 10 Day Notice for unrelated conduct during probationary is irrelevant to the matters in issue in this proceeding.

Conclusion

The Landlord's application is dismissed without leave to re-apply. The Tenants' application is granted. The 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated January 3, 2011 is cancelled and the tenancy will continue. 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 26, 2011.

Residential Tenancy Branch