



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes CNR

Introduction

This is the Tenant's application to cancel a Notice to End Tenancy for Cause.

The parties gave affirmed testimony at the Hearings.

Preliminary Matter

At the outset of the Hearing on January 7, 2011, the Tenant's agent requested an adjournment so he could arrange for witnesses to be available to give testimony. The Tenant's agent stated that he received the Landlord's evidence package on December 30, 2010, and that it contained information that was not previously provided to the Tenant. The Tenant's agent testified that the witnesses he wished to call needed time to arrange to be present, due to the nature of their jobs (homecare providers).

The Landlord stated that he had arranged to have his parties present and that it would be inconvenient to the Landlord to adjourn the Hearing. The Landlord was concerned that a reconvened Hearing might not take place before the effective date of the Notice (January 31, 2011) and that would be prejudicial to the Landlord.

I explained that evidence is to be provided to the other party as soon as possible and in any event at least 5 clear days before the Hearing date, excluding the date the party receives the evidence; the date of the Hearing; and any weekends or holidays. I also explained that I had an opening in my schedule on January 12, 2011, and therefore the reconvened hearing would take place before the effective date of the Notice. The Landlord consented to the adjournment. The Tenant's agent agreed to provide the Landlord with a list of witnesses and a synopsis of what testimony they were expected to give.

The Hearing was adjourned to January 12, 2011 at 10:30 a.m. and the parties were provided with the participant codes for signing into the reconvened Hearing.

Issue(s) to be Decided

Should the Notice to End Tenancy issued October 29, 2010, be cancelled?

Background and Evidence

The rental unit is an apartment in a 36 suite apartment building. All of the suites in the rental property are rented to people who are over the age of 55 years. The Tenant has lived in the rental unit since 1998.

The Notice to End Tenancy indicates the following reasons for ending the tenancy:

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; and
- put the landlord's property at significant risk.

The Landlord's agent and witness gave the following testimony:

The Landlord's witness testified that she is the building manager at the rental property, and has been working in that capacity for about 4 years. She stated that the Tenant had mobility issues ever since she met him, but that his mobility was getting worse. She stated that the Tenant has deteriorated physically in the last 6 months. She testified that the Tenant uses a cane or a walker to get around. She testified that she is concerned about the Tenant falling and does not believe he is capable of living independently because she has noticed that he cannot move easily from an arm chair to his table. The witness testified that the Tenant smokes. She stated that she has been called to his suite on a number of occasions and on two of those occasions the rental unit was heavy with cigarette smoke and on one occasion, the room was grey with smoke. The witness did not see the Tenant smoking on those occasions.

The Landlord's witness testified that her regular work hours are from 9:00 a.m. to 5:00 p.m., and that she has had to open the doors to ambulance personnel on the following occasions for the Tenant:

February 16, 2008
May 17, 2009
October 30, 2009, @ 7:15 a.m.
November 25, 2009 @ 6:30 a.m.
July 13, 2010 @ 5:45 a.m.
September 9, 2010 @ 3:30 a.m.

In addition, she stated that she has been called upon to let the Tenant's caregivers into the building because the Tenant had difficulty answering the buzzer on the following occasions:

Mid April, 2009
May 2, 16, 17, 18, 2009
June 25, 2009
July 9, 2009
December 5, 2009 (twice)
December 19, 2009
February 27, 2010
September 21, 2010 @5:15 p.m.

The Landlord's witness testified that she mentioned to the Tenant's agent in 2009 that she felt the Tenant was deteriorating and should be looking for alternate accommodation with assisted living.

The Landlord's agent submitted that there were genuine health concerns about the Tenant's ability to care for himself. He stated that the building manager has seen and smelled cigarette smoke in the Tenant's home. The Tenant has fallen on a couple of occasions and been unable to get up or summon help by himself. The Landlord's agent is concerned that the Tenant might start a fire with his smoking. The average age of the other tenants in the building is 70+ years old, and the results of a fire could be catastrophic to the other tenants, and damaging to the Landlord's property.

The Landlord submitted that there was no documentary evidence from medical professionals (i.e. an assessment) that the Tenant was capable of taking care of himself and that all indicators are that his has decreased in capability since he moved into the rental unit. The Landlord submitted that the building is not an assisted living or extended care home and that the building manager was significantly disturbed by the need to assist the Tenant's care givers and ambulance personnel with access to the Tenant's home.

The Landlord's agent stated that he provided the Tenant with three month's notice, rather than the one month notice required under Section 47 of the Act.

The Tenant's agent and witnesses gave the following testimony:

The Tenant's witness BJ works for a community based organization that delivers programs and services focused on promoting and maintaining independence, working in hand with the local Health Authority. The witness has known the Tenant for 20 years. She testified that the Tenant stopped smoking 3 years ago. The witness was last in the

Tenant's home a week ago and smelled no smoke. The witness acknowledged that the Tenant had some health challenges several months ago and is frail, but that he has adequate support from her organization. The witness visits the Tenant about twice a month and provides casual support. The Tenant suffers from Parkinsons disease, but has improved since the last time the ambulance was called. The Tenant has a "life line" which allows him to call for help if he falls and cannot get up. The witness has training in elder care and CPR (from the 1980s), and is not a doctor or a nurse.

The Tenant's witness ES also works for the community based organization and has been one of the Tenant's care givers since November, 2008. The organization was hired by the local Health Authority to assist the Tenant. The witness visits the Tenant regularly, once a week on Fridays. The Tenant also gets services twice a day from other employees in the organization. He has been to the Tenant's home 93 times since he began assisting the Tenant and has never smelled smoke in the Tenant's home, or noticed any evidence of smoking materials present. The witness has never seen the Tenant smoke. The witness assists the Tenant by helping him with his weekly shopping and occasionally making him lunch on the days he visits. The Tenant does not need assistance making his meals or using the bathroom. The Witness testified that he has clients more frail than the Tenant and who require more care, but continue to live independently in apartment buildings.

The Tenant's agent testified that the Tenant does not smoke. He submitted that the Tenant has adequate care that is being monitored by trained caregivers. The Tenant's agent acknowledged that the Tenant had some health issues, but testified that they were the result of the Tenant taking new medications that were causing drowsiness, and which have been adjusted. He stated that the Tenant is doing better now and was able to get in and out of a truck unassisted last week.

Analysis

The Landlord seeks to end the tenancy, in part, because of possible fire due to the Tenant smoking and his inability to summon help if he falls. The Landlord did not provide sufficient evidence that the Tenant is smoking in the rental unit. Even if the Tenant was smoking in the rental unit, there was insufficient evidence to support the Landlord's claim that the Tenant was unable to summon help if he falls.

The Landlord submitted that the Tenant has not provided proof from medical professionals that he is capable of caring for himself. The Tenant is not required to provide such evidence. In the case before me, the onus is on the Landlord to provide sufficient evidence to uphold the Notice to End Tenancy.

The Landlord provided dates when the Landlord's witness helped the Tenant with access to his suite. The majority of the dates go back to 2009, more than year ago. The Tenant's agent stated that the Tenant's drowsiness was caused by a change in medication and that after adjustments to his medication the Tenant is doing much better. The dates provided by the Landlord appear to support the Tenant's agent's statement. There have been no incidents reported since September, 2010.

The Landlord's witness provided 4 occasions when she was called upon to open doors for ambulance workers in the early morning house. Two of the occasions were in fall or 2009, and the other two were in July and September of 2010. I do not find that this constitutes significant interference or unreasonable disturbance to the building manager.

The Landlord has not provided sufficient evidence to support its claim that the Tenant has significantly interfered with or unreasonably disturbed the building manager; seriously jeopardized the health or safety of other occupants or the Landlord; or put the Landlord's property at significant risk.

The Tenant's application to cancel the Notice to End Tenancy issued October 29, 2010, is granted. The tenancy remains in full force and effect until it is ended in accordance with the provisions of the Act.

Conclusion

The Notice to End Tenancy issued October 29, 2010, is cancelled. The tenancy remains in full force and effect until it is ended in accordance with the provisions of the Act.

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 12, 2011.
