



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with an application by the tenant to cancel a notice to end tenancy for cause. Both parties participated in the conference call hearing.

Issue(s) to be Decided

Is the tenant entitled to any of the above under the Act.

Summary of Background and Evidence

This tenancy began March 2006 and the building is a non-profit, senior citizen housing complex. On March 28, 2011 the landlord served the tenant with a 1 Month Notice to End Tenancy for Cause: the tenant has breached of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The tenant testified that in 2006 when she moved in to her rental unit tenants were not allowed to smoke in their apartments but that there were designated areas on the grounds for smoking. In June 2009 at a general meeting a motion was brought forward and voted on by the 28 tenants present at the meeting to make the entire property, including all common areas, non-smoking. The tenant testified that the landlord then wrote an amendment to the tenancy agreement and all tenants were required to sign it. The amended tenancy agreement stated that the entire property: rental units and the grounds, would be designated as no smoking.

The tenant stated that many of them felt that if they did not sign the amended tenancy agreement that they would be evicted as the landlord's agent told tenants if they did not want to sign the amended tenancy agreement that *'the board will deal with the tenants'*. The tenant stated that she and others felt they had been coerced and threatened into signing the amended agreement and never told that they had the option to not sign the agreement without fear of reprisal. The tenant stated that only one tenant was *'smart enough'* to not sign the amended agreement and that tenant is still allowed to smoke on the property.

The tenant does admit that she did smoke in her rental unit when she was ill but that she now has to go to the parking area or her car to smoke.

The landlord testified that on November 2, 2010 he personally witnessed cigarette smoke in the hallway outside the tenant's rental unit. The landlord stated that the tenant and her next door neighbour both smoke but he was certain that the cigarette smoke was coming from the tenant's unit. The landlord has submitted evidence that on March 23, 2011, the doorbell which was being replaced on the tenant's unit was in a plastic bag smelling of cigarette smoke. The landlord stated that the caretaker had witnessed the smell of cigarette smoke in the hallway near the tenant's door on numerous occasions but that he did not have specific dates and times on these occurrences.

The landlord stated that the issue of smoking has been a '*sore point*' between management and the tenants for many years. The landlord stated that at the June 29, 2009 meeting, 28 of the approximately 42 residents were present and 25 of the tenants voted in favour of making the entire property no smoking, 3 tenants voted no.

The landlord stated that he had heard comments from more than one tenant regarding '*the board will deal with the tenants*' if the tenants did not sign the amended tenancy agreement. The landlord stated that the caretaker who was in charge of getting the amended tenancy agreements signed for the landlord, is a fairly big man who can be quite gruff and the landlord stated that he could understand how the caretaker '*could have sounded threatening*' to the tenants. The landlord stated that he could see how the tenants may not have known that they did not have to sign the amended tenancy agreement as that was never explained to them by the landlord.

Analysis

Based on the documentary evidence and testimony of the parties I find that there is insufficient evidence to uphold the 1 Month Notice to End Tenancy for Cause. The landlord smelling smoke in the hallway near the tenant's unit on one occasion in November 2010, a plastic bag smelling of cigarette smoke in March 2011 and undocumented reports of the caretaker smelling smoke in the tenant's hallway are not sufficient grounds on which to end this tenancy. Accordingly, the notice to end tenancy is hereby set aside and the tenancy continues in full force and effect.

Based on the documentary evidence and testimony of the parties I find that numerous tenants residing in this complex felt they had been intimidated and coerced into signing the amended tenancy agreement which banned smoking on the entire property. Tenants were not advised that there would be no reprisal if they did not sign the agreement and numerous tenants were under the impression that the landlord would seek to evict them if they refused to sign.

I find that the landlord has not complied with Section 6 (3) (c) of the *Act* which states that '*a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it*' as the landlord did not clearly communicate to the tenants that they had the right to not sign the amended tenancy agreement without fear of reprisal IE: being evicted by the landlord.

Residential Tenancy Policy Guideline 8 speaks to Unconscionable and Material Terms in tenancy agreements and when: *a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party, that terms which are unconscionable are not enforceable.* The manner in which the signatures were obtained leans to consideration of the terms of the amended tenancy agreement being unconscionable as the age and understanding of the tenant's rights appears to have been exploited when the amended tenancy agreement was signed. Therefore, I hereby order that the June 2009 amended tenancy agreement banning smoking outside on the common property be set aside.

Conclusion

I therefore allow the tenant's application and set aside the landlord's 1 Month Notice to End Tenancy for Cause dated March 28, 2011 with the result that the tenancy continues uninterrupted.

I order that the June 2009 amended tenancy agreement banning smoking outside on the common property be set aside in its entirety.

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: April 28, 2010

Residential Tenancy Branch