



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC and FF

Introduction

This hearing was convened on the tenant's application of April 23, 2012 to have set aside a Notice to End Tenancy for cause, dated April 20, 2012 and setting an end of tenancy date of May 31, 2012.

The tenant also sought a monetary award for loss of quiet enjoyment and recovery of the filing fee for this proceeding.

Issue(s) to be Decided

This matter requires a decision on whether the Notice to End Tenancy should be set aside or upheld and whether the tenants are entitled to a monetary award for loss of quiet enjoyment.

Background and Evidence

This tenancy, situated in a basement suite in a house occupied by the landlords, began on December 1, 2011. Rent is \$1,050 per month and the landlords hold a security deposit of \$525 paid on December 1, 2011.

During the hearing, legal counsel for the landlords advised that while numerous issues had been cited in the Notice to End Tenancy and in evidence submissions for the landlords, her presentation would focus primarily on the issue of the tenants smoking in and around the rental unit.

The landlords' counsel stated that the initial advertisement for the rental unit emphasized that it was a non-smoking building and that the parties had agreed from the beginning of the tenancy that non-smoking was fundamental to the tenancy.

The tenants concurred that they had advised the landlords at that time that they were former smokers and accepted the restriction on the tenancy. The tenants agreed that quitting had been a significant challenge, exacerbated by the recent loss of their own home by fire, illness in their two year old child and adjustment to living in the rental unit.

The landlords submitted medical evidence clearly showing that both the female landlord and her four-year-old child were under treatment for respiratory illnesses.

The landlords further submitted correspondence from a neighbour, the female tenant's home hairdresser and the baby sitter attesting to having smelled cigarette smoke while in the landlords' home. In addition the landlords submitted warning letters to the tenant, including two from March 19, 2012 and April 9, 2012. Further evidence was given at the hearing that cigarette smoke was again detected on May 5, 2012.

In addition to having applied to have the Notice to End Tenancy set aside, the tenants have asked for compensation of \$600 for loss of quiet enjoyment primarily on the grounds of being able to hear the landlords' music on 12 occasions noted on their April 2012 calendar. The tenants submitted a CD to illustrate the volume of the musical intrusion, but my office computer does not accommodate the file type required to play it and government guidelines prohibit downloading of program files to protect the network.

The tenants also submitted photographs of the rental unit showing a very well organized and immaculately maintained household.

Analysis

Section 47(1)(d)(ii) of the *Act* provides that a landlord may issue a Notice to End Tenancy for cause in circumstances in which the tenants have:

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

In the present circumstances, I accept the evidence of the landlords that the tenants have on a least some occasions continued to have smoked in and around the rental unit. In view of the respiratory conditions of both the female landlord and her child, I find that the smoking constitutes sufficient cause to end the tenancy.

Therefore, I advised that I would not set the notice to end tenancy aside.

On hearing that determination, counsel for the landlord requested an Order of Possession under section 55(1) of the Act which compels the issuance of the order when a tenant's application to set aside is dismissed or the order upheld.

While the Notice to End Tenancy set an end of tenancy date of May 31, 2012, the landlords agreed to accept the Order of Possession to take effect on June 30, 2012.

The landlords further offered that, if the tenants were able to find new accommodation and leave the rental unit by May 31, 2012, they would waive the requirement for one-month's notice and make no claim for loss of rent for June 2012.

While rent is paid by cheque, the tenants stated that they are required to provide their insurance company with receipts and requested receipts for that purpose. The landlords agreed to provide receipts for the months in which they were not issued.

The landlords promised to be mindful of the volume when playing music.

In consideration of the landlords having agreed to extend the tenancy to June 30, 2012, while they stated they had not done so since receiving the warning letters, the tenants have promised not to smoke anywhere on the rental property and to do their utmost to ensure the quiet enjoyment of the landlords.

As to the tenants' claim for monetary compensation for loss of quiet enjoyment, I am dismissing this claim for the following reasons:

This tenancy was the subject of a hearing on March 28, 2012 on the tenants' application for a similar claim. While the present application cites new incidents, I am not persuaded that the magnitude of the music complaints is sufficient to justify the award sought. In addition, as it follows the previous hearing so closely, I find that the matter is, in large, *res judicata*, that is, previously heard and decided.

Moreover, I find that landlords who are considerate enough to have offered to extend the tenancy a month beyond the Order to which they were entitled and permit the May 31st end without notice to or penalty are not of a character that would maliciously or carelessly disturb other occupants of the rental building.

Conclusion

The landlords' copy of this decision is accompanied by an Order of Possession, enforceable through the Supreme Court of British Columbia, to take effect at 1 p.m. on June 30, 2012.

The tenants' application is dismissed without leave to reapply.

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: May 10, 2012.

Residential Tenancy Branch