



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking to cancel a notice to end tenancy. The hearing was conducted via teleconference and was attended by the tenant and an agent for the landlord.

During the hearing, the parties agreed the landlord would obtain an order of possession should the tenant be unsuccessful in his Application. The parties also mutually agreed to amend the effective date of the 1 Month Notice to End Tenancy to November 30, 2012, should the tenant be unsuccessful in his Application.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a 1 Month Notice to End Tenancy for Cause and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 47, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord submitted a copy of a tenancy agreement signed by the parties on September 22, 2009 for a month to month tenancy beginning on October 1, 2009 with a monthly rent of \$755.00 due on the 1st of each month with a security deposit of \$387.50 paid. The tenancy agreement stipulates: "It is understood and agreed that there will be no smoking in the premises."

Both parties have provided a copy of a 1 Month Notice to End Tenancy for Cause issued on August 27, 2012 with an effective vacancy date of September 30, 2012 citing the tenant has breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The landlord has submitted into evidence letters dated March 5, 2012; June 23, 2011; December 14, 2010 and July 12, 2012 all advising the tenant that he must not smoke in the rental unit and that failure to comply will result in the landlord ending the tenancy.

The tenant has submitted a notice that he stipulates is posted in the building that states:

"Smoke Free Building:

Please be advised that the Lexington is a smoke free building.

Smoking is prohibited in all common areas of the building as well as within the suites. Common areas include but are not limited to the hallways, the laundry room, the parkade, the building entrance/lobby, storage areas, the stairwells and elevator.

Any persons smoking on the balconies are asked to ensure that all cigarette butts are disposed of in a proper receptacle and not thrown over the railings onto patios below.

Thank you for your immediate cooperation.

Dennison Property Management Ltd.”

The landlord’s agent testified this notice is quite old and originally in recognition of the “grand parented smokers” in the residential property when the building was converting to non-smoking. While the notice does ask people who smoke on balconies to use a proper receptacle it does not state that anyone can smoke in the building, in fact is specifically notes that people are not allowed to smoke.

The tenant testified that at the time he entered into the tenancy agreement he did not smoke but started to smoke about 6 months after moving in. He submits that he never smokes inside the rental unit but only on the balcony and that he stores his cigarette butts in a container near the bathroom door.

The landlord testified that when they have inspected the rental unit the tenant has full ashtrays in the unit and that the hallway and the unit smell of cigarette smoke. The tenant suggests that the smell is caused by the butts and not by lit cigarettes.

The landlord testified that he has responded only to one of the 4 warning letters submitted indicating that it was an oven mitt that was smoldering. The landlord pointed out that the tenant had not submitted any such letter into evidence.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- a) The tenant
 - i. Has failed to comply with a material term, and
 - ii. Has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

Residential Tenancy Policy Guideline 8 states that a material term is a term that is so important that the most trivial breach of that term gives the other party the right to end the tenancy. To determine materiality of the term the guideline states I must focus on the importance of the term in the overall scheme of the tenancy agreement.

As the impact of smoking in a rental unit can affect other tenancies and as the landlord has deemed this property to be smoke free the landlord have obligations to the other tenants in the residential property to ensure they all enjoy a smoke free building. As such, I find the term requiring no smoking is material to this tenancy.

I accept the landlord's position that the building is a smoke free building and that this is clearly outlined in the tenancy agreement as well as the "Smoke Free" notice the tenant submitted into evidence. Based on the testimony of both parties I accept that the "Smoke Free" notice had been posted prior to the start of this tenancy. I also accept that it was intended to accommodate "grand parented smokers".

While this "Smoke Free" notice is unclear as to whether or not it relates to people will break the smoke free rules or to any smokers, I find the tenancy agreement the parties signed September 2009 is very clear: "It is understood and agreed that there will be no smoking in the premises."

Black's Law Dictionary 7th edition defines premises as a house or building, along with its grounds. As such and despite the tenant's testimony that he only smoked on the balcony, in part, because he did not consider the balcony as part of the rental unit, I find smoking on the balcony constitutes smoking on the premises, and the tenant has breached a material term of the tenancy agreement.

I also find the landlord has provided the tenant with more than adequate time to correct the breach and he has failed to do so. As such, I find the 1 Month Notice to End Tenancy for Cause issued by the landlord on August 27, 2012 is valid and enforceable.

Conclusion

I find the landlord is entitled to an order of possession effective **November 30, 2012 after service on the tenant**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

As the tenant was unsuccessful in his Application to cancel the notice, I dismiss his claim to recover the filing fee.

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: October 05, 2012.

Residential Tenancy Branch