



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, FF

Introduction

This hearing was convened by way of conference call in response to the landlord's application for an Order of Possession for cause and to recover the filing fee from the tenants for the cost of this application.

The tenants and landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other and witness on their evidence. The landlord provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for cause?

Background and Evidence

The parties agree that this tenancy started on September 01, 2012. Rent for this unit is \$900.00 per month. Rent is due on the first of each month. The tenants paid a security deposit of \$450.00 on September 26, 2012.

The landlord testifies that the tenants were served with a One Month Notice to End Tenancy for cause after the landlord received numerous complaints about one of the

tenants smoking inside the rental unit. The tenants were advised that this is a non smoking unit and the unit was advertised as such. The landlord has provided a copy of the advertisement for the unit in documentary evidence. The landlord has provided complaint e-mails and letters from the upper tenants who claim their lives are being disrupted and their health affected by the cigarette smoke that filters in to the upper unit through the vents.

The upper tenants have informed the landlord that they have never seen the tenant smoke outside as she claims to do but are constantly bothered by her smoking inside her unit. The landlord testifies that the upper tenants moved from the rental unit on November 01, 2012 because of the lower tenants smoking and the uneasiness that had been created between the tenants in the lower unit and the tenants in the upper unit.

The landlord testifies that he approached the tenants after receiving complaints from the upper tenants and testifies that the female tenant told him that she smokes four to six cigarettes a day. The landlord testifies that he told the tenants that this was unacceptable as this was a non smoking unit and they had told him before the tenancy started that they did not smoke. The landlord testifies if he had known one of the tenants was a smoker he would not have rented the unit to them.

The landlord testifies that he can smell the cigarette smoke in the upper unit and has to clean this to prepare it for new tenants. The landlord testifies that when he went to these tenants unit he could also smell the smoke. The landlord testifies that he wrote to the tenants to inform them they must move from the rental unit before he sent the tenants the One Month Notice to End Tenancy.

The landlord testifies that the One Month Notice was served to the tenants in person on October 01, 2012. This notice has an effective date of November 01, 2012 and states the following reasons to end the tenancy:

- 1) *The tenant or a person permitted on the residential property by the tenant has*
 - (ii) *Seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant,*
- 2) *The tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that has*
 - (ii) *Has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property,*
- 3) *The tenant knowingly gave false information to prospective tenants or purchaser of the rental unit/site or property/park.*

The landlord seeks an Order of Possession affective on November 30, 2012. The landlord also seeks to recover his \$50.00 filing fee from the tenants.

The tenant YC testifies that they could not move into the rental unit on September 01, 2012 due to a bathroom flood and due to this the tenant became very stressed and started smoking again. The tenant testifies that she was on a no smoking program with BC Health and was using the gum to prevent her smoking. The tenant testifies that when the landlord spoke to the other tenant the other tenants did say they were non smokers because at the time that was the case.

The tenant YC testifies that she did smoke in the bathroom of the unit with the window open. The tenant testifies that the upper tenants made complaints about her smoking after one of them came to her unit to help her set up the internet and he noticed an ashtray, lighter and cigarettes next to the computer. After the upper tenant left the tenant testifies she then received a message from the landlord about not smoking in the unit.

The tenant YC testifies that the landlord came to the unit and made the tenant feel really bad about smoking because the landlord's father had died from lung cancer. The tenant

testifies that she understands why the landlord feels bad about people smoking because of this. The tenant testifies that she has not smoked in the unit for three weeks.

The tenant testifies the reason the upper tenants continued to make complaints about them smoking was because they had a dog which they were not allowed to have. When the tenant reported them to the landlord they moved out and they used the tenants smoking as an excuse to get them out of the house so the upper tenants could continue to live there with the dog without the landlord knowing about it.

The landlord calls a witness UF. The witness was one of the upper tenants. The witness testifies that these lower tenants occupied their unit around the last week of September, 2012. From September 23, 2012 one of the tenants in the upper unit noticed the smell of smoke and that tenant left a note on the lower tenants' door to inform them that this was a non smoking unit. The tenant also contacted the landlord to let the landlord know that smoke was coming through the vents into their unit. The witness testifies that the landlord contacted the lower tenants however the smoking continued throughout the remainder of their tenancy and was affecting the witness's health. The witness testifies that they made the decision to move out because of this.

The tenant cross examines the landlords witness and asks the witness if he recalls coming to the lower unit and helping the tenant set up the internet, while doing so did he notice an ashtray. The witness replies he did help the tenant set up the internet but does not remember seeing an ashtray. The tenant asks the witness who wrote the letter saying this was a non smoking unit and where was the letter left. The witness replies one of the other upper tenants wrote the letter and put it on the lower tenants' door.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties and witness. The landlord has provided a number of email correspondences between the landlord and the upper tenants concerning smoke from the lower tenants unit. The lower tenant YC has also testified that she did smoke in the

unit and the landlords witness confirms that he was a tenant living in the upper unit and that they smelt smoke in their unit coming from the tenants downstairs since the time the lower tenants moved in until November 01, 2012 when the upper tenants moved out.

The landlord has provided a copy of the tenancy agreement in evidence and there is no mention in this agreement that this is a non smoking unit; however, the landlord has also provided a copy of the original advertisement for this unit which does clearly state this is a non smoking unit. I also find it likely that the landlord did ask the male tenant before the tenancy started if the tenants were non smokers to which the male tenant replied they were.

I find from the evidence and testimony presented at the hearing that the female tenant did smoke in the unit and continued to smoke even after the landlord and upper tenants requested that she stop smoking as this was a non smoking unit. I therefore find the reason given on the notice that the tenant has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant. However, I am not satisfied that the tenant has engaged in an illegal activity that has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, as smoking in residential properties is still not considered to be an illegal activity. Furthermore I find that the landlord has presented no evidence to show that the tenants knowingly gave false information to prospective tenants or purchaser of the rental unit or property and if the tenants represented themselves to the landlord as none smokers then this would not fall under this section.

It is therefore my decision that the tenant did smoke in the rental unit knowing that this was a non smoking unit and the smell of smoke did seriously jeopardize the health or safety or a lawful right or interest of the landlord and other occupant as the upper tenants moved out because of the smoke and the impact on their health and the

landlord lost tenants for that unit and has to clean the unit to eradicate the smell of smoke.

I also direct the tenants to the One month Notice which notifies the tenants that they have 10 days after receiving the Notice to file an application for Dispute Resolution to cancel the Notice. If the tenants fail to do so they are presumed to accept the end of the tenancy and must move out of the rental unit.

The One Month Notice is therefore upheld and the landlord is entitled to an Order of Possession. As the One Month Notice was served on October 01, 2012, the effective date of the Notice has been amended to November 30, 2012 pursuant to s. 53 of the *Act* as any notice served upon a tenant must be served the day before the day that rent is due to give one clear months notice.

As the landlord has been successful with this application I find the landlord is entitled to recover the \$50.00 filing fee from the tenants pursuant to s. 72(1) of the *Act*.

Conclusion

I HEREBY ISSUE an Order of Possession in favour of the landlord effective on November 30, 2012. This order must be served on the Respondents and may be filed in the Supreme Court and enforced as an order of that Court.

I find that the landlord is entitled to be reimbursed for the **\$50.00** cost of filing this application. I order that the landlord retain this amount from the security deposit of \$450.00 leaving a balance \$400.00 which must be returned to the tenants or otherwise dealt with in compliance with section 38 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: November 15, 2012.

Residential Tenancy Branch