



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

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 the landlord's agent.

At the outset of the hearing the parties agreed that while the landlord did not provide an indication on the 1 Month Notice to End Tenancy for Cause as to what the cause was that they would like me to adjudicate whether the Notice would be valid based on the cause the landlord had intended to cite. The landlord testified that the cause was that the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.

During the hearing, the landlord did not verbally request an order of possession should the tenant be unsuccessful in her Application.

During the hearing the landlord's agent displayed open hostility towards both the tenant and myself and at one point declared that he was not going to cooperate with the process because he was right. I advised the agent to leave the hearing and he did so.

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, pursuant to Section 47 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord submitted the following documentary evidence:

- A copy of a residential tenancy agreement which was signed by the parties on July 1, 1997 for a month to month tenancy beginning on July 1, 1997 for the monthly rent of \$858.00 due on the 1st of each month and a security deposit of \$100.00 was paid;
- A copy of a 1 Month Notice to End Tenancy for Cause that was issued on January 10, 2013 with an effective vacancy date of February 28, 2013 with no reasons cited by the landlord on the Notice; and

- A copy of a letter dated January 10, 2013 from the landlord to the tenant indicating that the landlord was issuing a “Notice to End” because of an ongoing complaint in a common area that is upsetting the tenant above this tenant.

The landlord testified that he had received a complaint from another tenant that this tenant has been smoking on her balcony which bothers this other tenant and impacts her health due to existing medical conditions. The landlord testified that the *Act* requires that when he gets a complaint from a tenant he must act upon it or be held responsible for the complainant’s loss of quiet enjoyment.

The landlord acknowledges that the tenancy agreement does not prohibit smoking but that about a year and a half ago the landlord implemented no smoking rules for all common areas, including balconies, in all of their buildings. He also submits that all tenants were advised of this change and that the tenant has been provided several written warnings about this issue. The landlord submits that the balcony is deemed common area because it is on the outside of the building.

Section 23 entitled “Common Areas” of the tenancy agreement states:

“The Tenant shall take all reasonable steps to ensure that any Resident shall not abuse the common areas of the Property but shall use them prudently, safely and equitably; and shall conform to all notices, rules or regulations posted on or about the Property concerning the use of any laundry room, recreation room and facilities, parking areas, or storage areas and including restriction of use to Residents only, and restrictions on use by children. All such use shall be at the risk of the Residents.”

The landlord provided no documentary evidence including copies of any written notices to the tenant; documents or evidence that the landlord changed their policy regarding smoking in common areas; written complaints regarding this issue from other tenants; the landlord would not even identify the complainant in the hearing.

Analysis

Section 28 of the *Act* states a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord’s right to enter the rental unit in accordance with Section 29; and use of common areas for reasonable and lawful purposes, free from significant interference.

While I agree with the landlord’s position that he has a responsibility under Section 28 to ensure that all tenants receive quiet enjoyment including freedom from unreasonable disturbance, I find the landlord has failed to establish that any tenant lodged a complaint.

Even if a complaint was lodged, I find the landlord has failed to provide any evidence that this tenant's smoking on her balcony has caused unreasonable disturbance. It is not sufficient to state that "smoking bothered" another occupant or that the other occupant had health problems that were exacerbated by this tenant's smoking without any confirmation of any existing health problems.

Further, I find the tenancy agreement does not restrict this tenant from smoking anywhere in the rental unit, including the balcony. As Section 23 of the tenancy agreement defines that common areas are any laundry room, recreation room and facilities, parking areas, or storage areas I find the landlord has not established that balconies are common areas.

And finally, as I am not persuaded by the landlord's agent's position that the balconies should be considered common area and because Section 28 of the *Act* also conveys upon a tenant the right of exclusive possession of the rental unit I find the landlord cannot impose a rule subject to common areas on the tenant's balcony as she was granted exclusive possession of the unit, including balcony, when the tenancy began.

For these reasons, I find the tenant is allowed to smoke in her rental unit, including her balcony and this cannot be used as cause to end the tenancy.

Conclusion

Based on the above, I cancel the 1 Month Notice to End Tenancy issued on January 10, 2013 and find the tenancy remains in full force and effect.

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: February 12, 2013

Residential Tenancy Branch