



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Greater Victoria Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

CNC

Introduction

This is the Tenant's application to cancel a *One Month Notice to End Tenancy for Cause* (the "Notice") issued March 8, 2013.

The parties gave affirmed testimony at the Hearing.

It was determined that the Tenant hand delivered the Notice of Hearing documents and her documentary evidence to an agent of the Landlord's on March 21, 2013. It was also determined that the Landlord's agent served the Tenant with the Landlord's documentary evidence by hand delivering the documents on April 9, 2013, at 9:00 a.m.

Preliminary Matter

This is the second Notice to End Tenancy for Cause that has been issued against the Tenant. The parties attended a Hearing on February 12, 2013, to consider the Tenant's application to cancel a Notice to End Tenancy for Cause that was issued on January 10, 2013. A copy of the Notice to End Tenancy that was the subject of that application and a copy of the Decision dated February 12, 2013 were provided in evidence. The Notice to End Tenancy for Cause issued January 10, 2013, did not disclose a reason to end the tenancy; however, the parties asked the Arbitrator to adjudicate whether it would be valid based on the reason that the Tenant has significantly interfered with or unreasonably disturbed another occupant or the Landlord. The Tenant's application to cancel the notice was granted.

In his Decision of February 12, 2013, the Arbitrator made findings, as follows:

"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."

"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.”

(emphasis added)

During the Hearing, I explained to the parties that I would consider the above findings and determine whether or not I had jurisdiction under the legal principle of *res judicata*.

Res judicata is a rule in law that a final decision, determined by an Officer with proper jurisdiction and made on the merits of the claim, is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent Application **involving the same claim.**

I find that the Arbitrator made his findings based on a notice to end tenancy issued under the provisions of Section 47(1)(d)(i) of the Act. This application was made with respect to the Notice, which was issued under the provisions of Section 47(1)(d)(ii) of the Act. Therefore, I find that this is not the same claim because the reason for ending the tenancy differs and I find that I do have jurisdiction to rule on this matter.

Issue to be Determined

- Should the Notice be upheld or cancelled?

Background and Evidence

A copy of the tenancy agreement was provided in evidence. This tenancy began on July 1, 1997. The rental unit is situated in a building that provides subsidized housing. Market rent at the beginning of the tenancy was \$858.00, due on the first day of every month. The Tenant paid a security deposit in the amount of \$100.00 at the beginning of the tenancy.

The Landlord's agent ("RM") gave the following testimony:

RM stated that the health of other occupants in the building is seriously jeopardized by the Tenant's smoking cigarettes on her balcony. The Landlord provided 7 letters from other occupants in evidence.

RM expected a witness to sign into the Hearing to give testimony, but she did not do so. RM telephoned the witness, but she did not answer his call.

RM submitted that secondary smoke is known to be a health hazard and that he wants the Tenant to agree not to smoke on her balcony. There is no clause in the tenancy agreement which prohibits occupants from smoking in their home.

RM requested an Order of Possession if the Notice is found to be valid.

The Tenant ("GH") gave the following testimony:

GH acknowledged that she smokes cigarettes on her balcony. She testified that other occupants in the rental property also smoke cigarettes and marijuana. GH said that she felt she was being unfairly singled out because one of the complainants (the witness who did not attend the Hearing) bore a grudge against her for being barred from going to the restaurant where GH works.

GH stated that she was confused by the Notice and thought that it was issued because of marijuana smoke. She stated that she has a medical condition and a license to smoke marijuana to ease symptoms of her illness, but that she only smokes it inside the rental unit and not on her balcony. GH testified that she was not pre-warned about the Notice and did not receive any of the letters that were provided in evidence until she was served with the Landlord's documents on April 9, 2013.

GH stated that RM had posted a notice on all occupants' doors on April 4, 2013, inviting them to provide written statements with respect to how their health is affected by smoke.

GH acknowledged that there was a "no smoking" rule for the common areas. She submitted that the Arbitrator in the previous Hearing had found that the balcony was not a common area and that therefore she could smoke there.

GH did not wish to agree not to smoke on her balcony.

Analysis

When a tenant applies to cancel a notice to end tenancy, the onus is on the landlord to provide sufficient evidence that the tenancy should end **for the reasons provided on the notice to end tenancy**. In this case, the Notice issued March 8, 2013, provides the following reason for ending the tenancy:

Tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

In order for the Notice to be upheld, the Landlord must provide sufficient evidence that the **Tenant** has seriously jeopardized the health or safety or lawful right of another occupant or the landlord. Simply the fact that she is smoking on her balcony is not sufficient reason to end the tenancy.

The letters provided in evidence by the Landlord do not specify any particular person. In fact, one of the letters refers to another occupant in the building whose use of

marijuana adversely affects her health. The letters also speak in very general terms. Some of the comments include the following, in part:

- “I request again, and am hopeful that a solution may be found to overcome the challenge of second hand smoke entering intrusively into my apartment and of all those similarly affected.”
- “I have mild asthma and when the cigarette smoke comes into my home from a smoking neighbor it flares up and I then need to use my inhaler.”
- “Some of the residents smoke marijuana, and on a summer’s evening, with my windows open, the smoke comes into my bedroom. I do not smoke marijuana, nor do I wish to.”
- “I recommend that the building be made completely smoke-free; that no residents be permitted to smoke in their apartments. Obviously this is difficult to implement, and so I recommend that, until such time as this can be implemented, all apartment doors be fitted with efficient seals, which should not prove too costly.”
- “Both [occupants] find that cigarette and marijuana smoke (are) a significant nuisance. In the evening people below us smoke marijuana and we have to close our balcony door and windows to keep out the smell. We are afraid that it will permeate our furniture. It also gets quite hot in the summertime. The cigarette smoke in the halls is an annoyance too.”
- “One of our neighbours is on oxygen and has asthma so she suffers with her windows and doors closed all the time which is aggravated by the heat in the summertime. Our other neighbour has asthma also as well as a heart condition which is exacerbated by cigarette and marijuana smoke.”
- “I am now on home oxygen, and have to take a canister of oxygen with me when I do go out to any appointments, etc. No one is allowed to smoke around me at all due to the oxygen. My concerns are for my health due to this continuing second hand smoking from the tenants on the first floor, as well as a couple here on the third floor.”
- “Unit 101 uses a fan to blow his pot smoke out the window. It is directly on a path that my son and I need to access in order to get to our home and to the laundry room. It is inconsiderate of all others right to safe air.” (GH resides in rental unit 102)
- “As I recently went through cancer treatment I would appreciate clean air for myself and my child. At the other end of the building where the steps are to access there is no choice but to walk through heavy cigarette smoke (several people) that are regularly on their porch.”

It is clear that some of the occupants of the rental property desire a smoke free environment which includes all of the rental property, including the occupants’ homes.

However, in this case, I find that the Landlord has not provided sufficient evidence that the **Tenant specifically** has seriously jeopardized the health or safety or lawful right of another specified occupant or the Landlord.

Therefore, I grant the Tenant's application to cancel the Notice. The tenancy will continue until it is ended in accordance with the provisions of the Act.

Conclusion

The Tenant's application is granted. The Notice to End Tenancy for Cause issued March 8, 2013, is cancelled.

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 17, 2013

Residential Tenancy Branch

