



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, O

Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution, seeking an order to cancel a one month Notice to End Tenancy and for other relief.

Both parties appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

Preliminary Issues

The Tenant orally requested a monetary order for compensation from the Landlord during the hearing, for moving expenses and for some arrangements made for cable TV service. However, the Tenant's Application did not clearly set out that she was seeking an order for monetary compensation or specify an amount sought. In the Tenant's written submissions there is a request for monetary compensation if a mutual agreement is reached, however, I do not find this was sufficient to put the Landlord on notice that a monetary claim was being made against her in this Application.

Under the principles of natural justice, a person must know when monetary claims are being made against them and must know the amount claimed and for what the compensation is sought for. I find the Tenant did not do this. Therefore, there is no monetary order granted in this matter. I note it is still open to either party to make an Application for appropriate monetary compensation, if either of them so choose.

Issue(s) to be Decided

Should the one month Notice to End Tenancy be cancelled?

Background and Evidence

This tenancy began on July 1, 2013, with the parties entering into a written tenancy agreement. The monthly rent was set at \$800.00 per month and a security deposit of \$400.00 was paid. The rental unit consists of a basement suite in a residential home, and the upper portion of the rental unit is occupied by the Landlord and children under her care. It is agreed between the parties that the Tenant actually occupied the rental unit in late June of 2013.

The most relevant term of the tenancy agreement to this dispute is as follows:

“T Smoking

It is agreed between the [Landlord] and the [Tenant] that there will be no smoking in the premises by either the [Tenant] or guests. It is agreed that there will be no smoking by the [Tenant] and guests on the property either listed as [address of the rental unit].”

[Reproduced as written.]

The Landlord claims the Tenant breached this portion of the agreement when she was smoking on the property in close proximity to an open garage door, and inside the garage the Landlord and her children were sitting in a vehicle with the windows open, and they could smell the smoke.

The Landlord also testified there were instances when the Tenant was smoking outside and the smoke came into the upper portion of the rental unit through the windows and was detected by the Landlord.

On July 7, 2013, the Landlord issued the Tenant with a one month Notice to End Tenancy for cause, alleging that the Tenant had seriously interfered with or unreasonably disturbed another occupant or the Landlord and the Tenant had seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.

The Landlord wrote on this first Notice that the effective date to end the tenancy would be July 7, 2013, the same date the Notice was issued.

The Landlord became aware that this effective date was incorrect and issued a second Notice, dated July 10, 2013, with an effective date of August 15, 2013.

Both parties agreed that this is still an incorrect effective date. Under the Act, the correct effective date of the Notice would be August 31, 2013. Both parties agree that this is the correct effective date of the Notice.

The Tenant testified that the Landlord told her at their initial meeting that the Tenant could smoke outside of the rental unit on the property, and she would set up a spot for her to smoke. The Tenant testified that this is what prompted the Tenant to enter into the tenancy agreement and go and get a security deposit to pay to the Landlord.

The Tenant testified that for the first few days of the tenancy she smoked outside of the rental unit on the property, without any interference from the Landlord. Then on July 1, 2013, the Landlord informed her in an email that she would have to go off the property to smoke. Following this much of the communication between the parties was by email.

The Tenant then requested that the Landlord prepare an addendum to the tenancy agreement allowing her to smoke on the property which would interfere with the Landlord or her children's right to clean air, and to prevent further fear of being evicted.

The Tenant testified she was smoking on a chair that the Landlord set out for her in the yard when the smoke entered the garage and the occupied vehicle.

The Landlord agrees that she put the chair out in the yard for the Tenant to use when she smoked; however, the Landlord testified and wrote in an email, that this was an attempt at a "peace offering" as the Landlord just wanted to live in peace with the Tenant. The Landlord denies having given the Tenant permission to smoke on the property at the outset of the tenancy.

It appears from the evidence that when the smoke entered the garage and Landlord's vehicle the Tenant was smoking while seated in this chair.

The Tenant testified that she is moving out of the rental unit on August 31, 2013, as she has found a rental unit which accommodates her smoking.

Analysis

Based on the above, the evidence and testimony, and on a balance of probabilities, I find as follows.

I find that the one month Notice to End Tenancy must be cancelled, as the Landlord has not provided the Tenant with the appropriate cause to end the tenancy. The Landlord should have indicated on the Notice that the cause claimed was, "a material breach of the tenancy agreement which was not corrected within a reasonable time after written notice was given to do so".

Although the Landlord complained of the smell of the smoke, there was insufficient evidence to support that the amount smoked had caused significant interference or unreasonably disturbed the Landlord, or the smoke from the Tenant seriously jeopardized the health or safety or lawful right of the Landlord. It appears that the Landlord was most upset about the smoke entering the garage and car on one occasion. I am unable to find on the evidence here that this met the standards required to prove the cause alleged in the Notices issued.

In any event, once the Landlord set out a chair on the property for the Tenant to use, this was an implied waiver, and could be interpreted by the Tenant as a form of permission to smoke on the property in a designated area provided by the Landlord.

If the Landlord wanted to revoke this implied permission or waiver of the smoking clause, the Landlord should have given the Tenant a written notice that she was going back to the strict terms of the tenancy agreement and would no longer permit smoking on any portion of the premises. If the smoking continued after that warning, then the Landlord could have issued a one month Notice to End Tenancy for breach of a material term of the tenancy agreement.

For these reasons, I find that the one month Notice to End Tenancy should be cancelled and I order that it is cancelled and of no force or effect.

Nonetheless, the Tenant has testified that she is moving out at the end of August and the Landlord is certainly aware of this. The Tenant explained her plans to the Landlord in a letter dated July 30, 2013, and informed the Landlord she is moving out by the end of August and that the Landlord could re-rent the unit for September 1, 2013, and provided a forwarding address in writing for the security deposit refund.

Conclusion

The Application of the Tenant is allowed and the Notice(s) to End Tenancy issued by the Landlord in July are cancelled and of no force or effect. Nevertheless, the Tenant testified she is vacating the rental unit at the end of August 2013.

Both parties have leave to apply for appropriate monetary compensation.

This decision is final and binding on the parties, unless otherwise provided under the Act, and is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: August 12, 2013

Residential Tenancy Branch

