Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNDC, FF

Introduction
This hearing dealt with two related applications. File T is the tenant's application for a monetary order. File L is the landlord's application for a monetary order.

The hearing was set for 10:30 am. When the tenant had not called into the hearing by 10:40 am I advised the landlord that I would be dismissing the tenant's application. However, the tenant did call in at 10:44 am while the landlord and I were still talking. The tenant explained the problem that caused her to be late. I accepted the tenant's reasons and advised the landlord that I would be proceeding with the tenant's claim as well as hers.

As the parties and circumstances are the same for both application one decision will be rendered for both.

Issue(s) to be Decided
- Is the landlord entitled to a monetary order and, if so, in what amount?
- Is the tenant entitled to a monetary order and, if so, in what amount?

Background and Evidence
This month-to-month tenancy was to commence July 1, 2013. The monthly rent of $800.00 was due on the first day of the month. The tenant paid a security deposit of $400.00.

The written tenancy agreement contained the following clause:

> "It is agreed between the Lessor and the Lessee that there will be no smoking in the premises by either the Lessee or guest. It is agree that there will be no smoking by the Lessee or guests on the property either . . .".

The landlord is a foster parent. When this tenancy started she was caring for two babies and two five-year-olds. She explained that she operates under very strict guidelines and it is very important that the children in her care not be exposed to smoke.

The tenant explained that she is an outdoor smoker; she smokes but never inside. She disclosed this fact to the landlord when she looked at this rental unit.

The parties agree that they had a conversation about smoking but they gave differing accounts of that conversation. The tenant says the landlord told her would set up a place on the side of the house where the kids never go. The tenant testified that it was this undertaking that led her to agree to enter into this tenancy agreement. The landlord says she only said "we'll find a place for you to smoke" and the tenant must have misunderstood her.

It was after this conversation that the parties signed the tenancy agreement.

The tenant actually moved in on June 27. She smoked at the side of the house, near the garbage cans, without comment until July 1. On July 1 the landlord sent the tenant an email informing the tenant that she would have to go off the property to smoke. The tenant argued that the timing of this email showed some duplicity on the part of the landlord in that she did not enforce the actual wording of the tenancy agreement until the commencement date on the agreement. The landlord said she did not realize that the tenant was smoking in this location until July 1.

In an email dated July 6 the tenant wrote the landlord:

> "If you want me to stay on as your tenant, there will have to be an addendum to the Lease agreement that affirms the "no smoking in the premises" but deletes the "no smoking on the property" and replaces it with no smoking on the property that will interfere with your, your children's, and your neighbours' indisputable right to clean air. That you have set a seat out in front of the fence beside the carport where I can smoke without bothering anybody which, should satisfy all of the parties involved . . .I refuse to live in a place where the terms of the written lease agreement leave me open to eviction should I violate them. So give it some thought. I have another place to view in Brentwood Bay on Thursday."

The landlord replied:

> "I am fully agreeable to what you have offered as a solution. I did place that chair there and wanted to offer it to you as a peace offering. I would have to insist that you not sit under anyone's open though."

On July 7 there was an incident where the landlord smelled smoke in the garage. She issued and posted a 1 Month Notice to End Tenancy for Cause on that date. After realizing there was an error on that notice the landlord issued a second notice on July 10.

The tenant filed an application disputing the notice and the matter was set for hearing on August 12.

The tenant testified that she smokes, has a cat, and is of modest means so it is not that easy for her to find suitable accommodation. She could not risk the consequences if the notice to end tenancy was upheld so she started looking for another place. On July 28 she entered into a one year fixed term tenancy, starting September 1, at a different place.

On July 30 the tenant wrote the landlord:

> "I need not give any Notice of Termination of Tenancy, since you have already done so, and I can't afford to wait to find out what the Arbitrator decides. On the face of it, I have to be out by the end of August, 2013, so I have found another place. You are free to re-rent your suite for September 1, if you have not already done so.
>
> You have my rent cheques for August and September. Please return the September cheque to me forthwith. . .
>
> The Arbitration Hearing will be going forward on August 12, I have not withdrawn my Notice of Dispute".

The tenant also provided a forwarding address in this letter.

At the hearing on August 12 in addition to arguing that the notice to end tenancy should be set aside the tenant also advanced a claim for her moving expenses. In this hearing the tenant testified that she made it clear in that hearing the reason she was disputing the notice was to allow her to claim her moving expenses. The arbitrator at that hearing found that the tenant's application for dispute resolution did not clearly set out that she was seeking an order for monetary compensation and dismissed that part of the claim with leave to re-apply.

In that same decision, which was dated August 12, the arbitrator also held that:

> "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."

As part of her evidence the landlord filed a copy of a memo from the tenant to her dated August 12 which states, in part:

> "You are mistaken – I *have* given you 1-months' Notice to end tenancy. There is no prescribed form for the tenant to give this in, only prescribed elements to be included in the notice, and, in case your Notice was cancelled, I was careful to include all of the prescribed elements in my letter to you dated July 30, 2013, and delivered to you that day."

The landlord did advertise the unit for rent starting July 30 and she did show the unit at the beginning of August. She testified that once she started showing the unit she realized that she could not sign a new tenancy agreement until she knew the outcome of the dispute resolution hearing.

The tenant says that after some showings at the beginning of August the landlord did not re-advertise the unit until September 1.

The tenant moved out on August 30. Her moving expenses were $283.50 and she claims this amount from the landlord.

The landlord was able to re-rent the unit for October 1. She claims the September rent from the tenant.

Although the landlord had also claimed $100.00 for cleaning she withdrew that claim in the hearing.

The parties agree that the full security deposit had been returned to the tenant.

Analysis

Tenant's Claim for a Monetary Order

The evidence disclosed several facts about the tenant:

- She is legally trained.
- She is able to read and interpret written material, including contracts, legislation and legal decision, very capably.
- She writes with care and precision.
- Smoking is very important to her.

Even if the landlord had led the tenant to believe that she would be permitted to smoke on the property – a fact on which no finding is made – the tenant ultimately signed a tenancy agreement that clearly stated smoking on the property would not be permitted. Before signing the agreement and paying her security deposit the tenant could have

asked the landlord to change the wording of the tenancy agreement to reflect what she thought were the true terms of there agreement and, if that negotiation was unsuccessful, simply not entered into this tenancy agreement. There is no evidence that the tenant did so.

When the landlord served the tenant with the notice to end tenancy, the tenant disputed it. The tenant knew that if she was successful on her application the notice would be side aside and the tenancy would continue.

Although the uncertainty of the outcome was a factor in the tenant's decision to move the hurdles she faced were not quite as overwhelming as she suggested in her evidence as, in fact, she was able to find suitable accommodation within a short period of time. The tenant moved because she did not want to continue living in this particular situation.

The tenant chose to sign the tenancy agreement and then she chose to move out of the rental unit when she was not legally obligated to do so. She must bear the financial consequences of those decisions. Her claim for reimbursement of the moving expenses is dismissed.

Landlord's Claim for a Monetary Order

The tenant' assertion in her letter of July 30 that she did not have to give notice to end tenancy was not correct. If the landlord's notice was set aside, as requested by the tenant on her application for dispute resolution, the tenancy would continue until ended in accordance with the *Residential Tenancy Act.* If the tenant wanted to end the tenancy she was required by section 45(1) to give notice to end tenancy to the landlord.

Section 52 states that in order to be effective a notice to end tenancy given by a tenant must:

- be in writing;
- be signed and dated by the tenant;
- give the address of the rental unit; and,
- state the effective date of the notice.

The tenant's letter of July 30 was not as clear as it could have been. On the one hand it contained all of the elements required by section 52; on the other hand it specifically stated that it was not a notice of termination of tenancy and that the tenant was going to continue in her application to set aside the landlord's notice to end tenancy, the legal

result of which would be to continue the tenancy. However, part of the letter was very clear: “I have found another place. You are free to re-rent your suite for September 1.”

I find that the tenant did give notice to end tenancy as required by the *Act* and is therefore not responsible for the September rent.

The landlord’s claim is dismissed.

Conclusion

The claims of the landlord and the tenant are dismissed.

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: December 19, 2013

Residential Tenancy Branch