



Dispute Resolution Services

Page: 1

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 OPC, CNC, MT

Introduction

This hearing dealt with cross Applications for dispute resolution, filed by both the parties.

The Landlord had applied for an order of possession based on a one month Notice to End Tenancy for cause (the "Notice").

The Tenants had applied for more time to dispute the Notice and to request an order to cancel the one month Notice.

Both parties appeared at the hearing and each presented one witness. The hearing process was explained and the participants were asked if they had any questions. Both parties and the witnesses 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 their respective witness, and to make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Issues

At the outset of the hearing the Tenants explained that they had witnesses present who would testify on their behalf. I asked the Tenants to have those witnesses leave the rental unit and not listen to the hearing and I explained to all participants on the telephone conference call that the witnesses could not be present during the hearing and could not be listening to testimony before it was their turn to provide testimony. The Tenants informed me their witnesses had left the rental unit.

I was not informed by the Landlord they would have a witness call into the hearing. Nevertheless, before the Landlord's Agents had provided all their evidence and testimony, the teleconference system announced one of the Landlord's witnesses had called into the hearing.

At or around this point in the hearing it became apparent that other witnesses had called into the hearing at the outset, but either they did not identify themselves or their presence was not announced by the phone system. In any event, these witnesses had been listening to the proceedings since they began. I explained that since they had been hearing testimony and evidence I would no longer be able to hear testimony from them and they hung up from the hearing by telephone conference call.

I did proceed to hear the Landlord's witness over the phone as they had not heard any prior testimony, and then later in the hearing the Tenants' witness gave testimony from their rental unit. I will address issues with the one witness who appeared for the Tenants in my reasons below.

Issue(s) to be Decided

Did the Tenants file the Application to dispute the Notice on time?

Should the Notice to End Tenancy be upheld or cancelled?

Background and Evidence

This tenancy began on October 1, 2013. The Tenants and a child were to reside in the rental unit, according to the written tenancy agreement.

In April of 2014 the Tenants were served with the Notice which was based on the cause alleging a breach of a material term of the tenancy agreement.

The Tenants had applied for more time to dispute the Notice. Under the Act and as written on the Notice the Tenants had 10 days from the date of service of the Notice to dispute the Notice.

The Agent for the Landlord testified he served the Tenants in person with the Notice on April 24, 2014

The Tenants had set out in their Application that they had been served with the Notice to End Tenancy by receiving it under the door on April 24, 2014.

When asked when he was served with the Notice, the male Tenant testified that he had so many letters, notices and papers he was not sure when he was served. He testified he received some notices in the mail, some under the door and some in person. The male Tenant later explained he did not read well and neither did the female Tenant, so they went to an advocacy group for assistance. The Tenants believed they filed on time, based on the advice they received from the advocacy group that service under the door meant they were served three days after it was posted to the door.

The Agent for the Landlord repeated that he had served the Tenants in person on April 24, 2014. He later explained they do not serve these types of notices to end tenancy by placing them under a door; rather if served by the posting method, these notices are taped to the door. The male Tenant replied that the Notice must have fallen off the door and then slid under the door because there was such a large gap under the door.

If served in person the Tenants would have had until May 5, 2014 to file an Application to dispute the Notice. If served by posting to the door, the Tenants would have had until May 7, 2014 to file the Application.

The Tenants' Application was filed on May 7, 2014.

The Agent for the Landlord then testified as to why the Notice was issued.

The Notice alleges that the Tenants breached a material term of the tenancy and did not correct this within a reasonable amount of time after written notice to do so. The Agent testified he felt the Tenants had breached section 24 of their tenancy agreement which prohibits the Tenants or their guests from participating in illegal activities in the rental unit which included the use of illegal drugs.

The Agent testified that he had issued several warnings to the Tenants arising from complaints about marijuana smoke coming from the rental unit.

On November 10, 2013, the Landlord received a written complaint from another occupant that the Tenants were talking loudly and smoking marijuana on the balcony of the rental unit and the smoke and noise were entering into the unit above, disturbing the occupant living there. On November 13, 2013, the Landlord wrote a warning letter to the Tenants about the noise disturbance and the smoking of marijuana. The Tenants were warned this was a breach of their tenancy agreement and they might receive an eviction notice if this continues.

On January 3 and 4, 2014, the Landlord received two other complaints regarding the Tenants, noise and the smell of marijuana from the rental unit.

On January 6, 2014, the Tenants were warned in a second letter, following observations by the Agent for the Landlord and a different occupant, that they had an unauthorized guest living in the rental unit for an extended period of time and that this guest was bringing a dog into the rental unit, contrary to the building rules and the tenancy agreement. This letter also set out that although the balcony issue seemed to have subsided, now there were new complaints of the smell of marijuana smoke in the hallway outside of the subject rental unit. The Tenants were also cautioned that they may no longer qualify for the rental unit as their child was no longer residing with them.

On April 18, 2014, the Landlord received a further complaint from the occupant who lives in the rental unit above the subject rental unit. The occupant again complains

about the smell of marijuana coming from the rental unit and how it is upsetting her and a child with cancer in the unit above.

On April 24, 2014, the Landlord issued the Notice and explained in a letter that the Tenants should refer to page two of the Notice for information on how they might dispute the Notice.

The Agent for the Landlord testified that on April 24, 2014, he attended the rental unit to serve the Tenants with the Notice and the letter. The Agent testified that when the Tenants opened the door he could see a cloud of smoke in the rental unit and there was a very strong odour of marijuana smoke coming from the rental unit.

The other Agent for the Landlord testified that on two different occasions he was passing the rental unit while guests of the Tenants were exiting the rental unit. The Agent testified he could see smoke and could smell a strong odour of marijuana coming from the rental unit while the door was opened.

The male Tenant cross examined the Agents for the Landlord and questioned them if they had ever seen either of the Tenants put a marijuana joint in their mouth. The Agents agreed they had never seen the Tenants put a joint up to their mouths.

Around this time the witness for the Landlord called into the hearing, as described above.

The Witness for the Landlord ("J.S.") testified she had lived in the building for several years and became aware of the Tenants shortly after they moved into the building. She testified she has seen people coming and going from the subject rental unit who appeared to be high on drugs.

J.S. further testified that she had seen a woman with a dog coming and going from the rental unit on several occasions.

She testified that on another occasion she saw a guest of the Tenants smoking crack on the front lawn and trying to pack up his belongings in the front yard.

J.S. testified that she had seen the police attend at the rental unit several times.

The male Tenant was allowed to cross examine the witness J.S., although the male Tenant provided direct testimony rather than questioning the witness.

The male Tenant agreed the police had been to the unit and testified he had called them himself. He testified that he did not know who the witness was and that she had never been in the subject rental unit. He testified he felt she was making assumptions about the Tenants. He testified that the ministry had investigated the Tenants and would be returning their child to them.

In reply, the Agent for the Landlord asked the witness J.S. if she had ever smelled marijuana smoke in the hallway outside the rental unit and she replied that she did, but she explained that she did not know exactly which unit the smoke was coming from.

In reply to the Landlord's claims and in support of their Application, the Tenants then testified.

The male Tenant testified that in response to the Landlord's complaint about the lady with the dog, she was his sister and he did not know that guests could not bring dogs into the building. He testified that once he found out this was a problem his sister left the dog somewhere else. The male Tenant testified he felt he had fixed the problem.

The male Tenant alleges that he has made complaints about the noise from the rental unit above. He testified that the occupant above walks across the floor like a herd of elephants.

The male Tenant testified that they do not smoke marijuana in the apartment or on the balcony anymore. He testified they try to follow the rules of the building as much as possible. He further testified that both he and his spouse had been tested for drugs as they are in the process of having their child returned to them. He explained he tries his best to mind his own business.

The male Tenant testified that his social worker could have provided supporting testimony for the character of the Tenants, although the worker was not available at the time of the hearing to testify.

The Tenants both alleged they can smell marijuana in the hallway outside their unit. The male Tenant testified he does not do crack or stupid drugs like that and that he is not a drinker. He testified that the smell could be coming from anyone of the units on the second floor. He alleges the Landlord is picking on the Tenants.

The Tenants explained they smoke cigarettes on the balcony. The female Tenant explained she does not smoke weed, but does smoke cigarettes on the balcony.

The Tenants were then asked if they wanted to present their witnesses. They immediately replied, "Yes, she is right here."

I reminded the Tenants that I had explained that all witnesses should not be listening to the hearing proceedings and testimony, and that they were to leave the vicinity and not listen.

The Tenants then explained that the witness had forgotten her apartment keys and had returned to the rental unit to get them.

I note that I did not hear the witness knock on the door or ring the buzzer to gain entrance to the rental unit to retrieve her keys. Nevertheless, I allowed the witness to testify.

Under questioning from the Tenants, the witness C.L. testified she had never seen the Tenants smoking drugs in the rental unit. She testified she used to live on the second floor and could constantly smell drugs in the hallway. She alleged the smell of marijuana and crack was coming from another rental unit. She alleged that everyone on the floor is smoking marijuana and the hallway always smells.

An Agent for the Landlord cross examined the witness C.L. and noted that she was presently under her own Notice to End Tenancy, which the witness did not deny.

Under cross examination, the witness C.L. testified she was not in the Tenants' rental unit very often but had frequent phone calls with the Tenants. She testified she was often out with her children or going to her lawyer's office. She testified she was not able to go to the rental unit everyday but did phone there.

Under further questioning, the witness then testified she went to the rental unit nearly every morning for a little bit.

The Tenants again testified they were not smoking marijuana in the rental unit, but there was always a strong smell of pot in the hallway. The male Tenant explained they were going to parenting groups and he has proof that he was in other places when they were alleged to have been smoking marijuana in the rental unit. The Tenants both testified that the smell was not coming from the rental unit.

Analysis

A party that makes an Application has the burden to prove their claim as set out in the Application.

The burden of proof is the civil standard, based on the balance of probabilities.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

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

I accept the testimony of the Agent for the Landlord and find that the Tenants were personally served with the Notice on April 24, 2014. If served in person the Tenants would have had until May 5, 2014 to file an Application to dispute the Notice but they failed to do so. I found the male Tenant was evasive in giving testimony about being

served in person. I found the evidence from the Agent for the Landlord of when and how he served the Tenants to be more persuasive, as it was straightforward and direct.

Therefore, I find that the Tenants failed to file their Application on time and it should be dismissed.

In any event, even if it had been filed on time, I find the Tenants' Application would have failed, as **I find that the Landlord's Notice to End Tenancy is valid and should not be cancelled. Therefore, I allow the Application of the Landlord and grant an order of possession.**

I accept the testimony of both the Agents for the Landlord that they saw and could smell marijuana smoke in the rental unit with one or both of the Tenants present. In particular I accept that the Agent saw this on April 24, following the two warning letters. I found their testimony to be straightforward and direct. I further accept that at least one other occupant has smelled marijuana smoke coming up from the rental unit and the balcony, based on the written reports of the Landlord filed in evidence.

I found much of the Tenants' evidence lacked credibility. I found the male Tenant was often evasive in his testimony.

In particular I found that the testimony about their witness being in the subject rental unit to retrieve her keys at exactly the same time she was called to give testimony, lacked credibility. I find it is more likely than not the witness remained in the rental unit and heard the proceedings before she testified.

Furthermore, I found much of the phrasing she used to be exactly the same wording as that of the Tenants during their testimony. In other words, it appeared the witness was simply repeating exactly what the Tenants had themselves said in their evidence. Therefore, I do not accept any of the testimony of this witness, as I find it was tainted by being present and listening to the proceedings prior to her giving testimony.

I also find the Landlord adequately warned the Tenants the behaviour of smoking marijuana in the rental unit was a breach of the tenancy agreement so significant that the continued behaviour could cause the tenancy to end in an eviction. I find that despite the warnings, the Tenants and or their guests, continued to smoke marijuana in the rental unit and this has disturbed other occupants in the rental unit. I find this behaviour constitutes a material breach of the tenancy agreement as set out in paragraph 24 of the tenancy agreement, which prohibits the use of illegal drugs in the rental unit.

The Landlord had testified that the Tenants had paid rent till the end of June 2014.

Therefore, based on all of the above, I allow the Landlord's Application and grant an order of possession effective at 1:00 p.m. on June 30, 2014. The Tenants' Application is dismissed without leave to reapply.

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: June 27, 2014

Residential Tenancy Branch

