



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Summerland Kiwanis Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OPC, O

Introduction

This hearing dealt with an application by the tenant for an order setting aside a notice to end this tenancy and a cross-application by the landlord for an order of possession. Both parties participated in the conference call hearing.

Issues to be Decided

Does the landlord have grounds to end this tenancy?

Background and Evidence

The facts are not in dispute. The tenancy began in 2006 and the rental unit is located in a seniors' housing complex. The parties signed a written tenancy agreement in 2009 as one had not existed prior to that date. The tenancy agreement places no restrictions on smoking in the rental unit, in common areas or on the grounds of the residential property. The tenant has a licence to possess marijuana and smokes marijuana for medical purposes. In April 2013, the landlord announced to the tenants that the building would become a smoke free building. Existing tenants upon whom no smoking restrictions had previously been in place would be permitted to continue to smoke in their units and on their patios, but no new tenants would be permitted to smoke anywhere on the residential property, including parking lots, sidewalks and grassed areas. The tenant continued to smoke in the rental unit and on his patio after having received the April announcement.

The landlord received several verbal complaints from other tenants about the smoke emanating from the rental unit and over the course of several months received many written complaints from T.C., a tenant whose residence was facing the rental unit but more than 10 metres away across a common courtyard. In response to T.C.'s repeated complaints, the landlord sent the tenant several warning letters advising him to refrain from smoking marijuana on the residential property.

On September 26, 2014, the landlord issued the tenant with a one month notice to end tenancy for cause alleging that the tenant had significantly interfered with or unreasonably disturbed

other occupants, had seriously jeopardized the health or safety of other occupants, had put the landlord's property at significant risk and had caused extraordinary damage.

T.C. appeared at the hearing and testified that she moved into the unit in November 2010 and initially was not particularly bothered by the smell of smoke, but in the summer of 2011 the odour was stronger and occurred more frequently. T.C. testified that the problem escalated over the years and as a result, there have been approximately 15 nights in which she did not sleep in the rental unit because the smell of smoke was so overpowering and on several occasions slept in her car. She spoke with the tenant about the problem and they entered into an agreement that the tenant would keep his doors and windows shut on every day except for Sunday. T.C. testified that this resolved the problem for a few weeks, but eventually the tenant again began to open his windows during the week which allowed the odour to drift to her unit. T.C. testified that the odour makes her physically ill and has caused her to lose quiet enjoyment of her unit.

The landlord testified that they purchased an air purifier for the tenant in 2010 but it has not helped alleviate the odour and in any event, when they inspected it in September 2014, they found that the filter was clogged rendering the purifier ineffective.

The tenant testified that he used the air purifier regularly but the filters were expensive to replace. Since the landlord inspected the filter in September, he has run it constantly. He further testified that for the most part, he has complied with his agreement with T.C. to leave his doors and windows shut during the week and has only occasionally opened windows at night.

The landlord alleged that the extreme odour of smoke has significantly interfered with and unreasonably disturbed other occupants of the residential property and has also seriously jeopardized their health. They further testified that the tenant has caused damage to the rental unit because the residue left by the smoke will take a significant amount of work to remove, which will cause them to lose several months of income when they remediate after the tenancy has ended.

Analysis

The landlord bears the burden of proving that they have grounds to end the tenancy. The landlord provided insufficient evidence to show that the tenant has placed their property at significant risk or caused extraordinary damage. While the landlord may expect that some work will need to be performed at the end of the tenancy to make the unit odour free, I am not satisfied that the impact of this odour may be characterized as placing property at significant risk or as extraordinary damage.

While I applaud the landlord for making the property a smoke free environment, the landlord must keep in mind that it is contractually bound to provide the tenant with the rental unit agreed to in 2006. When the tenant entered into this tenancy, there were no smoking restrictions in

place and he could smoke freely in the rental unit, opening doors and windows as desired in order to enjoy his unit. The landlord may not now unilaterally impose restrictions on that freedom. The restrictions on smoking in common areas I find to be reasonable, but I find the landlord's expectation that the tenant will cease or limit his smoking inside his own unit to be unreasonable.

The landlord has an obligation to inform incoming tenants that there are rental units in the building in which occupants will smoke because their tenancies began prior to the advent of the smoke free environment. This will allow those tenants to make an informed decision as to whether they wish to be exposed to smoke by renting a unit. T.C. acknowledged in her testimony that the landlord had so advised her and while I appreciate that the odour is offensive and even medically problematic for her, she made an informed decision to reside in a building which housed smokers.

I find that the landlord has failed to prove that they have grounds to end the tenancy and for that reason, I order that the notice to end tenancy served on September 26, 2014 be set aside and of no force or effect.

I encourage the parties to work cooperatively and search for creative solutions which will allow all residents of the property to live comfortably. This may involve housing tenants who smoke in an area away from those who do not as was suggested by one of the parties at the hearing.

Conclusion

The notice to end tenancy is set aside and the landlord's claim is 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: November 19, 2014

Residential Tenancy Branch

