



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding GRACE DELICATESSEN AND RESTAURANT LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47.

Representatives for parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant attended the hearing with his advocate. The landlord was represented by two agents.

The tenant testified that he served the landlord with the dispute resolution package on 15 January 2015 by registered mail. The tenant provided me with a Canada Post customer receipt that showed the same. The landlord did not contest service. On the basis of this evidence, I am satisfied that the landlord was served with the dispute resolution package pursuant to section 89 of the Act.

Both the tenant and landlord served late evidence. They each consented to the admission of the other party's evidence that was received. Notwithstanding this consent, the tenant's agent reported that he did not have the landlord's one page submission to the Residential Tenancy Branch. The landlord's agent SM acknowledged that he did not serve this evidence on the tenant. As the one-page document has not been served, I will not consider it in reaching my decision.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

This tenancy began in 1987. Current monthly rent of \$520 is due on the first. I was not provided with a copy of the tenancy agreement.

The agent SM testified that on 1 January 2015, the landlord served the tenant with the 1 Month Notice by posting it to the tenant's door. The 1 Month Notice set an effective date of 31 January 2015. The 1 Month Notice set out that it was given as:

- the tenant or person permitted on the property by the tenant has:
 - seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
 - put the landlord's property at significant risk; or
- the tenant has caused extraordinary damage to the unit.

The agent SM testified that the rental unit is uninhabitable and that it is not healthy to live there. The agent SM testified that he verbally asked the tenant to clean up his clutter in April 2014. The tenant acknowledged that he had accumulated newsprint and paper, but testified that he was working to clear it out. The tenant acknowledged that the rental unit was cluttered. The agent RS testified that it was not just clutter. The agent SM testified that the tenant is unable to sleep in his bedroom because of the clutter and so he is sleeping in the hallway.

The agent SM testified that the tenant's clutter problems have been occurring since 2000. The agent SM testified that the landlord had issued five prior notices to the tenant: 2005, 2008, 2011, and 2013/14. The tenant testified that he has never received any written warnings and that all warnings to this point have been verbal. The agent SM testified that the tenant has been unable to keep his promises regarding the maintenance of the rental unit.

The landlord provided me with a letter dated 30 December 2005. This letter warned the tenant to maintain a home free of clutter and to cease from "improper usage of the suite". The landlord provided me with an unsigned agreement dated 11 January 2006. This letter purports to be an agreement to conditionally continue the tenancy.

The tenant testified that there was an issue with bedbugs in 2006 or 2007. The tenant testified that he reported the issue as soon as he was aware of it.

The agent SM testified that the tenant is smoking in the rental unit, which is against his tenancy agreement. The tenant acknowledged smoking inside and stated that he would stop. The agent SM testified that smoking inside represents a fire hazard in combination with the tenant's paper clutter and is an issue from an insurance prospective. I was not provided with any documentary evidence relating to the landlord's insurance.

The agent SM testified that in April 2014 the tenant washed his clothes in the bathtub and spilled water on the bathroom floor. The agent SM testified that he believed that because of the tenant's clutter and vision problems the tenant was unable to see that the water was there. The agent SM testified that there was a large amount of mildew behind the toilet and beside the bathtub. The tenant testified that this leak was because of a deficient shower valve and that this is what caused the damage. The agent SM testified that the leaky shower valve occurred in September 2014, not April. Further, the tenant testified that the damage could have also been caused by a dripping pipe. The agent SM testified that the dripping is caused by condensation and only occurs in the winter.

The agent SM testified that the tenant's refrigerator broke in November 2014. Again the agent SM testified that he believed that because of the tenant's clutter and vision problems the tenant was unable to see that the water was there. The agent SM testified that this caused damage to the rental unit. The agent SM testified that the water leaked downstairs. The tenant testified that he was not aware of the refrigerator leak.

The agent testified that three tenants have complained about a rotten smell coming from the rental unit. The tenant submitted that if there is an odor it is probably coming from his carpets.

The tenant testified that the landlord conducted a fire inspection in October. The tenant testified that he did not hear any complaints regarding the condition of the apartment at that time. The tenant submitted that he questioned why the landlord did not take steps after the fire inspection if the condition of the rental unit was an issue. The landlord RS testified that the smell of the rental unit "hits you like a bomb" and that the landlord was almost unable to conduct the inspection.

The landlord provided me with photographs taken in April and November 2014:

Photograph 1 shows the living room of the rental unit. The rental unit is very full and contains a significant amount of clutter. The clutter appears to mostly be paper products such as flyers, newsprint, and boxes.

Photograph 2 shows the hallway between the bedroom and living room. The hallway has a layer of letter mail, flyers, and newsprint. There is visible carpet.

Photograph 3 shows the hallway in the entrance of the rental unit. There is an accumulation of letter mail and flyers near the front door. There is a roll up mattress against the wall of the hall. Most of the carpet is visible in the photograph.

Photograph 4 shows the kitchen and dining area of the rental unit. There are letter mail and flyers on the floor as well as some boxes. The linoleum is visible.

Photograph 5 shows the living room. There is a cot in the living room. There is a significant amount of flyers and newsprint on the floor. There is almost no carpet visible.

Photograph 6 shows the bathroom counter and sink. The bathroom counter is mostly covered with debris. There are at least four empty cigarette containers visible.

Photographs 7 and 8 show the linoleum behind the toilet and beside the bathtub. The linoleum is discoloured with mildew.

Photograph 9 shows a light fixture.

The tenant provided me with photographs taken 15 January 2015:

Photograph 1 shows the dining area of the rental unit. There is greatly reduced clutter from the landlord's photograph 4. Most of the carpet in the walkway area is visible.

Photograph 2 shows the living room area of the rental unit. The photograph shows greatly reduced clutter from the landlord's photograph 1.

Photograph 3 shows the living room area of the rental unit. The photograph shows greatly reduced clutter from the landlord's photograph 5. All of the carpet is clear of clutter.

Photograph 4 shows the hallway leading from the living room towards the bathroom. The carpet is free of clutter.

Photograph 5 shows a hallway completely free from clutter.

Photograph 6 shows the bathroom. The bathroom counter is busy but tidy. The floor is free of clutter.

The tenant's advocate submitted that there have been no other warnings from the landlord since the 2006 agreement. The advocate asked that I consider the passage of time since 2006 and that the 1 Month Notice should be considered a first warning to the tenant. The advocate submitted that the tenant has engaged in cleaning of the rental unit and shown improvement.

Analysis

In an application to cancel a 1 Month Notice, the landlord has the onus of proving on a balance of probabilities that at least one of the reasons set out in the notice is met.

Subparagraph 47(1)(d)(ii) of the Act permits a landlord to terminate a tenancy by issuing a 1 Month Notice in cases where a tenant or person permitted on the residential property by the tenant seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant.

The landlord alleges that the tenant's clutter poses a safety and health hazard to the other occupants of the building. In particular, the landlord points to a strong smell that the agent testified emanates from the rental unit. The landlord did not provide letters or testimony from any of the other occupants. The tenant denies that there is a smell, but submits that, if there is any smell, it is from the stale carpet in the rental unit.

The tenant has occupied the rental unit since 1987. I was not provided with any evidence that the carpet has been replaced since the tenant began occupying the rental unit. Pursuant to *Residential Tenancy Policy Guideline* "40. Useful Life of Building Elements" sets out that carpet has a useful life expectancy of ten years. I find that it is entirely plausible that the carpet requires replacement and is the source of any offending smell.

On the basis of the landlord's lack of evidence and the plausible explanation provided by the tenant, I find, on a balance of probabilities, that the landlord has failed to prove that the tenant has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant.

Subparagraph 47(1)(d)(iii) of the Act permits a landlord to terminate a tenancy by issuing a 1 Month Notice in cases where a tenant or person permitted on the residential property by the tenant has put the landlord's property at significant risk.

In this case, the landlord alleges that, by smoking in the rental unit that contains excess paper clutter, the tenant is placing the landlord's property at significant risk of fire. The evidence the landlord provided only shows cigarette debris in the bathroom. I note that there is little, if any, paper debris in the bathroom. The landlord has not provided any evidence that the tenant's actions have placed the landlord's property at significant risk. I find that the landlord has failed to prove, on a balance of probabilities that the tenant is placing the landlord's property at significant risk.

Pursuant to paragraph 47(1)(f), a landlord may terminate a tenancy in cases where a tenant or person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property.

In this case, the landlord has alleged that the tenant has caused damage in the following ways:

- failing to identify that the refrigerator was leaking;
- failing to identify that the shower valve was leaking; and
- splashing water outside of the bathtub when washing his clothes.

The landlord provided pictures of mildew on the linoleum and a picture of a light fixture in support of this claim. The landlord's agents provided limited evidence as to the extent of the damage alleged: no particulars were provided. The landlord has not provided any documentary evidence that he has incurred costs in relation to these damages or estimates in regard to the extent of the damage. While the landlord may have shown damage, the landlord's photographs 7, 8, and 9 and testimony fail to prove that there is extraordinary damage to the rental unit.

Furthermore, I am mindful of *Residential Tenancy Policy Guideline* "40. Useful Life of Building Elements". This guideline provides me with direction in determining damage to capital property. This guideline sets out that the useful life expectancy of tile and

carpet is ten years. The policy is silent on linoleum, but I find that this floor covering is significantly analogous to both tile and carpet to assign the same useful life expectancy to linoleum. I was not provided with any evidence that the linoleum has been replaced in the nearly thirty years the tenant has occupied the rental unit. As such, even if there has been damage caused by the tenant, I question whether or not the damage would be compensable given the age of the floor.

The tenant should not consider this decision an endorsement of his behaviour. I limit my decision to my finding that the landlord failed to prove on a balance of probabilities that the tenant's behaviour provides grounds for any of the three grounds indicated by the landlord on the 1 Month Notice. Evidence of continued conduct of this nature could be grounds for a successful future 1 Month Notice.

Conclusion

The tenant's application is granted. The 1 Month Notice is canceled and is of no force and effect. The tenancy will continue until it is ended in accordance with the Act.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: February 03, 2015

Residential Tenancy Branch

