Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, LRE, OPB, OPC, FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the one month Notice to End Tenancy was personally served on the Tenant on May 21, 2015. Further I find that the Application for Dispute Resolution/Notice of Hearing was filed by each party was sufficiently served on the other. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to an order cancelling the Notice to End Tenancy dated May 21, 2015?
b. Whether the tenant is entitled to an order suspending or setting conditions on the landlord's right to enter?
c. Whether the landlord is entitled to an Order for Possession?
d. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

The tenancy began on October 1, 2003. The rent is $899 per month payable in advance on the first day of each month. The tenant(s) paid a security deposit of 200 at the start of the tenancy.

Grounds for Termination:

The Notice to End Tenancy relies on section 47(1)(d) of the Residential Tenancy Act. That section provides as follows:

> Landlord's notice: cause
>
> 47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
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> …
>
> (d) the tenant or a person permitted on the residential property by the tenant has
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> (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
>
> (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
>
> (iii) put the landlord's property at significant risk;
>
> (h) the tenant
>
> (i) has failed to comply with a material term, and
>
> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

The landlord seeks to end the tenancy based on the following evidence:

- She conducted a regular suite inspection on May 20, 2015. She testified the rental unit was in filthy condition. There were open garbage bags on the floor. The kitchen was filthy. The stove was extremely dirty. It appeared the tenant has been using the stove to light his cigarettes.
- The tenant is a heavy smoker. The second hand smoke is bothering other tenants who have written complaint letters.
- The representative of the landlord produced photographs of the condition of the rental unit as of the date of the inspection. The photographs include the following:
    - Cigarette butts piled on a coffee table. Cigarette packages and butts on the floor of the rental unit.
    - A large container of cigarette butts on the floor underneath the table.

  - Open garbage bag next to the table.
  - Cigarette ashes on the floor
  - The stove was extremely dirty and there appeared to be a small piece of tin foil on the burner.
  - The counter contained dishes that were extremely dirty and had not been washed for an extended period of time
  - Dirt stains on the counter beside the sink and other places.
  - The bathtub and toilet was dirty.
  - There was no indication the tenant was smoking on the balcony.
- The representative of the landlord referred me to three letters from other tenants complaining about the excessive smoke.

The tenant disputes much of the landlord's testimony.

The representative of the landlord gave the following evidence on cross examination:

- MD is the health and safety inspector for the company. He inspected the rental unit two days after the initial inspection and confirmed the rental unit was very messy and dirty.
- MD was not able to attend this hearing because he was dealing with another tenant emergency.

MD failed to provide any evidence for this hearing including an affidavit or a letter.

Tenant Witness #1 testified she was present when MD conducted his inspection.

- DM told her the rental unit was messy and dirty. However, it was much improved from the photographs.
- DM agreed there was no fie hazard or health problem with the rental unit.
- Witness #1 helps with arranging cleaning on behalf of the tenant. The rental unit is cleaned on the first and third Monday of each month.

The tenant's representative submits the Notice to End Tenancy should be cancelled for the following reasons:

- The landlord is attempting to re-litigate an arbitration which they lost in a decision dated March 19, 2015. The grounds and issues are the same as what is being raised in this hearing.
- The tenant is a client of the MPA Society Supported Independent Living Program which provides rental subsidy and tenant support to person with mental illness.
- The tenant receives twice a month housekeeping services.
- The landlord is conducting inspection on a monthly basis and has demonstrated considerable hostility toward the Tenant and his support workers.
- The tenant acknowledges the dispute premises are sometimes messy. However, there is nothing in the condition of the unit that creates a risk to health, safety or property.
- The tenant rolls cigarette butts on the coffee table.
- The decision of the previous arbitrator provides that the tenant is entitled to smoke in the rental unit.
- The images of the rental unit relied on by the landlord in the previous hearing are similar to the images relied on by the landlord in this hearing.

There is a dispute between the parties as to the time when the May 20, 2015 inspection took place. The tenant testified it took place at 9:00 a.m. in the morning much earlier than proposed in the notice. The tenant testified did not have enough time to clean the rental unit as he intended to do. The landlord testified that the inspection took place in the late afternoon at the time set out in the Notice to End Tenancy..

Analysis - Tenant's Application to Cancel the one month Notice to End Tenancy dated May 21, 2015:

In essence the representative for the tenant submits the landlord's claim is barred by the principle of res judicata. This principle provides that a matter which has already been conclusively decided by a court is conclusive between the parties. Final judgments prevent any re-examination or re-trial of the same dispute between the same parties. The Supreme Court of British Columbia in Jonke v, Kessler, Vernon Registry, Docket No. 3416 dated January 16, 1991 held that the principle of res judicata applies to residential tenancy arbitration. The policy reasons in favor of the principle are set out in a decision of Hardinge L.J.S.C., in Bank of B.C. v. Singh 17 B.C.L.R. (2d) 256 as follows:

> "…While people must not be denied their day in court, litigation must come to an end. Thus litigants must bring their whole case to court and they are not entitled to relitigate the same issues over and over again. Nor are litigants entitled to argue issues that should have been before the court in a previous action…"

The principle of res judicata prevents a party from bringing to litigation not only a matter that was previously heard, but also a matter that should have been heard at that previous arbitration. Mr. Justice Hall of the Supreme Court of British Columbia, in the case Leonard Alfred Gamache and Vey Gamche v. Mark Megyesi and Century 21 Bob Sutton Realty Ltd., Prince George Registry, Docket No. 28394 dated November 15, 1996, quoted with approval the following passage from the judgement of Henderson v. Henderson, (1843), 67 E.R. 313

> "In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

I asked the representative of the landlord to identify the differences between the issues raised in the previous arbitration hearing and this hearing. She submitted the condition is much worse. The number of cigarette butts on the floor and table is significantly more. She testified the tenant appears to be smoking more. Further she submitted the tenant represented in the previous hearing he was smoking on the patio. The evidence discloses he smokes inside.

The representative of the tenant presented evidence where representatives of the landlord expressed strong dissatisfaction with the result of the previous hearing which concluded the tenant had a legal right to smoke in his rental unit and the landlord did not have sufficient grounds to end the tenancy and where they have indicated they intend to continue to serve Notices with the intention of forcing the tenant out.

<u>Res Judicata Analysis:</u>

I determined the principle of res judicata applies to this situation. The representative of the landlord has failed to establish there are material differences between the previous hearing and this hearing. While the landlord has a legal right to serve a new Notice to End Tenancy where the situation has changed for the worse, the law does not permit a landlord to continue to serve a new Notice which raise matters that have been already been decided. The issues raised in the Notice to End Tenancy dated May 21, 2015 are the same issues that were considered by the arbitrator when she dismissed the landlord's application in her decision that was rendered on March 19, 2015. I determined the landlord's claim is barred by the principle of res judicata for the following reasons:

- The grounds are identical
- The arbitrator carefully considering the evidence relating to the tenant's smoking and determined the landlord did not have grounds to end the tenancy. The landlord raised the same arguments in this hearing.
- The representative of the landlord failed to establish there is anything about the tenant's conduct that is materially different than what was litigated in the previous hearing.
- The landlord failed to prove the tenant's smoking is any different than the previous hearing. The tenant testified he is smoking one pack of cigarettes a day. The landlord alleged greater smoking but failed to establish sufficient proof.
- The photographs relied by the landlord at the previous hearing are photocopies of photos. It is difficult to determine whether because of the poor qualities of the photos but they it does not appear the condition of the rental unit is significantly different between those photos and the previous hearing.
- The representative of the landlord acknowledges the tenant has a right to smoke in his rental unit.

<u>Failure to establish sufficient cause on the Merits:</u>

In addition, I determined the landlord has failed to present sufficient evidence to establish cause to end the tenancy on the merits. The landlord has the burden of proof.

The landlord has the burden of proof to establish sufficient cause based on a balance of probabilities. The landlord has failed to prove the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. The complaint letters in essence complain about the tenant smoking. The other tenants who complained did not attend the hearing and give first hand testimony. The representative of the landlord acknowledged the

tenant is permitted to smoke in the rental unit. I determined the landlord failed to provide sufficient evidence to establish grounds to end the tenancy under section 47(1)(d).

The landlord failed to prove that the conduct of the tenant has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or put the landlord's property at significant risk. In my view it is significant that DM, the health and safety inspector for the landlord did not give evidence at the hearing or provide evidence of any support. The landlord's explanation of him attending another tenant emergency is not a sufficient explanation for the failure to provide to provide affidavit evidence and or a letter outlining possible concerns. Further, hearings are conducted by conference call at specific times. It is not unusual for clients and witnesses to be telephoning in from all over the world. The eviction of a long term tenant is a significant event. In my view an adverse inference can be drawn from the failure of DM to provide any evidence. Further, I accept the hearsay evidence of Tenant's Witness #1 when she testified that DM, the safety inspector told her that while the rental unit was messy and unclean, he did not consider it to be health and safety hazard. I determined that while the rental unit is messy and unclean, it has not reached a stage to seriously jeopardize the health and safety of the landlord or put the landlord's property at significant risk.

Finally, the landlord failed to prove the tenant breached a material term of the tenancy agreement and failed to rectify the breach within a reasonable period of time after getting written notice to do so. The landlord conducted the inspection on May 20, 2015. The landlord did not give a breach letter but instead chose to serve a one month Notice to End Tenancy the next day. The landlord cannot rely on letters served in the past as those matters were merged in the previous arbitration.

As a result I ordered that the Notice to End Tenancy dated May 21, 2015 be cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged.

Tenant's Application to suspend or set conditions on the landlord's right to enter the rental unit:
The representative of the tenant submits the landlord believes the previous arbitration hearing was wrongly decided, the conditions in the unit were and remain unacceptable and they are

abusing there rights in unfair and oppressive attempt to evict the tenant. Section 29(2) of the Residential Tenancy Act provides as follows:

Landlord's right to enter rental unit restricted

29 (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

(a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;

(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

(i) the purpose for entering, which must be reasonable;

(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;

(d) the landlord has an order of the director authorizing the entry;

(e) the tenant has abandoned the rental unit;

(f) an emergency exists and the entry is necessary to protect life or property.

(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

The tenants submits that while the landlord has the right to conduct monthly inspections the purpose for entering must be reasonable and section 32(1)(b) must be complied with. The landlord has conducted inspections on a monthly basis yet they have failed to make repairs that are warranted. The representative of the tenant submits in effect that the inspection amount to an abuse of process as the landlord is merely attempting to get evidence to evict the tenant in order to evict him. The tenant testified the landlord inspects on a regular basis but fails to make any of the required repairs.

The representative of the landlord disputes this submission. She stated that the landlord conducts inspection of all rental units in their rental property on a regular basis between 30 and 40 days apart. All units are inspected. She is concerned about safety issues not only for the tenant but all tenants.

The documentary evidence from the representatives of the landlord in refusing to either accept the decision of the previous arbitration or taking steps to have the decision overturned is disturbing and does suggest an abuse of process. However, I accept the testimony of the representative of the landlord when she testified that all units are inspected every 30 to 40 days. The representative of the tenant stated the landlords verbally abused and intimidated the tenant when conducting the inspection. When the tenant testified he was referring to incidents that took place a couple of years ago. The tenant testified he has not given the landlord written notice of matters that need to be repaired. I am not satisfied that it is appropriate to make an order restricting the landlord's right of entry as I accept the testimony of the representative of the landlord she has a good faith intention to maintain the health and safety of the rental property.. As a result I ordered that application of the tenant to set conditions on the landlord's right of entry is dismissed. The parties are required to following the procedures set out in the Act.

Landlord's Application for an Order for Possession and an order to Recover the Cost of the filing.:

I ordered the application of the landlord for an Order for Possession be dismissed as the Notice to End Tenancy has been cancelled. Further, I dismissed the application of the landlord to recover the cost of the filing fee as the landlord has not been successful their it's application.

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: July 15, 2015

Residential Tenancy Branch