



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MENKIS CONSTRUCTION
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, MNR, FF

Introduction

In the first application the tenant seeks to cancel a one month Notice to End Tenancy for cause dated June 5, 2015.

In the second application the landlord, anticipating the end of the tenancy pursuant to the Notice, seeks to recover an expected loss of rental income from the month of August 2015.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that there are justifiable grounds for ending the tenancy? If so is it likely the landlord will suffer a loss of rental income from the month of August if the tenant is evicted as a result of this hearing?

Background and Evidence

The rental unit is a one bedroom apartment in a 36 unit apartment building.

The tenant appears to be the only tenant to have signed the written tenancy agreement though Ms. M.K. is listed as one of the tenants.

The tenancy started on June 1, 2014. It is now on a month to month basis. The rent is \$1700.00, due on the first of each month, in advance. The landlord holds an \$850.00 security deposit and a \$500.00 pet damage deposit.

The respondent Ms. G.D. is the building manager. She is not the tenant's landlord. Mr. M.D., her son, attended the hearing to give evidence as he was the previous manager of the building.

The tenancy agreement contains a clause, #43, which states

43. **SMOKING.** The tenant agrees to the following material term regarding smoking:

- No smoking of any combustible material is permitted on the residential property, including within the rental unit.

Ms. G.D. testifies that on June 5, 2015 she saw the tenant standing by a bench near the front entrance of the apartment building with a cigarette in one hand and a cell phone in the other. She saw him lift the cigarette to his mouth. She recognized him as a tenant and confronted him. She says he said that he “had better go round back” (a place of the premises where occupants regularly smoked). She says the cigarette was lit though she did not smell anything because she was not close enough to him. She did not see the tenant draw on the cigarette or expel any smoke.

Ms. G.D. later checked her tenant files and discovered that there had been previous incidents involving this tenant smoking. At hearing she and Mr. M.D. related incidents occurring in July 2014 when the tenant was smoking marijuana in his suite, an incident when the tenant's father, who may have been unaware of the extent of the coverage of the smoking ban, lit a cigarette on the tenant's balcony and an incident in September 2014 when the manager Mr. M.D. gave the tenant a warning letter after smelling marijuana smoke at the tenant's apartment door.

Ms. G.D. immediately issued and served the one month Notice. It alleges that the tenant has breached a material term of the tenancy agreement and has failed to remedy the breach with a reasonable time after being given written notice to do so. Such a ground, if established, is a valid ground for ending a tenancy under s. 47 of the *Residential Tenancy Act*.

Ms. G.D. explained that the apartment building is a “zero tolerance” building when it comes to smoking because it is located near a hospital and houses many medical professionals. Indeed, she will not consider prospective tenants who admit to the smoking habit.

The tenant Mr. S. responded denying the first incident and explaining the two other previous incidents.

He says he was not smoking in front of the building on June 5, 2015. Rather, he was chewing on an unlit cigar. He says he does not smoke but formerly chewed tobacco and that chewing on a cigar is an occasional remnant of that habit.

Ms. M.K. testifies that neither she nor Mr. S. smoke. She has observed Mr. S. with a cigar but says he never lights it.

The landlord refers to letters from other tenants indicating they had seen Mr. S. smoking off the residential property. It is not clear that it was tobacco that was being smoked.

Mr. S. refers to a letter from a work acquaintance to confirm he is a non-smoker.

Analysis

The ending of a tenancy is a very serious matter. A landlord will be required to present clear and cogent evidence in order to establish grounds sufficient to evict a tenant.

In this case, the breach in question is the allegation that the tenant was smoking a cigarette on the residential property on June 5, 2015. Though the landlord related previous incidents, it is the June 5 alleged breach that forms the cause for the Notice.

I have reviewed the evidence presented at the hearing, and looked closely at the text messages the landlord considers compromise the tenant's credibility.

On weighing the evidence I am not satisfied on a balance of probabilities that the tenant was smoking a cigarette or any other combustible material in front of the apartment building on June 5, 2015.

The landlord has not proved cause in this case. The Notice to End Tenancy is hereby cancelled.

It goes without saying that should the tenant be discovered smoking on the residential property after this, the landlord is free to seek its remedies.

Conclusion

The tenant's application is allowed. The landlord's application is dismissed.

In all the circumstances, I decline to award either party recovery of a filing fee.

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 28, 2015

Residential Tenancy Branch

