



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Salco Management Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FF

Introduction

This is an application brought by the tenant requesting an order canceling a Notice to End Tenancy that was given for cause.

A substantial amount of documentary evidence, photo evidence, and written arguments has been submitted prior to the hearing. I have thoroughly reviewed all relevant submissions.

I also gave the parties the opportunity to give their evidence orally and the parties were given the opportunity to ask questions of the other parties.

All parties were affirmed.

Issue(s) to be Decided

The issue is whether or not to cancel or uphold a Notice to End Tenancy that was given for cause.

Background and Evidence

This tenancy began on June 1, 2003.

On June 10, 2015 the landlords posted a 1 month Notice to End Tenancy on the tenant's door stating the following reasons:

- 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.
- Tenant has engaged in illegal activity that has, or is likely to damage the landlord's property.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The landlord stated that the Notice to End Tenancy was given because the tenant has refused to remove an air conditioner from his bedroom window.

The landlords further stated that it is a safety issue is there is a parking lot right below the air conditioner and if the air conditioner were to fall it could injure or kill someone.

The landlord stated that the box alleging illegal activity was checked off in error and they are not alleging any illegal activity by the tenant.

The landlords further stated that it is a breach of a material term of the tenancy agreement because the tenant has breached clause 16 of the conditions of tenancy which states:

- No structural or electrical operations or repairs, painting, papering, redecorating, or driving of nails, screws in walls, floors or would work shall be done without the consent of the landlord or his manager or agent, and no adhesive material or scotch tape will be used on the walls.

The landlords further stated that there is also a breach of clause number 12 which states:

- Nothing shall be thrown from or placed or hung outside the windows and flower boxes or other articles may not be placed on the outside of the top of balcony rails or window ledges.

The landlords further stated that they have asked the tenant to remove the air conditioner and the tenant refused to do so and therefore the Notice to End Tenancy was given. They are requesting that the Notice to End Tenancy be upheld.

The tenant testified that at the beginning of the tenancy he got permission to put an air conditioner in his bedroom window from the managers who were in place at that time.

The tenant further testified that he has had the air conditioner in his window, during the hot months, every year of his 12 year tenancy.

The tenant further testified that even though the present managers took over management of the building three years ago, they did not give him notice to remove the air conditioner until this year, and therefore, even they allowed it for two years.

The tenant therefore argues that even though there is nothing in his tenancy agreement stating he is allowed to have an air conditioner his bedroom window, the fact that it has always been allowed means that he is not breaching a material term of the tenancy agreement.

The tenant further argued that there is no safety issue because, as he has demonstrated with his photo evidence, the air conditioner is securely held in the window by a strong chain attached to two very strong hooks, and the flange on the bottom of the air conditioner blocks the air conditioner from being pushed out the window.

The tenant is asking that the Notice to End Tenancy be canceled and that his tenancy be allowed to continue, with the use of the air conditioner.

Analysis

The landlords have argued that the air conditioner in the window poses a safety risk to persons passing below the window, stating that, were the air conditioner to fall from the window, it could injure or kill a person below.

It is my finding however that the tenant has demonstrated that the air conditioner is securely fastened inside the window frame and I find it highly unlikely that the air conditioner would be able to fall from the window. Therefore it's my finding that the landlords have not met the burden of proving that the air conditioner poses any safety risk.

Further, although the landlords are alleging there is a breach of a material term of the tenancy agreement that the tenant has failed to rectify within a reasonable time after receiving written notice to do so, it is my finding that, first of all, the landlords have provided no evidence to show that the tenant was given a written notice to rectify a breach of that material term of the tenancy, and secondly the landlord s are preventing from claiming this reason for ending the tenancy by the principle of estoppel.

In a 2005 decision of the Supreme Court of Canada, *Ryan v. Moore*, 2005 2 S.C.R. 53, the court explained the issue of estoppel by convention as follows:

59 ... After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention;

1. The parties' dealings must have been based on a shared assumption of fact and law: estoppel requires manifest representation by statements or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
2. A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
3. It must also be unjust or unfair to allow one of the parties to resile or depart from common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the party is allowed to resile from the assumption since there has been a change from the presumed position.

Therefore in this case, although the tenant claims he was given verbal permission to have the air conditioner in his window, the landlord's failure to communicate any disagreement with the tenant having the air conditioner in the window over the past 12 years means that the landlords, through their silence, have provided implied consent for the tenant to have the air conditioner, even if verbal consent had not been given.

It is also my finding that the tenant has shown that, to allow the landlord to now depart from this long implied position would be detrimental to the applicant.

For the above reasons I grant the tenants request to cancel the Notice to End Tenancy and this tenancy will continue.

Since the tenant has been successful, I also allow the request for recovery of the \$50.00 filing fee which the tenant may deduct from future rent payable to the landlords.

Conclusion

This application is granted and the Notice to End Tenancy is canceled. As stated above the tenant may make a one-time \$50.00 deduction from future rent payable to the landlords.

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: August 20, 2015

Residential Tenancy Branch

