



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF, O

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the “Application”) made by the Tenants to cancel a 1 Month Notice to End Tenancy for Cause (the “Notice”), to recover the filing fee, and for “Other” issues of which none were disclosed during the hearing.

One of the Tenants and Landlord appeared for the hearing and provided affirmed testimony. The Landlord confirmed that she had received the Tenants’ Application and their documentary evidence prior to the hearing by registered mail pursuant to Section 89(1) (c) of the *Residential Tenancy Act* (the “Act”).

However, when the Landlord was asked to confirm that she had not provided any evidence prior to this hearing, the Landlord stated that she did not know that she could rely on documentary evidence to support the Notice. The Landlord was informed that the Notice of Hearing document she had been served which detailed the dial in codes she had used for this hearing, contained specific instructions on a parties ability to submit evidence prior to the hearing. This is detailed in the general information section of the document. The document also pointed to contact details which the Landlord had the option to use to find out more information about this.

I informed the Landlord that she could still rely on her oral evidence for this hearing or she could withdraw the Notice with the consent of the Tenant and serve the Tenant with another Notice. However, the Landlord decided to proceed with the hearing relying solely on her oral testimony.

The hearing process was explained to the parties and they had no questions about the proceedings. Both parties were given a full opportunity to present evidence, make submissions to me, and cross examine the other party on the evidence provided.

Issue(s) to be Decided

Have the Tenants established that the Notice ought to be cancelled?

Background and Evidence

Both parties agreed that this tenancy started on May 1, 2014 on a month to month basis. Rent under the written tenancy agreement is payable by the Tenants in the amount of \$850.00 on the first day of each month. There are no rental arrears.

The Landlord testified that she had served the Tenants with the Notice by placing it at their rental unit door on August 1, 2015. The Notice which was provided into evidence by the Tenants and shows a vacancy date of September 1, 2015; the reason for ending the tenancy is because the Tenant has seriously jeopardized the health and safety or lawful right of the Landlord. The Tenant confirmed receipt of the Notice on August 2, 2015 and applied to dispute the Notice on August 10, 2015.

As the Landlord bears the burden to prove the Notice, I invited the Landlord to provide her testimony regarding the reason on the Notice. The Landlord testified the Tenants are smoking on the deck of the rental unit which is causing serious harm to her health. The Landlord explained that second hand smoke was a serious issue and that the toxic smells to a non-smoker can increase disease. The Landlord submitted that the Tenants' second hand cigarette smoke is causing her medical problems.

The Landlord testified that the Tenants used sheets on their balcony to create a tunnel effect that has increased the smoke coming from their unit into her unit which is located above. The Landlord testified that she requested the Tenants to smoke at the front of the house as this is the place that the Landlord's guests smoke in, but they have refused. The Landlord testified that her daughter saw the Tenants smoking inside their rental unit which is prohibited.

The Tenant explained that when they moved into the rental unit their written tenancy agreement mentioned nothing about a prohibition of smoking in the rental unit or outside on the deck. However, the Tenant acknowledged that smoking is not permitted inside the rental unit and that the other Tenant, who is the smoker, has never smoked inside the rental unit. The Tenant testified that the Landlord's daughter did not witness them smoking inside, rather she startled and confronted the other Tenant whilst she was smoking on the balcony who then ran inside. The Tenant testified that the Landlord made no mention of them smoking on the balcony for several months into the tenancy despite him having numerous contacts with her when he personally paid rent to her.

The Tenant testified that shortly after an inspection of the rental suite in July 2015, they were provided with an additional addendum to their tenancy agreement to sign. One related to restrictions on pet numbers and the other one was a no smoking new addendum which restricted the Tenants from smoking on or near the Landlord's property.

The Tenants stated that there were no such restrictions imposed on them at the start of the tenancy and the Landlord was not allowed to impose this new addendum pursuant to the Act. The Tenant stated that the Landlord was angry at them for not signing this and subsequently served them with a breach letter about their smoking.

The Tenant testified that he wrote to the Landlord in attempt to resolve the matter by putting forward suggestions such as having a designated area for smoking near the rental unit, or only smoking when the Landlord is out or during inclement weather. However, the Landlord flatly refused to communicate or work with the Tenants to alleviate the Landlord's concerns.

The Tenant provide extensive documentation regarding the harmful effects of second hand smoke which he had researched on line. The Tenant explained that the research documents downgrades the effect of second hand cigarette smoke and upgrades the effect of vehicle pollution. The Tenant submitted that they live in a high traffic area and that the Landlord's alleged medical conditions are being exacerbated more by vehicle pollution rather than cigarette smoke. The Tenant submitted that the Landlord leaves her windows open which allows air pollution to enter her rental unit.

The Tenant submitted that the renter in the adjacent unit also smoke on their balcony and this is another source of the Landlord's irritation. The Tenant submitted that it is unreasonable to ask that they should smoke at the front of the house as this is a long way from their actual rental unit. The Tenant submitted that he wants to work with the Landlord to alleviate her concerns but the Landlord does not want to talk.

The Tenant testified that the sheets on their balcony were not placed there to create a chimney of smoke for the Landlord but were placed there to block out sun as they are south facing. However, these have since been removed in any case.

The Landlord confirmed that the sheets had been removed. The Landlord explained that the renter/smoker in the adjacent unit had now left and therefore this was not an issue for her. The Landlord submitted that the Tenants were breaking a bylaw which restricts permitted smoking distances and that this is affecting her health.

Analysis

Firstly, I find that the Landlord served the Tenant with a Notice that complied with Section 52 of the Act and I accept that the Tenant received the Notice on August 2, 2015. Secondly, I find that the Tenant made the Application to dispute the Notice within the 10 day time limit stipulated by Section 47(4) of the Act.

When a landlord issues a tenant with a Notice for the reason in this case, the landlord bears the burden in proving the Notice disputed by the tenant. In this case, I find that the Landlord has failed to provide sufficient evidence to prove the Notice. The Landlord relied solely on her oral testimony as evidence of the reason on the Notice which was disputed by the Tenant.

Section 14(2) of the Act provides that a tenancy agreement may only be amended if the landlord and tenancy consent to the change. As the Tenants refused to sign the new addendum provided to them regarding smoking in the Landlord's vicinity of her residence, the Act does not allow this new addendum to be enforced.

The parties agreed that the Tenants are not allowed to smoke inside the rental unit. The Landlord relied on her daughter's allegations that she had seen the other Tenant smoking inside the rental unit. However, I find that the Landlord provided no direct or supporting evidence to prove this was the case. Therefore, this results in hearsay evidence which I find is unreliable.

I find the Landlord failed to prove that the Tenants' cigarette smoke coming from their rental unit is the direct cause of the Landlord's medical problems. I find the Tenant provided an alternative plausible explanation of air pollution that could also be responsible for the health conditions testified to by the Landlord. The Landlord failed to show sufficient evidence of the extent and frequency of the cigarette smoke coming from the Tenant's rental unit that would demonstrate that it was serious enough to cause harm to the Landlord. I also find the Landlord failed to provide evidence of the existence of city bylaws that restricted smoking distances and that the Tenants had breached such distances.

Based on the foregoing, I find that the Landlord's oral evidence for the reason stated on the Notice is no more compelling than the Tenant's evidence. Therefore, the Notice must fail. As a result, I cancel the Notice dated August 1, 2015. The tenancy will continue until it is ended in accordance with the Act.

As the Tenants have been successful in cancelling the Notice, pursuant to Section 72(2) (a) of the Act the Tenant may recover the \$50.00 filing fee by deducting it from a future installment of rent. The Tenant may want to attach a copy of this decision when making this reduced rent payment.

Conclusion

The Tenant's Application is granted and the notice to end tenancy is cancelled. The Tenants may recover their filing fee through the next installment of rent.

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: October 22, 2015

Residential Tenancy Branch

