Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Sierra Holdings Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPC, MT, CNC, AS, FF, O

Introduction

This hearing dealt with two related applications. One is the landlord's application for an order of possession based upon a 1 Month Notice to End Tenancy for Cause. The other was the tenant's application for orders setting aside that notice; granting him more time in which to file his application; and allowing him to assign or sublet because the landlord's permission had been unreasonable withheld.

Both parties appeared. No issues with the written evidence filed by the parties were noted.

The tenant advised that sub-letting is not a current issue. I severed that part of his application pursuant to Rule 2.3 of the Rules of Procedure and dismissed it with leave to re-apply.

Preliminary Issue

The landlord asked that the tenant's application be dismissed because he did not serve his application for dispute resolution on the landlord within ten days of receiving the notice to end tenancy.

The landlord posted the 1 Month Notice to End Tenancy for Cause on the door of the rental unit on September 16, 2015. He submitted his application for dispute resolution on-line on September 30. The application was dated October 1 and was forwarded to the landlord on October 2.

The case file for the tenant's application show that on September 17 the tenant filed his application for dispute resolution at the Service BC office and it was received by the Residential Tenancy Branch from Service BC on that date. On October 13, 2015, the entry on the case file says that the tenant's application was: "not processed until today due to admin error." The case file also notes that the tenant was called on that date and

told to pick up the documents and serve them by October 16, 2015. The landlord received the tenant's application for dispute resolution by registered mail on October 20.

The landlord argues that it was the tenant's responsibility to follow up with the Residential Tenancy Branch and ensure that his application was served on the landlord within the ten day period.

Section 47(4) of the *Residential Tenancy Act* states that a tenant may dispute a notice to end tenancy for cause "by making an application within 10 days after the date the tenant receives the notice". (Underlining added)

Section 59(3) states that "a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it". (Underlining added)

The law is that a tenant must make, or file, their application for dispute resolution within the ten day period, not give, or serve, it within ten days.

The record is clear that the tenant did make his application for dispute resolution within ten days of receiving the notice to end tenancy.

The vast majority of parties participating in Residential Tenancy Branch proceedings, both landlords and tenants, are lay people with very limited experience with legal procedures. They rely on the information given to them by staff and they rely on staff to process their claims in a manner that protects their legal rights.

There is no evidence as to what the tenant was told by the Service BC staff when he filed his application. He may have been told that the Residential Tenancy Branch would be calling him when the documents were ready to be picked up, as that is the usual instruction. The record shows that when he was finally called by the Residential Tenancy Branch staff he responded in a timely manner.

The record is clear that the problem, whatever it was, lay with the Residential Tenancy Branch. I am not prepared to foreclose any party's right to file an application for dispute resolution, let alone end a seventeen year tenancy, because of an administrative error that was not the tenant's fault.

The tenant's application will be accepted and decided on its' merits.

Issue(s) to be Decided

Does the landlord have grounds for ending this tenancy?

Background and Evidence

This tenancy commenced in 1997. The rental unit is a three bedroom ground floor corner apartment. The current monthly rent is $825.00 and includes heat and hot water. The landlord acknowledges that the written tenancy agreement does not contain a prohibition against smoking.

There are 93 units in the 1970 four-story building. All the units have sliding glass doors and balconies. Because of the age of the building the windows and sliding doors are single pane glass. The building is fully occupied and vacancies are rare.

The resident manager (referred to as the landlord in the balance of this decision) started his employment on May 1, 2014. The building has a designated caretaker unit, which is located directly above the tenant's unit, two floors up. It is also a corner unit. The landlord testified that he is very sensitive to smoke and the smell of it really bothers him.

The previous two resident managers and occupants of the caretaker unit were heavy smokers.

On September 24, 2014 the landlord wrote the tenant a warning letting advising that the smell of smoke coming from the tenant's unit was entering his unit and interfering with his quiet enjoyment of his unit.

On January 21, 2015 the landlord received a written complaint from the tenants on the second floor, just one balcony over from the tenant and the landlord, complaining about the smell of cigarette smoke. The landlord testified that this is the only written complain he has ever received from a resident of the building.

The landlord sent the tenant a strongly worded "Final Warning" letter on January 22. The letter stated:

> "Take notice that this is your final notice, and I am requesting a full stop to the practise of smoking on your patio, by all parties concerned. You have until January 25, 2015 to change the location for smoking and to resolve this issue. I suggest you go out to the street. . . Failure to immediately bring the smoking problem to an end will result in me issuing a 1 Month Notice to End Tenancy . . ". (Bolding and underlining not included)

The landlord took no other action until September. He testified that he was overwhelmed with work so let the matter drop for a while. One evening in September he went out for a walk and saw the tenant sitting inside his unit, next to the open patio

door, smoking. The tenant saw him but continued to smoke. This was the final incident that impelled him to issue and post a 1 Month Notice to End Tenancy for Cause. The reason stated on the notice was: “Tenant or person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord”.

The tenant testified that he is 59 years old and on a disability income. He said that none of the previous four resident managers ever complained about his cigarette smoking.

(In the hearing the parties referred to a dispute resolution proceeding between them in May 2006 so I looked at that decision. In that case the issue was whether the tenant and/or his roommates were smoking marijuana on the balcony.)

The tenant acknowledged that one of his roommates, who lived in the unit for seven years, was a heavy smoker. Both the landlord and the tenant testified that this roommate moved out in July.

The tenant’s other roommate, a grad student and a non-smoker, testified that when the other roommate lived there both she and the landlord smoked heavily but that since she left the smoking has decreased significantly. He testified that the smell of smoke bothers him and he has asked the tenant to only accept non-smokers in the future as roommates.

The tenant testified that after receiving the letter in January he removed the ash tray from his balcony, is careful with the disposal of his butts, usually smokes E-cigarettes or the occasional rollie, and has attempted to cut his smoking down. He said that as there was no complaint between January and September he thought the situation was resolved.

The landlord filed a log of the smoking incidents that upset him. He testified that this only represents a portion of the occasions on which he was disturbed. The first log is from September 26, 2014 to December 5, 2014 and appears to have been made as the incidents occurred. The second log is for the period of February 12, 2015 to October 1, 2015. This document has clearly been prepared at some subsequent date. For example, the notation for February 12 refers to the smoking roommate, who moved out in July, as “rented (past tense)”.

In addition to some material about the dangers of second hand smoke and a decision of the Ontario Rental Housing Tribunal, the landlord filed letters from a friend and a family

member, both of whom live out of town or out of province, describing visits with the landlord earlier this year that were made less pleasant because of the smell of cigarette smoke in his apartment. The friend's letter states that her last visit was the last weekend in July. The son's letter does not say when their visit occurred but does state that he, his wife and their young child will not be visiting the landlord as long as they were at risk of being exposed to second hand smoke.

The landlord argued that society has changed since 1997 and smoking is no long accepted. He said that "grandfathering" of tenancy agreements should not apply. He referenced the legislation that prohibits or severely limits smoking in public places although he did acknowledge that this legislation does not apply to private residences, such as apartment buildings. He feels strongly that the law should change.

The landlord acknowledged that the smoking roommate moved out in July and that the current roommate is a non-smoker. He expressed the concern that this is no guarantee. He said the tenant had a smoking friend stay with him for more than a month that fall and future roommates could be smokers.

Analysis

Delay is the main problem with the landlord's application. First of all, the tenant smoked for fifteen years without complaint. After this resident manager gave the tenant a final warning, some significant changes were made in the rental unit. It was not unreasonable for the tenant to conclude, after a silence of over seven months, that he had complied with the landlord's request and resolved the situation. If the landlord's action, or lack of action, did not create an implied waiver of the tenant's conduct, it came very close. Finally, the decision as to whether the tenant has or person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord must be made on the facts as they exist around the time the notice to end tenancy was served.

The activity complained of by the landlord is not prohibited by the terms of the tenancy agreement or by any legislation. The tenancy agreement may be many years old, but tenants and landlords are bound by the terms of the agreements they sign.

When people live in close proximity, as apartment residents do, there has to be some mutual accommodation. For example, a tenant living in an older wood-frame building cannot insist on absolute silence from the adjoining units, no matter how sensitive they are to noise.

In this case, the tenant has a legal right to smoke in his unit; his neighbour has the right to enjoy his own home. Neither right is absolute. The tenant cannot allow the smoking in his unit to significantly interfere with or unreasonably disturb his neighbours. On the other hand, the landlord cannot take the position that even one cigarette is too many.

I find that although the smoking in the tenant's unit in the early part of this year may have met the standard of significant interference or unreasonable disturbance, by the time the landlord served the notice to end tenancy on him the situation in the rental unit had changed significantly and it no longer met that standard.

Accordingly, the 1 Month Notice to End Tenancy for Cause dated September 16, 2015 is set aside and is of no force or effect. The tenancy continues until ended in accordance with the legislation. The tenant's application is granted and the landlord's application is dismissed.

As the tenant was successful on this application he is entitled to reimbursement from the landlord of the $50.00 fee he paid to file it. Pursuant to section 72 that amount may be deducted from the next rent payment due to the landlord.

Conclusion

For the reasons set out above, the 1 Month Notice to End Tenancy for Cause dated September 16, 2015 is set aside and is of no force or effect. The tenancy continues until ended in accordance with the legislation.

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: December 18, 2015

Residential Tenancy Branch