



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Metro Inn
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with an application by the tenant for an order setting aside a 1 Month Notice to End Tenancy for Cause dated September 15, 2015.

The tenant filed this application for dispute resolution on September 25 and the hearing was set for November 26. After the tenant filed and served his application, the landlords retained a lawyer. The lawyer sent a letter to the Residential Tenancy Branch dated November 2 in which she purported to amend the notice to end tenancy by adding an additional reason for ending the tenancy. An amended notice to end tenancy was attached to the lawyer's letter.

Section 52 of the *Residential Tenancy Act* provides that in order to be effective a notice to end tenancy given by a landlord must, among other things, state the grounds for ending the tenancy.

Section 68(1) allows an arbitrator to amend a notice that does not comply with section 52 if satisfied that:

- the person receiving the notice knew, or should have known, the information that was omitted from the notice; and,
- in the circumstances, it is reasonable to amend the notice.

These sections are discussed in *Residential Tenancy Policy Guideline 11: Amendment and Withdrawal of Notices* which provides the following guidance:

"In determining if a person 'should have known' particular facts, an arbitrator will consider whether a reasonable person would have known these facts in the same circumstances. In determining whether it is 'reasonable in the circumstances' an arbitrator will look at all the circumstances and consider, in particular, if one party would be unfairly prejudiced by amending the notice."

These provisions are usually utilized in situations where the landlord has made a clerical error such as forgetting to include the address of the rental unit or some particular of the landlord's address information on the notice to end tenancy.

Facts, such as the address of the home in which he or she is living, are facts that the tenant "should have known" and amending a notice to end tenancy to include this information does not unfairly prejudice either party. However, what other grounds the landlord may subsequently decide might apply to the dispute are not facts that a reasonable tenant "should have known", and these provisions are not intended to allow landlords to add additional reasons to a notice to end tenancy, particularly after the notice has been served on and then disputed by the tenant.

Accordingly, I ordered that the hearing would proceed and the decision made upon the reasons set out on the notice to end tenancy originally served on the tenant.

Before oral testimony was heard the written evidence was reviewed with the parties and no issues were identified.

The landlord and tenant had only completed their examination-in-chief when the time allotted for this hearing was almost finished. I offered the parties a continuation in order to allow the landlord an opportunity to give her rebuttal evidence but the landlord, through her counsel, advised that she did not want the hearing to last any longer and she was content to have the decision made on the evidence that had been heard on this date.

Before the conclusion of the hearing the landlord did make an oral request for an order of possession.

Issue(s) to be Decided

Should this tenancy be ended and an order of possession granted to the landlord?

Background and Evidence

This month-to-month tenancy commenced December 18, 2014. The monthly rent of \$850.00 is due on the 17th day of the month. The tenant paid a security deposit of \$420.00.

The written tenancy agreement contains the following clauses:

"All rooms are non-smoking, if found in violation, will be asked to leave immediately with \$100.00 deduction from the deposit." The tenant initialled this paragraph.

“No illegal activities or any other business activities are allowed on the premises. Will be asked to leave immediately.”

The rental unit is a kitchenette unit in a motel. There are 33 units in the motel, only a few of which are rented by the month. The motel is a two-story, ell-shaped building. All of the rooms open directly to the outside. The tenant's unit is on the ground floor, at the end of the building. There are adjoining doors between it and the neighbouring unit. On the door of every unit is a no smoking sign.

The landlord testified that she and her husband took over management of the motel on June 2, 2015, and they have been working hard to clean it up, both literally and figuratively, ever since. Part of their mandate has been to ensure that the rules are complied with.

On June 29 the landlord hand delivered a letter to every tenancy which stated:

“Please note that all our rooms. . .are NON-SMOKING and if you are smoking in your room you must stop immediately. You are welcome to smoke outside ONLY. We are also aware that some people use cannabis for medicine or pleasure but we do not allow this practise on the premises. If you choose to use, go for a walk.”

The landlord testified that the first time she caught the tenant smoking in the unit she could see him through the open door of the unit, passed out on his bed from the medication he takes, lit cigarette in his mouth, and his tee shirt on fire. She yelled at him from the door and he woke up. She testified that the tenant sits in his wheel chair in front of his unit, smoking. He will pass out from his pain medication with a lit cigarette in his mouth. Eventually the pain from his burning tee shirt will wake him up. She said that both the tenant and his clothes have numerous burn marks on them.

The tenant testified that he has serious health problems as a result of an accident and that he is in constant pain. He takes 1200 mg of morphine every day but that is not enough to dull his pain. He said that the medication makes him drowsy but it does not cause him to pass out. To help him sleep he smokes a half joint in the bathroom, with the fan on.

The tenant testified that he has a doctor's certificate for the medicinal use of marijuana. This certificate allows him to join a “social club” and to obtain marijuana legally from the club. He did not file a copy of the certificate, a prescription, or any other documentation from his doctor in evidence.

Both the landlord and the tenant testified that the landlord has spoken to him many times about not smoking marijuana in his room but he tells her that he has a prescription and is not breaking the law.

The tenant testified that he tried marijuana pills a long time ago but found them to be ineffective. Until he heard certain comments in the hearing he did not know that there were alternate methods of taking cannabis and he has made no inquiries about a substitute for smoking joints.

He also testified that the police have told him that if he smokes marijuana on the public sidewalk he could be charged for an offence similar to drinking in public. No written information about police policy in this situation was provided in evidence.

The landlord testified that when the tenant smokes the smoke goes into the adjoining rooms and the three suites above the rental unit. She has personally gone into those units and smelled the smoke. She says that some potential guests of the motel refuse to stay because of the smell and she described a particular incident where three ladies refused to accept the room. The tenant testified that it was someone else smoking marijuana that day that caused the odor.

The tenant testified that the previous occupant of his unit smoked and that there are a few other residents of this motel who smoke in their rooms. He also said that he does not smoke cigarettes in his room or on the motel property. He smokes at a location about seven meters away from his door where the landlord has provided a chair and pail of sand.

Both parties testified about difficulties between the tenant and his next-door neighbour. Each gave a different perspective. The landlord says the neighbour has complained about the tenant's smoke filling his room; the tenant says his neighbour and former friend is an alcoholic who also smokes in his room and whose smoke comes into the tenant's unit.

The landlord testified about incidents where the tenant has taken it upon himself to chase certain individuals, including relatives of his neighbour and a young man the landlord had specifically given permission to remove cardboard from the recycling. The tenant acknowledged that he had done so and explained his reasons for so doing.

There was also conflicting evidence about pest control, cleaning, inspections and entry of the unit by the landlord.

The landlord testified that since she and her husband took over management of this motel the tenant has been very uncooperative and a source of frustration for them. An incident on September 15 was the tipping point for her.

On that day she heard a heated argument in the tenant's room. The door to his room was open. She could see that a man had the tenant on the bed and looked like he was about to punch him. When she arrived the other man said he was leaving. Before he left he told the tenant he would be back for the money.

The tenant says the other man was high on something. He was bringing the tenant contraband cigarettes, not drugs as she had concluded; for which he had already paid.

On September 15 the landlord issued and personally served the tenant with a 1 Month Notice to End Tenancy for Cause. The reasons stated on the notice were:

Tenant or a person permitted on the property by the tenant has:

- significantly interfered with or unreasonable disturbed another occupant or the landlord.
- seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

The tenant paid the rent due on October 17 and November 17. On both occasions the landlord accepted the rent and gave the tenant a receipt for the payment. Neither receipt contained special notations or comments.

Analysis

As explained on the Residential Tenancy Branch web site, where a landlord has served the tenant with a One-Month Notice to End Tenancy, and then accepts a rent payment for the month after the tenancy was to end, the landlord should clarify with the tenant whether they have reinstated the tenancy.

When a landlord does not want the tenancy to continue, the landlord should:

1. Specifically tell the tenant in writing that the rental payment is being accepted for the use and occupancy only and does not reinstate the tenancy; and,
2. Tell the tenant that they must move out, as required by the Notice to End Tenancy."

This is usually accomplished by the landlord giving the tenant a receipt that states the rent payment is being "accepted for use and occupancy only".

I find that by accepting the rent without giving the tenant a receipt that made it clear the payment was being accepted for use and occupancy only the landlord has reinstated the tenancy. Accordingly, the 1 Month Notice to End Tenancy for Cause dated September 15, 2015 is set aside and of no force or effect. The tenancy continues until ended in accordance with the legislation.

Although the tenancy has been reinstated because the landlord made a technical error the tenant remains bound by the terms of the tenancy agreement. The tenancy agreement prohibits all smoking in the unit. It does not matter whether the tenant is smoking marijuana or nicotine or herbs; or whether he has a legal right to smoke any of these substances; his tenancy agreement says he cannot smoke in the rental unit.

If the tenant continues to smoke in his unit the landlord may choose to serve the tenant with a 1 Month Notice to End Tenancy for Cause, either for breach of a material term that was not corrected within a reasonable time after written notice to do so or for the grounds set out in this notice to end tenancy. Of course, the validity of the notice, if disputed, will be determined by the arbitrator upon the evidence introduced before him or her at that hearing.

Conclusion

The 1 Month Notice to End Tenancy for Cause dated September 15, 2015 is set aside and of no force or effect for the reasons set out above. 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 11, 2015

Residential Tenancy Branch

