



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Firview Apartments
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking to cancel a notice to end tenancy.

The hearing was conducted via teleconference and was attended by the tenant; her advocate and two agents for the landlord.

During the hearing the landlord requested an order of possession should the tenant be unsuccessful in his Application for Dispute Resolution. I note however, the landlord was willing to allow a future end date to the tenancy of February 29, 2016.

Issue(s) to be Decided

The issues to be decided are whether the tenant is entitled to cancel a 1 Month Notice to End Tenancy for Cause, pursuant to Section 47 of the *Residential Tenancy Act (Act)*.

Should the tenant be unsuccessful in seeking to cancel the 1 Month Notice to End Tenancy for Cause it must also be decided if the landlord is entitled to an order of possession pursuant to Section 55(1) of the *Act*.

Background and Evidence

The tenant submitted into evidence the following relevant documents:

- A copy of a tenancy agreement signed by the parties on April 26, 2015 for a 1 year fixed term tenancy beginning on May 1, 2015 for a monthly rent of \$1,065.00 due on the 1st of each month with a security deposit of \$532.50 paid; and
- A copy of a 1 Month Notice to End Tenancy for Cause issued on October 27, 2015 with an effective vacancy date of November 30, 2015 citing the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord; seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and the tenant has engaged in illegal activity that has, or is likely to adversely affect the

quiet enjoyment, security, safety, or physical well-being of another occupant or the landlord.

The parties agreed that prior to entering into the tenancy agreement they discussed whether or not the tenants could smoke in the rental unit and on the balcony areas. The parties confirmed that it was agreed the tenants could smoke.

The landlord submitted that when they agreed to this they did not realize that there would be three smokers smoking all day and night.

The landlord submitted that since the tenants have moved in the landlord has begun to receive complaints from other renters in the residential property because of the amount of smoke that infiltrates other units and the main hallway as a result of these tenants smoking.

In support of their position the landlord has submitted several emails and letters from 3 other renters in the building. Two of the complainants live above the subject rental unit (one is one floor above and the other is two floors above) and the other complainant lives across the hall. All of the complainants are non-smokers. The complainant who lived two stories above the subject unit has since ended her tenancy. The landlord submits she moved as a result of the smoking issue. The complainants directly above the subject unit also state they are allergic to smoke.

While all three of these complainants speak mostly of cigarette smoke, the renters immediately above the subject unit also complain about marijuana smoke and the opening and closing of the patio doors in the subject unit.

The complaints regarding the opening and closing of the patio doors speak of the tenants using the door 54 times between the hours of 8:00 a.m. and 11:00 p.m. one day. Two other complaints from the same people indicate on two other occasions the doors were opened and closed during the night and early morning hours.

Also in support of their position the landlord has submitted a letter of warning issued by the landlord on August 18, 2015. The letter states: "We have had numerous complaints about the smoke from your patio, so please refrain from smoking on the patio as much as you can. There have also been noise complaints so please be respectful of your neighbours."

The landlord submits that there have been other more recent complaints, one from a smoking resident; one from a potential tenant and one from a new tenant with asthma. One of the landlord's agents testified that she has noticed the smell in the hallway as soon as she arrives on the floor.

While the landlord acknowledges the residential property is not a non-smoking building he has never had such a problem with the smell of cigarette smoke in the complex in the all the years that he has been managing it.

The tenant submitted that she only has two or three “puffs” on her cigarettes when she does smoke; that the other tenant smokes about a package per day; and her granddaughter is not there very often.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if one or more of the following applies:

- a) The tenant or a person permitted on the residential property by the tenant has
 - i. Significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
 - ii. Seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
- b) The tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
 - i. Has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property.

Despite the letter of complaints from the renters directly above the subject unit complaining of marijuana smoke the landlord presented no further evidence or testimony regarding these complaints. As such, I find the landlord has failed to provide sufficient evidence to establish the tenant has been engaged in any illegal activity that has adversely affected the quiet enjoyment; security, safety or physical well-being of another occupant or the landlord.

As the landlord acknowledges that the residential property does not restrict smoking I find that the threshold to determine that a person or persons smoking would rise to the level that it significantly interferes with, unreasonably disturbs or seriously jeopardizes the health or safety or lawful right of another occupant or the landlord would be extremely high.

I find that it is likely, on a balance of probabilities that other occupants who are non-smokers or have allergies or other medical conditions that are impacted by exposure to smoke find even the slightest amount of smoke to be disturbing.

While I accept the landlord has obligations to the other renters in the building I find the landlord has failed to provide sufficient evidence and testimony that the amount the tenants are smoking constitutes an unreasonable disturbance or a significant interference to other occupants considering there are no smoking restrictions in the building.

Further, I find that the tenants smoking in their own unit and on their own patio in an building that imposes no smoking restrictions cannot be considered as the ground of

seriously jeopardizing the health, safety or lawful right of another occupant to end a tenancy.

In regard to the noise of the patio door opening and closing several times per day or in the late night and early morning hours, I find the landlord has provided no evidence that the tenants were doing anything unusual or causing the opening of the door to be louder than a normal opening and closing. As such, I find the fact the tenants use their patio door in the middle of the night is not grounds for ending a tenancy.

Based on the above, I find the landlord has failed to establish a cause to end the tenancy.

Conclusion

I order that the 1 Month Notice to End Tenancy for Cause issued on October 27, 2015 be cancelled. I find the tenancy continues in full force and effect.

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: January 12, 2016

Residential Tenancy Branch

