



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HADDEN INVESTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC FF

Introduction

This hearing was convened to hear matters pertaining to an Application for Dispute Resolution filed by the Tenant on November 3, 2015. The Tenant filed seeking an order to cancel a 1 Month Notice to end tenancy for cause and to recover the cost of the filing fee from the Landlord.

The hearing was conducted via teleconference and was attended by the Landlord and the Tenant. Each person gave affirmed testimony. I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process; however, each declined and acknowledged that they understood how the conference would proceed.

On November 3, 2015 the Tenant submitted 15 pages as evidence to the Residential Tenancy Branch (RTB) along with her application. The Landlord confirmed receipt of these documents and no issues regarding service or receipt were raised. As such, I accepted the Tenant's submission as evidence for these proceedings.

On November 27, 2015 the Landlord submitted 5 pages as evidence to the RTB. The Tenant confirmed receipt of these documents and no issues regarding service or receipt were raised. As such, I accepted the Landlord's submission as evidence for these proceedings.

Both parties were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Has the Landlord submitted sufficient evidence to uphold the 1 Month Notice issued October 25, 2015?

Background and Evidence

The Tenant entered into a month to month written tenancy agreement with the previous owners that began on May 1, 1985. Rent began at \$450.00 per month and was subsequently raised to \$847.68 per month. Effective February 1, 2016 the rent will increase to \$864.00 per month. On approximately May 1, 1985 the Tenant paid \$225.00 as the security deposit.

The rental unit was described as being an apartment in a 29 unit building that was built in 1973. The Landlord purchased this property approximately 2 ½ years prior to this hearing.

On October 29, 2015 the Tenant was personally served a 1 Month Notice to end tenancy for cause listing an effective date of December 1, 2015. The following reasons were selected for ending the tenancy:

- *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*
 - *Put the Landlord's property at significant risk*

The Landlord testified that the moment they took over the building they sent letters to all the tenants reminding them that the building was a non-smoking building. There are "no smoking" signs posted in the hallways by the elevator which supports the Landlord's submission that this is a non-smoking building. The Landlord stated that the Tenant continues to smoke in her unit which is negatively affecting the quality of life of the other occupants who live on the same floor.

The Landlord testified that the manager has been living at this building prior to the Landlord purchasing the building. The Landlord said that the only information that he had regarding this situation was the manager's letter which he submitted into evidence. He confirmed that he had been given tenant files when he purchased the property; however, he did not have the file with him during this hearing. The Landlord asserted that the Tenant's file included the exact same tenancy agreement and documents she had submitted into evidence.

The Landlord stated that the resident manager, who lives next door to the Tenant, suffers from medical issues including C.O.P.D. He asserted that the Tenant is affecting the life of their manager to the point that the manager has threatened to quit. He referenced the statement submitted into evidence from the manager and argued that the Tenant has been given several verbal warnings to stop smoking in her rental unit.

The Landlord submitted that in addition to the health concerns of other occupants, the inside of the Tenant's rental unit has been "shockingly damaged" by cigarette smoke. He stated that in his opinion the Tenant is jeopardizing the safety of the other occupants

and his manager due to fire risk caused by her smoking inside her rental unit. He argued that there is a potential for the Tenant to cause a fire if she smokes in her bed and falls asleep. Upon further clarification the Landlord stated that he did not have evidence that the Tenant was smoking in her bed.

The Landlord asserted that the three reasons listed above support his issuing the 1 Month Notice. He stated that he wished to proceed with the eviction and requested that an Order of Possession be issued.

The Tenant testified that she had resided in her rental unit for almost thirty years and has always smoked in her unit. She stated that she has never been served a paper advising her that the building was non-smoking.

She said smoking was never an issue until the new Landlord purchased the property. She testified that the manager had approached all of the smokers and told them that the new Landlord would pay the cost for them to quit smoking. The Tenant submitted that she is one of four smokers who reside in the building and she is the only one being targeted with an eviction notice. She said that the manager told her she was allowed to smoke on her sundeck.

The Tenant asserted that the manager has resided in the unit beside her for about 15 years. She said during that time he has switched between being the maintenance person, the manager, back to being only a tenant, and now he is the manager again.

The Tenant questioned how her smoking in her rental unit was negatively affecting the manager's health. She argued that she sees the manager every morning having his morning coffee standing outside the front door directly beside another tenant who is out there smoking.

The Tenant stated that during her 30 year tenancy she has painted her unit once. She argued that the Landlord(s) have never painted her unit during her tenancy and her carpet is over 20 years old. She asserted that she has not damaged her unit.

In closing, the Landlord stated that he had asked his manager if the Tenant had been issued warnings about smoking in the unit and he was told she was. He said that he has told his manager to tell the tenants that they are prepared to evict people if they do not stop smoking.

Analysis

Upon review of the 1 Month Notice to End Tenancy, I find the Notice to be completed in accordance with the requirements of section 52 of the Act. I further find that the Notice was served upon the Tenant in a manner that complies with section 88 of the Act.

Where a Notice to End Tenancy comes under dispute, the landlord has the burden to prove the tenancy should end for the reason(s) indicated on the Notice.

Section 14(2) of the *Act* provides that a tenancy agreement may be amended to add, remove or change a term, other than a standard term, only if both the landlord and tenant agree to the amendment.

Estoppel is a legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial. The rationale behind estoppel is to prevent injustice owing to inconsistency.

Upon review of the tenancy agreement submitted into evidence I note that the tenancy agreement does not stipulate that the rental is a non-smoking unit. Furthermore, the tenancy agreement does not indicate there was any addendums attached to this agreement.

Based on the above, and in absence of evidence to contrary, I favored the Tenant's submission that she had always been allowed to smoke in her rental unit and smoking did not become an issue until the new Landlord purchased the building. In addition, the Landlord submitted adverse evidence that supported the Tenant's submission when he spoke of the condition of the rental unit alleging the unit was damaged from several years of cigarette smoking.

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find there was insufficient evidence to support that smoking in the Tenant's rental unit was an issue or prohibited during the first 27 years of this tenancy. The Tenant had not mutually agreed to change the terms of her tenancy with the new owner to make her rental unit non-smoking. Therefore, I conclude that the Landlord cannot unilaterally impose a term stating that the unit is now a non-smoking rental unit, as to do so would be a breach of section 14(2) of the *Act*. The Landlord does however, have the authority impose no-smoking restrictions in common areas, such as hallways and stairwells, in accordance with municipal by-laws.

Furthermore, there was evidence that this long term Tenant was the only one out of a total of four smokers who was issued an eviction notice.

Therefore, given the aforementioned inconsistencies during the 30 years tenancy and the undisputed fact that other smokers had not served eviction notices, I find the Landlord is estopped from enforcing a no-smoking policy upon this Tenant that prevents her from smoking in her rental unit.

I give very little evidentiary weight to the manager's written statement as he was not in attendance at the hearing and could not be cross examined. Furthermore, while the manager indicated in his statement that he suffered from health conditions, there was no medical evidence before me that would support his statements or indicate how long he has suffered from those medical conditions. The manager has resided in the unit beside this Tenant for approximately 15 years during which the Tenant has always smoked in her rental unit. That being said, there was no evidence of a previous attempt to evict this Tenant or a prior dispute resolution hearing regarding the issue of smoking.

Residential Tenancy Policy Guideline 40 provides the normal useful life of building elements in a rental unit. Specifically, this *Guideline* provides that the normal useful life of interior paint is 4 years while the normal useful life of carpet is 10 years. I agree with the aforementioned time frames.

In this case the undisputed evidence was the Tenant's carpet was more than 20 years old and the rental unit had only been painted once in the last 30 years. The Landlord's evidence included two photographs that had been faxed to the RTB as evidence. Those photographs were not legible as they were black and shaded.

By his own submission the Landlord did not have evidence that the Tenant was smoking in bed. That being said the Landlord was still of the opinion that if the Tenant continued to smoke inside the rental unit she was considered as being a risk to start a fire. While I agree that smoking has been the cause of many fires elsewhere, fires can be started from many sources. Accordingly, I find there was insufficient evidence to prove the Tenant should be banned from smoking in her rental unit or be evicted based on the Landlord's opinion.

In absence of documentary evidence to the contrary, I do not accept the Landlord's submission that the Tenant has caused shocking damage to the rental unit from smoking. Rather, there is undisputed evidence that the condition of the interior of the rental unit may be attributed to the expiration of the useful life of the building elements or by normal wear and tear that may be found in a smoking rental unit.

Based on the above, I find the Landlord has provided insufficient evidence to prove 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; or put the Landlord's property at significant risk. Accordingly, I grant the Tenant's request and Order the 1 Month Notice issued October 27, 2015 cancelled.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Tenant has succeeded with their application; therefore, I award recovery of the **\$50.00** filing fee, pursuant to section 72(1) of the Act.

Conclusion

The Tenant was successful with her application and the 1 Month Notice issued October 27, 2015 has been cancelled. The Tenant was awarded recovery of her \$50.00 filing fee.

The Tenant may deduct the one time award of \$50.00 from her next rent payment as full satisfaction of the award, pursuant to section 72(2) of the *Act* or the Tenant may choose to collect the \$50.00 directly from the Landlord by serving them the enclosed Monetary Order.

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 08, 2016

Residential Tenancy Branch

