



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes:

CNC, OPC, OPB, MND, FF

Introduction

This was a cross-application hearing.

The tenant A.L. has applied to cancel a one month Notice to end tenancy for cause that was issued on March 31, 2016 and to recover the filing fee cost from the landlord.

The landlord has applied requesting an order of possession based on cause and compensation for damage to the rental unit and to recover the filing fee cost.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Matters

Three co-tenants are indicated on the tenancy agreement. Tenant C.A. was named as a respondent, with tenant A.L., who attended the hearing.

A.L. confirmed that he received the hearing documents and evidence on April 1, 2016 and that several days later he gave the hearing documents to his co-tenant, C.A. Therefore, I find pursuant to section 71 of the Act that C.A. has been sufficiently served with the hearing documents effective April 3, 2016.

Issue(s) to be Decided

Should the one month Notice ending tenancy for cause issued on March 31, 2016 be cancelled or must the landlord be issued an order of possession?

Is the landlord entitled to compensation in the sum of \$1,564.50 for damage caused to the balcony decking?

Background and Evidence

This tenancy commenced in August 2011. Rent is currently \$2,364.00 due on the first day of each month. The landlord is holding a security deposit in the sum of \$1,087.50.

The rental unit is in a multi-unit building. The tenant said he lives on the 15th floor.

A copy of the tenancy agreement, addendum and crime-free multi-housing agreement signed by the parties was supplied as evidence. Page two of the rental agreement conditions contained in the addendum includes clause ix:

“Smoking is not allowed in the building.”

The addendum for crime-free multi-housing includes a term that prohibits criminal activity, including, in part:

“Drug-related criminal activity (this includes smoking marijuana in this resident’s suite or anywhere else on or near the premises – even where medical reasons are given the smoking of marijuana will not be tolerated as the toxic smell may be extremely bothersome to other tenants.) Any single breach of this condition will result in immediate and complete nullification of the Tenancy agreement, an immediate and uncontestable end to the resident’s tenancy, and the tenant agrees to vacate the premises on the month immediately following the nullification of this Tenancy Agreement.”

(Reproduced as written)

The landlord and tenant agreed that on March 31, 2016 the tenants received a one month Notice to end tenancy for cause. The Notice had an effective date of April 30, 2016. The Notice included the following reasons:

That the tenant has engaged in illegal activity that has, or is likely to:

- *damage the landlord’s property*
- *adversely affect the quiet enjoyment, security, safety or well-being of another occupant; jeopardize a lawful right or interest of another occupant or the landlord; and*
- *that the tenant has caused extraordinary damage to the unit*

The landlord said that since August 2015 there has been an on-going problem with marijuana and cigarette smoking in the tenants’ unit. The landlord provided copies of detailed management notes for the building, a notice issued to all tenants, a warning letter issued to the tenants, coloured photographs, letters from contractors, a repair

estimate, breach letter and letters of complaint issued by other occupants of the building.

On August 31, 2015 the landlord received a verbal complaint regarding marijuana smoke that was bothering other occupants of the building and believed to be coming from the tenants' unit. The resident manager spoke to the tenant and the neighbouring occupant who had complained. An argument between the occupant and tenants ensued. The neighbour said smoke could be detected; the tenant denied that he was smoking.

The landlord then began to receive complaints from other occupants of the building. The tenant denied that smoking was occurring in the unit. As a result the landlord was having difficulty proving where the smoke was originating.

On November 20, 2015 a contractor entered the suite and told the landlord he could smell marijuana. At the landlord's request the technician wrote a letter that was supplied as evidence. The technician wrote that during completion of his duties at the building during the week of November 11, 2015 he gained access to the exterior of the building by going through the tenants' unit. The technician could not help but notice an unusual smell that he described as a heavy marijuana smell and "a powerful skunk smell that was persistent in the living room area for the entire time during my work."

The landlord met with the crime-free housing group to discuss the issue and on November 24, 2015 each occupant of the building was given a notice, posted to the doors. The notice set out the non-smoking rules and that they were aware some residents were smoking and using recreational drugs in the units. All occupants were warned that all reports of smoking would be investigated and considered a breach of the tenancy agreement. The occupants were reminded that the building was non-smoking and smoking was prohibited anywhere on the premises.

The notice was accompanied by a November 24, 2015 letter issued by the crime prevention team with the local police. The police department crime-prevention team letter warned that tenants and their guests could not smoke in the building and were reminded that marijuana smoking would not be tolerated. The letter explained that it is a criminal offence to use, possess, manufacture or sell marijuana without a Health Canada licence.

On December 16, 2015 contractors were working in the building, preparing to replace windows in the units. As soon as they entered the tenants' unit they could smell marijuana. The workers were asked for letters and two were supplied. Both workers describe a heavy smell of marijuana throughout the unit.

The resident manager said she spoke to the tenant many times about the smoking complaints made by other occupants and reports of smoking in the tenants' unit. On February 7, 2016 there was an incident between the tenant and his neighbour and the police attended. The conflict was due to a noise complaint and smoke. On February 12,

2016 the tenant was called by the resident manager who issued another verbal warning regarding noise and the smell of smoking. The tenant told the manager that he does not smoke.

On February 13, 2016 another contractor was in the unit to complete repair to the dryer. That person wrote a letter dated February 24, 2016 to explain he could detect a very bad smell of marijuana in the suite. The tenant was given a verbal warning.

On February 29, 2016 the resident manager could detect a strong smell of marijuana smell in front of the tenants' door and on the deck, south of the patio door. The landlord issued the tenants a breach letter regarding repeated complaints made by occupants living around the unit. The letter warned the tenants that the smoke was affecting other tenants around them, who were finding that adverse odor was causing a hazard to their health and enjoyment. The letter explained that professionals working in the unit had smelled marijuana. The tenants were reminded that smoking anywhere on the property was prohibited and would be a breach of the tenancy agreement. The tenants were asked to immediately stop and that any further reports regarding smoking would result in an end of the tenancy. The resident manager said she talked to the tenant on at least five occasions regarding the suspicion that smoking marijuana was occurring in his unit.

The landlord submitted copies of four letters of complaint issued by other tenants of the building. One undated letter issued by an immediate neighbour complained of noise.

On January 20, 2016 another neighbour issued a letter regarding a noise complaint.

On April 4, 2016 another occupant, who lives above the tenants, wrote to complain about the marijuana smoke that they have been tolerating almost every day. This person explained that the odor was strong and that with so many families with young children in the building the smoking must stop.

On April 6, 2016 the same occupant who wrote the January 20, 2016 letter issued another letter, as their 3rd written complaint. The occupant reported that on February 7, 2016 there was a noise disturbance next door and that "copious amounts of marijuana" was being smoked and that this caused a disturbance. The police were called. The occupant explains that the amount of marijuana smoke that billows into their unit is unacceptable and that the shared hallway smells of marijuana. The occupants do not want to leave their child's bedroom window open as the marijuana enters the room. There is no border between the suites on the deck, so the air is pulled into the occupants' windows.

On March 31, 2016 the landlord was on the exterior of the building, checking work that had been completed on a balcony repair project. Tenants had been prohibited from going onto their balconies during this work as the railings were removed. When the landlord checked the area outside of the tenants' patio door she discovered a couch had been placed on the deck.

The landlord provided five coloured photographs taken of the deck area immediately outside of the tenants' unit. The photos showed a considerable amount of cigarette butts and some garbage on the decking. Photos also showed what the landlord described as cigarette burns to the composite deck surface that had just been installed. Two burn marks were evident on the decking; which the landlord said appeared to have been caused by a cigarette having been left on the surface for a period of time. The landlord was in the process of completing a deck refurbishment at the cost of approximately \$50,000.00. The landlord said the tenants were responsible for causing damage to the decking and for smoking on the balcony when they had been prohibited from even being on the balcony; the doors had been taped closed during the repairs. The landlord has submitted an estimate for repair of the composite decking, in the sum of \$1,564.50.

After the landlord discovered the damage to the deck and the evidence of smoking on the deck, the Notice ending tenancy was issued and served to the tenants that evening. The Notice was served with a letter to the three co-tenants. The tenants were informed that after numerous complaints regarding illegal activity and smoking of marijuana in the rental unit and the discovery of damage caused to the deck by cigarette a decision had been made to end the tenancy.

The tenant said he does not smoke. The tenant stated he is a registered user of several healing centres.

The tenant said he has smelled something in the halls. He has lived in the unit since 2011 and there were never any complaints of smoking. The tenant supplied a letter from a past neighbouring tenant who lived next door from 2011 to February 2015. This person submits they never had any issues with the tenant.

During the hearing the tenant acknowledged that the landlord has talked to him on at least five occasions regarding the issues of smoking and that he has told the landlord he does not smoke. The tenant's written submission indicates that the tenants never received verbal or written complaints or notices regarding odors that would cause a breach of tenancy.

The tenant suggested that the smell of marijuana might be originating from the unit above his.

In relation to the cigarette butts found on the balcony, the tenant writes that they apologize for this oversight; it was inconsiderate and unacceptable. The tenant has reminded the co-tenants and asked them to remind all guests of the strict no smoking policy and to help enforce the policy. The butts were cleaned up once the tenants were made aware of them.

During the hearing the tenant said that he did not know where the cigarette butts on the balcony came from; that it must have been the construction workers who were smoking on the deck.

The tenant said that they did place the couch on the deck and had obtained permission from the resident manager.

The tenant submitted photographs taken of the damage to the composite decking and disputes the cause of those burns. The tenant writes that if the damage is in fact from cigarettes the tenant would agree to pay for repairs. The tenant submits that he and the other tenants would not intentionally damage the unit and apologize for the damage caused to the balcony. During the hearing the tenant said the repair estimate was too high and that the claim was frivolous.

During the hearing the tenant said that no one smokes inside of the unit and that when the cigarette butts were brought to his attention they were cleaned up. The tenant said there is no proof the burns are from a cigarette; it is windy on the deck any a cigarette would have been blown off the deck. The tenant thinks the burns could be from a torch.

The resident manager said that the tenants did not ask if they could put the couch on the deck and if they had she would have denied that request. The tenants were not allowed on the deck as the railings had been removed and the doors had all been taped closed.

Analysis

I note that the landlord has used a one month Notice to end tenancy for cause on a form issued by the Residential Tenancy Branch in 2007. At that time the Notice included a potential loss of quiet enjoyment by a landlord as a possible reason to support the end of a tenancy. Section 47(1)(e) of the Act does not confer a covenant of quiet enjoyment to a landlord; only to other occupants. The Notice currently in use has removed the reference to a landlords' loss of quiet enjoyment.

My decision is based on whether the tenants have engaged in illegal activity for the reasons set out in the Notice and whether the tenants have caused any extraordinary damage to the rental property.

From the evidence before me I find that there was no damage caused by illegal activity or any jeopardy to a lawful right or interest of another occupant or the landlord. The landlord has made submissions in relation to damage caused by cigarettes; which are not illegal. The balance of the reasons I have considered are based on an alleged loss of quiet enjoyment due to illegal activity; the Notice was limited to illegal activity and damage.

First I have assessed the credibility of the tenant. The tenant supplied a written submission in which he declared he had never been given verbal or written complaints or notices regarding the matters in dispute. During the hearing the tenant contradicted his written statement, and agreed that the landlord had talked to him on at least five

occasions about the allegation of marijuana smoking. During the hearing the tenant did not dispute receipt of the November 2015 notice issued to all occupants of the building.

The tenant's written submission acknowledged the cigarette butts on the balcony and apologized for that "oversight." The tenant wrote that other tenants have been informed and were asked that guests be warned of the no smoking policy. The written submission completely contradicted the testimony provided by the tenant during the hearing when the tenant stated he had no knowledge where the cigarette butts had come from and that it must have been the construction workers who left them on the balcony.

In relation to the presence of the couch on the balcony; I found the tenants' testimony completely at odds with common sense and that it further demonstrated a lack of consistent and believable submissions on the part of the tenant. I find it extremely unlikely that the landlord would have given permission for a couch to be placed on a balcony deck that had no railings, on the 15th floor of a building, when the doors had been taped shut and tenants had been directed not to use the balcony.

As a result I have concluded that the tenants' submission lacked any credibility and that the truth of the story lies with the landlord's version of events. I cannot accept any of the tenant's testimony as truthful when his testimony varied so dramatically from his written submission. The inconsistencies were too stark, and impossible to accept as inadvertent errors in recall. Therefore, I have turned to the landlords' submission, on their own, to determine if cause exists based on the reasons given on the Notice ending tenancy.

Residential Tenancy Branch policy suggests that when considering whether or not the illegal activity is sufficiently serious enough to warrant ending the tenancy I must consider the extent of damage to the landlord's property, interference with the quiet enjoyment of other occupants and the jeopardy that would attach to the activity as it affects the landlord or other occupants. The smoking of a single marijuana cigarette may be illegal, but to support the end of the tenancy for cause the smoking of the substance must have a significant impact on the other occupants or the landlord's property.

I have considered the tenancy agreement term prohibiting smoking of any kind on the residential property and the crime-free agreement that prohibits the smoking of marijuana, specifically. I also considered the notice issued by the landlord and the letter issued by the local police department crime prevention team on November 24, 2015 that stated smoking marijuana was illegal, as was use, possession, manufacture or sale, without a Health Canada licence. There was no evidence before me that the tenants have been issued a certificate by Health Canada. I have taken into account the absence of any statute submitted by the landlord, proving marijuana use is illegal. The letter from the police department has made that declaration and I can accept that the police have done so, based on the *Criminal Code of Canada*. Therefore, I find that the tenants have engaged in illegal activity and that this activity constituted more than occasional marijuana use.

I find that by signing the tenancy agreement and addendum the tenants acknowledged they were aware of the smoking prohibition for both cigarettes and marijuana and they agreed smoking marijuana would constitute illegal activity. The notice and letter warning all tenants, issued in November 2015, was unequivocal; that smoking marijuana was illegal and would not be tolerated. I find that this written warning provided the tenants with clear and ample caution that the tenancy could end if they or their guests continued to smoke marijuana on the rental property; as set out in the terms signed at the start of the tenancy.

I have rejected the tenants' submission that the tenants or their guests have not smoked marijuana in the unit. The absence of any credibility on the part of the tenant leads me to find on the balance of probabilities that the tenant and/or his guests did smoke marijuana in the unit over a period of months since August 2015.

I gave the letters of complaint made by contractors' limited weight as those individuals were not present to be cross-examined.

The landlord has received verbal and written complaints from other occupants and has verbally communicated those concerns to the tenants on at least five occasions. The resident manager has also smelled marijuana in the hallways, outside of the tenants' unit. It is difficult to know if the complaints were all related to marijuana smoke, or both cigarette and marijuana smoke, as details such as dates and specific complaints made by other occupants were not provided.

The only direct evidence of a loss of quiet enjoyment came from the landlord's submission of the letters of complaint; issued after the Notice had been given to the tenants. When facing allegations a party is entitled to an opportunity to respond to those who have accused him and at the very least to be given a detailed history of specific events that are alleged. Letters of complaint issued after the Notice was given to the tenants are of no value, particularly when the complainant fails to attend the hearing to be cross-examined. When the landlord is ending the tenancy based on the evidence of written complaints, in the absence of any corroboration, I find that the principle of fairness overweighs those allegations.

The Notice was issued after the landlord found evidence of cigarette smoking and damage to the decking; issues that were not illegal. The smoking of cigarettes discovered after February 29, 2016 does not have any impact on the validity of the Notice ending tenancy, as this is not an illegal activity.

The landlord has the strict burden of proving occupants have suffered a loss of quiet enjoyment as the result of the smoking of marijuana and while I have determined marijuana is being smoked I cannot end a tenancy based on the absence of direct submissions by the complainants and the absence of proof of a loss of quiet enjoyment specific to marijuana smoking.

The breach letter issued on February 29, 2016 did inform the tenants that marijuana smoke was affecting other tenants around them, who were finding the adverse odor was causing a hazard to their health and enjoyment. After February 29, 2016, to the time the Notice ending tenancy was issued, there did not appear to have been any further complaints made regarding the smoking of marijuana; which is the illegal activity upon which the Notice ending tenancy is based. The tenants had been given a warning on February 29, 2016 that the tenancy would end if there were further reports of marijuana use. I find this was a reasonable stance taken by the landlord, if evidence supported the reasons included on a Notice ending tenancy that relate to illegal activity. However, the Notice ending tenancy was issued based on smoking cigarettes and damage to the balcony, not on evidence of marijuana use and a loss of quiet enjoyment due to illegal activity.

Therefore, I must conclude that the landlord has failed to provide proof the tenancy should end based on illegal activity.

In relation to extraordinary damage, I find that the tenants are responsible for the damage caused to the decking and that the landlord is entitled to compensation as claimed, in the sum of \$1,564.50.

Given my assessment of the tenants' credibility and what I find was reliable testimony given on the part of the landlord, I find that the tenants or their guests accessed the balcony during a period of time when railings were not installed and that they caused the damage to the decking likely by leaving a cigarette on the deck surface. However, I do not find that this damage, on its' own, would form cause to end the tenancy. While the damage was caused to new decking, it can be repaired.

I have considered the test for extraordinary, which Black's Law Dictionary, 6th edition, defines, in part, as:

"out of the ordinary; exceeding the usual, average or normal measure or degree; beyond or out of the common order, method, or rule....remarkable; uncommon..."

The use of the deck was reckless and smoking on the property is prohibited, but I find that the two burn marks do not meet the test for remarkable or uncommon; but one of negligence. Therefore, I find that the two burn marks do not meet the test for ending a tenancy based on extraordinary damage.

Therefore, I find that the one month Notice to end tenancy for cause issued on March 31, 2016 is of no force and effect. The Notice is cancelled. The tenancy will continue until it is ended in accordance with the Act.

The tenants must be aware that the February 29, 2016 breach letter stands as a final warning regarding the use of marijuana. I find that the landlord will be at liberty to bring forward all evidence considered in this matter should another dispute arise.

As each application has merit I find that the filing fees are set off against the other.

Based on these determinations I grant the landlord a monetary order in the sum of for \$1,564.50. In the event that the tenants do not comply with this order, it may be served on the tenants, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court

Conclusion

The one month Notice ending tenancy for cause issued on March 31, 2016 is cancelled.

The landlord is entitled to compensation for the damaged deck, as claimed.

Filing fee are set off against each other.

This decision is final and binding and 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: May 10, 2016

Residential Tenancy Branch