



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF (Tenant's Application)
 OPC, FF (Landlord's Application)

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by the Landlord and the Tenant. The Landlord applied for an Order of Possession based on a 1 Month Notice to End Tenancy for Cause (the "Notice"). The Tenant applied to cancel the Notice. Both parties also applied to recover their filing fee from each other.

Both parties appeared for the hearing and provided affirmed testimony as well as documentary and photographic evidence in advance of the hearing. Both parties confirmed receipt of each other's Application, the Notice of Hearing documents, and the evidence served under the *Residential Tenancy Act* (the "Act") and the Residential Tenancy Branch Rules of Procedure.

The hearing process was explained to the parties and they had no questions about the proceedings. Both parties were given a full opportunity to present their evidence, make submissions to me, and cross examine the other party on the evidence provided. While I have carefully considered the evidence provided by the parties in this case, I have only documented that evidence which I relied upon to making findings in this decision.

Issue(s) to be Decided

- Has the Tenant established that the Notice ought to be cancelled?
- Is the Landlord entitled to an Order of Possession?

Background and Evidence

Both parties agreed that this tenancy started on December 15, 2013. A written tenancy agreement was signed and rent in the amount of \$771.70 is currently payable by the Tenant on the first day of each month. The Tenant paid a security deposit of \$375.00 at the start of the tenancy which the Landlord still retains.

The Landlord described the rental unit as a 2nd floor apartment which is located in a residential building. The residential building sits next to a restaurant and the Tenant's

window in the residential building abuts the roof of the restaurant. The owner of the restaurant leases the commercial property from the owner of that commercial building.

The Landlord testified that on April 30, 2016, while he was painting the front door of the residential building he noticed that the Tenant was taking a pet lizard to his rental unit. The Landlord confronted the Tenant in the residential building about having pets in the rental unit and provided the Tenant with a written notice to have the pet removed. The written notice dated the same day informed the Tenant to remove the pet and that this was contrary to the tenancy agreement.

The Landlord testified that during the next day, his brother noticed the Tenant on the roof of the restaurant. As a result, he confronted the Tenant on the roof and noticed that the Tenant was using it and accessing it from the window of the rental unit. The Landlord saw that the Tenant had chairs and personal possessions on the restaurant roof as there was also a large amount of debris including cigarette butts, empty beer cans, and planters. The Landlord provided a number of photographs showing this debris.

The Landlord testified that he confronted the Tenant about this and informed him that he was trespassing and that he was to clean up the roof of the mess he had created. The Landlord testified that the Tenant explained to him that he had permission from the restaurant owner to use the restaurant roof. The Landlord informed the Tenant that he would check the roof again to see if it had been cleaned up the next day.

The Landlord testified that he visited the rental unit on May 2, 2016 and the mess was still there. The Landlord explained that he was unable to speak to the owner of the commercial property being leased to the restaurant owner. As a result the Landlord posted the Notice to the Tenant's door on May 2, 2016. The Notice was provided into evidence and details a vacancy date of June 8, 2016. The reasons on the Notice for ending the tenancy were because the Tenant has:

- Significantly interfered with or unreasonably disturbed another occupant or the landlord;
- Seriously jeopardised the health or safety or lawful right of another occupant or the Landlord;
- Put the Landlord's property at significant risk; and
- Engaged in an illegal activity that has or likely to jeopardise a lawful right or interest of another occupant or the Landlord.

The Landlord testified that the Tenant called him to discuss the Notice but the discussion was not fruitful because the Tenant was defiant that he was not going to clean it up because he had permission to use it by the restaurant staff. The Landlord testified that when he

received the Tenant's Application to dispute the Notice, he saw that the Tenant was arguing that there was nothing in the tenancy agreement that prevented him from using the restaurant roof next door. The Landlord testified that while the Tenant had made a small effort to do some cleaning on the restaurant roof there was still debris there 18 days after the Tenant was verbally asked to clean the roof.

The Landlord then pointed to a letter which he had obtained from the commercial building owner. This letter states that over the past two years the restaurant owner has complained to the commercial building owner that the Tenant has set up lawn chairs on the building roof and that he has gone up there to find beer cans and assorted garbage strewn about. The commercial building owner continues to write that the lawn chairs have damaged the roof as indentations are apparent on the roof surface and that the restaurant owner has complained about the noise on the roof when the Tenant is present and that this disrupts his business.

The Landlord testified that the Tenant had placed two bags of garbage on the roof of the rental property. The Landlord confirmed that he was not seeking to end the Tenant's tenancy because the Tenant had a pet lizard as he was satisfied that the pet had been removed.

The Tenant confirmed receipt of the Notice on May 2, 2016. The Tenant testified that he accessed the restaurant roof from his rental unit window and that he uses the roof to relax and watch the sunset in the evenings. The Tenant testified that the restaurant staff members gave him permission to do this and that was why he had been using the roof in this manner over a period of two years without any mention of any disturbances or damage which the Tenant denied. The Tenant testified that the cigarette butts were there prior to his usage of the roof but acknowledged that the remaining debris and chairs belonged to him.

The Tenant argued that the Landlord had not given him a clear verbal or written notice or sufficient time for him to clean the roof. The Tenant testified that the Landlord simply noted the mess and proceeded to serve him the Notice. The Tenant testified that in the past the Landlord had provided him with written notice of breaches, which he provided into evidence. These included the breach letter about the pet lizard and one about storing the Tenant's personal belongings in the common areas of the building. Therefore, the Tenant questioned why the Landlord had not given him written notice of this breach and questioned the Landlord's motive in attempting to end the tenancy.

The Tenant testified that he was working long hours and could not have done the clean up during the short period of time in which the Landlord noticed the mess to the time he was served the Notice. The Tenant testified that he attempted to speak to the Landlord about getting some time to clean up the roof but the Landlord refused to discuss the issue with

him. The Tenant explained that after he had received the Landlord's Application, he fully completed the cleanup of the roof and provided photographic evidence to support this.

The Tenant disputes that his use of the roof has had any impact on the tenancy and the reasons on the Notice for ending the tenancy have not been proved. The Tenant disputes that there is damage to the roof or disturbance caused by him and states that he does not smoke.

The Landlord confirmed that the roof had been fully cleaned but argued that the Tenant had been given several verbal requests to clean up the mess and was defiant he was not going to do it. The Landlord testified that due to the seriousness of the situation he proceeded with issuing the Notice to the Tenant without giving any written notice for the Tenant to clean it. The Landlord argued that the Tenant had been using the restaurant roof illegally for two years and that this was clear evidence that the Tenant was trespassing.

Analysis

In relation to the form and content of the Notice served to the Tenant, I find the Notice complied with the requirements of Section 52 of the Act and that it was served to the Tenant pursuant to Section 88(g) of the Act. The Tenant confirmed receipt of the Notice on May 2, 2016 and applied to dispute the Notice on May 9, 2016. Therefore, I find that the Tenant made the Application to dispute the Notice within the 10 day time limit stipulated by Section 47(4) of the Act.

When a landlord issues a tenant with a Notice, the landlord bears the burden of proving the reasons on the Notice if they are disputed by the tenant. Therefore, I must determine if the Landlord has met the burden by providing sufficient evidence to prove the reasons elected on the Notice. After careful consideration of the oral and documentary evidence before me, I find the Landlord has failed to satisfy the burden to prove that the tenancy should end. I base this decision on the following findings.

Firstly, I find that the Landlord has failed to disclose any impact the Tenant's use of the restaurant roof had or may have had on the rental unit and the tenancy itself apart from evidence showing that the Tenant placed two bags of garbage on the residential building roof of the rental unit. I find that this alone is not a significant reason for me to end the tenancy. The Landlord issued the Tenant the Notice because the Tenant had put the Landlord's property at significant risk. However, there is not sufficient evidence before me that the Tenant put the **rental unit or the common property** of the rental unit, which is the Landlord's property, at significant risk. The evidence the Landlord relies on pertains to the use of the restaurant roof by the Tenant and the restaurant building does not belong to the Landlord. Therefore, this reason on the Notice is dismissed.

Secondly, I turn my mind to the remaining reasons on the Notice for ending the tenancy. The Notice states that Tenant has significantly or unreasonably disturbed another occupant or the Landlord. There is no evidence that the Tenant's use of the restaurant roof caused significant or unreasonable disturbance to the Landlord himself, rather the Landlord relies on the fact that the commercial building owner writes in the letter dated May 24, 2016 that his renter (who is the restaurant owner) has complained of noise caused by the Tenant while he used the roof and that this disrupted the business. However, I find the Landlord failed to provide sufficient evidence of these disturbances. There were no details provided from either the Landlord, the restaurant owner, or the commercial building owner of these alleged disturbances which the Tenant denied, such as the frequency and nature of them or any other supporting or corroborative evidence to support these allegations. Without such evidence I am unable to determine whether these alleged disturbances were minor in nature or significant enough to end the tenancy.

Furthermore, it concerns me that the commercial building owner writes in the same letter dated May 24, 2016 that the Tenant's use of the roof had been occurring for two years. I am only able to conclude from this that both the commercial building owner or the restaurant owner allowed this alleged behaviour to continue for this lengthy period of time without making any attempts to address the issue with either the Tenant directly or bringing this to the attention of the Tenant's Landlord. This would suggest that the Tenant's alleged disturbances were not serious enough to warrant urgent action.

I also find that the above finding also applies to the commercial building owner's letter which states that the Tenant has caused damage to the roof. Again, neither the Landlord nor the commercial building owner provided sufficient evidence of this, such as photographs, which would have been prudent and vital evidence to show that the Tenant had jeopardised a lawful right of the Landlord or another occupant.

Thirdly, I find that there is sufficient evidence before me to conclude the Tenant didn't have permission to use the restaurant roof. Therefore, he would have been trespassing while he used it. Policy Guideline 31 provides extensive examples and guidance on what constitutes an illegal activity and the circumstances under which termination of a tenancy should be considered. The guideline states that the illegal activity must have some effect on the tenancy. In this respect, I find the Landlord has not provided sufficient evidence to demonstrate how the Tenant's illegal use of that roof jeopardised the Landlord's or another's occupants lawful right. I also take into consideration that the trespassing took place in a building that is not part of the rental unit or the residential property.

Lastly, while I acknowledge that the Tenant used the restaurant roof in a manner that meant it was left unclean, I find the Tenant was not provided with sufficient opportunity or written notice to clean up the space. I find the Tenant demonstrated a clear pattern of written breach letters issued to him in the past by the Landlord to deal with issues associated with

the tenancy. However, with regards to the cleanup of the restaurant roof, the Landlord issued no such written breach letter to the Tenant. I find the Landlord instead issued the Notice the day after the Landlord verbally told the Tenant to clean it up and then sought to obtain evidence from the commercial building manager and the restaurant owner after the Notice was served in the form of one written letter.

While it would have been reasonable to expect that the Tenant should have taken immediate steps to clean the restaurant roof after the Landlord had verbally requested him to do so, I find that the Tenant has now taken all of the necessary steps to clean the roof and states that he will no longer continue to use it. Therefore, I am satisfied of the Tenant's assurances that he will refrain from using the restaurant roof again.

Conclusion

For the reasons set out above, the Landlord has not proved the Notice. Therefore the Landlord's Application must fail and is dismissed accordingly.

The Tenant's Application to cancel the Notice is granted. The tenancy will continue until it is ended in accordance with the Act. As the Tenant has been successful in cancelling the Notice, the Tenant may recover his \$100.00 filing fee.

Pursuant to Section 72(2) (a) of the Act, the Tenant may achieve this relief by deducting \$100.00 from his next installment of rent. The Tenant may want to attach a copy of this decision when making the reduced rent payment to the Landlord.

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: June 10, 2016

Residential Tenancy Branch