



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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 June 13, 2016. Both parties appeared and had an opportunity to give affirmed evidence. No issues regarding the exchange of evidence were identified.

Issue(s) to be Decided

Is the 1 Month Notice to End Tenancy for Cause dated June 13, 2016 valid?

Background and Evidence

This month-to-month tenancy commenced July 1, 2014. The monthly rent of \$650.00 is due on the first day of the month. The rental unit is a basement suite. The upper level of the house is a separate living unit.

Although neither party filed a copy of the tenancy agreement both testified that it includes a clause that states "No smoking inside".

There have been two previous dispute resolution proceedings between the parties. The file numbers of the related files are noted on the front page of this decision.

On February 9, 2016 the landlord issued and served the tenant with a 1 Month Notice to End Tenancy for Cause. The reason on the notice was that the tenant had significantly interfered with or unreasonably disturbed another occupant or the landlord.

The tenant disputed the notice and the hearing was conducted on March 31. The notice was set aside for the reasons set out in that decision but the topic of smoking was addressed in the hearing. The decision, which was dated April 1, contained the following passage:

“In this case, the tenant denies they are smoking in the rental unit and stated that they smoke on their balcony. However, I find smoking on the balcony is a breach of the tenancy agreement as there is to be no smoking near any doors.

However, the Notice was not issued for a breach of a material term of the tenancy agreement and there is no evidence of how this significantly disturbed the other renter or interfered with the landlord as the landlord does not live on the premises.

The tenant is cautioned that they must comply with the non-smoking term of their tenancy agreement. Failure to comply may give cause to the landlord to issue a notice to end tenancy for noncompliance with a material term. A copy of the decision may be filed at any future hearing as evidence to show the tenant has been formally cautioned.”

On April 1 the landlord faxed the tenant's advocate a letter which was her recap of the previous day's hearing. The letter included a reminder that the arbitrator had stated that the tenant was to refrain from smoking in the unit as well as anywhere near any doors or entrances. It also included reminders about the tenant's obligation to allow access to the realtor and to keep the unit neat and tidy for realtor showings.

The tenant's advocate testified that he received the letter on April 1 and advised the tenant of its contents the very same day. Both the tenant and her advocate testified that he provided her with a written copy of the letter some time later.

The property manager testified that she went to the rental unit on April 2 and saw the tenant coming out of her unit with a lit cigarette. She testified that she spoke to the tenant about smoking. The tenant testified that on April 2 she did not come out of her unit while the property manager was at the property. She let her dog out, and opened the window and spoke to the property manager through the window. The tenant testified that the property manager did not see her smoking on that day.

On April 20 the landlord issued and served the tenant with a 2 Month Notice to End Tenancy for Landlord's Use. The reason stated on the notice was the unit was going to be occupied by the landlord or a close family member of the landlord.

The tenant disputed the notice and the dispute resolution hearing was on June 9. It was at this hearing that the parties found out that neither had received a copy of the previous decision. That document was sent to parties after the hearing and both testified that they had received it in due course.

The arbitrator set aside the notice on the following grounds:

“Section 49 of the Act allows a landlord to end a tenancy if the landlord or a close family member intends in good faith to occupy the rental unit.

Residential Tenancy Policy Guideline #2 defines “good faith” as an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage.

When the good faith intent of the landlord is called into question, the burden rests with the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The Guideline requires the landlord to establish that they do not have another purpose that negates the honesty of intent or demonstrates that they do not have an ulterior motive for ending the tenancy.

Based on the landlord’s documentary submissions I find that the landlords do intend to retire and move to the rental unit as they have indicated. However, I am not satisfied that the landlord’s intention is to remain in the unit permanently.

I find the landlords’ testimony regarding how much they were looking forward to moving into the rental unit and starting the retirement phase of their life is inconsistent with the fact that they had been attempting to sell the property.

I also find the female landlord’s testimony in regard to their plans to take the property completely off the market inconsistent with her own previous testimony where she stated that they intended to resume the sale in September 2016 after they had settled into the rental unit.

In addition, I find the female landlord’s specific testimony where she stated that they might have moved into the upstairs unit had the tenant just followed the rules raises the issue of whether or not the landlords’ intentions are made in good faith.

From the female’s tenant’s own testimony, I find that landlords have another purpose that negates the honesty of intent and demonstrates they have an ulterior motive for ending the tenancy. Specifically, I find that a significant part of the landlord’s reason to end this tenancy because they want the tenant out of the rental unit for her previous behaviour and conduct.”

This decision was dated June 9.

On June 13 the landlord issued and served the tenant with a 1 Month Notice to End Tenancy for Cause. The reason stated on the notice was that the tenant had breached a material term of the tenancy agreement after written notice to do so.

In addition to testifying that she had seen the tenant with a lit cigarette on April 2 the property manager testified that a contractor doing renovations had spoken to her about the smell of smoke in the house. She could not remember when those renovations were done or when those conversations would have taken place. In her testimony the landlord confirmed that the renovations were done between July and September 2015.

The property manager testified that she could not remember when the upstairs unit was rented out and said she had only been in the unit on two occasions, and that was at the start of that tenancy. In her testimony the landlord testified that the upstairs unit had been rented from November 2015 to June 2016.

The property manager apologized for not being clearer about dates in her testimony and explained that she had been busy with a sick dog.

The property manager testified that over the course of this tenancy she had given the tenant numerous letters and text messages about not smoking. The landlord said the same. The tenant denied ever receiving any notification in writing.

The property manager testified that she had not been in the tenant's unit since June 2.

The landlord testified that they did not take any action regarding the tenant's smoking in April because by then they had decided to move from Ontario to British Columbia. They thought the 2 Month Notice to End Tenancy for Landlord's Use would solve all their problems and they expected the Residential Tenancy Branch to apply some logic and uphold the notice.

The landlord testified that she went into the upstairs unit on July 14, after the tenants had moved out and the unit had been thoroughly cleaned, and it reeked of smoke. She went downstairs to the shared laundry area and knocked on the tenant's door. She spoke to the tenant through the door. The landlord testified that she could smell cigarette and marijuana smoke while standing outside the door.

The landlord and tenant gave different accounts of their conversation through the door on July 14. The landlord said she told the tenant that smoking was not allowed; the

tenant said smoking was not mentioned. They agreed that their conversation included a request for the tenant to move her items from the laundry area.

The landlord testified that she had been to the upstairs unit every day since July 14 and the smell of cigarette smoke continues, sometimes mixed with the smell of incense. The landlord's husband also testified that the smell of cigarette smoke is very strong in the upstairs unit.

The tenant testified that she is not smoking inside. She testified that she knows her tenancy could be ended for breach of the non-smoking clause and she has been careful to comply with her tenancy agreement. She testified that she has set up a smoking area away from the house. She did acknowledge burning incense from time to time.

The tenant testified that the previous upstairs tenants were not good neighbours. She said they were involved in prostitution and drug use; and the police were there numerous times. She has filed a claim against the landlord for loss of quiet enjoyment based upon the upstairs tenants' conduct and the landlord's failure to respond to her complaints. That hearing is set for November.

The tenant testified that the upstairs tenants smoked hard drugs in the house and marijuana and cigarettes outside the back door.

She also testified that she has not been in the upstairs unit so could not comment on the odor.

In her rebuttal evidence the landlord testified that she did not know if the upstairs tenants were smokers or not.

She also related an incident that occurred on July 17. As she was sitting in her car she saw a man approach the house with a lit cigarette. The man put out the cigarette on the door step and left the butt there. The landlord spoke to the man and told him it was a non-smoking property. She testified that she was confident that if she had not been there the man would have entered the house with a lit cigarette. She said his conduct showed blatant disrespect for their property.

The tenant testified that she cleaned up this butt just as she had cleaned up the butts left by the upstairs tenants.

The landlord testified that the issue is the tenant's lack of respect for their property and lack of respect for the terms of the tenancy agreement. Her husband echoed these comments.

Analysis

As the parties are well aware, on applications of this nature the onus is on the landlord to establish, on a balance of probabilities, the grounds stated on the notice to end tenancy.

There was conflicting evidence as to whether the tenant had been given written notice by way of letters; notes or text messages about the need to comply with the no smoking clause in the tenancy agreement prior to the hearing on March 31. The landlord and her witnesses said she had; the tenant said she had not. No copies of any written notifications were filed in evidence except for the letter to the tenant's advocate on April 1. I find that the April 1 letter comprised written notice of the tenant's obligation to comply with a material term of the tenancy agreement. The question therefore, is whether the tenant has smoked inside the house since April 1.

The only witness who said they actually saw the tenant smoke inside since that date was the property manager. While I think the witness tried to be truthful she was confused about every other date or timeline she testified about. Accordingly, I cannot rely on her testimony that this incident happened on April 2, rather than some time prior to April 1. Meanwhile, the tenant testified that this did not happen on April 2.

No one except the tenant has been in the rental unit so there is no evidence as to whether there is any sign of the tenant smoking in her unit.

I accept the landlord's and her husbands' uncontradicted evidence that the upstairs unit smells like smoke. However, the tenant's evidence is that the upstairs tenants were smokers and the landlord was not able to provide any evidence that they were not. In fact, the landlord specifically testified that she did not know if they were smokers or not.

It comes down to two rental units in the house, both occupied by smokers who may or may not have smoked in their respective units. I know, both from hearing damage claims for smoke damage and from personal experience, that when living units are occupied by heavy smokers it often requires special cleaning products and/or repainting of the unit before the lingering smells of smoking are removed. The smell in the upstairs unit is as consistent with the previous tenants having smoked in the upper unit contrary to the terms of their tenancy agreement as it is with the smell of smoke wafting upstairs from the lower unit.

There is no additional evidence to tip the balance of probabilities in the landlord's favour.

Accordingly, I must grant the tenant's application. The 1 Month Notice to End Tenancy for Cause dated June 13, 2016, is set aside and is of no force or effect. The tenancy continues until ended in accordance with the legislation.

Conclusion

For the reasons set out above the 1 Month Notice to End Tenancy for Cause dated June 13, 2016, is set aside and is of no force or effect. The tenancy continues until ended in accordance with the legislation. As the tenant did not pay a fee to file this application no further order is required.

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: July 29, 2016

Residential Tenancy Branch