



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

CNC, FF

Introduction

The tenant has applied to cancel a one month Notice to end tenancy for cause that was issued on July 7, 2016 and to recover the filing fee cost from the landlord.

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

There are two tenants; one tenant has submitted the application.

The tenants have been away from the rental unit, off and on, during August. The tenant said he picked up the registered mail sent by the landlord on August 11, 2016, the day prior to the hearing. The tenant was able to view the digital evidence and written submission and was prepared to proceed.

Issue(s) to be Decided

Should the one month Notice ending tenancy for cause issued on July 7, 2016 be cancelled or must the landlord be issued an Order of possession?

Background and Evidence

The tenancy commenced on July 1, 2013; rent in the sum of \$1,036.00 is due on the first day of each month.

The landlord and the tenant agreed that a one month Notice to end tenancy for cause was served to the tenants on July 7, 2016. The Notice requires the tenants to vacate the rental unit on September 1, 2016.

The single reason stated for the Notice to End Tenancy is:

“the tenant has breached a material term of the tenancy that was not corrected within a reasonable time after written notice to do so.”

The landlord was asked which material terms of the tenancy agreement supplied as evidence were breached. The landlord pointed to term 10:

“Smoking of any sort whatsoever by the Tenant or Tenant Guest(s) in NOT permitted in or around the rental unit or within the rental building.”

(Reproduced as written)

The landlord confirmed that tenants are not prohibited from smoking on the residential property. They are not allowed to smoke anywhere within the building.

The tenant confirmed receipt of a breach letter issued on December 23, 2015 by the landlord. A copy of the letter was supplied as evidence. The tenant was given warning that guests who were at the suite in the early hours of that day had been smoking “in and around the building.” The tenant did not respond to this letter and said that they did have a party at their unit but did not allow anyone to smoke inside the building. People may have smoked outside the door to the building and held it open, so they could re-enter. Smoke could have entered the building. There are only a few steps up to the tenants’ floor. The landlord confirmed that there is no clearly marked smoking area outside of the building, although there is a paint can where butts can be placed.

On July 4, 2016 the landlord and his spouse attended at the rental unit in the early hours of the morning in response to a noise complaint. The landlord supplied audio evidence in which the landlord and his wife can be heard repeatedly asking the tenants if they had been smoking. The tenant responded that there was “no more smoking.” The landlord submits that the tenants’ response indicated that they had been smoking in the unit. The landlord could smell the smoke. The warning letter issued on July 5, 2016 and supplied as evidence, did not mention smoking, only alleged disturbances. The landlord is convinced that the tenants were smoking and that the response to the question of smoking indicates they had been smoking in the unit.

The tenant said they had been at a wedding where smoking was allowed and that it is likely their clothes were saturated in smoke. The tenants had also gone outside several times after arriving home, to smoke. The tenant said they would never smoke in the rental unit or allow any guest to smoke in the building.

The second material term the landlord is relying on is clause 13(3):

“If the number of occupants in the rental unit is unreasonable, the landlord may discuss the issue with the tenant and may serve a notice to end a tenancy.”

Disputes regarding the notice may be resolved through dispute resolution under the Residential Tenancy Act.”

The landlord said that when the tenants had a party on December 23, 2015 they had an unreasonable number of people in the rental unit. The tenant confirmed that there might have been 15 to 20 people who came to their rental unit for the party.

Analysis

When a landlord issues a Notice ending tenancy and the tenant disputes the Notice, the landlord has the burden of proving the reasons on the Notice.

After considering all of the written and oral evidence submitted at this hearing, I find that the landlord has provided insufficient evidence in support of the reasons given on the Notice ending tenancy.

There was no compelling evidence before me that the tenants had smoked in the rental unit on December 23, 2015. There is no dispute that a party was held at the rental unit and that some guests likely smoked outside of the building. However, the landlord has the burden of proving the tenant or their guests smoked inside the building. There was no independent testimony to support the landlords' submission. I found the tenants' assertion that they would not allow any smoking in the building equally believable.

Even after hearing the audio recording, made at approximately 4:30 a.m. on July 4, 2016, I find that the tenants' comments, that there would be no more smoking, just as likely refers to the tenants having left the rental unit to smoke during the early hours of the day. The landlord was at the unit to respond to noise complaint, so it is possible the coming and going from the unit might be heard by other occupants of the building. The landlord issued a warning letter on July 5, 2016; that letter said nothing about smoking in the unit on July 4, 2016. If the landlord had believed the tenants were smoking in the unit I find it difficult to understand why the notice issued to the tenants did not reference smoking.

Therefore, I find that the landlord has not proven the tenants or their guests have smoked in the rental unit.

Residential Tenancy Branch (RTB) policy defines occupants as:

Where a tenant allows a person who is not a tenant to move into the premises and share the rent, the new occupant has no rights or obligations under the tenancy agreement, unless all parties agree to enter into a tenancy agreement to include the new occupant as a tenant.

There was no evidence before me that the tenants have any occupants living in the rental unit, sharing rent. I find that multiple guests attending the rental unit on one occasion fails to support a breach of the occupant clause of the tenancy agreement.

Guests are not occupants. Therefore, I find that the landlord has not proven the tenants have allowed an unreasonable number of occupants to reside in the rental unit.

Therefore, I find that the one month Notice to end tenancy for cause issued on July 7, 2016 is of no force and effect. The Notice is cancelled. The tenancy will continue until it is ended in accordance with the Act.

As the tenants' application has merit I find that the tenant is entitled to recover the \$100.00 filing fee from the next months' rent due.

I note that the landlord did not mention the fact that he had made an application for dispute resolution, requesting an order of possession and to recover the filing fee cost. That file was not before me during the hearing. However, the outcome of this hearing is unaffected as, pursuant to section 55 of the Act, if the tenant's application had failed the landlord would have been issued an order of possession.

Conclusion

The one month Notice to end tenancy for cause issued on July 7, 2016 is cancelled.

The tenant is entitled to recover the filing fee cost.

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: August 30, 2016

Residential Tenancy Branch