



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

On August 15, 2016, the Tenant submitted an Application for Dispute Resolution asking that a 1 Month Notice to End Tenancy for Cause dated August 8, 2016, (“the 1 Month Notice”) be cancelled.

The hearing was scheduled as a teleconference hearing. The Landlord and Tenant appeared at the hearing. The hearing process was explained and the participants were asked if they had any questions. Both parties provided affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Does the Landlord have cause to end the tenancy and is he entitled to an order of possession?
- Should the Notice to End Tenancy be cancelled?

Background and Evidence

Both parties testified that the tenancy commenced on July 13, 2012, and is currently a month to month tenancy.

The Landlord testified that the tenancy agreement does not prohibit or restrict the Tenant from smoking in the rental unit, but he submitted that the Tenant's smoking is a health hazard.

The Landlord testified that the rental property is his work site and he started working at the rental property in November 2015. The Landlord submitted that he is allergic to smoke and suffers a difficulty in breathing from smoke.

The Landlord testified that there are other occupants within the rental property that smoke. He testified that the rental building is in transition from a smoking allowed building to a no smoking allowed building. The Landlord testified that there are only a few occupants left that are allowed to smoke in their rental units. The Landlord testified that smoking is not permitted in the hallways of the rental building. The Landlord testified that the occupants of two other rental units within the building have received notices to end their tenancy for smoking. The Landlord testified that one of the occupants who received a notice to end tenancy lives in close proximity to the Tenant.

The Landlord testified that he received complaints from other occupants about second hand smoke coming from the Tenant's unit. The Landlord testified that he has spoken to the Tenant about the smoke issue many times.

The Landlord testified that he issued a warning letter to the Tenant on June 2, 2016, regarding complaints he has received from neighbouring occupants about his smoking. The Landlord testified that the Tenant did not change his behaviour so a second warning letter was issued to the Tenant on July 13, 2016.

The Landlord provided a copy of the letters issued to the Tenant dated June 2, 2016, and July 13, 2016.

The Landlord testified that after waiting one month and noticing no improvement, he decided to issue the Tenant a notice to end the tenancy. The Landlord testified that he posted the 1 Month Notice on the Tenant's door on August 8, 2016.

The 1 Month Notice states that the Tenant or a person permitted on the property by the Tenant has seriously jeopardized the health or safety or lawful right of another occupant or the Landlord. In the details section of the 1 Month Notice, the Landlord has written: *"Extreme smoking causing loss of quiet enjoyment"*.

The Notice provides information for Tenants who receive the Notice. The Notice states that a Tenant has the right to dispute the Notice within 10 days after receiving it by filing an Application for Dispute Resolution at the Residential Tenancy Branch.

The Tenant testified that he received the 1 Month Notice on August 8, 2016.

The Tenant testified that he does smoke in the rental unit and that the Landlord has spoken to him about the smoke. The Tenant testified he has taken steps to minimize the chance that smoke will bother other occupants. He testified that he has reduced the number of cigarettes that he smokes to about five per day. He testified that he purchased an air purifier to clean the air in his rental unit, and he has a fan that he uses to blow smoke out the window of the unit. He testified that he has no balcony.

The Tenant testified that there are a few people in the rental building that smoke, one of which lives just up the hall from him. He testified that he has never had a confrontation with any of his neighbours.

A witness for the Tenant, M.P. testified that he is an outreach worker and he visits the Tenant twice per week. He testified that he is familiar with the smell of the Tenant's unit and he does not detect the smell of excessive smoke. He testified that he has on occasion detected the smell of smoke in the hallway of the rental building, but upon entering the Tenant's unit, he did not detect smoke. M.P. testified that the Landlord has never spoken to him about a smoke issue involving the Tenant.

The Tenant's advocate S.W. submitted that there is no evidence that the Tenant's actions have seriously jeopardized the health or safety or lawful right of another occupant or the Landlord. He submitted that the Landlord did not receive any written complaints from other occupants dated before the Landlord issued the 1 Month Notice.

S.W. submits that the proximity of other occupants who smoke in the building makes it difficult to determine the source of any smoke that is affecting other occupants. He submits that due to the transition of the building from smoking to non-smoking the other occupants are confused and upset if they notice any level of smoking in the building. S.W. submitted that the Tenant has lived there for 4 years and the warning in June is the only warning he has received.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

In the matter before me, the Landlord has the onus to prove that the reason in the 1 Month Notice is valid. I find that there is no term in the tenancy agreement that prohibits the Tenant from smoking in the rental unit. The Tenant has been smoking in the rental unit since July 2012, without previous issue being raised.

The Landlord testified that he is allergic to smoke and suffers a difficulty in breathing from smoke, but he took a position in November 2015, working as a Landlord in a building that allows some occupants to smoke. I find it reasonable to expect that a Landlord, who is responsible to deal with occupants who are permitted to smoke, may encounter smoke in the normal course of their position.

I find that the Tenant's testimony shows that he alive to the issue of second hand smoke as he has taken steps to minimize the disturbance of other occupants from second hand smoke.

The letters of complaint from other occupants within the building are all dated after the Landlord had already issued the 1 Month Notice. I find that the Landlord did not issue the 1 Month Notice based on any written complaints from other occupants. Two of the complaints indicate that the occupants believe the building is a non-smoking building. None of the complaints identify the Tenant as the only source of the smoke.

I find that the Landlord has not established the Tenant is the source of the smoke that is affecting the other occupants of the building.

I find that the Landlord has not provided sufficient evidence to support the reason to end the tenancy; therefore, I cancel the 1 Month Notice to End Tenancy for Cause, dated August 8, 2016.

I order the tenancy to continue until ended in accordance with the Act.

Conclusion

The Tenant's application is successful. The 1 Month Notice issued by the Landlord dated August 8, 2016, is cancelled.

The tenancy will continue until ended in accordance with the Act.

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: October 13, 2016

Residential Tenancy Branch