



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 the Tenant's Application for Dispute Resolution, received at the Residential Tenancy Branch on September 8, 2016 (the "Application"). The Tenant applied to cancel a 1 Month Notice to End Tenancy for Cause, dated August 31, 2016 (the "1 Month Notice"), pursuant to the *Residential Tenancy Act* (the "Act").

The Tenant attended the hearing on her own behalf and was capably assisted by J.P., her legal advocate. The Landlord attended the hearing on her own behalf. All parties giving evidence provided their solemn affirmation.

The Tenant testified the Notice of a Dispute Resolution Hearing, the Application, and the Tenant's documentary evidence were served on the Landlord, in person, on September 8, 2016. The Landlord confirmed receipt. Accordingly, I find the Landlord was duly served with the above documents on that date.

The Landlord's evidence package, consisting of nine pages of documentary evidence, was received at the Residential Tenancy Branch on October 31, 2016, three days before the hearing. The Tenant confirmed receipt of the Landlord's documentary evidence on November 1, 2016, two days before the hearing. On behalf of the Tenant, J.P. submitted the evidence should not be accepted as it was not served in accordance with the Rules of Procedure and she had not had an opportunity to review and consider it.

Residential Tenancy Branch Rule of Procedure 3.14 states:

Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC office not less than 14 days before the hearing.

Further, Residential Tenancy Branch Rule of Procedure 3.17 states:

Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC office...may or may not be considered

depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

In this case, the Landlord's documentary evidence was not submitted to the Residential Tenancy Branch and served on the Tenant in accordance with Rule of Procedure 3.14. The Tenant objects to the admission of the Landlord's evidence. Pursuant to the Rules of Procedure noted above, I find that the evidence submitted by the Landlord is not new, and that accepting it would unreasonably prejudice the Tenant, whose legal advocate had not had an opportunity to consider and respond to it. Accordingly, I decline to accept the Landlord's documentary evidence. It has not been considered further in this Decision.

The parties were otherwise provided the opportunity to present evidence orally and in written and documentary form, and to 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

Is the Tenant entitled to an order cancelling the 1 Month Notice?

Background and Evidence

The parties agreed the tenancy began on October 23, 2014. Rent in the amount of \$575.00 per month is due on the first day of each month. The Landlord received a security deposit of \$287.50 at the beginning of the tenancy.

Although the Tenant applied to cancel the 1 Month Notice, the Landlord bears the onus of proving the validity of the 1 Month Notice. Accordingly, I have summarized the Landlord's evidence first.

The Landlord testified the Tenant smokes in her rental unit and on the patio. She stated that smoke enters the hallway and enters other rental units through open windows. As a result, the Landlord testified, she has received eight written complaints from other tenants in the building, and "many more" verbal complaints. Further, the Landlord stated two other tenants – previously in units 301 and 310 – have moved out of the building because of the Tenant's unwillingness to change her smoking habits.

The Landlord also provided oral testimony regarding a visit by the Tenant's mother in August and September, at which time they smoked heavily in the rental unit. According to the Landlord, a cloud of smoke could be seen in the hallway.

The Landlord testified she tries to accommodate everyone in the building, which includes 57 rental units. She states she tries to help all tenants live together in a "unified building". However, she issued the 1 Month Notice as a result of the Tenant's smoking habits and the interference to other tenants. The reasons for issuing the 1 Month Notice are as follows:

Tenant or a person permitted on the property by the tenant has (check all boxes that apply):

- ☒ *significantly interfered with or unreasonably disturbed another occupant or the landlord.*
- ☒ *seriously jeopardized the health or safety or lawful right of another occupant or the landlord.*
- ☒ *put the landlord's property at significant risk.*

The written submissions included with the Tenant's documentary evidence confirm the 1 Month Notice was served on the Tenant, in person, on August 31, 2016.

The Tenant made few submissions of her own, instead relying on the assistance of J.P. On behalf of the Tenant, J.P. referred to a type-written notice that was received by the Tenant on January 10, 2016, when she returned home from a vacation in Calgary. She suggested the notice condones smoking in the rental unit. It states:

WE HAVE HAD, AND STILL ARE, HAVING SEVERAL COMPLAINTS OF MARIJUANA SMELL AND CIGERATTE SMOKE, AS WELL AS NUMEROUS OTHER COMPLAINTS, BOTHERING PEOPLE IN THE FRONT ENTRANCE AREA... YOU HAVE UNTIL JANUARY 01/2016 TO PRODUCE A LEGAL MARIJUANA CARD, IF NOT! WE SUDJEST YOU START LOOKING FOR ANOTHER PLACE TO LIVE. COMPLY OR YOU WILL BE EVICTED!

[Reproduced as written.]

In addition, J.P. submitted that notices posted in the building, included with the Tenant's documentary evidence, support the position that smoking is permitted in rental units. According to J.P., these notices, posted in April and July 2015, purported to set conditions on any tenant who wished to smoke in the rental property. Although J.P. acknowledged that the Tenant continues to smoke in the rental unit, she submitted that the Tenant has tried to comply with the conditions and minimize smoke in the building.

J.P. also submitted that the city by-law regarding smoking supports the Tenant's right to smoke in her rental unit, and that many other residents smoke in their units.

In specific response to the Landlord's oral testimony regarding a visit by the Tenant's mother in August and September 2016, J.P. acknowledged the Tenant and her mother smoked in the rental unit and that there was a period where there was "excessive" smoke originating in the Tenant's rental unit. However, she confirmed the Tenant's mother is no longer visiting.

Analysis

Based on the above testimony of the parties and witnesses, and on the documentary evidence submitted, I find on a balance of probabilities that:

Section 47(1) of the *Act* describes the circumstances where a landlord may give notice to a tenant to end a tenancy for cause when the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlords. The burden of proof is on the landlord to demonstrate the validity of the notice to end tenancy.

In this case, the Landlord's oral testimony, which I accept, was that the Tenant smokes in her rental unit and on her patio. She stated that smoke emanates from the rental unit into the hallway, and from the Tenant's balcony into other tenants' units. According to the Landlord, the Tenant's smoking habits have resulted in multiple complaints and the loss of two tenants in the last year.

Neither the Tenant nor her advocate disputed that the Tenant smokes in her rental unit. Neither did they provide sufficient evidence to satisfy me that the Landlord did not receive the complaints or lose tenants as alleged. Rather, J.P.'s submissions, supported by documentary evidence, appear to emphasize the Tenant's right to smoke in the rental unit without

interference by the Landlord. The Tenant's evidence also appears to highlight the Landlord's efforts to reduce the impact of smoking tenants on non-smoking tenants. In addition, the Tenant's own evidence confirms previous complaints for smoking, as indicated on the Landlord's written notice.

A tenant's activities cannot significantly interfere with or unreasonably disturb other occupants or the landlord. Accordingly, I find that the Tenant's smoking has unreasonably interfered with or unreasonably disturbed other occupants and the Landlord. In addition to receiving written complaints, the Landlord has lost two tenants as a result of the Tenant smoking activity. Accordingly, the 1 Month Notice is upheld and the Tenant's Application is dismissed.

When a tenant's application to cancel a notice to end tenancy is dismissed, section 55 of the *Act* requires me to grant an order of possession to a landlord if the notice to end tenancy complies with section 52 of the *Act*. Having examined the 1 Month Notice, I find it does comply with section 52, of the *Act*. Accordingly, I grant the Landlord an order of possession, which will be effective two (2) days after service on the Tenant.

Conclusion

The Tenant's application is dismissed.

Pursuant to section 55 of the *Act*, I grant the Landlord an order of possession, which will be effective two (2) days after service on the Tenant. The order of possession may be filed in and enforced as an Order of the Supreme Court of British Columbia.

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: November 3, 2016

Residential Tenancy Branch