Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

A hearing was convened to deal with the tenant's application under the *Residential Tenancy Act* (the "Act") for an order cancelling the landlord's 1 Month Notice to End Tenancy for Cause dated February 22, 2017 (the "1 Month Notice"). The tenant also seeks recovery of the application filing fee.

The tenant attended the hearing with a temporary articling student and supervising counsel. The landlord was represented by two of its managers. Both parties had full opportunity to be heard, to present affirmed testimony, to present documentary evidence, to make submissions, and to respond to the other party.

Preliminary Issue: Adjournment

At the outset the tenant's advocate requested an adjournment on the basis that the tenant's current illnesses would prevent her from participating meaningfully in the hearing. The tenant suffers from severe depression, post-polio syndrome, and several other conditions, including rheumatoid arthritis, osteoarthritis, fibromyalgia and chronic fatigue (as set out in the tenant's submissions in response to a prior application by the landlord, included in the landlord's evidence for this hearing). The tenant submitted a doctor's letter dated April 3, 2017 to the Residential Tenancy Branch. As that letter was submitted the day before this hearing it was not yet before me. The landlord received it late on April 3, 2017. The tenant's advocate advised that the letter states that the tenant is presently unable to participate meaningfully due to heath concerns and will be unlikely to be able to participate meaningfully for one to two months or longer.

In response to my questions as to what the tenant could contribute that her advocates could not, the articling student advised that the tenant has been residing in the rental unit in question for 28 years and has information about the historical management practices in the building to contribute.

The landlord opposed the adjournment. After considering the request, I refused the adjournment, and advised that I would set out my reasons for doing so in this decision.

Rule 7.9 of the Rules of Procedure set out some of the applicable considerations with respect to an adjournment:

> *Without restricting the authority of the arbitrator to consider the other factors, the arbitrator will consider the following when allowing or disallowing a party's request for an adjournment:*
>
> - *the oral or written submissions of the parties;*
> - *the likelihood of the adjournment resulting in a resolution;*
> - *the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment: and*
> - *whether the adjournment is required to provide a fair opportunity for a party to be heard; and*
> - *the possible prejudice to each party.*

An adjournment was not, in my opinion, necessary to provide the tenant a fair opportunity to be heard. This was because the information about past management practices that the tenant could more meaningfully speak to on another day were not likely to be relevant to the question of whether there is cause now to end the tenancy, especially where, as here, the tenant had received notice of changes in management expectations. I also considered that the tenant had opportunities to meet with her counsel and share relevant information in advance of the hearing, with the result that her advocates could contribute meaningfully on her behalf. Lastly, I considered that the doctor's note indicated that the tenant's condition may not improve for one or two months or more. As the tenant suffers from several chronic illnesses with uncertain trajectories I concluded that it would be prejudicial to require the landlord to wait for a hearing because there was no clear sense of when the tenant might be more capable of contributing.

Based on these considerations, the hearing was not adjourned. The tenant did, then, participate significantly in the hearing. Although she had two advocates assisting, she made submissions and gave evidence and clearly understood the issues involved.

Issue(s) to be Decided

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

Is the tenant entitled to recover the application filing fee?

Background and Evidence

This tenancy began in 1989.

Landlord's submissions

The landlord submitted over 100 pages of evidence. The tenant did not submit any documentary evidence. The 1 Month Notice indicates that the tenant has (i) "significantly interfered with or unreasonably disturbed another occupant or the landlord"; (ii) "seriously jeopardized the health or safety or lawful right of another occupant or the landlord"; and (iii) "put the landlord's property at significant risk." The landlord raised three major concerns in the material included with the 1 Month Notice (appended as the "details" of the 1 Month Notice) as follows:

1. *Open apartment door and use of fans*

In the "details" section of the 1 Month Notice the landlord alleges that the tenant "continuously" leaves her suite door open "with 4 heavy duty fans running blowing cold air into the hallways, which is making the other suites cold" such that "they are having continuously to turn their heat up." The landlord did not submit any evidence with respect to increased heating costs. The landlord says that the tenant has been given caution notices and verbal warnings but has continued to keep her unit door open and her fans running.

The landlord also says that leaving the suite door open is a breach of fire regulations. The landlord's evidence included sections from the *Fire Services Act.* Section 31(2)(f) of that statute requires owners and occupiers to "ensure that smoke and fire doors or closures are kept closed when not in use for access, unless they are automatically controlled by an approved fire or smoke detection system."

The landlord also submitted sections from the *British Columbia Fire Code 2012* (the "Code") under cover of an email from the municipal Fire Chief. In his email, the fire official draws attention to s. 2.2.2.4(4) of the Code, which requires that "*Closures* in *fire separations* shall not be obstructed, blocked, wedged open, or altered in any way that would prevent the operation of the *closure*." In the same section of the Code (s.2.2.2.4), "doors" are referred to independently, suggesting that "doors" and "closures" are different things, although the cover email from the fire official does refer to s. 2.2.2.4(4) as referencing "doors" rather than "closures." No definition section from the Code was before me.

The covering email from the Fire Chief closes as follows: "I hope this helps in achieving compliance. I will ask that Assistant Chief . . . follows up if there is a more applicable section of the Fire Code."

The landlord's manager also argued that a clause in the tenancy agreement that provides that doors must be locked for security purposes is a material term of the agreement.

The landlord provided photographs showing the tenant's apartment door propped open with a small personal shopping cart and a paper screen room divider and another object (also relevant to the "barricading" alleged below).

2. *"Barricaded" apartment door*

The second major concern, also around the open apartment door, is that the tenant "barricades" her open apartment door with various objects. Section 30(2) of the *Fire Services Act,* also in evidence, requires an owner or occupier of a building to keep "means of exit" unobstructed. "Means of exit" is defined as "a continuous path of travel provided by a doorway, hallway, corridor . . . for the escape of persons from any point in a building, floor area, room . . . to a public thoroughfare or other unobstructed open space . . . ".

3. *Clutter in the apartment*

The landlord's third concern is with the "clutter" in the suite, which the landlord says is a fire hazard. The landlord also says that the clutter in the apartment means that emergency attendants could not get their equipment into the suite should an emergency occur.

The landlord submitted a chronology starting in 2014 and a "tenant abstract report" starting in 2003. In oral submissions the landlord specifically referenced the following incidents:

1. Another tenant made a noise complaint about this tenant's banging on walls during the night, which resulted in a letter to this tenant from the landlord (February, 2014).

   The email from the complaining tenant says that this tenant complained to him directly about his guests and noise. He then states that his email to the landlord about the banging "is not a formal complaint, since I know this is a complicated situation . . . taking into account that she in an old lady and seems to have some mental problems or social skills deficit . . . but I would like you know what is going on, in case she tries to escalate things."

   The warning letter to the tenant from the landlord is not with respect to this tenant's banging on the other tenant's walls, but with respect to her approaching the other tenant directly.

2. This tenant overflowed her bathtub causing damage to suites below (January, 2015).

   The work order and incident report in evidence suggest that the tenant overflowed her tub while talking on the phone and make clear that the damage is limited to staining of the ceilings of the units below, requiring an unspecified amount of repainting.

3. This tenant left her apartment door open and received an incident report and verbal warning (January, 2015).

   The incident report in evidence indicates that the tenant admitted putting milk jugs in the hallway to keep the fire doors open, and removed them when approached, but that they kept reappearing.

4. The tenant propped the hallway doors and her suite door open and received a verbal warning and 1 Month Notice to End Tenancy for Cause (March 12, 2015).

Attached to the March, 2015 1 Month Notice, or delivered shortly thereafter in support, is an incident report dated March 20, 2015 citing the tenant's leaving the hall and unit doors open and overflowing the tub, and stating "the condition of your apartment that is a safety and fire hazard."

Also in the landlord's evidence is an application by the tenant to dispute the 1 Month Notice of March, 2015. The landlord testified that an agreement was reached that the landlord would cancel the notice and help the tenant find more suitable housing. This is documented in a letter from the landlord to the tenant dated March 20, 2015 stating "I trust you are in agreement with this arrangement, and I will be in contact with you later next week.

5. The landlord issued a caution letter to the tenant regarding her leaving her apartment door open and fans on 24 hours a day, stating that it is disrupting the fire alarm system, and asking her to close her door (April 17, 2015)

6. The tenant overflowed her bathtub causing damage to suites below (April 18, 2015). The caution notice says: "This is more then the first time that you overflowed your tub and cause damage to the unit below you; this time you will be responsible for the cost of the repairs to the unit below yours" (reproduced as written).

7. The landlord received a complaint regarding this tenant's leaving the fire and suite doors open, which resulted in another warning letter to this tenant (June, 2015);

8. The tenant received a 1 Month Notice to End Tenancy for Cause for repeated late payment of rent, which was subsequently cancelled when the tenant paid rent (August, 2015);

9. Another tenant complained that this tenant had accused them of stealing the door stop she uses to prop open the fire door, which resulted in a letter from the landlord to the tenant advising that complaints should be made in writing to the office and asking her to stop propping open the hallway door and her apartment door as this is in breach of fire regulations (April, 2016);

10. Another tenant made two noises complaints about this tenant banging on the walls in the early morning hours, which resulted in a warning letter to this tenant from the landlord (December, 2016);

11. Another tenant complained about the tenant's leaving her suite door open and fans running day and night, cooling the air in the other tenant's unit, which resulted in a warning letter to this tenant from the landlord (January 17, 2017);

12. The landlord says that inspected the tenant's suite and found clutter and impeded access. The landlord says that there was no access to the bedroom, living room, or kitchen (February, 2017);

13. The landlord received two other complaints that this tenant was still leaving her suite door open and her fans on, resulting in a letter dated February 14, 2017 from the landlord asking the tenant to remove the fans and keep the suite door closed.

One of the tenant complaints received by the landlord says: "I would greatly appreciate it if the door would remain closed at all times . . . having to walk by . . . is disturbing to me with many fans making noise and also all the clutter. Potential fire hazard."

The other tenant complaint says that this tenant continues to have her apartment door open and barricaded with wooden privacy screens, grocery carts, etc, and continues to "run fans to draw in cold air through her apartment and directly into the hall. This results in the hallway being cold and a constant draft that makes it cold in our unit."

The February 14, 2017 letter from the landlord asks that the tenant "please remove a lot of the clutter" in the suite. It also states as follows:

> We have also asked you numerous times to keep your suite door closed at all times, enclosed in your signed Tenancy Agreement (20) which clearly states the door to the Tenant's suite shall be kept closed. This is a material term of your Tenancy agreement, it is also a fire safety regulation, it is causing a strain on our heating system as it is continuously trying to keep the hall and suite warm and is causing disturbances within your neighbours, as we have received numerous complaints. It is making the other suites cold and the tenants are uncomfortable.
>
> Since we spoke to you on February 10, 2017 you have continued to leave your door open over the weekend. **This will be your final letter to ask you to remove the fans and keep your suite door closed.** If you continue to run the fans and leave your door open we will proceed with a 30 Day Notice to End Tenancy for Cause. [Reproduced as written]

14. Another tenant complained that on February 15 the tenant's apartment door was again open and her fans running and that this was the case at 8:00 pm, 10:30 pm, and 7:45 the next morning, and was probably also the case overnight, based on his experience.

    The complaining tenant's email sets out his concern with fire safety. He says that if there were ever a fire in this tenant's unit, the fans and her open windows would contribute to it, and her open apartment door would not provide a barrier to the fire's movement into the apartment hallway. He also notes that while the tenant's fans were off, his unit got noticeably warmer. His written complaint ends with the following statement: "This is worrisome enough that I intend to keep you informed as to what she does but it's obvious that she intends to do as she pleases."

15. The complaining neighbor reported to the landlord on February 21 and 22 to say that the tenant has been opening the unit door and blowing her fans less than usual, but still for several hours a day on most days.

16. On February 22, 2017, the landlord served the tenant with the 1 Month Notice that is before me, as well as a caution notice. The caution notice states: "Please stop blowing air in the hallway and barricading your apartment door open with stuff; your behavour is against fire regulation and could also cause the fire alarm to be activated."

Tenant's response

1. *Open apartment door*

The tenant says that there are toxic and/or unpleasant smells coming from inside her apartment, which the landlord has not properly investigated, and that she keeps her door open and the fans running for this reason. She points to complaints from two other tenants in evidence about smells coming from her own unit as evidence of this. The landlord says it has investigated the tenant's concerns and found nothing; the tenant says the landlord has not sufficiently investigated.

However, the tenant says that in spite of these odors, she is now willing to keep her apartment door closed at all times. She says she has done so consistently since receipt of the 1 Month Notice at issue today. The tenant made clear that she does not wish to leave her apartment and that leaving would be very difficult for her owing in part to her health concerns.

2. *Barricaded apartment door*

The tenant says she leaves a screen, a small personal shopping cart, and/or a trolley, in front of her door so that there is not easy access to her unit when the door is open. Her counsel submitted that the objects "barricading" the tenant's doorway when the door is left open are not a safety hazard for the other tenants in the building and do not have any significant effect on the other tenants or the landlord. Again, the tenant is now willing to keep her door shut so that these items will no longer be necessary to block the entrance.

3. *Clutter in the apartment*

The tenant acknowledges that she stores food and other household items in her unit. She says that this is because she purchases them in bulk when they are on sale. She disagrees with the landlord's account of how cluttered her unit is. She says that the things she has in her apartment are all useful, that she does not collect garbage and that she is not "hoarding" as alleged. She also says it is not true that the manager could not access various rooms in her apartment and that in fact she "strode through" the unit at the inspection. She says her unit may be untidy but it is not obstructed to the degree the landlord alleges.

Tenant's counsel suggested that rather than ending the tenancy I should impose conditions on the tenant.

Analysis

Section 47(1)(d) of the Act allows a landlord to end a tenancy for cause where the tenant has (i) significantly interfered with or unreasonably disturbed another occupant or the landlord, (ii) seriously jeopardized the health or safety or a lawful right or interest of another occupant or the landlord, or (iii) put the landlord's property at significant risk. The burden of proof is on the landlord on a balance of probabilities to establish cause significant enough to end a tenancy.

1. *Open apartment door*

The tenant has admitted to keeping her apartment door open and using fans to move air in and out of her apartment. There is also ample evidence from the landlord that the tenant has done so over a relatively long period of time. It is also clear that the tenant has been asked, and then

cautioned, not to do so. Based on the landlord's evidence I am also satisfied that the apartment door should be kept closed for fire safety reasons.

However, I cannot accept that the tenant's keeping her apartment door open and her fans blowing represents "significant interference" or "unreasonable disturbance" of other occupants or the landlord. One of the neighbouring tenants complains that the tenant is cooling their unit, but it is not clear how disruptive this is. It is unlikely that the cooling would be bothersome throughout the year and, in any event, the cooling of the hallway and the other tenant's own unit cannot be more than mildly uncomfortable at best. The tenant can also mitigate the discomfort by turning up the heat in his own unit, by wearing a sweater, by blocking the space under his apartment door, etc. The landlord is responsible for heating costs and there is no evidence of a significant increase in heating costs. Another tenant complains that "having to walk by" the unit is "disturbing to me with all the fans making noise and also all the clutter." I do not accept that having to walk by fans and view the "clutter" holding the door open qualifies as a significant disruption.

Apartment doors should be shut when not in use in the unlikely event of a fire in this tenant's unit. A shut door will slow the spread of fire if it happens to move into the hallway. However, I do not accept that the open apartment door and the use of fans has "seriously jeopardized" the safety of others. The tenant has testified that she is always at home when her doors are open. This means that any fire that may start is likely to be noticed by the tenant before it becomes serious. The tenant has testified that she has a fire extinguisher in her kitchen. It is also clear on the evidence submitted by the landlord that there is a fire alarm system in the building. (There is insufficient evidence about how the fans might interfere with the fire alarm system, although the landlord mentions this in at least one of its letters to the tenant.)

Residential Tenancy Branch Policy Guideline #32, which deals with the termination of a tenancy for an "illegal activity" under s. 47(1)(e) of the Act, applies here by analogy. Policy Guideline #32 makes clear that an "illegal activity" alone will not necessarily serve to terminate a tenancy. The illegal activity must also be serious enough to warrant the termination. By the same token, simply because the tenant has left her apartment door open in breach of the Fire Code does is not sufficiently serious to warrant terminating the tenancy.

The landlord's chronology makes clear that the open apartment door has been an issue since at least January of 2015. The landlord issued a 1 Month Notice in March, 2015 based in part on this issue. The landlord withdrew that 1 Month Notice with the intention of assisting this tenant to locate more appropriate housing. That did not transpire, and the landlord documented concerns with the open door again in April and June of 2015. There do not appear to have been any concerns with respect to the door or the fans during 2016. It is not clear whether this is because for some reason the tenant was not leaving her door open and her fans on during 2016, or because the landlord was not monitoring the situation and other tenants were not complaining. In any event there is no evidence that the landlord has been consistently and concertedly monitoring compliance until after its letter to the tenant of February 14, 2017. After

that letter, there are emails between the landlord and another tenant about whether the tenant has complied with the landlord's request to keep her door closed. If the tenant's open door and her use of fans was a sufficiently serious threat to the safety of the other tenants, or to the building itself one would expect that the landlord would be have been consistently monitoring the situation before February of 2017.

I do not accept that the clause in the tenancy agreement requiring the tenant to keep her apartment door closed for security purposes is a material term of the tenancy agreement. Residential Tenancy Branch Policy Guideline #8 states that a material term "is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement." It further states that simply because the term is part of the agreement does not mean that it is a material term. The burden is on the landlord to establish on the evidence and in argument that the term is material to the agreement. The landlord has not submitted either argument or evidence of this.

2. *"Barricaded" apartment door*

The tenant has admitted that she props open her apartment door with various items, and that this obstructs her entrance way. The landlord has submitted photographs evidencing same. However, I do not accept that this represents serious interference with or disruption of other tenants or the landlord, that it seriously jeopardizes the health or safety of those other parties, or that it put the landlord's property at significant risk. It may be that by creating this obstruction in the hallway the tenant making her own egress from the unit in the event of fire difficult, but that is not the test.

3. *Clutter in the apartment*

The tenant and the landlord have different views on the navigability of the tenant's unit. Although the unit may well be cluttered, the tenant obviously lives in and moves around her apartment. The landlord has not provided any clear photographs interior of the rental unit, although photographs could have been taken at the recent inspection. There is thus insufficient evidence for me to find that the tenant's unit so severely cluttered that it represents a threat to the safety of other tenants or the landlord or seriously jeopardizes the landlord's property.

4. *Other*

The tenant has also admitted to blocking the hallway doors open but says that she has stopped doing so. There is insufficient evidence of any major concerns with the hall doors since June, 2015. The landlord did not focus on the open hallway doors in its submissions and the tenant's propping them open on some occasions in 2015 does not suffice to end the tenancy now. Additionally, if this was a significant concern at the time the landlord could have moved forward with another 1 Month Notice.

The landlord has also referred to two instances of an overflowing bathtub. According to the incident report for the second, the tenant was required to pay for the cost of (minor) repairs herself.

The landlord's chronology indicates that it received one noise complaint in 2014 and two noise complaints in late 2016, three months before it delivered the 1 Month Notice here at issue. Although the landlord did not rely upon the bathtub or the noise issues in the 1 Month Notice before me today, I am not satisfied these incidents, assuming without deciding that they did occur, would qualify as sufficiently "unreasonable" or "significant" to require the termination of this tenancy in any event, especially because the landlord did not take that position when they occurred.

The landlord's submissions make clear that over the last three years of this tenancy there have been multiple complaints from other tenants regarding this tenant's open apartment door and use of fans, several warning letters from the landlord, and three 1 Month Notices to End Tenancy for Cause. Managing this tenancy may be more time-consuming than managing others. Managing it is no doubt made considerably more difficult by the fact that the tenant has not cooperated with the landlord's reasonable requests that she keep her apartment door closed. However, I am not convinced that this amounts to <u>significant</u> interference or <u>unreasonable</u> disruption of the other tenants or the landlord, or that it has put the safety of those others in "serious jeopardy" or put the landlord's property at "serious risk."

At the same time, the tenant may not "do as she pleases" as one of the complaining tenants alleges that she has done. Since receiving the 1 Month Notice the tenant has agreed to keep her door closed and appears to have actually done so. Accordingly, **<u>I order the tenant to keep her apartment door closed when she is not entering or exiting her apartment and to refrain from operating fans in her open apartment door.</u>**

<u>The landlord may bring another application to end the tenancy if the tenant breaches this order.</u>

The parties are reminded that they may still negotiate an agreement to end this tenancy on terms and conditions that are agreeable to both of the parties.

<u>Conclusion</u>

The tenant's application to cancel the 1 Month Notice is allowed. The landlord's 1 Month Notice is cancelled. The tenancy will continue until ended in accordance with the Act.

<u>The tenant is ordered to keep her apartment door shut and to refrain from operating fans in the open apartment door.</u>

<u>If the tenant breaches this order the landlord may apply to end the tenancy on the basis of this order.</u>

The tenant may not have her application filing fee from the landlord. She would not have had to file her application if she had she simply agreed to keep her door closed prior to the issuance of the 1 Month Notice.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act. Pursuant to s. 77 of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: April 07, 2017

Residential Tenancy Branch