



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing was convened to deal with an application by the tenants pursuant to the *Residential Tenancy Act* (the “Act”) to cancel a Notice to End Tenancy for Cause dated March 9, 2017 (the “1 Month Notice”).

Both of the tenants and both of the landlords attended the hearing and had full opportunity to be heard, to present affirmed testimony and documentary evidence, to make submissions, and to respond to the submissions of the other party.

Service of the tenants’ application and supporting evidence, and of the landlords’ supporting evidence, was not at issue.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling the 1 Month Notice?

Background and Evidence

A copy of the residential tenancy agreement was in evidence. This tenancy began in May of 2014. Monthly rent is \$1,650.00 due on the first of the month. A security deposit of \$825.00 is currently being held by the landlords. No pet damage deposit was paid at the beginning of the tenancy.

The 1 Month Notice indicates that the tenants have breached a material term of the agreement and failed to correct that breach within a reasonable time after written notice to do so. It does not indicate that the tenants have caused extraordinary damage or put the landlord’s property at significant risk or failed to repair damage within a reasonable amount of time, which are other categories of “cause” under s. 47(1) of the Act.

Alleged material terms

The landlords say that the advertisement for the rental home stated that neither pets nor smoking were allowed. There is nothing in the written tenancy agreement prohibiting pets or smoking. The landlords say that they advised the tenants orally that smoking in the house was not permitted and that in spite of the advertisement stating that pets were not welcome, they agreed orally to allow the tenants to have their elderly dog. They asked that the tenants deposit \$250.00 as a pet damage deposit but did not insist upon it when the tenants indicated their unwillingness to do so.

The landlords also say that the tenants have or had a cat in the rental unit in breach of their oral agreement that only the elderly dog is allowed. An email from the landlords to the tenants dated October 1, 2014 comments on the cat: "Regarding the cat, it is still a pet that was not agreed too. It was a dog only." The landlord continues on to say: "Usually a pet deposit is held on top of a damage deposit to protect us regarding carpet damage, fleas, scratching, etc. I would think only the first two would apply to a cat. We agreed to waive the requirement for the dog (reproduced as written)." In response the tenant states: "It seems that every email we get is asking for more money . . . if you want to push the issue of a part time indoor cat then I guess that's your prerogative but I will say the cat can be moved. He will only be there on visiting part time. We are really not comfortable with the thought of giving you any more deposits . . ." (reproduced as written).

The tenants acknowledge that smoking was prohibited in the home but say that they understood smoking in the garage was acceptable. They also say that the landlords have observed their smoking "at door's edge" before and not raised any concerns. They also say that the smell of smoke in the garage may be the result of an old jacket that belonged to a smoker that had been stored there but that has since been moved.

The tenants further say that the landlords were aware that they took care of a cat, that they have been doing so for years, and that the landlords have indeed met and interacted with the cat. They say that if the landlords were not agreeable to their having the cat on a part-time basis then they ought to have indicated as much earlier.

The landlords testified that they have decided to put this residence on the market. To that end, they visited it in February of this year with their realtors and they were upset with the condition of the unit because it was not appropriate for marketing the home. The landlords' realtors wrote a letter dated March 21, 2017 about the condition of the residence at the February visit. In that letter they state that there is a "heavy odor which

we can only describe as urine/pet odors,” damage to the cork floors “by what appears to be pet stains,” and “evidence of a cat living there.” The realtors also state that the “garage was filled with cigarette smoke making it unbearable to be in.” The letter closes with a suggestion that the home be professionally cleaned and that the cork floors be replaced to get rid of the pet smell.

Both of the parties have submitted photographs. The landlords’ photos are primary concerned with establishing that this is a high-end home. The photos show what appears to be a very small stain on the carpet that seems washable. They also show some sections of the cork flooring that appear to be water damaged. The floors are also relatively worn, which is consistent with the landlords’ testimony that they are approximately nine years old.

The landlords testified that their realtors have advised that rather than replace the floors before sale they can offer potential buyers a “floor allowance” so that the buyers can select their own flooring.

Landlords’ notice of breaches

The landlords wrote a letter to the tenants dated February 24, 2017 (posted February 26) giving written notice of the following breaches: (1) breach of the term that no damage to the property would occur as a result of the dog; (2) breach of the no additional pets policy because of the evidence of a secondary pet; (3) breach of the prohibition on smoking because of the strong cigarette smoke odour in the main floor laundry room and garage.

This letter required the tenants to correct the breaches as follows: (1) “Immediately the small elderly dog must not be allowed to urinate on the floor/carpets. Corrective action is necessary to prevent further damage/odor.” The landlords required the tenants to install an indoor moveable pen with a protective bottom by March 1 and to have a professional, approved in advance by the landlords, replace all flooring that has been damaged by urine by March 8. Regarding (2), the letter also required the tenants to remove all other pets by February 27 and professionally clean all household carpeting. Regarding (3), the landlords required the tenants to immediately stop smoking in the garage or any other interior areas and air out the garage and laundry room daily.

Tenants’ response to notice

In response to (1), the tenants say that they are now keeping their elderly dog in a pen at night as requested, that they are mindful of his bathroom breaks, and that one of

them is always at home with him. They have scrubbed the cork floor and washed their couch and loveseat and believe the smell has been eradicated. Regarding (2), the tenants say the stain on the upstairs carpet is tea not urine as their dog cannot use stairs, and that they have spot-cleaned the stain and that it is unreasonable to expect them to have the carpets professionally cleaned while they are still residing in the rental unit. In response to (3), the tenants say they have stopped smoking in the garage and are airing it out daily.

The tenants have submitted letters from two other people, one dated March 20, 2017 and another undated. Both letter writers state that they have visited the tenants' home and have never noticed any foul smells or the smell of urine. In summary, the tenants say they have addressed the concerns raised in the landlords' notice.

The landlords say that the tenants have not remedied all of the material breaches of the tenancy agreement. They have submitted a letter from a tradesperson who attended on March 9 stating that upon entering the home through the front door he noticed a smell of urine and cat litter and that there was a strong cigarette smell in the garage.

Analysis

Section 47(1)(h) of the Act allows a landlord to end a tenancy for cause where the tenants are in breach of a material term of the agreement and have failed to correct that breach within a reasonable amount of time after receiving written notice. The burden of proof is on the landlords on a balance of probabilities to establish that the alleged term is a material one, that there has been a breach, and that the breach has not been corrected after written notice and a reasonable amount of time.

The landlords submit that the tenancy agreement includes a provision prohibiting pets other than the tenants' elderly dog and that this is a material term of the agreement. I do not accept that there are any material terms regarding pets.

Residential Tenancy Branch Policy Guideline #8 describes "material terms" as terms that are so fundamental to the agreement that the most trivial breach will suffice to end the tenancy. A material term is generally important enough to document in writing, and the "no pets other than the elderly dog" provision was not included in the written tenancy agreement.

Additionally, the email correspondence between the tenants and the landlords in October of 2014 does not establish that the landlords prohibited the cat. Instead, it suggests that the landlords sought a damage deposit for the cat once they discovered it

was there. I also accept the tenants' evidence that the landlords were aware that the cat was sometimes at the unit. On balance, then, I do not accept that the "no additional pets" was a material term of the tenancy.

Nor do I accept that the tenants' comment that their elderly dog would not cause any damage was a material term of the agreement. A pet damage deposit is meant to cover damage caused by a pet because it is reasonable to expect that a domestic animal may cause some damage. The landlord allowed the tenants to have the dog and afterwards chose not to insist on a pet damage deposit that had initially been discussed. In other words, the landlords originally anticipated that the dog might cause some damage and asked for a pet damage deposit accordingly. When the tenants resisted paying the deposit, the landlords chose not to insist on it. They cannot now say that they entered the tenancy based on the tenants' promise that the dog would cause no damage. Rather, they anticipated that it might cause damage and negotiated a deposit that they did not later require.

Nor do I accept that a prohibition on smoking in the garage was a material term of the agreement. There was insufficient evidence to establish an agreement that the tenants could not smoke in the garage. Again, if this had been a material term one would expect it to be documented in writing. I also accept the tenants' evidence that the landlords have been aware of their smoking at the threshold of the home. If no smoking were actually a material term of the agreement the landlords would likely have reacted to the smoking they witnessed earlier.

Although they did not give the tenants clear written notice of this, the landlords also appear to be alleging that the tenants have breached their obligation to maintain reasonable health, cleanliness, and sanitary standards throughout the rental unit. This is a standard term of all tenancy agreements and may well be a material term in most circumstances.

However, there is insufficient evidence to establish that the rental unit is unreasonably unclean or unsanitary. It is only clear that some of the cork flooring, which has almost reached its "useful life" as per Policy Guideline #40, has been damaged and that the home smelled of urine, and the garage of smoke, at one point. The tenants say they have done their best to remedy this. There is conflicting evidence as to whether those odors are still significant.

However, the landlords have not established on a balance of probabilities that there is cause to end the tenancy under s. 47(1)(h) of the Act. They have not established that the terms alleged are material terms of the tenancy agreement. Accordingly, I cancel

the landlord's 1 Month Notice. The tenancy will continue until it is ended in accordance with the Act.

Conclusion

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

The landlords and tenants here have had a cooperative relationship for the vast majority of this tenancy. In light of this, and in light of the fact that responsibility for the maintenance and repair of a residential property is shared under both the Act and the tenancy agreement, the parties may wish to cooperate in order to remediate any concerns and allow the tenancy to continue while the residence is marketed for sale.

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 12, 2017

Residential Tenancy Branch