



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 the tenant's applications pursuant to the *Residential Tenancy Act* (the "Act"). The tenant seeks an order cancelling a 1 Month Notice to End Tenancy for Cause dated March 7, 2017 (the "1 Month Notice"). The tenant also seeks orders as follows: requiring the landlord to make emergency repairs for health and safety reasons; suspending or setting conditions on the landlord's right to enter the rental unit; requiring the landlord to comply with the Act; requiring the landlord to provide services or facilities; requiring repairs to the rental unit; compensating for loss or money owed; and authorizing a reduction in rent for repairs, services, and facilities agreed upon but not provided.

Both the tenant and the landlord attended the hearing, as did a witness for the landlord. Service of the tenant's application and of both parties' supporting evidence was not at issue.

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, to cross-examine the other party, and make submissions.

At the outset of the hearing I advised the parties that I would be severing the tenant's application to cancel the 1 Month Notice from the tenant's other applications. Rule 2.3 of the Residential Tenancy Branch Rules of Procedure authorizes me to dismiss unrelated disputes contained in a single application. Here, the tenant seeks several different orders, the most urgent of which is an order setting aside the 1 Month Notice. The other orders sought are not so related to the question of whether or not the tenancy will continue to require determination during these proceedings. Accordingly, I dismiss the balance of the tenant's application, with leave to re-apply.

Issue(s) to be Decided

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

Background and Evidence

It was agreed that this tenancy began in December of 2016 as a one year fixed term tenancy with an end date of December 14, 2017. Monthly rent of \$1,050.00 is due on the first of the month, and security and pet damage deposits totaling \$1,050.00 were made at the beginning of the tenancy and remain in the landlord's possession.

The 1 Month Notice was served on the tenant by posting on her door on March 7, 2017. It indicates that the tenant has allowed an unreasonable number of occupants into the unit, significantly interfered with, unreasonably disturbed, and seriously jeopardized the health or safety or lawful right of another occupant or the landlord, put the landlord's property at significant risk, and breached a material term of the agreement and failed to correct that breach within a reasonable time after written notice to do so. The 1 Month Notice also alleges that the tenant or a person permitted on the property by the tenant has engaged in illegal activity that has or is likely to adversely affect or jeopardize the lawful right of another occupant or the landlord.

The tenancy agreement includes an addendum, which states in part as follows: "There is absolutely no smoking within the property or anywhere within the property lines. This includes anywhere in the back yard, side yard, drive way. Each occurrence is subject to a \$25 fine. Third warning will result in an eviction notice, no exceptions." The tenant has signed the addendum.

The landlord's evidence also included a copy of a craigslist advertisement for this basement suite, which includes this statement: "Absolutely no smoking in house or anywhere on property." The tenant testified that this was not necessarily the advertisement to which she had responded. However she acknowledged that the advertisement to which she did respond included the restriction on smoking.

Another person has been assisting the landlord with managing this rental property and attended the hearing as a witness. The landlord's agent testified that she met with the current tenant in advance of the tenancy and was assured that the tenant would not smoke on the property.

The landlord testified that she received a complaint from the upstairs tenants by email dated February 2, 2017 advising that beginning early that morning their suite started to smell of smoke and asking for a prompt response from the landlord "not like with last

tenants we got delayed for months to solve the problem. This time we can't take the risk as you already know that we are living with very small baby whose lungs are still developing." In their email the upstairs tenants also said that they had not experienced the smoke problem with the downstairs tenants until that day, and that if the smell continued they would have to shut down the heat and close the heat vents, although they did not wish to live in a house without heat in the cold weather. A copy of this email was in evidence. The agent also testified that the prior basement suite tenants had intimidated and upset the upstairs tenants and as a result the upstairs tenants were concerned about conflict with other tenants.

The landlord sent the tenant whose application is before me today an email dated February 2, 2017 advising of the complaint and stating: "As has been clearly explained to you prior to your tenancy and during your tenancy that the home is strictly non smoking . . . It is been further clarified that due to zero tolerance, you would receive one warning only. This is your one warning. The next notice we receive of any smoking coming from your unit will result in an eviction notice." A copy of this email was also in evidence.

The tenant's evidence included her February 4, 2017 response to the above email which includes this: "I have spoken to the upstairs tenant. He said it only happened once and on a night I was in bed fairly early. He smelt it at 4am. I showed him the air intakes along the pathway where the neighbours smoke as well. I have not smoked in the house but I head the warning not to. I also smelt it for a good day as a smoker so I do agree with him and am not sure as to where it came from. We are on good terms regardless." The landlord's materials did not include this response by the tenant.

The agent testified that the upstairs tenants moved out with only 14 days' notice due to the continued smoke smell. She also said that because the upstairs tenants were intimidated by the downstairs tenants based in part on their experience with the prior downstairs tenants, they asked that the landlord refrain from raising the smoking complaint with the downstairs tenants until after they had safely moved out. An email from the upstairs tenants giving notice, but not mentioning the smoking concern, was in evidence. The tenant testified that the upstairs tenants had told her they had purchased a home.

The landlord testified that smoking appeared to be continuing as of February 26, 2017. The agent said that she noticed the smell of cigarettes and marijuana in the upstairs unit during the walk-through with the vacating upstairs tenants on that day. The agent took photographs, which the landlord submitted in support of her claim. There is a photograph of a collection of cigarette butts in a garbage bag, and another of cigarette

butts in a large ceramic bowl on the tenant's patio. Beside the bowl there appear to be some ashes or a rolled cigarette butt.

Other photographs show duct tape over a heating vent and around a door in the upper unit. The landlord's agent said that the upstairs tenants were using this tape to keep smoke from entering their unit. The tenant in response said that she knew and was friendly with the upstairs tenants and had seen some of the taping and that they told her it was to deal with a mice problem in the residence and subsequent fumigation.

Other photographs taken by the agent two days later were submitted by the landlord. These show the ceramic bowl with a different arrangement of cigarette butts in it.

In response to the photographs the tenant stated that she moved the cigarette bowl from her prior residence with butts in it, that she smokes off the property and that she then puts her cigarette butts in the garbage or the bowl. She provided a photograph of an air intake duct into her residential unit and a photograph showing how close the homes are to one another, and suggested that the smoke complaints from the upstairs tenants may have been the result of the next door neighbours, who smoke very near to the air intake unit of the adjacent home.

A copy of an email dated February 28, 2017 from the agent to the landlord regarding the February 26 and the February 28 walk-throughs of the upstairs unit was in evidence. In that email the agent says that on February 28 she reminded the tenant whose application is before me today that she was renting a non-smoking property and that the tenant responded that the upstairs tenants do not mind her smoking and that she wanted to see the complaints the agents reported having received. The agent's email closes with this: "The upstairs tenant expressed his reasons for not providing sufficient notice to move because he could not tolerate the continuous smoking, drug smell. Also his infant became very ill over the winter months in & out of the hospital and there was no warmth or enjoyment of a heated house as they had to tape shut the vents to block out the smoking odours coming in from the tenants of the basement suite to include guests."

On March 2, 2017 the landlord received an email from the new upstairs tenant regarding the smell of cigarette smoke in the upstairs unit. This was also in evidence. It states in part as follows: "Also, we know that the property is a smoke free property so I just want to share an observation . . . as soon as we opened the door to go look there was an awful stench of cigarette smoke emanating from there . . ."

The tenant submitted a letter from her social worker dated March 7 stating that she had attended the tenant's home on January 19, February 20, and March 6 and that at no time did she notice the smell of smoke inside the unit or have concerns that anything was being smoked in the home prior to her arrival.

Analysis

Section 47(1) of the Act allows a landlord to end a tenancy for cause. Unless the tenant agrees that the tenancy will end, the tenant must dispute a notice under this section by filing an application within 10 days of receipt. In this case, the tenant received the 1 Month Notice on March 7, 2017. At the hearing there was some uncertainty based on the materials in the file whether the tenant had applied to dispute the 1 Month Notice on March 17 or March 21. It is clear that the tenant at least began the application to dispute process on March 17. Additionally, any delay is minimal and over a weekend, and the tenant testified and supplied documentary evidence establishing that she was compromised to some degree by an eye injury. Accordingly, even if the tenant were late in filing I would extend the time limit as per s. 66(1) of the Act.

Once a tenant disputes a notice, the burden of proof is on the landlord on a balance of probabilities to establish the cause alleged.

Unreasonable number of occupants

The landlord alleges that the tenant has allowed an unreasonable number of occupants in the rental unit because the tenant's boyfriend is sometimes there. There is nothing in the tenancy agreement or the addendum that restricts the number of occupants that may reside in the rental unit, although only the tenant is named on the agreement and I do not accept that one additional occupant would necessarily qualify as unreasonable. However, I am not required to decide whether the tenant has allowed an unreasonable number of occupants into the unit because I do not accept that the tenant's boyfriend is an occupant. Instead, I accept the tenant's evidence that her boyfriend has his own home and schedule and only visits as a guest on occasion.

Significant interference, unreasonably disruption, affecting quiet enjoyment

The landlord also alleges that the tenant or a person permitted onto the property by the tenant has significantly disrupted other occupants, seriously jeopardized their health or safety or other lawful right, put the landlord's property at significant risk, and engaged in illegal activity that has had adversely affected another occupant's quiet enjoyment or lawful right.

The landlord did not focus on the illegality of any conduct, although she may be referring to the alleged marihuana smoking as an illegal activity. Residential Tenancy Branch Policy Guideline 32 defines “illegal activity” as a serious violation of federal, provincial, or municipal law and specifies that the burden is on the landlord to establish the illegality of any contentious activity. Any illegal activity must also be sufficiently serious to warrant ending a tenancy. Accordingly, even if the landlord had clearly established marihuana use on the residential property and had clearly established that such use was illegal, which she has not, I would not have found the consequences serious enough to warrant terminating a tenancy. The question of whether the tenant or her guests are smoking a potentially illegal substance is of less concern than whether smoking of any type is sufficiently disrupting the comfort of other occupants or the landlord.

Nor has the landlord offered sufficient evidence that the tenant has put the landlord's property at significant risk. Again, in my opinion the main question to be answered is whether the tenant has significantly or unreasonably disturbed another occupant or seriously jeopardized the health or safety of another occupant. Again, the burden of proof is on the landlord, and I am not satisfied that the landlord has established substantial enough interference or disruption. Although the tenancy began in or about mid-December, 2016, there is only one email from the prior upstairs tenant complaining of smoke on February 2, 2017 in evidence. The landlord conveyed this complaint to the downstairs tenant, and the downstairs tenant responded that she had not been smoking at that time but understood the caution.

Although the landlord's agent testified that the upstairs tenants left because of smoking by the downstairs tenants, there is no written correspondence from the vacating tenants to that effect. Nor were those tenants called as witnesses. The tenant said that she understood the vacating tenants had bought their own home. It is therefore not clear on a balance of probabilities that smoking by the tenant or her guests has significantly affected the upstairs tenants.

The tenant has submitted a letter from her social worker suggesting that she does not appear to be smoking indoors. The tenant has also raised the fact that next door neighbours smoke close to the air intake unit in the residence under consideration. The landlord does not appear to have investigated that as a possibility. Accordingly, even if these upstairs tenants were in fact disturbed by smoke, the landlord has not established that the smoke ingress was caused by the tenant before me.

The tenant and/or her guests may have smoked on the tenant's patio as the landlord alleges. However, I am not satisfied that this has significantly interfered with or unreasonably disrupted or seriously threatened the health or safety or lawful right of another occupant or the landlord. The upstairs tenants and the landlord have some responsibility to share any concerns about the tenant in the downstairs unit with her. By not doing so, the tenant may not have received an opportunity to address these concerns. Additionally, because the upstairs tenants were apparently unwilling to provide the landlord with any evidence of their alleged disruption and discomfort, the landlord is left without adequate evidence in support of the cause alleged.

Breach of a material term without correction after written notice

The tenancy agreement addendum states that there is absolutely no smoking on the residential property. The advertisement for this rental clarified that smoking was not allowed. However, the agreement also states that a tenant in breach of this term will be given two warnings, each subject to a fine, and that the third breach will result in eviction. Although I accept that the prohibition on smoking is a material term, I also find that term includes a commitment by the landlord to give two warnings before terminating the tenancy. The landlord cannot unilaterally alter the terms of the addendum that the landlord herself drafted.

The tenant is entitled to a second and final warning based on the language of the addendum. The agent's February 28, 2017 email to the landlord suggests that the tenant advised that she understood the upstairs tenants did not mind her smoking. The landlord's own evidence suggests the tenant was not aware that the upstairs tenants had any concerns with any smoking. Indeed, the agent and the landlord and the upstairs tenants made a concerted effort not to share these concerns with the tenant.

The tenant argues that the landlord's first warning was not a proper warning because it was by email. I do not accept the tenant's argument. The tenant herself responded to the landlord and confirmed that she understood the warning. **By bringing this application to terminate the tenancy, the landlord has given the tenant her second and final warning.**

The tenant may not smoke on the residential property. Nor may any of her guests smoke anywhere on the property. This is regardless of whether any agreement or understanding is reached with the current upstairs tenants or with any other future tenants.

If the tenant or any of her guests smoke anywhere on the property from the date of this decision onward, the landlord is at liberty to reapply for an order ending the tenancy based on breach of a material term of the agreement.

Conclusion

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.

I order the tenant to refrain from smoking anywhere on the residential property, including the patio and the front, back, and side yards, and the driveway, and to prevent all guests and occupants from smoking anywhere on the residential property also.

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 26, 2017

Residential Tenancy Branch