



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC OLC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("the Act") for: cancellation of the landlord's 1 Month Notice to End Tenancy for Cause ("1 Month Notice") pursuant to section 47; and an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The landlord confirmed receipt of the tenant's Application for Dispute Resolution including evidentiary materials. The landlord confirmed receipt of the tenant's further evidentiary materials served on May 10, 2017 to the landlord including the amendment to the tenant's Application for Dispute Resolution. The tenant confirmed receipt of the landlord's evidentiary materials served on May 15, 2017.

Issue(s) to be Decided

Should the landlord's 1 Month Notice be cancelled or is the landlord entitled to an Order of Possession? Is the tenant entitled to an order that the landlord comply with the Act?

Background and Evidence

This tenancy began on January 1, 2017 with a rental amount of \$1200.00 payable on the 1st of each month. The tenancy was scheduled as a one year fixed term tenancy to end on December 31, 2017. A copy of the residential tenancy agreement was submitted for this hearing. The landlord continues to hold a \$600.00 security deposit paid by the tenant prior to the outset of the tenancy (December 4, 2016).

A copy of the 1 Month Notice to End Tenancy for Cause issued by the landlord was submitted as evidence for this hearing. In that Notice, requiring the tenant to vacate the rental unit by May 31, 2017, the landlord cited the following reasons for the issuance of the Notice:

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;*
- *put the landlord's property at significant risk.*

Tenant has engaged in illegal activity that has, or is likely to:

- *damage the landlord's property;*
- *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;*
- *jeopardize a lawful right or interest of another occupant or the landlord.*

Both the landlord and his witness testified that they smelled a marijuana smoke smell at the residence on March 12, 2017. The landlord testified that he first smelled smoke or burning on the premises that day. He attended to the tenant's rental unit. The tenant did not respond to knocks on the door. The tenant also did not respond to the text messages he sent that same afternoon. Eventually, he spoke to the tenant and she advised him that she was burning sage, the practice of "smudging". The tenant showed sage to the landlord and showed him the burnt ash in a container, explaining the practice to him.

The landlord testified that the residential premises included 4 units: 3 unoccupied and 1 occupied by the tenant. He testified that, when the tenant moved in to the unit and for a brief period of time, the unit above the tenant was occupied. He testified that he is renovating the other rental units and therefore spends some time at the property himself. He testified that, in the time he was at the property (a minimum of 5 hours), the smell did not dissipate. He provided a letter from a neighbour stating that she had also been bothered by the smell and that she was quite certain the smell was marijuana.

The landlord testified that, on March 12, 2017, he was so affected by the smell and the smoke that he stumbled out of the residence. He testified that he does not believe the tenant was burning sage: he believes she was smoking marijuana. He testified that he is aware that the "political climate" around smoking marijuana has changed but, to him, smoking marijuana is illegal. He also submitted that the tenant having an open flame in a residential premise is likely some type of bylaw violation. After this first incident encountering the smell and smoke, the landlord wrote the tenant a letter to advise her that she must minimize the smell so there is no impact on others and that he appreciates the smudging is a spiritual practice.

The landlord testified that, whether it is marijuana or sage smell in his rental premises, he is not used to the smell, doesn't like it and doesn't want it on his property. Furthermore, he testified that the smell and the smoke affect his health. The landlord acknowledges that he had originally agreed with the tenant that she could move into the upstairs unit when it was ready for occupation but that, now, he will not give the tenant a key to the new unit and allow her to move in because she continues to "smoke". The landlord testified that he feels betrayed that the tenant did not tell him about her smudging practice before she moved in to the residence, especially considering his addendum to the residential tenancy agreement that included prohibitions on smoking and strong smells. Specifically, the landlord claims that the relevant portions of the addendum include,

- *No smoking or drugs in the residence or in building. This includes medical marijuana.*
- *Use cooking fan before/during/after cooking.*

- *Smelly foods must be cooked outside.*

The landlord and tenant's agreement regarding the change of suite/rental unit is also included in this addendum stating,

... that landlord plans to renovate basement suite later in tenancy. Landlord will permit to move upstairs scheduled for March 1, 2017 but no later than April 1, 2017

The landlord sent a second letter to the tenant on April 7, 2017 writing, "I am demanding you stop burning any substance until the residential tenancy board decides on this breach of the tenancy agreement".

The landlord testified that the heating system in the residence is provided through forced air and therefore the smell and smoke travels throughout the premises. The landlord also testified that the walls in the tenant's unit are panelled with wood and the unit is carpeted. The landlord claimed that these materials within the rental unit are flammable and therefore the tenant should not have open flame within the rental unit. The landlord argued that the tenant has never asked for fans to provide better ventilation within her rental unit.

The tenant submitted informational materials on the nature and reasons for smudging. She also provided a letter from her prior landlord written in contemplation of this hearing: the prior landlord wrote that the tenant was refunded her full security deposit after 10 months in that residence, "the smell and smoke let off from the smudge did not seem to penetrate the walls as there was no smell or damage to them".

The tenant testified that she regularly smudges. She described smudging as a spiritual practice that it is intended to cleanse a space, as well as one's body and mind. The tenant testified that, on May 12, 2017, she and her children were smudging. She testified that it does not take long – it probably continued for approximately 10 minutes. She testified that she could not open the windows as it was too cold to do so. She testified that there are not heat and no fans in the unit, even on the stove.

The tenant testified that, normally, she would smudge twice a week but that now, to reduce any bother to the landlord, she smudges once every two weeks. The tenant testified that she has never caused a fire with smudging nor has she ever heard of anyone causing a fire with smudging: it is, in essence, a practice using smoke and not flame. She testified that, when there were other occupants residing in the unit, she made arrangements with the other occupants to ensure they were not bothered.

The tenant's advocate submitted that; the landlord has not shown or provided evidence of any illegal activity by the tenant; the tenant has a right to her spiritual practices; that there has been no evidence presented to show that the infringement of health, safety, right of an occupant or landlord or risk to the landlord's property. The tenant's advocate submitted that there is no evidence to show that an open flame, of the level required for smudging, is considered illegal.

She referred to other examples including burning candles and types of cooking. She testified that the standard of **seriously** jeopardized the health or safety or lawful right of another occupant or the landlord; or putting the landlord's property at **significant** risk are not met in this instance.

The tenant's advocate also requested that the landlord be ordered to provide the tenant with a key to the rental unit that she is entitled to reside in accordance with the residential tenancy agreement and its addendum signed by both parties.

Analysis

When a tenant applies to cancel a notice to end tenancy the burden shifts to the landlord to show on a balance of probabilities that the tenancy should come to an end. The landlord relied on his own evidence and the evidence of his witness (his father) to show that the tenancy should end based on the tenant's actions in seriously jeopardizing the health or safety or lawful right of another occupant or the landlord and by putting the landlord's property at significant risk.

The landlord also claimed that the tenant has engaged in **illegal activity** that has, or is likely to:

- *damage the landlord's property;*
- *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord;*
- *jeopardize a lawful right or interest of another occupant or the landlord.*

The landlord's Notice to End Tenancy cited that the tenant has engaged in illegal activity as one the grounds to end the tenancy. Specifically, the landlord relied on the ground that the tenant has engaged in illegal activity that adversely affects the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord or has jeopardized a lawful right of another occupant or the landlord.

Allegations on this ground ("illegal activity") require clear and decisive proof that the tenant or someone she has allowed on the property has engaged in illegal activity. I find that the landlord did not present sufficient documentary evidence or detail, beyond his statement on the notice to end tenancy that the tenant or her guests have engaged in any form of illegal activity. The landlord stated that he believed the tenant was smoking marijuana, he believes it should be a crime and so therefore it is a crime in his premises. Given that the tenant disputes this allegation, given that I have found that there was insufficient evidence submitted with respect to this ground to end a tenancy and given that an allegation is insufficient to use in relying on this ground, I will not consider this ground of illegal activity as a justification to end tenancy any further.

I accept the argument of the tenant's advocate that the tenant did not **significantly** interfere with or unreasonably disturb the landlord or other occupants. It is reasonable to assume, based on the testimony at this hearing and the supporting documentary evidence between these two

parties that the landlord and the neighbouring tenant might be perturbed by the tenant. The landlord regularly expressed his displeasure that he was not aware the tenant would smudge prior to her moving in. However, the standard with which to consider the end of a tenancy is that a landlord or another occupant has been **unreasonably** disturbed or **significantly** interfered with.

The landlord testified that, due to his own health issues and particular sensitivities, the smoke from the tenant's unit has adversely impacted him. The landlord also testified that his addendum to the tenancy agreement precludes cooking smelly food in the house and smoking drugs on the premises. I find that these items on the addendum do not refer to smudging – smudging does not involve cooking food nor does it involved the tenant smoking tobacco, marijuana or any other substance.

I find that the burning of sage in the rental unit is not prohibited by the Residential Tenancy Act or the residential tenancy agreement in this case. I find that the dislike of the smell by the landlord is insufficient to end a tenancy. The landlord did not present sufficient evidence to support a claim that his health is impacted by the burning sage.

Based on the testimony of the tenant, and the testimony of the landlord, I find that the tenant has taken steps to reduce any impact burning sage might have on the neighbours and the landlord. I find that the tenant has not acted in some way that has unreasonably disturbed or significantly interfered with the landlord or any other occupant of the building. I find that any disturbance to the landlord is within the realm of the demands of a landlord/tenant relationship as well as a relationship when two parties occupy the same residential premises. I find that that the tenant has not taken any actions that are unreasonable or that represent a significant departure from the reasonable behaviour of a tenant.

Based on the testimony of the landlord, and despite his medical documentation, I find that the landlord has not provided sufficient evidence to meet the burden of proof, on a balance of probabilities that he or the other occupants were **unreasonably** disturbed by this tenant or her guests.

Using the same reasoning as above and, with acceptance of the submissions on behalf of the tenant with respect to any risk to the landlord's property, I find that the landlord has not provided sufficient evidence to show that his property is at risk as a result of the tenant smudging within her unit.

I am not satisfied that the landlord had sufficient grounds to issue the 1 Month Notice and obtain an end to this tenancy for cause. The tenant made an application pursuant to section 47(4) of the Act within ten days of receiving the 1 Month Notice. In this case, the tenant has successfully disputed this notice to end tenancy. The 1 Month Notice to End Tenancy for Cause should be cancelled. The tenancy will continue.

As the tenancy will continue, the residential tenancy agreement and its addendum shall be enforced: I order the landlord to comply with the Act and the residential tenancy agreement by providing the tenant with the key to her upstairs rental unit.

Conclusion

The landlord's 1 Month Notice to End Tenancy for Cause is cancelled. The tenancy shall continue.

I order the landlord provide the tenant with the key to her upstairs rental unit.

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: May 30, 2017

Residential Tenancy Branch