



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC
 OPC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenant (the “Tenant’s Application”) under the *Residential Tenancy Act* (the “Act”), seeking an Order for the Landlord to comply with the *Act*, *Regulation*, or tenancy agreement. The Landlord also filed a cross-application (the “Landlord’s Application”) seeking an Order of Possession pursuant to a One Month Notice to End Tenancy for Cause (the “One Month Notice”), and recovery of the \$100.00 filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant, and two agents for the Landlord (the “Agents”); all of whom provided affirmed testimony. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. Neither party raised any concerns regarding the service of documentary evidence.

At the request of the parties, the Decision and any resulting Orders will be e-mailed to the appropriate parties at the addresses provided in their Applications.

I have reviewed all evidence and testimony before me that met the requirements of the Rules of Procedure; however, I refer only to the relevant facts and issues in this decision.

Preliminary Matters

On September 29, 2017, an Amendment to an Application for Dispute Resolution was received by the Residential Tenancy Branch (the “Branch”), from the Tenant, indicating that they had received a One Month Notice on September 19, 2017, which they wished to dispute. The Tenant testified that they served a copy of the Amendment and the One Month Notice on the Landlord in person and the Agent L.M. confirmed receipt. As a result, the Application was amended pursuant to the *Act*.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with Section 52 of the *Act*.

During the hearing the Agent raised a concern with a document allegedly signed by three other occupants of the building attesting to the fact that smoking is allowed on balconies. The Agent testified that their copy had the names and the unit numbers of the other occupants redacted, and as a result, they could not verify or refute this information as they were unable to determine if the people listed are even occupants of the building. The Tenant confirmed that they removed identifying information from the document given to the Agent and stated that they did this in order to protect the privacy of those involved. The Agent requested that the document be excluded or significantly reduced in weight as a result.

I have reviewed the document in question and the copy before me lists the names and unit numbers of the individuals involved. However, I recognize that a true copy of this document was not served on the Landlord. Given that a copy of the document, albeit a redacted one, was served on and received by the Landlord, I have admitted this evidence for consideration in the hearing. However, as the copy received by the Landlord had the personal identifying information of those who signed it redacted, I am going to reduce the evidentiary weight I give this document in my decision as I find that the Landlord did not have full opportunity to consider, challenge or contradict this evidence due to the redacted information.

Issue(s) to be Decided

Is the Tenant entitled to an Order for the Landlord to comply with the *Act*, Regulation, or tenancy agreement?

Is there a reason to cancel the One Month Notice under the *Act*?

If the Tenant is unsuccessful in seeking to have the One Month Notice cancelled, is the Landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Is the Landlord entitled to recover the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

The tenancy agreement in the documentary evidence before me indicates that the month to month tenancy began September 1, 2012, under section 42 of the tenancy agreement there is a handwritten clause initialed by both the Landlord or Agent and the Tenant that states “NO PETS” and “NO SMOKING”.

Both parties agreed that the Tenant smokes on the balcony and that there is a no smoking clause in the tenancy agreement. However, the parties disagree about whether this policy applies to the balcony of the rental unit. The Agent claims that the no smoking clause under section 42 of the tenancy agreement is a material term of the agreement and that it applies to the entire rental unit, including the balcony. As a result, the Agent testified that a One Month Notice was served on the Tenant for a breach of a material term. The Tenant claims that they are allowed to smoke on the balcony and therefore seeks an Order to that affect, as well as cancellation of the One Month Notice.

The One Month Notice in the documentary evidence before me, dated September 18, 2017, has an effective vacancy date of October 31, 2017, and indicates the following reasons for ending the tenancy:

- The tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gave written notice to do so.

The One Month Notice indicates that it was posted to the door of the Tenant’s rental unit on September 19, 2017, and the Tenant confirmed that on September 19, 2017, they received One Month Notice in the manner described above.

The Tenant testified that they have been a smoker for many years and would never have signed a tenancy agreement that did not allow smoking on the balcony. The Tenant testified that they were not in any particular rush to choose a new rental unit and therefore had no motive to agree to a no smoking tenancy when they didn’t wish to do so. Further to this, the Tenant stated that prior to signing the tenancy agreement they e-mailed the Agent at that time, who clarified that the no smoking policy stipulated that smoking was not allowed in the unit itself but was allowed on the balcony. The Tenant submitted a copy of this e-mail for reference.

The Agent testified that the no smoking policy applies to all parts of the rental units, including balconies, and has been in place since before the tenancy agreement was signed in 2012. The Agent testified that although the person named as the author of the

e-mail was in fact the Agent of the rental unit at that time, they believe that the e-mail has been altered by the Tenant and is therefore fraudulent. In support of their argument, the Agent pointed to the fact that the section relied upon by the Tenant appears to have been electronically highlighted and is written using a different font than the previous e-mail. The Tenant responded by stating that they did electronically highlight and bold that portion of the e-mail for ease of reference as it was part of a long e-mail chain but testified that they did not alter in any other way the contents of the e-mail. Further to this the Tenant pointed out that throughout the e-mail chain both parties used different fonts at different times and stated that as a result, this does not indicate that the wording of the e-mail was altered by them in any way.

The Tenant submitted the following documentary evidence in support of their claim that smoking is allowed on their balcony:

- A document signed by three individuals claiming to be occupants of the building, stating that at the time they moved in they were advised that they could smoke on their balconies and that the no smoking policy only applies to the interior of the rental units;
- A letter from their previous spouse stating that at the time they moved in, they were told they could smoke on the balcony;
- Photographs of ashtrays on the balconies of other occupants; and
- Photographs of ashtrays at what the Tenant claims are designated smoking areas for the building.

The Agents submitted the following documentary evidence in support of their claim that smoking is not allowed on the balconies:

- The tenancy agreement;
- Complaint e-mails from other occupants of the building regarding the Tenant smoking on the balcony;
- A Memo sent to the Tenant stating that smoking is not allowed on the balcony and warning the Tenant that if it continues, they may face eviction; and
- A letter sent to the Tenant stating that they are in breach of their tenancy agreement and warning them that if they do not stop smoking on the balcony immediately, they will be served with an eviction notice.

Analysis

Rule 6.6 of the Rules of Procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities and that when a tenant applies to

cancel a Notice to End Tenancy, the landlord bears the onus in the hearing to prove that they had cause to end the tenancy.

Section 47 of the *Act* states a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable time after the landlord has given written notice to do so.

In the hearing, the Agents and the Tenant provided conflicting testimony with regards to the nature of the no smoking clause in the tenancy agreement. The Agents testified that the no smoking clause applies to all parts of the rental unit, including balconies, but did not submit a copy of the no smoking policy or any documentary evidence to suggest that the Tenant was provided with clarification that the policy also applied to balconies, prior to the start of the tenancy. Further to this, the Tenant testified that the no smoking policy only applies to the interior of the rental unit and submitted significant documentary evidence in support of this testimony.

Although the Agents argued that the Tenant altered the wording in the e-mail chain between himself and the previous Agent with regards to the no smoking policy, the Tenant denies changing any of the words used by the previous Agent in the e-mail and aside from their unsupported testimony, the Agents have not submitted any evidence upon which they have based this claim. As a result, I find that this argument is speculation only and I have not given it any weight in my decision.

Based on the evidence and testimony before me, and the lack of corroborating documentary evidence from the Agents regarding the no smoking policy, I find the Landlord has failed to provide sufficient evidence to establish that the Tenant is not allowed to smoke on their balcony or that not smoking on the balcony is a material term of the tenancy agreement for which a breach constitutes sufficient grounds to end of the tenancy. As a result, I find the Landlord has failed to establish a cause under Section 47 of the *Act* to end the tenancy and I order that the One Month Notice dated September 18, 2017, be cancelled and of no force or effect.

Further to this, although I have significantly reduced the evidentiary weight I have attributed to the document alleged to have been signed by other occupants of the building regarding the no smoking policy, I find on a balance of probabilities that the Tenant has submitted sufficient evidence to establish that they are entitled to smoke on their balcony under their tenancy agreement. Based on the above, I also order that the Landlord comply with the conditions of the tenancy agreement and allow the Tenant to

smoke on their balcony. However, I do want to note that even if a tenant's smoking is not a breach of a material term of their tenancy agreement, it still may have a detrimental effect on other occupants in a building. The Tenant is cautioned that if their smoking is causing an unreasonable disturbance or interfering with another occupant, or is seriously jeopardizing the health or safety or lawful interest of another occupant, the Landlord might issue a different Notice to End tenancy under section 47(1)(d) of the Act.

As the Landlord was not successful in their Application, I decline to grant them recovery of the filing fee.

Conclusion

I order that the One Month Notice dated September 18, 2017, be cancelled and that the tenancy continue in full force and effect until it is ended in accordance with the Act.

I Order that the Landlord comply with the conditions of the tenancy agreement which allow the Tenant to smoke on their balcony.

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 21, 2017

Residential Tenancy Branch