



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 450617 BC LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with an application by the tenant pursuant to the *Residential Tenancy Act* (“the Act”) for an order as follows:

- to cancel a 1 Month Notice to End Tenancy given for Cause (“1 Month Notice”) pursuant to section 47 *Act*.

The tenant acknowledged receipt of the landlord’s 1 Month Notice on November 20, 2017. Pursuant to section 88 of the *Act*, I find that the tenant was duly served with the landlord’s 1 Month Notice.

The landlord confirmed receipt of the tenant’s application for dispute. No evidence was submitted to the hearing by either party.

Issue(s) to be Decided

Can the tenant cancel the landlord’s 1 Month Notice to End Tenancy for Cause?

Background and Evidence

Undisputed testimony was presented at the hearing by the tenant that her tenancy began in September 2003. Rent is \$701.00 and a security deposit of \$275.00 paid at the outset of her tenancy was passed from the previous owners to her current owner. The tenant explained that the current owner/landlord is her sixth since she began occupation of the apartment in 2003. No tenancy agreement was presented at the hearing as both parties acknowledged that this had been lost over the course of the six various ownerships.

On November 11, 2017 the tenant was served with a 1 Month Notice to End Tenancy for Cause ("1 Month Notice"). The landlord's 1 Month Notice stated that the tenant had seriously jeopardized the health or safety or lawful right of another occupant.

The owner explained that he purchased the building in November 2016 and was told by the previous owner that it was a non-smoking building. The current owner said that signs in the building indicate that the building is non-smoking and that upon taking possession of the building, the landlord placed notices under all of the doors in the rental unit reminding the tenants that the building was non-smoking.

The landlord said that he had received numerous complaints from other occupants of the building. These people told him they were disturbed by the tenant smoking inside her rental unit. The landlord explained that he had spoken to the tenant several times within the past year about these complaints and he conveyed to her, his concerns with her smoking inside the rental unit. He said the complaints he received detailed the potential health hazard for the other occupants through second hand smoke, and fears of potential fire hazards. The landlord said while he did not live in the building, he had a duty to protect its residents.

The tenant acknowledged that she smoked in the unit but explained that she did not smoke in the hallways or other public areas. She acknowledged that the landlord had spoken to her with his concerns about the smoking and noted she was aware that the landlord had received complaints. The tenant argued that she was 'grandfathered' into being allowed to smoke in the building and that she had spoken to an information officer with the residential tenancy branch who informed her that the landlord may have waived his right to enforce the non-smoking clause.

Analysis

When a Notice to End Tenancy is disputed by a tenant, the burden of proof is shifted to the landlord to demonstrate why they are entitled to an Order of Possession. In this case, the landlord explained that he issued a 1 Month Notice to End Tenancy alleging that the tenant had seriously jeopardized the health or safety or lawful right of another occupant.

At the hearing, the landlord said that he had received complaints from several tenants regarding the tenant's continued smoking in the rental unit. He said that he had spoken to the tenant on several occasions, informing her of his concerns. The landlord also

explained that several notices are present in the building informing the building's occupants that the apartment is a non-smoking building.

The tenant acknowledged smoking in the unit and acknowledged having discussed her smoking with the landlord. The tenant argued that the landlord had waived his right to enforce the smoking ban because she had done so since she first began occupying the building in 2003.

Residential Tenancy Policy Guideline #11 provides a detailed explanation of waivers and the manner in which they relate to tenancies.

A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.

There are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights. Implied waiver can also arise where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. To show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel.

I do not find that any such waiver exists or that the tenant is 'grandfathered' into smoking in her rental unit and that no waiver as described above is in place. The current landlord has owned the property since November 2016. Testimony from the landlord explained that he intended this to be a non-smoking building, that following his purchase of the building he informed all tenants that the building was non-smoking, and non-smoking signs are present in the building's hallways. The tenant acknowledged being aware of the landlord's concerns with her smoking and confirmed that she was adequately informed of the landlord's desire to maintain a non-smoking building.

Although I am sympathetic to the landlord and other occupants, I find based on the evidence presented at the hearing that the landlord has failed to demonstrate that the tenant had seriously jeopardized the health or safety or lawful right of another occupant.

The landlord did not specify or provide detail on when complaints were given to him by the other occupants regarding the tenant's smoking, he did not explain the number, frequency or scope of these complaints and he failed to show how the tenant's smoking has directly affected the building's occupants. While I accept that second hand smoke is very unhealthy for all parties exposed to it, it is not sufficient to argue that second hand smoke affects the building's tenants without providing specific information about the nature of the complaints received. For these reasons, I find that the tenant has successfully cancelled the landlord's 1 Month Notice.

Conclusion

The landlord's 1 Month Notice to End Tenancy is dismissed. This tenancy shall continue until it is ended in accordance with the *Act*.

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: February 14, 2018

Residential Tenancy Branch