Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, DRI, ERP, FFT, LRE, MNDCT, OLC, OT, PSF, RP, RR

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants on July 4, 2018 (the "Application"). The Tenants applied as follows:

1. To dispute a One Month Notice to End Tenancy for Cause dated June 27, 2018 (the "Notice");
2. To dispute a rent increase that is above the amount allowed by law;
3. For an order that the Landlords make emergency repairs for health or safety reasons;
4. For an order suspending or setting conditions on the Landlords' right to enter the rental unit;
5. For an order that the Landlords comply with the Act, regulation and/or the tenancy agreement;
6. For an order that the Landlords provide services or facilities required by the tenancy agreement or law;
7. For an order that the Landlords make repairs to the unit;
8. For an order reducing rent for repairs, services or facilities agreed upon but not provided;
9. For compensation for monetary loss or other money owed; and
10. For reimbursement for the filing fee.

The Tenant appeared at the hearing for all Tenants. Property Manager 1 and Property Manager 2 appeared at the hearing for the Landlords.

Rule 2.3 of the Rules of Procedure (the "Rules") requires claims in an Application for Dispute Resolution to be related to each other and allows arbitrators to dismiss unrelated claims.

I told the Tenant the main issue before me is the dispute of the Notice. I heard the Tenant on whether the remaining claims were related to the dispute of the Notice. I determined that the remaining claims were not related to the dispute of the Notice and told the Tenant I would not consider them. All claims, other than the dispute of the Notice and request for reimbursement for the filing fee, are dismissed with leave to re-apply. This does not extend any time limits set out in the *Residential Tenancy Act* (the "*Act*").

Property Manager 1 advised that the commercial Landlord acts as agent for the owners of the rental unit. He provided the names of the owners. Both parties agreed it was appropriate to include the owners of the rental unit as Respondents in the Application. I amended the Application accordingly and the style of cause reflects this.

I explained the hearing process to the parties who did not have questions when asked. All parties provided affirmed testimony.

Both parties had submitted evidence. I addressed service of the hearing package and evidence and no issues were raised in this regard.

All parties were given an opportunity to present relevant oral evidence, make relevant submissions and ask relevant questions. I have considered the documentary evidence and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?

2. If the Tenant is not successful in cancelling the Notice, are the Landlords entitled to an Order of Possession?

3. Are the Tenants entitled to reimbursement for the filing fee?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. It is between the Landlords and Tenant M.N. and G.N. in relation to the rental unit. The tenancy started February 1, 2015 and is a month-to-month tenancy. Rent is $1,400.00 per month due on the first day of each month. A security deposit of $165.00 and pet damage deposit of $165.00 were paid. The agreement is signed on behalf of the Landlords and by Tenant M.N.

The agreement includes an addendum with the following two terms:

> The Tenant agrees:
>
> 8. To ensure that no illegal, controlled or banned substances, including marijuana are brought onto the property or into the home or suite at any time. The tenant agrees that failure to abide by this rule will result in an immediate termination of their tenancy.
>
> 11. That there will be absolutely no smoking inside the home, building(s) or suite. The tenant further agrees that any expenses incurred by the Landlord resulting from the Tenant's or Tenant's guests wilful disregard of this covenant, including painting the premises will be borne by the tenant. The tenant further agrees that a breach of this covenant can result in a 30 day notice to terminate the tenancy.

The addendum is signed on behalf of the Landlords and by Tenant M.N.

The tenancy agreement is not signed by Tenant G.N. but the parties agreed there is an agreement between Tenant G.N. and the Landlords in the same terms as the written agreement.

The Application includes Tenant J.P. who is not a named tenant in the tenancy agreement. The parties disagreed about whether Tenant J.P. is a tenant or an occupant. I have not detailed this evidence here, or made a finding in this regard, as it is not necessary to do so for this application.

The Notice is addressed to Tenant N.M. and G.N. It refers to the rental unit. It is signed by Property Manager 1 and dated June 27, 2018. The effective date is July 31, 2018.

The grounds for the Notice are:

1. Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to, jeopardize a lawful right or interest of another occupant or the landlord. ("Ground 1")

2. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. ("Ground 2")

There was no dispute that Property Manager 1 posted the Notice on the door of the rental unit on June 27, 2018. The Tenant confirmed she received the Notice the same day. She confirmed the Application was filed July 4, 2018 and Property Manager 1 did not take issue with this.

Property Manager 1 said he did not think the Tenants were doing anything illegal and therefore I told the parties I would not consider Ground 1.

Property Manager 1 testified as follows in relation to Ground 2. An inspection of the rental unit was done and marijuana was discovered in the rental unit. The Tenants have breached term eight and 11 in the tenancy agreement. The Tenants were warned twice verbally and once in writing about having marijuana in the rental unit.

Property Manager 1 referred to a letter from a bylaw officer submitted as evidence. The letter is an email dated June 7, 2018. It says that when the officer attended the rental unit and a female opened the door there was a strong odour of marijuana coming from inside the residence. It goes on to say, "I'm afraid it's not an area of expertise so I can't say for sure if it was vegetative or burning". Property Manager 2 said this email is the evidence of the Landlords that the Tenants are smoking marijuana in the rental unit.

The Landlords submitted a written statement as evidence. It indicates that the inspection that lead to the discovery of the marijuana occurred March 28, 2018. It indicates that when Property Manager 2 entered the rental unit it smelled of marijuana and Tenant G.N. told them he was making marijuana edibles at the time.

Property Manager 1 referred to an email of B.P. submitted as evidence. It is dated July 10, 2018. It indicates that a strong odour of marijuana was detected in the rental unit when he attended with Property Manager 2.

Property Manager 1 acknowledged that the Tenants have licences to possess marijuana.

The Tenant testified as follows. The marijuana in the rental unit is not illegal as the Tenants have licences to possess it due to life-threatening illnesses. The Tenants do not grow marijuana on the property. The Tenants are not smoking marijuana in the rental unit and the Landlords have provided insufficient evidence that they are.

The Tenant submitted that it is a violation of the Tenants' human rights to evict them for having marijuana in the rental unit when they have prescriptions for the marijuana and use it due to illness. She submitted that it does not make sense that someone who has been prescribed marijuana as medication could not possess it in their home. The Tenant pointed out that term eight in the tenancy agreement would prevent them from renting from the commercial Landlord at other properties as well.

The Tenant submitted an "Access to Cannabis for Medical Purposes Regulations – Registration Certificate" (the "Registration Certificate"). She is the registered person on the Registration Certificate. It allows her to store dried marijuana or its equivalent at the rental unit. The effective date of the Registration Certificate is March 27, 2018 and the expiry date is March 27, 2019.

The Tenants had also submitted documentation signed by a health care practitioner dated February 2, 2018 indicating Tenant M.N. and G.N. have been prescribed marijuana.

Analysis

The Landlords were permitted to serve the Notice based on Ground 2 pursuant to section 47(1)(h) of the *Act*. The Tenants had 10 days from receiving the Notice to dispute it under section 47(4) of the *Act*.

It is not in dispute that the Tenants received the Notice June 27, 2018 and filed the Application July 4, 2018, within the time limit set out in section 47(4) of the *Act*.

The Landlords have the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules. The standard of proof is on a balance of probabilities meaning it is more likely than not that the facts occurred as claimed.

I am not satisfied that the Landlords have proven that the Tenants have smoked within the rental unit. The Tenant denied that the Tenants smoke in the rental unit. The evidence Property Manager 2 pointed to in this regard was the email from the bylaw officer. That email specifically states, "I'm afraid it's not an area of expertise so I can't say for sure if it was vegetative or burning". This email is not sufficient evidence of the Tenants smoking in the rental unit. The Landlords have not pointed to any further evidence in this regard. I note that all other evidence submitted refers to a smell or odour of marijuana in the rental unit and does not refer to the smell of burnt or burning marijuana. I cannot find that the Tenants have breached term 11 in the tenancy agreement.

The Tenants have clearly breached term eight of the tenancy agreement. The Tenant did not deny that the Tenants have marijuana in the rental unit. I find term eight prohibits this both in relation to prohibiting controlled substances and specifically prohibiting marijuana.

However, I find this term unconscionable and therefore unenforceable pursuant to section 6(3)(b) of the *Act*. Policy Guideline 8 addresses unconscionable terms and states in part on page one that "a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party".

I find term eight to be unconscionable as it fails to account for the situation presented here. The Tenants are legally permitted to possess medical marijuana. Property Manager 1 did not dispute this and I understood him to acknowledge this. The Registration Certificate submitted as evidence specifically allows the Tenant to possess medical marijuana at the rental unit. The written submissions of the Landlords seem to suggest otherwise but Property Manager 1 did not address this during the hearing and I have reviewed the Registration Certificate and note that the "storage address" is the rental unit address.

Not only do the Tenants legally possess medical marijuana, but they do so due to life-threatening illnesses. Again, Property Manager 1 did not dispute this aspect of the Tenant's evidence.

I cannot find that a term in a tenancy agreement that precludes an individual who is legally permitted to possess medical marijuana due to a life-threatening illness from possessing that marijuana at their home is enforceable. This is oppressive and grossly unfair to the Tenants who require marijuana for medical purposes and who are legally permitted to possess it. This is an unconscionable term.

I note that term eight would capture a number of substances that are controlled substances under the *Controlled Drugs and Substances Act* but commonly prescribed as medication and legally possessed. Term eight would preclude a tenant who was prescribed these medications from possessing them in their home. This is not logical. It is oppressive and grossly unfair. Marijuana possessed for medical purposes is no different.

In my view, for a term such as term eight to be enforceable, it would have to allow for an exception when tenants are legally permitted to possess marijuana for legitimate medical purposes ostensibly under medical prescription. Term eight in this tenancy agreement does not allow for exceptions and therefore I find it unconscionable and unenforceable.

I note that Property Manager 1 referred to property insurance being cancelled due to marijuana being on the property. I understood him to be saying he was aware of this happening. I did not understand Property Manager 1 to say this was a known issue in this matter. Nor did Property Manager 1 provide any evidence to support this position.

Given term eight is unenforceable, I decline to uphold the Notice based on the Tenants breaching term eight of the agreement. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

As the Tenants were successful in this application, I grant them reimbursement for the filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, I authorize the Tenants to withhold $100.00 from one future rent payment as reimbursement for the filing fee.

Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

The Tenants are entitled to reimbursement for the filing fee and are authorized to withhold $100.00 from one future rent payment as reimbursement for the filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: August 13, 2018

Residential Tenancy Branch