



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, LRE, FFT

Introduction

On November 1, 2018, the Tenant submitted an Application for Dispute Resolution under the *Residential Tenancy Act* (the “Act”) to cancel a One-Month Notice to End Tenancy, for an order to restrict the Landlord’s entry, and to claim reimbursement for the filing fee. The matter was set for a participatory hearing via conference call.

The Landlord and the Tenant’s Representative BK attended the hearing and provided affirmed testimony. They were provided the opportunity to present their relevant oral, written and documentary evidence and to make submissions at the hearing. The parties testified that they exchanged the documentary evidence that I have before me.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The Tenant’s Representative BK prioritized the issues for the Tenant’s Application and agreed that the issue of whether the tenancy would continue was the priority. In accordance with Section 64(3) of the Act, I have amended the Tenant’s Application by severing the request for an order to restrict entry for the Landlord.

Issues to be Decided

Should the One-Month Notice to End Tenancy for Cause, dated October 24, 2018 (the “Notice”), be cancelled, in accordance with Section 47 of the Act?

If the Notice is not cancelled, should the Landlord receive an Order of Possession, in accordance with Section 55 of the Act?

Should the Tenant be compensated for the cost of the filing fee, in accordance with Section 72 of the Act?

Background and Evidence

The Tenant's Representative BK ("BK") and the Landlord agreed on the following terms of the tenancy. The month-to-month tenancy began when the Tenant moved in on September 15, 2018. The rent is \$900.00 and due on the first of each month. The Landlord collected a \$450.00 security deposit.

Landlord Evidence:

The Landlord testified that an Addendum Page was added to the Tenancy Agreement and that it specifically stated the following:

- 1) The Tenant(s) will not smoke or participate in the use of drugs, recreational or otherwise, on the property or within their suite.
- 2) The Tenant(s) will insure that any guest(s) of the Tenant(s) will not smoke or participate in the use of drugs, recreational or otherwise, on the property or within their suite.

The Landlord stated that she and her daughter, who live above the Tenant, are both asthmatic and have sensitivities to smoke. The Landlord included Terms #1 and #2 as material terms in the Tenancy Agreement as she is worried about smoke triggering an asthma attack. The Landlord reviewed these terms in the Tenancy Agreement with the Tenant and both parties initialed the terms on September 3, 2018.

The Landlord testified that she entered the rental unit, in company police officers who had forcibly entered, on October 16, 2018. The Landlord stated that police officers had advised her that they were checking the welfare of the Tenant, forcibly entered the rental unit and located the Tenant in medical distress. The Tenant was escorted out of the rental unit by ambulance.

While in the rental unit, the Landlord noticed a strong smell of cigarettes and upon looking around the small space, noticed a pack of cigarettes, a lighter and a single unsmoked cigarette. The Landlord also observed a cigarette butt (that had been smoked) in the kitchen sink and submitted photos of same.

The Landlord submitted copies of statutory declarations from the repairman and the Landlord's daughter, who were present in the rental unit, who both stated that there was a strong smell of cigarette smoke in the rental unit and that they observed cigarettes and a lighter in the unit.

The Landlord testified that she served the Notice on October 24, 2018, by posting it on the Tenant's door. The Notice indicated that the Tenant must move-out of the rental unit by December 1, 2018. The Landlord indicated that the reasons for the Notice were that the Tenant had unreasonably disturbed the Landlord and had caused extraordinary damage to the unit.

The Landlord is requesting an Order of Possession for the rental unit as she is concerned for her own and her family's well-being if the Tenant has been smoking or has been allowing smoking to occur in the rental unit.

Tenant's Evidence:

BK testified that the Tenant does not smoke, that the picture of the cigarette that was burned was in the garbage and may have been from the Tenant disposing of a butt in the garbage.

BK stated that the smell that the Landlord would have smelled, upon entry of the rental unit was likely the burned-out candles that over-burned when the Tenant had had her medical issue.

BK said there was no evidence of ashtrays or accumulated cigarette butts and suggested that the Landlord has never seen the Tenant smoking.

BK stated that the Tenant would like the tenancy to continue.

Analysis

The Landlord has served the Notice on the Tenant and based most of her testimony in relation to Section 47(1)(d) of the Act and the concern that she has about the Tenant smoking in the rental unit. When I consider the validity of the reason the Landlord has for ending the tenancy, I must determine if the Landlord has sufficient evidence to prove that the Tenant's actions significantly interfered with or unreasonably disturbed the Landlord. The standard of proof is based on the balance of probabilities. If I find that any one of the reasons set out in the Notice are valid and that the Notice complies with Section 52 of the Act, I must grant the Landlord an Order of Possession for the rental unit in accordance with Section 55 of the Act.

The Landlord has provided testimony, sworn statements and photo evidence that I find compelling and believe, on a balance of probabilities, that the Tenant is either smoking or allowing someone else to smoke in the rental unit.

However, when I consider the Tenancy Agreement and terms #1 and #2, I find that the wording is ambiguous and does not specifically state that the Tenant will not smoke cigarettes in the rental unit. Rather, it states that the Tenant "will not smoke or participate in the use of drugs..."

Although the Landlord made it clear during the hearing that her intention was to ensure that the Tenant did not smoke (anything) in the rental unit, I am not convinced that this was made obvious to the Tenant when the Tenancy Agreement was signed.

Based on the above testimony, evidence and findings, I find that the Landlord failed to provide sufficient evidence that Tenant's actions significantly interfered with or unreasonably disturbed the Landlord and furthermore, that the Tenant was aware that her actions may be causing the Landlord distress. As a result, I cancel the Notice and order that the tenancy will continue until ended in accordance with the Act.

As this tenancy will continue, I will clarify the intention of the Landlord and order that the Tenant or a person permitted on the property by the Tenant shall not smoke anything, including cigarettes or cannabis, in the rental unit or on the rental property. If the Tenant breaches this order, the Landlord may end the tenancy by serving a One-Month Notice to End Tenancy for Cause – breach of a material term – to the Tenant, in accordance with Section 47(1)(h) of the Act.

Although I found in favour of the Tenant and cancel the Notice, I do not award compensation for the filing fee.

Conclusion

The One-Month Notice to End Tenancy for Cause, dated October 24, 2018, is cancelled and the tenancy will continue until it is ended in accordance with the Act.

Pursuant to Section 62 of the Act, I make the following order, to be considered a material term of the tenancy:

The Tenant shall not smoke anything, including cigarettes or cannabis, in the rental unit or on the rental property.

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: December 10, 2018

Residential Tenancy Branch