



Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC PSF FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the “*Act*”) for:

- Cancellation of One Month Notice to End Tenancy for Cause (“One Month Notice”) under section 47;
- An order requiring the landlord to provide services or facilities as required by the tenancy agreement or the *Act* under section 62; and
- Reimbursement of the filing fee pursuant to section 72.

Both parties attended the hearing and had full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions. The landlord acknowledged receipt of the tenant’s Notice of Hearing and Application for Dispute Resolution and the tenant acknowledged receipt of the landlord’s evidence. Neither party raised issues of service. I find the parties were served in accordance with the *Act*.

The One Month Notice was dated January 31, 2019 with a stated move-out date of February 28, 2019. The parties agreed that the tenant was personally with the notice on February 1, 2019. I find that the tenant was served the One Month Notice on February 1, 2019 pursuant to section 88 of the *Act*.

Both parties were informed of Section 55 of the *Act* which requires, when a tenant submits an Application for Dispute Resolution 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 in compliance with the *Act*.

Preliminary Issue: Severance of Portion of Tenant’s Application

Residential Tenancy Branch Rules of Procedure, number 2.3 states that:

“2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.”

It is my determination that the priority claim regarding the One Month Notice and the continuation of this tenancy is not sufficiently related to any of the tenant's other claim for an order to provide services and facilities to warrant that they be heard together. The parties were given a priority hearing in order to address the question of the validity of the One Month Notice.

The tenant's other claim is unrelated in that it does not pertain to facts relevant to the grounds for ending this tenancy as set out in the One Month Notice. I exercise my discretion to dismiss all the tenant's claims with leave to reapply except for the cancellation of the One Month Notice and recovery of the filing fee for this application.

Issue(s) to be Decided

Is the tenant entitled to an order for cancellation of the landlord's One Month Notice under section 47 of the *Act*?

If not, is the landlord entitled to an order of possession pursuant to section 55 of the *Act*?

Is the tenant entitled to reimbursement of the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, I do not reproduce all details of the respective submissions and/or arguments in my decision.

The parties agreed that the tenant has resided at the rental unit since 2002. The rent is currently \$770.00 per month and the landlord holds a \$326.00 security deposit. The landlord testified that the parties did not have a written tenancy agreement. The tenant testified that the parties did have a written agreement, but she did not provide a copy.

The landlord testified that the rental unit is an apartment on the upper level of a two-story building. The landlord testified that they rent the lower level of the building to commercial tenants.

The One Month Notice stated the landlord is seeking an end of the tenancy because the tenant or a person permitted on the property by the tenant has:

- Significantly interfered with or unreasonably disturbed another occupant or the landlord;

- Seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and,
- Put the landlord's property at significant risk.

The landlord testified that each of these grounds are based on an allegation that the tenant has been burning incense and paper in her rental unit.

The landlord has a commercial tenant, JB, who operates a business in the space beneath the tenant. JB testified that large amounts of incense smoke emits from the tenant's rental unit and permeates into his business. JB testified that he is allergic to smoke. The landlord presented a note from JB's physician which stated that "...due to a medical issue [JB] needs to ensure that the air quality of his store is as clean as possible. He cannot be exposed to any smoke." JB testified that the ventilation system in the building is sending the smoke from the tenant's rental unit into his store.

The landlord provided health literature stating that incense burning could be harmful.

The landlord testified that BC workers compensation law requires the landlord to provide a smoke free environment for the commercial tenant downstairs.

The landlord attached a note to the One Month Notice which stated that the landlord's grandson was going to move into the rental unit after the tenant moved out. In the hearing, the landlords testified that their grandson intended to live there while he attended college. The landlord described this as a secondary reason for giving the notice to end tenancy.

The tenant testified that she burns incense twice a day as a religious memorial practice. She testified that the incense did create a lot of smoke, but she did not receive a written complaint until the landlord issued the One Month Notice. The tenant testified that she has switched to a more expensive brand of incense which emits much less smoke after she received the One Month Notice. The tenant testified that she could eliminate the incense smoke by making offerings of fruit or using an electric vaporizer rather than burning incense.

Analysis

A tenant may dispute a One Month Notice to End Tenancy for Cause pursuant to section 47(4) of the *Act*. Pursuant to *Rules* 6.6, the landlord has the onus of proof to establish, on the balance of probabilities, that notice to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct.

I find that the landlord has failed to establish that the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. While the tenant acknowledged that smoke was emitted from the burning of incense, it is unclear how incense smoke from the tenant's upstairs rental unit penetrated the commercial tenant's business downstairs in significant volume. JB testified that the rental unit's ventilation system is directing the airflow from the tenant's rental unit down to the business downstairs. However, the operation of the ventilation system is the landlord's responsibility pursuant to *Residential Tenancy Branch Guideline No. 1*. The landlord, not the tenant, is responsible for ensuring airflow is properly designed to minimize transference of smells. I find that the landlord has not provided sufficient evidence to establish, on a balance of probabilities, that the disturbance caused by incense smoke was the result of the conduct of the tenant rather than the result of a problem with the landlord's ventilation system.

The landlord also argued that the incense burning is harmful to the other occupants in the building. I find the health literature submitted by the landlord fails to contain sufficient evidence or information related to the alleged dangers associated with burning incense. While the literature provides general information concerning health hazards of incense smoke, I find the medical literature submitted by the landlord does not establish, more likely than not, that the amount of incense smoke permeating from the tenant's rental unit seriously jeopardized the landlord's or other occupant's safety.

Furthermore, I find that the tenant's burning of incense to be reasonable and find it does not put the property at significant risk. As with burning anything, including candles, or even cooking, there is potential for a fire hazard; however, if done in a responsible manner, the risk is relatively small. I did not hear sufficient evidence that the tenant was burning incense irresponsibly or leaving it unattended. Therefore, the landlord has failed to establish that the tenant has put the property at significant risk.

The landlord argued that the tenant should be prevented from burning incense by the BC *Workers Compensation Act*. However, this dispute involves a residential tenancy, not a commercial tenancy. Furthermore, the matter at issue is whether the grounds stated on the One Month Tenancy are valid. The impact of the *Workers Compensation Act* on the landlord's other commercial tenancy is not relevant to this hearing.

Considering the above, the landlord has not satisfied me that the tenant has done anything that has significantly interfered with or unreasonably disturbed another occupant, seriously jeopardized the health or safety of the landlord or another occupant, or put the landlord's property at significant risk. Therefore, I cancel the landlord's One

Month Notice. The One Month Notice is of no force or effect and this tenancy will continue until it ends pursuant to the *Act*.

As the tenant has been successful in this application, the tenant is awarded the filing fee. The tenant is authorized to deduct \$100.00 from a future rent payment on **ONE** occasion, in satisfaction of this award.

Conclusion

The tenant's application for an order requiring the landlord to provide services or facilities as required by the tenancy agreement or the *Act* is dismissed with leave to reapply.

I grant the tenant's application to cancel the landlord's One Month Notice dated January 31, 2019. The One Month Notice is of no force or effect and this tenancy will continue until it ends pursuant to the *Act*.

The tenant is awarded reimbursement of the filing fee. The tenant is authorized to deduct \$100.00 from a future rent payment in satisfaction of this award on **ONE** occasion.

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: April 8, 2019

Residential Tenancy Branch