



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BAYVIEW RENTAL SERVICES and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenants' application pursuant to section 47 of the *Residential Tenancy Act* (the *Act*) for cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice).

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenants confirmed that they received the 1 Month Notice posted on the tenants' door on March 18, 2019, I find that the tenants were duly served with this Notice in accordance with section 88 of the *Act*. As the landlord confirmed that on March 27, 2019, they received a copy of the tenants' dispute resolution hearing package sent by the tenants by Canada Post's ExpressPost service, I find that the landlord was duly served with this package in accordance with section 89 of the *Act*. Since both parties confirmed that they had received one another's written, photographic and video evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Background and Evidence

This tenancy began on December 15, 2017 for an initial fixed term that was to run from that day until December 31, 2018. At the expiration of this initial term, the tenancy continued as a month-to-month tenancy. The parties agreed that the current monthly rent is set at \$1,050.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$500.00 security deposit paid when this tenancy began.

The landlord's 1 Month Notice was issued three days after the landlord noticed a high capacity venting fan operating in the window of one of the bedrooms in this rental unit where the window was also blocked off. The reasons cited on the landlord's 1 Month Notice seeking an end to this tenancy by April 30, 2019, were as follows:

Tenant has engaged in illegal activity that has, or is likely to:

- *damage the landlord's property;*
- *adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant;*

On March 15, 2019, the landlord sent the tenants an email asking about the ventilation fan, observed nine large pots with soil newly placed on the ground outside the rental townhome and inspected the bedroom where the ventilation fan was placed. The landlord provided sworn testimony and written evidence that there was a large wet spot on the carpet in that room. The landlord's 1 Month Notice asserted the following:

...It was evident from the marijuana smell, lighting equipment in the closet, water stains on the carpet, and the ventilation system, that the tenants have a grow op.

Although the landlord did report the activity to the local police, and the police attended the premises, no charges were laid, nor has the landlord any evidence that charges are pending. The landlord provided no copy of a police report, nor any testimony or written evidence from anyone else living nearby that would suggest the occurrence of illegal activity operating in the rental unit or to support what the landlord described as a "perceived grow op" happening there. The police were apparently present when one of the plants that the tenants maintained were potatoes were extracted from the ground, which Tenant DB (the tenant) claimed confirmed his claim that the plants were potatoes and not part of a grow operation.

For their part, the tenants provided written evidence, photographic evidence and video evidence supported by their sworn testimony that nothing illegal has been or was happening in this rental unit, nor have they used one of the bedrooms as a site for a

grow operation. The tenant maintained that they were using one of the bedrooms to give the tomato and potato plants they grow a headstart on the growing season. At the hearing, the tenant testified that they use the ventilation fan as a way of keeping that bedroom cool and dry and that the fan installed is a standard two way 110 volt fan. They described the window covering as much the same as blackout curtains to reduce the sunlight in that room.

Analysis

Section 47 of the *Act* contains provisions by which a landlord may end a tenancy for cause by giving notice to end tenancy. Pursuant to section 47(4) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within ten days after the date the tenant received the notice. If the tenant makes such an application, the onus shifts to the landlord to justify, on a balance of probabilities, the reasons set out in the 1 Month Notice. As the tenants applied to cancel the 1 Month Notice, the landlord bears the burden of demonstrating on a balance of probabilities that this tenancy should be ended for the reasons stated in the 1 Month Notice.

Paragraph 47(1)(e)(i) and (ii) of the *Act* reads in part as follows:

Landlord's notice: cause

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if...

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

(i) has caused or is likely to cause damage to the landlord's property,

(ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property,...

In considering this matter, I have taken into consideration the guidance provided to arbitrators by the Residential Tenancy Branch's *Policy Guideline 32: Illegal Activities*. That Guideline notes that the party alleging the illegal activity has the burden of proving that the activity was illegal. The term "illegal activity" would include a serious violation of federal or provincial laws or municipal bylaws, whether or not it is an offence under the *Criminal Code of Canada* or Provincial Statutes. It may include an act prohibited by any

statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property. The party alleging the illegal activity has the burden of proving that the activity was illegal. Thus, the party should be prepared to establish the illegality by providing to the arbitrator and to the other party, in accordance with the Rules of Procedure, a legible copy of the relevant statute or bylaw that the other party has allegedly contravened.

In considering whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy the arbitrator should consider such matters as the extent of the interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects the landlord or other occupants.

Policy Guideline 32 reads in part as follows:

...The test for establishing that the activity was illegal and thus grounds for terminating the tenancy is not the criminal standard which is proof beyond a reasonable doubt. A criminal conviction is not a prerequisite for terminating the tenancy. The standard of proof for ending a tenancy for illegal activity is the same as for ending a tenancy for any cause permitted under the Legislation: proof on a balance of probabilities...

While a criminal conviction is not a prerequisite for terminating the tenancy for illegal activity, arbitrators are to take into consideration " whether or not the illegal activity is sufficiently serious to warrant terminating the tenancy." Consideration is also to "be given to such matters as the extent of interference with the quiet enjoyment of other occupants, extent of damage to the landlord's property, and the jeopardy that would attach to the activity as it affects the landlord or other occupants."

In this case, the landlord did report the activity to the local police, and the police attended the premises; however, no charges were laid, nor has the landlord any evidence that charges are pending.

I can understand why the landlord would be concerned that the ventilation equipment installed by the tenants may have been supporting a grow operation from the tenants' rental unit. If the landlord could demonstrate on a balance of probabilities that this were happening, then the landlord may very well be justified in issuing a 1 Month Notice based for illegal activity that could damage or was likely to damage the landlord's property. However, the explanations provided by the tenants that their plant cultivation was for tomatoes and potatoes, and not a grow operation, could just as easily require

additional ventilation and a cooler temperature in the bedroom in question. The tenant's photographs and video also reinforce the tenants' claim that the wet mark on the carpet that the landlord noticed when they inspected was temporary. The evidence that the police attended the premises, witnessed the tenants pull up at least one potato plant from their garden, and have apparently taken no action to follow-up on the landlord's assertion that the tenants are running a grow operation from their rental unit lends more credence to the tenants' account of what has transpired than the landlord's suspicions, photograph of a second floor ventilation fan and their observation of a watermark on the carpet and growing equipment in a closet.

On a balance of probabilities, I find that the landlord's evidence has fallen significantly short of demonstrating that there is or has been illegal activity occurring at the tenants' rental unit that would justify the landlord's 1 Month Notice issued on March 18, 2019.

Even if the landlord had proven that there was illegal activity occurring at one time, which is not the case, the landlord has provided insufficient evidence to show that there has been any significant damage to the rental unit or that there has been any pattern of behaviours that would lead to a justifiable fear that significant damage was likely to ensue from the continuation of the activities the landlord claims were illegal.

I also note that the landlord acted quickly on this matter and without providing any written warning to the tenants regarding the landlord's concerns or suspicions that illegal activity was happening in the rental unit. While warning letters are not required if illegal activity is proven, I find that the landlord has failed to demonstrate to the extent required that illegal activity has occurred in this rental unit. It would also seem that there is little evidence that the tenants' continuing actions are placing the landlord's premises in danger or that illegal activity is happening there following the landlord's first notification of concerns about this matter to the tenants.

At the hearing, the landlord stated that although no one else lives at this unit, the management company that they represent identified as the landlord for the purposes of the tenants' application does manage other properties on either side of this townhome, and which share common walls. As such, it would appear that there are no other "occupants" on this residential property because no one shares this municipal address with the townhome (i.e., this is not a duplex or triplex, with others living at the same property). As I am not satisfied that there has been sufficient evidence presented by the landlord to demonstrate on a balance of probabilities that the tenants have been involved in illegal activity, there is no need for me to make a finding with respect to

whether those living in townhomes on either side of the tenants constitute "another occupant of the residential property" defined by paragraph 47(1)(e)(ii) of the *Act*.

Conclusion

I allow the tenants' application to cancel the 1 Month Notice. The 1 Month Notice is set aside and of no force nor effect. This tenancy continues until 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: May 02, 2019

Residential Tenancy Branch