



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WENTWORTH PROPERTIES
INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC FFT

Introduction

This hearing was convened by way of conference call concerning an application made by the tenants seeking an order cancelling a notice to end the tenancy for cause and to recover the filing fee from the landlord for the cost of the application.

Both tenants and an agent for the landlord company attended the hearing and the landlord's agent was accompanied by a building manager who did not testify or take part in the hearing. The landlord's agent and one of the tenants gave affirmed testimony and the parties were given the opportunity to question each other.

No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Has the landlord established that the One Month Notice to End Tenancy for Cause was issued in accordance with the *Residential Tenancy Act*, or should it be cancelled?

Background and Evidence

The landlord's agent testified that this fixed term tenancy began on May 1, 2003 and expired on November 30, 2003 thereafter reverting to a month-to-month tenancy and the tenants still reside in the rental unit. Rent in the amount of \$958.00 per month is currently payable on the 1st day of each month and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenants in the amount of \$387.50 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is an apartment in a 3 story plus basement complex, containing 34 units.

A copy of the tenancy agreement with a document entitled "Additional Terms" has been provided as evidence for this hearing. Paragraph 9 in the Additional Terms states: "9. Smoking: Smokers may find themselves liable for smoke-related damages."

The landlord's agent further testified that 4 breach letters have been given to the tenants about smoking in the rental unit, and copies have been provided for this hearing. The first is dated November 8, 2018 which states that any type of smoking is prohibited inside your unit or any common areas at any time, including hallways, laundry rooms, garden's and enclosed garages, as well as balconies or on the property.

The second is dated December 12, 2018 also stating the any type of smoking is prohibited inside the suite or any common areas.

The third is dated December 14, 2018 stating that it is a formal request to stop smoking in your suite immediately and no further warnings will be provided.

The fourth letter is dated March 21, 2019 marked as "Breach Letter, 3rd Warning" stating that: "Regardless if you have been grandfathered in under a previous lease, please be advised that the smell of cigarette smoke is affecting and interfering with the quality and quiet enjoyment of the living experience of your neighboring residents."

The landlord has also provided a note dated April 5, 2019 stating that while visiting friends at the rental complex the writer noticed a strong cigarette smell coming from the hallway and was told it came from this rental unit, and that it was very bothersome, invasive and lingered in the hallway. It also states that the writer understood it was a smoke free building.

The landlord caused the tenants to be served with a One Month Notice to End Tenancy for Cause. The landlord's agent testified that it was served on March 26, 2019 by posting it to the door of the rental unit, and a copy has been provided for this hearing. It is dated March 25, 2019 and contains an effective date of vacancy of April 30, 2019. The reason for issuing it states: "Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so." The Details of Cause(s) section states: "Despite multiple warnings from the Landlord and complaints from the neighboring residents, the tenant continues to smoke inside the suite, interfering with other resident's enjoyment and quality of the living experience of the building."

Smoking disturbs other residents of the building, and whether the tenants can smell it or not, others can and it is interfering with other occupants' quiet enjoyment. The tenants could smoke on the balcony to minimize the interference.

The tenant testified that the landlord is trying to get the tenants out so the landlord can raise rent considerably. The tenants have done no harm, and this issue started last year. The previous building manager would have talked to the tenants, but the new manager refuses to communicate; just issues letters and notices.

The tenants received a breach letter dated March 21, 2019 which was found under the door on Friday, March 22, 2019, then on the following Tuesday the tenants received the One Month Notice to End Tenancy for Cause. The other letters were not received by the tenants. The tenant tried to get ahold of the part-time manager but could reach her, then received the notice to end the tenancy.

If there is an issue in the hallway, the landlord or the tenants could get weather stripping on the door, but the tenancy agreement doesn't say smoking is prohibited. Further, the neighbour next door received a letter from the landlord stating that smoking is prohibited on their balcony. A copy of that letter has also been provided as evidence for this hearing, and now the landlord suggests that the tenant should also smoke on his balcony, which does not seem at all fair.

A lot of people smoke in the building on every floor and in different areas of the building. The landlord is advertising it as a smoke free building, but that simply isn't true. The tenants do not chain smoke; the rental unit is clean, and the tenants try to accommodate. It would be nice if the landlord would do the same.

The tenant's Application for Dispute Resolution states: "eviction notice served on basis of smoking inside suite. Being disputed as nothing was ever written in the contract that smoking was not allowed, smoking in fact was allowed as this was the main reason to move to this building. I have lived at this address for 16 years, smoking the whole time with no issues."

Analysis

The *Residential Tenancy Act* specifies how a tenancy ends. Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was given in accordance with the *Act*, which can include the reason(s) for issuing it. In this case, the reason for issuing it is in dispute.

I have reviewed the tenancy agreement and Additional Terms, and there is nothing in any agreement specifying a no smoking rule. Further, the only evidence of a person being disturbed is a letter from a visitor provided for this hearing by the landlord.

The landlord may very well wish the building to become a non-smoking building, but the landlord cannot enforce a rule that was not agreed to by the tenant. The tenant's application states that the absence of a no-smoking rule is why he rented this rental unit, and I accept that and find that it is a material term of the tenancy agreement that the tenant be permitted to smoke inside the rental unit and on the property.

In the circumstances, I find that the landlord has failed to establish that the tenant has breached a material term of the tenancy agreement and I cancel the notice to end the tenancy.

Since the tenants have been successful with the application, the tenants are entitled to recovery of the \$100.00 filing fee, and I grant a monetary order in that amount and I order that the tenants be permitted to reduce rent for a future month by that amount or may otherwise recover it.

Conclusion

For the reasons set out above, the One Month Notice to End Tenancy for Cause dated March 25, 2019 is hereby cancelled and the tenancy continues.

I hereby grant a monetary order in favour of the tenants as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$100.00 and I order that the tenants be permitted to reduce rent by that amount for a future month, or may otherwise recover it.

This order is final and binding and may be enforced.

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 17, 2019

Residential Tenancy Branch