



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 2425 YORK HOLDINGS LTD and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC, FFT

Introduction

This teleconference hearing was scheduled in response to an application by the Tenant under the *Residential Tenancy Act* (the “Act”) to cancel a One Month Notice to End Tenancy for Cause (the “One Month Notice”), for an Order for the Landlord to comply with the *Act*, *Residential Tenancy Regulation* and/or tenancy agreement, and for the recovery of the filing fee paid for the Application for Dispute Resolution.

Legal counsel was present for the Landlord as was an agent and two witnesses that joined the hearing to present testimony. Legal counsel made submissions on behalf of the Landlord and asked questions of the agent and witnesses. The Tenant was present at the teleconference hearing with a friend who did not participate in the hearing.

The Landlord’s legal counsel confirmed receipt of the Notice of Dispute Resolution Proceeding package and a copy of the Tenant’s evidence. Although some evidence was received late, they stated that they were willing to accept this evidence. The Tenant confirmed receipt of a copy of the Landlord’s evidence and did not bring up any issues regarding service. Therefore, the evidence of both parties will be accepted and considered as part of this decision.

All parties were affirmed to be truthful in their testimony and were provided with the opportunity to present evidence, make submissions and question the other party.

Preliminary Matters

As stated by rule 2.3 of the *Residential Tenancy Branch Rules of Procedure*, claims on an application must be related to each other and unrelated claims may be dismissed. Due to the urgent nature of a dispute over a notice to end tenancy, the hearing

continued regarding the Tenant's application to cancel the notice. I exercise my discretion to dismiss the Tenant's claim for an Order for the Landlord to comply, with leave to reapply. This decision will address the Tenant's application to cancel the One Month Notice as well as the request for the recovery of the filing fee.

Legal counsel for the Landlord submitted that they were requesting permission to amend the One Month Notice dated March 25, 2019. The One Month Notice stated the following as the reason for the notice:

- Tenant or a person permitted on the property by the tenant has:
 - Significantly interfered with or unreasonable disturbed another occupant or the landlord
 - Seriously jeopardized the health or safety or lawful right of another occupant or the landlord
 - Put the landlord's property at significant risk

Legal counsel for the Landlord requested to add the following as a reason for the One Month Notice:

- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Legal counsel submitted that this would not unfairly prejudice the tenant as she was aware that the issue was regarding a breach of a term of the tenancy agreement. Legal counsel submitted a copy of *Residential Tenancy Policy Guideline 11: Amendment and Withdrawal of Notices*. They submitted that their request fits the requirement of a request for an amendment. They noted that 'breach of a material term' was left off the One Month Notice through an inadvertent error by the Landlord.

The Tenant stated that she applied to dispute the One Month Notice as she received it and prepared her testimony and evidence based on the reasons listed on the notice. She further stated that she did not have time to obtain legal counsel and believes that amending the notice would unfairly prejudice her.

I do not accept the request to amend the notice.

Policy Guideline 11 states the following regarding amending a notice:

The Legislation allows an arbitrator, on application, to amend a Notice to End Tenancy where the person receiving the notice knew, or should have known, the

information that was omitted from the notice, and it is reasonable in the circumstances.

In determining if a person "should have known" particular facts, an arbitrator will consider whether a reasonable person would have known these facts in the same circumstances. In determining whether it is "reasonable in the circumstances" an arbitrator will look at all of the facts and consider, in particular, if one party would be unfairly prejudiced by amending the notice.

Upon consideration of the above information, I do not find that the Tenant would have "reasonably known" that the Landlord intended to include additional reasons on the One Month Notice. Instead, I find that the Tenant applied to dispute the notice as provided to her and would not have reasonably known that the Landlord intended to add additional reasons to the One Month Notice.

The Landlord requested this amendment in their written submissions as well as at the hearing. However, given the evidence submission deadlines, I find that the Tenant submitted evidence in response to the notice as is and may not have had an opportunity to fully prepare testimony and evidence regarding possible additional reasons for the One Month Notice.

Furthermore, I find that the Landlord had the option to withdraw the notice and serve the Tenant with a new notice should they have wished to add additional reasons to the One Month Notice prior to a hearing. Should the current notice be cancelled through this decision, the Landlord is also at liberty to serve a new One Month Notice. As such, I find that the Landlord is not unfairly prejudiced with the denial of the request to amend the notice.

Therefore, the Landlord's request to amend the One Month Notice is denied. The One Month Notice in dispute stands as written and the validity of the notice will be addressed below.

Issues to be Decided

Should the One Month Notice to End Tenancy for Cause be cancelled?

If the One Month Notice to End Tenancy for Cause is upheld, is the Landlord entitled to an Order of Possession?

Should the Tenant be awarded the recovery of the filing fee paid for the Application for Dispute Resolution?

Background and Evidence

While I have considered the relevant documentary evidence and testimony of both parties, not all details of the submissions are reproduced here.

The parties were in agreement as to the details of the tenancy which were also confirmed by the tenancy agreement submitted into evidence. The tenancy began on June 1, 2015. Monthly rent is currently \$1,120.00 with an increase to \$1,148.00 taking effect in June 2019. A security deposit of \$525.00 was paid at the outset of the tenancy.

While legal counsel for the Landlord made the majority of submissions on behalf of the Landlord, I will be referring to the submissions from the agent and legal counsel as from the "Landlord" for ease and brevity in this decision. The exception to this is where it is relevant to clarify such as testimony from the witnesses for the Landlord.

The Landlord stated that the One Month Notice was served to the Tenant by posting it on her door on March 25, 2019.

The One Month Notice was submitted into evidence and states the following as the reasons for ending the tenancy:

- Tenant or a person permitted on the property by the tenant has:
 - Significantly interfered with or unreasonable disturbed another occupant or the landlord
 - Seriously jeopardized the health or safety or lawful right of another occupant or the landlord
 - Put the landlord's property at significant risk

Further details were provided on the notice as follows:

Other tenants around tenant living in this suite has been complaining of smoking inside the suite. Tenant was warned by the building manager to stop smoking but still continued. Tenant was served a caution notice on March 19 2019. Tenant continues to smoke inside the suite after caution notice was issued. In the lease agreement it states that no smoking is allowed in the suite or on the property. It has now become a health issue for other tenants and has now affected the quiet of enjoyment of other tenants. [Reproduced as written]

The Landlord's first witness, L.L. stated that she resides in a rental unit across the hallway from the Tenant and has lived there since December 2018. The witness testified that she has noticed the odour of tobacco smoke in the building since moving in and noted that she has complained many times to management. The witness stated that she does not know for sure where the smell is coming from, but since the smell is strongest by the Tenant's unit, it is her belief that the smoke odour is coming from the Tenant's rental unit. The witness also stated that she has not seen the Tenant smoking, but the odour is stronger on the second floor, particularly by the Tenant's rental unit. The witness further stated that the smoke aggravates respiratory issues.

The Landlord presented testimony that they have received many complaints regarding smoking on the residential property. They noted that it is a non-smoking building which includes no smoking in the building, on the patios, or anywhere on the property inside of the property line. They noted that there have been many complaints from other occupants who have noticed the smell around the Tenant's unit.

The Landlord stated that they served the Tenant with a warning letter on March 18, 2019. The warning letter was submitted into evidence and states the following:

Management has received multiple complaints of tenant smoking inside the suite. This building is a non smoking building so smoking of any kind is strictly prohibited and is breach of contract.

The Landlord also stated that there was a notice posted to the whole building on March 25, 2019. This notice was submitted into evidence and notes that management has been receiving complaints of smoking on common property and provided a reminder that the building is smoke free.

The Landlord submitted in part the following evidence regarding complaints of smoking:

- An email from other occupants in the building dated March 26, 2019. States that they are moving out due to "numerous issues with tenants smoking in the building."
- Text correspondence from an occupant in the building. States concerns with the smell of smoke on the second floor. Indicates belief that on March 4, 2019 the smell was coming from Tenant's unit.
- An email dated May 14, 2019 from the Tenant's neighbour stating that the smell of smoke has been noticed after March 18, 2019. Further states that the neighbour has not witnessed the Tenant smoking.

The Landlord also referenced the tenancy agreement which states that this is a non-smoking building.

The Tenant provided testimony that she has been living in the building since 2015 and has never had an issue despite smoking on her patio since the start of the tenancy. She stated that no one ever asked her to stop and she received no warnings or complaints until receipt of the warning letter on or around March 19, 2019.

The Tenant stated that at the start of her tenancy, she was provided verbal permission to smoke on the patio. She referenced the tenancy agreement which although it states no smoking, it was not initialled by the Landlord and does not include specific information about smoking outside of the rental unit. The Tenant also noted that she asked whether anything should be put into writing regarding smoking on the patio but was told it was fine.

Since the Landlord had not told her to stop smoking until 2019, the Tenant stated that she did not think it was an issue. The Tenant submitted that the building manager has been aware that she was smoking on her patio since the start of the tenancy as he was the one who provided her permission to do so. The Tenant stated that she has never smoked inside of her rental unit and does not allow others to do so either. She stated that she smokes outside on the patio with the doors and windows to the rental unit closed, as do any guests.

The Tenant submitted in part the following evidence:

- An affidavit from a friend dated April 1, 2019 which states that the Tenant's rental unit has never smelled of cigarette smoke and that the Tenant and guests have never smoked inside the rental unit, instead smoking on the patio. Further notes that the hallway on the second floor of the building smells like smoke.
- An audio recording with the building manager in which the Tenant states that the building manager did not deny that he provided her verbal permission to smoke on her patio.
- Airline tickets to show that the Tenant was away from January 17 to January 29, 2019 during which time the Tenant stated there were complaints about the smell of smoke.
- Affidavit from upstairs neighbour of Tenant dated April 1, 2019. States that the building lobby smells like smoke. States that the Tenant smokes on the patio but has never smelled cigarette smoke from the rental unit.

- Affidavit from a friend of the Tenant dated April 1, 2019. States that this friend lived in the rental unit prior to the Tenant and during that time was aware that several tenants smoked inside their units. States that this friend has never smelled smoke in the Tenant's rental unit.

The Tenant further submitted that there is no proof that her smoking on the patio is the cause of any issues. She noted that she can smell smoke on her floor as well, but that this is not coming from her as she smokes outside on the patio.

The Landlord's second witness, G.L. is the building manager for the residential property. He testified that he never provided permission to the Tenant to smoke on her patio and was not aware until recently that she was doing so. The witness further stated that he has seen smoke from the Tenant's rental unit and has also noticed the smell of smoke outside of the door to the Tenant's rental unit.

Analysis

The One Month Notice was served to the Tenant on March 25, 2019 pursuant to Section 47(1)(d) of the *Act* which states the following:

- (d) the tenant or a person permitted on the residential property by the tenant has
 - (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
 - (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
 - (iii) put the landlord's property at significant risk;

As stated in Section 47(4) of the *Act*, a tenant has 10 days in which to dispute a One Month Notice. The Tenant applied for dispute resolution on April 3, 2019, which was within the timeframe allowable under the *Act*. Therefore, the matter before me is whether the reasons for the One Month Notice are valid.

Rule 6.6 of the *Rules of Procedure* states that when a tenant applies to dispute a notice to end tenancy, the onus is on the landlord to prove, on a balance of probabilities, that the reasons for the notice are valid.

The Landlord provided evidence that the smell of smoke in the residential property is disturbing other occupants and the Landlord. Based on the testimony and evidence of

both parties, it was not only clear that the smell of smoke is present in the building, but also that the Tenant has been smoking on her patio. However, I am not satisfied that the Landlord established that the smell of smoke in the building is connected to the Tenant smoking on her patio. It also seems that there may be other occupants of the building who are smoking on the property and causing disturbance to others.

Therefore, I do not find sufficient evidence to establish that the Tenant is significantly interfering or unreasonably disturbing others. The witnesses both testified as to the smell of smoke on the second floor where the Tenant resides, as did the Tenant. However, neither witness had seen the Tenant smoking at the time that the odour was present or had any other evidence that the smell of smoke on the second floor was coming from the Tenant. Furthermore, the affidavits from the Tenant's witnesses all stated that they also smell smoke on the second floor but have not noticed the smell inside of the Tenant's rental unit.

Accordingly, while it does seem that the odour of smoke is causing disturbance to occupants of the residential property, I do not find sufficient evidence to be satisfied that the smell inside the building is caused by the Tenant smoking on her patio. I also fail to find sufficient evidence to establish that the Tenant is smoking inside of her rental unit instead of only on the patio as stated. Therefore, the Tenant was successful in her application to cancel the notice. The One Month Notice dated March 25, 2019 is cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act*.

However, I also **caution** the Tenant that she should consider herself sufficiently warned that she resides in a non-smoking building and that this includes smoking anywhere on the residential property as stated by the Landlord. Regardless of what happened at the start of the tenancy, at the hearing the Landlord was clear that the Tenant does not have permission to smoke on the patio of the rental unit. Should the Tenant continue to smoke on the residential property, the Landlord may find cause to serve the Tenant with a new notice to end tenancy and may use this decision as evidence that the Tenant was aware of the no-smoking policy.

I decline to award the recovery of the filing fee paid for the Application for Dispute Resolution.

Conclusion

The One Month Notice dated March 25, 2019 is cancelled and of no force or 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 23, 2019

Residential Tenancy Branch