



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened as the result of the tenant's application for dispute resolution under the Residential Tenancy Act (the "Act"). The tenant applied for an order cancelling the landlords' 1 Month Notice to End Tenancy for Cause (the "Notice") and for recovery of the filing fee.

The named parties attended, the hearing process was explained and they were given an opportunity to ask questions about the hearing process.

Thereafter all parties were provided the opportunity to present their evidence orally and to refer to relevant documentary evidence submitted prior to the hearing, and make submissions to me and respond each to the other's evidence.

I have reviewed all oral, digital, and documentary evidence before me that met the requirements of the Dispute Resolution Rules of Procedure ("Rules"); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Words utilizing the singular shall also include the plural and vice versa where the context requires.

Preliminary and Procedural Matter

At the outset of the hearing, neither party raised any issues regarding service of the application; however, the landlords addressed their concern that the tenant served them with her evidence shortly before the hearing, contrary to the timelines outlined in the Rules. I inquired if the landlords had time to submit their response, to which they said "no", without explanation as to why they did not have time.

In reviewing the evidence of the tenant, I have determined that this evidence referred to by the landlords was in reply to the landlords' responsive evidence. Under Rule 3.15, the respondent, the landlords in this case, are required to serve their evidence as soon as possible. In this case, the tenant served her application for dispute resolution on the landlords on April 5, 2019, by registered mail. Under section 90 of the Act, a document served by registered mail is deemed received five days later, or here, by April 10, 2019. I note that the landlords' first package of evidence was received by the Residential Tenancy Branch ("RTB") on May 1, 2019, or 15 days prior to the hearing, and another package of evidence on May 7, 2019, seven days before the hearing. The tenant's reply evidence was received by the RTB seven days before the hearing.

While the landlords' evidence was received within seven days of the hearing, I do not find sufficient evidence to support why they did not submit their evidence as soon as possible. Due to this and the principles of administrative fair play and natural justice, I have accepted and reviewed all evidence filed in this matter. I note that as will be shown, the submitted evidence of the tenant was not necessary to make a decision in this matter and the landlords did not request an adjournment of this hearing.

Additionally, the parties provided their email addresses at the hearing. The parties confirmed their understanding that the decision would be emailed to both parties.

Issue(s) to be Decided

Should the 1 Month Notice to End Tenancy for Cause be cancelled?

Is the tenant entitled to recovery of the filing fee?

Background and Evidence

The undisputed evidence was that this tenancy began on May 1, 2017, that monthly rent is \$950.00, and the rental unit is located in the lower suite. The upper suite on the house is also rented out by the landlords to other tenants.

The landlords were advised that the only evidence that would be relevant and considered at the hearing was related to the claimed cigarette smoking by the tenant and her guests and/or occupants. This was due to the details of the causes listed on page 2 of the landlords' Notice.

Pursuant to the Rules, the landlords proceeded first in the hearing and testified in support of issuing the tenant the Notice. The Notice was dated March 20, 2019, was served via registered mail on that date and listed an effective end of tenancy of April 30, 2019. The tenant filed her application in dispute of the Notice on March 29, 2019.

The causes listed on the Notice alleged that the tenant significantly interfered with or unreasonably disturbed another occupant or the landlord and breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

In support of their Notice, the landlord submitted that the tenant was smoking outside and within the rental unit, in contravention of the written tenancy agreement. This smoking has been a persistent problem since the tenancy began and has impacted the upper tenants' quiet enjoyment of their rental unit, according to the landlords. Further, the landlords submitted the upper tenants and the small children living there are suffering from smoke related health issues, which now include marijuana and vaping smoke. All of this has significantly interfered with and unreasonably disturbed the upper tenants.

The landlords submitted that the tenant's boyfriend has been and is currently living in the rental unit, and that he is smoking cigarettes and marijuana both inside and outside the rental unit. The landlords submitted a photo taken by the upper tenants, which show the boyfriend smoking directly outside the window of the upper tenants.

The landlords submitted that they have cautioned the tenant about the smoking in and around the rental unit, but due to another complaint made by the upper tenants in January 2019, they were compelled to issue the tenant a written warning.

The landlords submitted that not only has the tenant significantly interfered with and unreasonably disturbed the upper tenants due to the continued smoking, the smoking breached a material term of the tenancy agreement, which reads in relevant part:

This is a non-smoking residence, including the storage room. Any smoking within the premises could trigger expulsion of the Tenants.....

The landlords submitted that the rental property is an older home, with one central furnace, with return air ducts between the upper and lower rental units. The shared air duct shows that the upper tenants are able to verify that the tenant or her guests/occupants are smoking within the rental unit.

The landlords submitted that they received a complaint by the upper tenant on March 19, 2019, regarding more smoking on the premises, which prompted the issuance of the Notice on March 20, 2019.

The landlord's additional relevant documentary evidence included, but was not limited to, a text communication dated January 30, 2019, to the tenant regarding the smoking at the premises and rental unit, and an email from the upper tenant dated May 6, 2019, to the landlords summarizing their experience with the tenant throughout the tenancy.

Further, the relevant evidence included an email from the upper tenant, dated April 28, 2019, complaining that the tenant and/or her boyfriend were vaping in the rental unit as of April 17, 2019, as the cherry scented smoke was coming through the vents, and another email from the upper tenant, dated April 8, 2019, outlining her experience with the tenant from the time she, the upper tenant, moved in.

Tenant's response-

The tenant submitted that she has not and never has smoked in the rental unit. Additionally, she has not allowed her guests and/or occupants to smoke within the rental unit. The tenant submitted that she has not breached a material term of the tenancy agreement, as that restriction is related only to inside the rental unit, not outside. In a compromise, she originally, smoked down the driveway, and since the complaint, she and her guests go off premises.

The tenant denied smoking on the premises since the January 2019 warning from the landlords.

The tenant submitted that she had a conversation with the upper tenants two years ago, and that the upper tenant has not raised any issues with her.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on the balance of probabilities, I find the following.

When a tenant disputes a Notice, the onus of proof reverts to the landlord to prove that the Notice is valid and should be upheld. If the landlord fails to prove the Notice is valid, the Notice will be cancelled.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

In this case, the landlord has claimed that the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord and breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

I will first address my findings as to the claim that the tenant has breached a material term of the tenancy agreement. Upon my reading of the term in question, I find that the wording does not sufficiently clarify that smoking is not allowed anywhere on the property. When I interpret the word “within”, I take that to mean within, or inside the rental unit.

As a result, I find that the landlords have failed to support their Notice under this cause.

As to the landlords’ other listed cause, I find the landlords failed to submitted sufficient evidence to support this cause. While the landlords submitted a volume of evidence, the emails from the upper tenant show a history of her dealings with the tenant, not directly related to the smoking issue which lead up to the January 29, 2019, complaint to the landlord, which in turn caused the Notice to be issued. The emails were dated well after the Notice was issued on March 20, 2019, and I have no direct documentary evidence from the upper tenant that she made any further complaints to the landlord regarding the smoking issue from January 29, 2019, through March 20, 2019.

I find that any other issues raised by the upper tenant regarding allegations with the tenant were unrelated to the present issue, the cause listed on the Notice, and were remote in time. A recounting of events from 2017 onwards is not relevant for my consideration in this matter.

I also could not rely on the undated photo of the tenant’s boyfriend outside the upper suite, as it may very well have been a photo taken during the last two years.

While not at the hearing, I was informed that the upper tenant was available to testify at the hearing; however, I conclude that her testimony would not have been helpful in my consideration, as the tenant has denied smoking in the rental unit and therefore, as previously stated, I found no separate documentary evidence to support a complaint.

Overall, for all the above listed reasons, I find the landlords have submitted insufficient evidence to prove the cause listed on the Notice.

As a result, I find the landlords' 1 Month Notice to End Tenancy for Cause dated and issued on March 20, 2019, for an effective move-out date of April 30, 2019, is not supported by the evidence, and therefore has no force and effect. I order that the Notice be cancelled, with the effect that the tenancy will continue until ended in accordance with the Act.

I allow the tenant recovery of her filing fee of \$100.00. I grant her a one-time rent reduction of \$100.00 from her next or a future month's rent payment in satisfaction of her monetary award, notifying the landlords of when this deduction is being made. The landlords may not serve the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities when the tenant has made this deduction of \$100.00.

Conclusion

The Notice issued by the landlords is cancelled and is of no force or effect.

The tenancy has been ordered to continue until ended in accordance with the Act.

As the tenant's application was successful, and pursuant to section 72 of the Act, the tenant has been granted a one-time rent reduction of \$100.00 from a future month's rent.

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 21, 2019

Residential Tenancy Branch