



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, FFL

Introduction

This hearing convened as a result of a Landlords' Application for Dispute Resolution, filed on April 5, 2019, wherein the Landlords sought an Order of Possession based on a 1 Month Notice to End Tenancy for Cause issued on February 16, 2019 (the "Notice") and recovery of the filing fee.

Only the Landlords called into the hearing. They gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions to me.

The Tenants did not call into this hearing, although I left the teleconference hearing connection open until 11:28 a.m. Additionally, I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the Landlords and I were the only ones who had called into this teleconference.

As the Tenants did not call in, I considered service of the Landlords' hearing package. The Landlord, H.C., testified that he personally served the Tenants on April 7, 2019. The Landlord, G.C., also testified that she witnessed her husband, H.C., personally serve the Tenants on April 7, 2019. H.C. also testified that following receipt of the Landlord's hearing package the Tenants attended a resource centre which provides advocacy services. H.C. stated that he received several calls from representatives from the centre who discussed the upcoming hearing on behalf of the Tenants. In all the circumstances I find that the Tenants were given notice of the hearing and I therefore proceeded with the hearing in their absence.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Rules of Procedure*. However, not all details of the Landlords' submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The Landlords confirmed their email addresses during the hearing as well as their understanding that this Decision and any applicable Order would be emailed to them.

Issues to be Decided

1. Are the Landlords entitled to an Order of Possession?
2. Should the Landlords recover the filing fee?

Background and Evidence

The Landlord, H.C., testified that he served the Notice on the Tenants February 16, 2019. He confirmed that although the Notice originally indicated that the effective date was March 31, 2019, the Tenants asked if they could stay until the end of April 30, 2019 and the Landlord agreed and wrote this on the Notice.

The Tenants did not apply to dispute the Notice.

The Landlord, H.C., stated that the Tenants failed to move out at the end of April 2019 as they stated they would.

H.C. stated that the Tenants then said they would move out May 5 and they did not move out. They also stated that they would move out May 10, yet they did not move out.

The reasons cited on the Notice are that the Tenants have breached a material term of the tenancy. H.C. stated that the tenancy agreement provides that the rental unit is non-smoking. This is clearly noted on the agreement which was provided in evidence before me and which was initialled by the parties. The Landlords also testified that the rental unit was advertised as a non-smoking unit.

H.C. stated that despite this, the Tenant, K.H., has smoked in the rental unit. The Landlord confirmed that K.H. has limited command of the English language but had his son present when the tenancy agreement was signed and was informed by the Landlord, which was translated by K.H.'s son, that smoking was prohibited.

In written submissions provided by the Landlord the Landlords write that the first time this was brought to the Tenants' attention was the day they moved into the rental unit as despite the clear prohibition against smoking K.H. was smoking on the day they moved in. At this time the Landlord warned the Tenants that they were not permitted to smoke in the rental unit and continued smoking would put their tenancy in jeopardy.

H.C. further testified that despite their clear warning to the Tenants K.H. continued to smoke in the rental unit to such an extent that the smoke infiltrated the upper unit and caused their clothes to smell of smoke. The Landlords also emailed the Tenants on April 19, 2019 to remind them not to smoke in the rental unit, yet K.H. continued smoking even after receipt of the Notice. A copy of this message was provided in evidence before me. On April 28, 2019 the Landlords sent a letter to the Tenants setting out their concerns with the Tenants smoking, the noise disturbances as well as the repeated setting off of the fire alarm.

The Landlords also submitted evidence and provided testimony supporting their claim that the Tenants are in violation of the tenancy agreement by repeatedly making noise in the middle of the night, and regularly setting off the fire alarm. The Landlord also provided a time line of noise disturbances, including information which indicated that the Tenants set off smoke nearly daily.

Analysis

After consideration of the Landlords' undisputed testimony and evidence before me, and on a balance of probabilities I find as follows.

I find that the Tenants were served the Notice on February 16, 2019. The Notice informed the Tenants that they had 10 days in which to file to dispute the Notice.

Section 47 of the *Residential Tenancy Act* allows a Landlord to end a tenancy for cause. Subsection 47(4) confirms the information provided on the Notice and provides that a Tenant has 10 days in which to file to dispute the Notice. Subsection 47(5) provides that a Tenant who fails to dispute the Notice within those 10 days is conclusively

presumed to accept the end of the tenancy and must move out. For clarity I reproduce those two subsections as follows:

47...(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit by that date.

I accept the Landlords' evidence that the Tenants did not file to dispute the Notice. As such, and pursuant to section 47(5) of the *Residential Tenancy Act*, I find the Tenants have accepted the end of the tenancy.

I also accept the Landlords' evidence that the Tenants agreed to move out by the end of March 2019, yet failed to do so.

I accept the Landlords evidence that the Tenants breached their tenancy agreement by smoking in the rental unit. I am satisfied based on the evidence before me that the Tenants were aware that this was a non-smoking rental. I am further satisfied that the Tenants were repeatedly warned that they were not permitted to smoke in the rental unit, yet continued to do so.

For the above reasons I find the Landlords are entitled to an Order of Possession. This Order will be effective two days after service on the Tenants. Should the Tenants fail to move from the rental unit as required, the Landlords may file and enforce the Order of Possession in the B.C. Supreme Court. The Tenants are cautioned that any costs the Landlords incur to enforce the Order of Possession may be recoverable from the Tenants.

As the Landlords have been successful in their application, I find that the Landlords are entitled to recovery of the \$100.00 filing fee. I authorize them, pursuant to sections 38 and 72 to retain \$100.00 from the Tenants' security deposit. The Landlords must continue to hold the balance in trust and deal with those funds in accordance with the *Act*.

Conclusion

The Landlords' request for an Order of Possession and recovery of the filing fee is granted.

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