



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding FRASER VILLAGE HOMES SOCIETY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

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 tenant confirmed that they received the landlord's 1 Month Notice posted on their door by the landlord on April 10, 2019, I find that the tenant was duly served with this Notice in accordance with section 88 of the *Act*. As the landlord's representatives confirmed that the tenant handed the landlord a copy of the tenant's dispute resolution hearing package on April 24, 2019, 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 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? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

This tenancy for a rental unit in a seniors rental building commenced on or about June 15, 2008. The tenant gave undisputed sworn testimony that no written tenancy agreement was created when this tenancy began. The tenant said that they currently pay \$361.00 in monthly rent for this rent geared to income rental unit.

The landlord entered into written evidence a copy of the 1 Month Notice, requiring the tenant to end this tenancy by May 10, 2019. This date automatically corrected to May 31, 2019. The parties agreed that the landlord has accepted the tenant's payment for May and June 2019, enabling the tenant to remain in the rental unit until at least June 30, 2019. The reasons cited on the 1 Month Notice for ending this tenancy were as follows:

Tenant or a person permitted on the property by the tenant has:

- *seriously jeopardized the health or safety or lawful right of another occupant or the landlord;...*

Non-compliance with an order under the legislation within 30 days after the tenant received the order or the date in the order.

In the details section of the 1 Month Notice, the landlord noted that they had received more than 34 complaints from more than nine people about the tenant smoking in this rental unit. The landlord noted that the tenant had signed a statement which confirmed that this was a no smoking facility and that the tenant was given their first written warning about this matter in November 2008, shortly after they moved into this building. The tenant confirmed at the hearing that they have known that this was a non-smoking building for many years.

The landlord's claim that the tenant has failed to comply with an order under the legislation within 30 days of receiving that order applies to the following provision of paragraph 47(1)(l) of the *Act*:

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

(l) the tenant has not complied with an order of the director within 30 days of the later of the following dates:

- (i) the date the tenant receives the order;*
- (ii) the date specified in the order for the tenant to comply with the order.*

As the landlord confirmed that there has been no order issued by an arbitrator appointed by the Director of the RTB pursuant to the *Act*, this is not a ground whereby the landlord can end this tenancy for cause. As such, the sole ground on which the landlord is seeking an Order of Possession is on the basis of the tenant's alleged refusal to abide by the no-smoking provisions of their tenancy on this rental property.

The landlord entered into written evidence copies of many letters/notes and emails documenting the complaints they have received from people living in this rental complex about the tenant's failure to abide by the no smoking policy in this rental property. Many of these maintained that smoke originating in the tenant's rental unit was affecting their health. At the hearing, the landlord's representatives said that smoking in this rental property presents a significant health and safety risk to other residents in this property and causes health problems for its workers. The landlord also included photographs of the walls of an adjacent rental suite, which the landlord claimed demonstrated the presence of nicotine stains resulting from the tenant's smoking.

The landlord also entered into written evidence an extensive outline of the landlord's history of attempting to take action against the tenant for smoking in this non-smoking property. The landlord noted that as early as April 2008, tenants were notified that smoking was not allowed in the buildings or on the property. This outline included a copy of a November 20, 2008 notation in the Society's Minutes in which the President of the Society was going to speak to the tenant about complaints they were receiving about the tenant's smoking. Landlord Representative JP (the landlord) said that a written notice was sent to the tenant in June 2012 following receipt of additional complaints about smoking in March 2012. The landlord said that this notice advised the tenant that smoking on the premises was considered to be a breach of a material term of their tenancy agreement. The landlord said that there is no record of any further follow-up regarding smoking complaints for a six year period until March 2018. In October 2018, the landlord sent the tenant another letter and representatives met with her about complaints that were being received about the tenant's smoking. At that meeting, the tenant denied that she was smoking in her rental unit.

The tenant initially testified that the only letter they received from the landlord prior to the issuance of the 1 Month Notice was what she described as a "standard letter" sent to tenants in this complex in October 2018. The tenant maintained that she was informed by landlord representatives to not worry about it. The tenant attributed the concerns raised by other tenants in this complex about the tenant's smoking to the person who moved into the rental unit beside the tenant in July 2018. The tenant said that she had gone around to other tenants in this complex who assured her that they could not smell any smoke coming from the tenant's rental unit. The tenant said that they never smoke in their rental unit. The tenant testified that the former President of the Society operating this rental complex made an oral agreement with the tenant enabling the tenant to smoke on the benches in front of the building. The tenant said that they had been "grandfathered" into being given permission to smoke on these benches because they had been living in the building for so long.

At the hearing, the landlord asked the tenant whether they had received the January 7, 2019 "Caution Notice to Tenant" included in the landlord's written evidence. Although the tenant had previously testified that the only recent letter they had received from the landlord about smoking was in October 2018, the tenant responded that they were handed the January 7, 2019 letter by Landlord Representative JW. This letter read in part as follows:

Smoking on the grounds and in unit ***

We have received numerous written complaints regarding you or someone in your unit. You signed your contract you were a non-smoker and you have had written letters previous for you to stop smoking in your unit.

We are asking you to take immediate steps to permanently correct this situation by cease smoking any combustible materials anywhere on the residential property or in your unit in accordance with your tenancy agreement.

Please be advised that should there be any further incident or circumstances warranting termination of tenancy, we will have no alternative but to issue such notice.

We look forward to your cooperation in this matter.

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.

The landlord relied on the following wording of paragraph 47(1)(d)(ii) of the *Act* in seeking an end to this tenancy:

47 (1) *A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies...*

(d) the tenant or a person permitted on the residential property by the tenant has

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, ...

In this case, there is no dispute as to whether tenants in this rental property understand that it is a non-smoking building. In the final analysis, the parties disagree as to whether the tenant is complying with the no smoking policy that she agreed to adhere to many years ago. The tenant maintains that she does not smoke in the building, and only smokes on benches on the property in accordance with an oral agreement she entered into with the then President of the Society that owns this property. The landlord's representatives have supplied considerable documentation in the form of complaints from other tenants who believe that the tenant is not abiding by the no smoking restrictions of this rental property. Many of these other tenants have complained of the health problems that they are experiencing as a result of their inhalation of second hand smoke for which the tenant is responsible.

It is admittedly difficult for a tenant to supply evidence that they are not smoking. While the tenant maintained that they have never smoked in the rental unit, they freely admit that they do smoke on benches on the property, with the oral agreement of the President of the Society that owns this building. However, the tenant offered no evidence other than their sworn testimony that any such agreement exists, nor did they alert the landlord that they were planning to provide this testimony at this hearing. In fact, the agreement they signed and all written cautions and warnings provided advise

the tenant that smoking is not permitted anywhere on the rental property, which would include the benches.

In considering this matter, I found the tenant's sworn testimony changed during the course of this hearing. While the tenant originally claimed to have received only a single standard letter as a caution that their smoking could lead to an end to their tenancy, the tenant subsequently confirmed that she had received the January 2019 Caution Notice. I find that the wording of that Caution Notice is unmistakeable in that it applied to the entire rental property and not just to smoking inside the rental unit. The landlord's representatives were unaware of any oral agreement between the President of the Society, which would be in direct conflict with every other document provided by the landlords to the tenant during the lengthy history of the landlord's attendance to this matter.

Based on a balance of probabilities and after taking into account the written statements provided by the parties, I find that the landlord has demonstrated to the extent required that the tenant has been repeatedly informed that a continuation of their smoking habit on the rental property, including inside and outside the building, could lead to an end to their tenancy. Despite warnings that go back as far as November 2008, over ten years ago, the tenant appears to have taken insufficient measures to ensure that the health and safety of other tenants of this building have not been compromised by her smoking. In addition to the tenant's admitted smoking on benches outdoors on this property I find it more likely than not that the symptoms reported and complaints received from others residing on this rental property result from the tenant's surreptitious smoking within her own rental unit. In this regard, the multiple letters of complaint about smells of smoke coming from the tenant's rental unit from a wide variety of sources suggest that this problem is much broader than the tenant's claim that these complaints originate from a single tenant who now lives in the rental unit next to the tenant.

Under these circumstances, I find that the landlord has met their burden of proof in demonstrating to the extent required that the 1 Month Notice was issued for valid reasons. I dismiss the tenant's application to cancel this Notice as I find that the landlord has provided sufficient evidence that the health and lawful rights of other occupants in this rental property are being seriously jeopardized by the tenant's actions.

Since the tenant's application is dismissed, I make no order to enable the tenant to recover their filing fee from the landlord.

Conclusion

I dismiss the tenant's application without leave to reapply. The landlord is provided with a formal copy of an Order of Possession effective by 1:00 p.m. on June 30, 2019. I do so, as the landlord has accepted a payment from the tenant for the month of June, which enables the tenant to remain in the rental unit until the end of this month. Should the tenant fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: June 03, 2019

Residential Tenancy Branch