



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, LAT, LRE

Introduction

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

- cancellation of the landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to section 47;
- authorization to change the locks to the rental unit pursuant to sections 31 and 70; and,
- an order to suspend or set conditions on the landlord's right to enter the rental unit pursuant to section 70.

Both parties attended the hearing and had full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions. Each party acknowledged receipt of the other party's Notice of Hearing and Application for Dispute Resolution. Neither party raised issues of service. I find the parties were served in accordance with the *Act*.

Preliminary Issue: Severance of Portion of Tenant's Application

Residential Tenancy Branch Rules of Procedure, number 2.3 states that:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the One Month Notice and the continuation of this tenancy is not sufficiently related to any of the tenant's other claims to warrant that they be heard together. The parties were given a priority hearing in order to address the question of the validity of the One Month Notice.

The tenant's other claims are unrelated in that they do not pertain to facts relevant to the grounds for ending this tenancy as set out in the One Month Notice. I exercise my discretion to dismiss all the tenant's claims with leave to reapply except for the tenant's claim for cancellation of the One Month Notice.

Issue(s) to be Decided

Is the tenant entitled to an order for the cancellation of the landlord's One Month Notice pursuant to section 47?

If not, is the landlord entitled to an order of possession pursuant to section 55?

Background and Evidence

The parties both agreed with the following facts:

The tenancy started on July 1, 2016. The monthly rent was initially \$650.00 per month with a \$325.00 security deposit. The rental unit was an apartment in a multi-unit apartment building. The tenancy agreement stated a term which stated the following rules regarding smoking: "Smoking tobacco on balcony and outside. No marijuana"

The tenant began smoking cannabis on his balcony after the possession of cannabis was legalized. The tenant did not smoke cannabis inside his rental unit.

The landlord testified that that other occupants in the apartment building complained about the tenant's cannabis smoke. They told the landlord that the cannabis odor was unpleasant and it adversely affected their health. Specifically, multiple occupants provided written letters stating that they had respiratory medical issues which made the exposure to smoke medically dangerous. The tenant testified that many other occupants in the building smoke on their balconies.

The landlord sent a written warning letter on May 30, 2019 instructing the tenant not to consume cannabis anywhere on the property. The tenant continued to smoke cannabis on the property.

On June 14, 2019, the landlord posted the One Month Notice on the tenant's door. The notice stated a moveout date of July 31. The One Month Notice checked the following as grounds for the Notice:

- The 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.
- The tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of the other occupant.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The tenant acknowledged receiving the One Month Notice on June 14, 2019. the tenant filed this application to cancel the One Month Notice on June 27, 2019.

Analysis

A tenant may dispute the One Month Notice pursuant to section 47 of the *Act*. Pursuant to *Rules* 6.6, the landlord has the onus of proof to establish, on the balance of probabilities, that notice to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct.

The landlord's One Month Notice claimed the following basis for ending the tenancy for cause: (i) the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord; (ii) tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of the other occupant or jeopardize a lawful right or interest of another occupant or the landlord; and (iii) the tenant has breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

I will address each of the landlord's contentions separately.

i. Seriously jeopardized the health or safety or lawful right of another occupant

I find that the landlord has not provided sufficient evidence to satisfy his onus of proving that the tenant's smoking of cannabis on his balcony has seriously affected the health or safety of other occupants. The landlord has presented written statements from other occupants claiming that the smoke exposure harmed their health. However, the landlord did not present any witnesses to testify regarding this claims. Furthermore, the written statements were not supported by any medical records or opinions from the occupant's physicians.

Furthermore, the tenancy agreement permits the smoking of tobacco on the tenants' balconies. The tenant testified that many of the occupants in the building smoke on their balconies. However, the landlord did not provide a sufficient explanation as to how the tenant's cannabis smoke was causing serious health problems but the occupants' exposure to tobacco smoke from other smokers was not. In the absence of evidence explaining how the exposure to the tenants' cannabis smoke is more harmful than the exposure to tobacco from other occupants, I am unable to find that the tenant's smoking of cannabis is causing serious health problems for other occupants.

For the forgoing reasons, the landlord's One Month Notice cannot be upheld on the basis that it seriously jeopardized the health or safety or lawful right of another occupant.

ii. Illegal Activity

I take judicial notice of the fact that section 14 of the *Cannabis Control and Licensing Act* has come into force prior to the date that the landlord's One Month Notice was issued. As such, I find that the smoking of cannabis on the tenant's balcony is not an illegal activity within the laws of British Columbia. Accordingly, the landlord's One Month Notice cannot be upheld on the basis that the tenant was engaged in an illegal activity.

iii. Breach of a material term of the tenancy agreement

The tenancy agreement permits tobacco smoking on the tenant's balcony but the smoking of cannabis is prohibited.

The *Act* has recently been amended to address the cannabis in tenancy agreements. Section 21.1(2) states that:

- (2) If a tenancy agreement entered into before the cannabis control date
 - (a) includes a term that prohibits or limits smoking tobacco, and
 - (b) does not include a term that expressly permits smoking cannabis...

I find that the intent of section 21.1 of the *Act* is to treat tobacco smoke and cannabis smoke in the same manner after the enactment of section 14 of the *Cannabis Control and Licensing Act*. Accordingly, if the tenancy agreement permits the smoking of tobacco in a rental unit, I find that the *Act* provides that the smoking of cannabis is also permitted under the same conditions as the smoking of cannabis.

Furthermore, even though this tenancy agreement specifically restricts the smoking of cannabis but not the smoking of tobacco, the tenancy agreement must still comply with the *Act*.

- 5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.
- (2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

I find that cannabis prohibition in the tenancy agreement does not comply with the *Act*. Accordingly, pursuant to section 5 of the *Act*, I find that the term of the tenancy agreement prohibiting the smoking of cannabis is of no effect.

Accordingly, the landlord's One Month Notice cannot be upheld on the basis that the tenant breached a material term of the tenancy agreement.

For the forgoing reasons, grant the tenant's application to cancel the One Month Notice. The One Month Notice is cancelled and is of no force or effect and the tenancy continues until ended in accordance with the *Act*.

Conclusion

I grant the tenant's application to cancel the One Month Notice.

The One Month Notice is cancelled and is of no force or effect and the tenancy continues until ended in accordance with the *Act*.

All the tenant's claims, except for the tenant's claim for cancellation of the One Month Notice, are dismissed with leave to reapply.

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: August 20, 2019

Residential Tenancy Branch