Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NANAIMO REGION JOHN HOWARD SOCIETY & ARDENT PROPERTIES INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT

Introduction

On August 19, 2019, the Tenant applied for a Dispute Resolution proceeding seeking to cancel a One Month Notice to End Tenancy for Cause (the "Notice") pursuant to Section 47 of the *Residential Tenancy Act* (the "*Act*") and seeking recovery of the filing fee pursuant to Section 72 of the *Act*.

A.F. and A.R. attended the hearing as representatives of the Tenant and M.M. attended the hearing as the occupant of the rental unit. W.M. attended the hearing as an agent for the Landlord. All in attendance provided a solemn affirmation.

A.F. advised that the Landlord was served with the Notice of Hearing package by registered mail, but he was not sure when this was done. W.M. confirmed that he received this package by Xpresspost on August 30, 2019. Based on this undisputed testimony, in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord has been served with the Notice of Hearing package.

A.F. advised that the Landlord was served with their evidence by hand on September 12, 2019 and W.M. confirmed that he received this package. Based on this undisputed testimony, as this evidence was served in compliance with the timeframe requirements of Rule 3.14 of the Rules of Procedure, I am satisfied that the Landlord has been served with the Tenant's evidence package, and it was considered when rendering this decision.

W.M. advised that the Landlord's evidence was serve to the Tenant by registered mail on September 13, 2019. A.F. stated that they received this evidence on or around September 17 or 18, 2019. As service of this evidence complies with Rule 3.15 of the

Rules of Procedure, I am satisfied that the Landlord's evidence has been satisfactorily served on the Tenant, and it was considered when rendering this decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

- Is the Tenant entitled to have the Notice cancelled?
- If the Tenant is unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on July 1, 2015 and that rent is currently established at $673.00 per month, due on the first day of each month. A security deposit of $312.50 was also paid. They agreed that the Tenant rented the rental unit and then sublet to other occupants as part of the Tenant's housing program. A copy of the tenancy agreement was submitted as documentary evidence.

All parties agreed that the Notice was served to the Tenant by registered mail on August 13, 2019 and A.F. confirmed that the Notice was received. The reasons the Landlord served the Notice are because the "Tenant or a person permitted on the property by the tenant has: significantly interfered with or unreasonably disturbed another occupant or the landlord, seriously jeopardized the health or safety or lawful right of another occupant or the landlord, and/or put the landlord's property at significant risk.", the

“Tenant or a person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to: damage the landlord’s property and/or adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant.”, the “Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.”, the “Tenant has not done required repairs of damage to the unit/site.”, a “Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.”, and the “Tenant has assigned or sublet the rental unit/site without landlord’s written consent.” The Notice indicated that the effective end date of the tenancy was September 30, 2019.

W.M. advised that there is a material term in the tenancy agreement prohibiting smoking in the rental unit or on the property; however, the occupant or the occupant’s guest had been smoking cigarettes and/or drugs in the rental unit. This was seriously jeopardizing the health of a tenant directly upstairs and this tenant complained to the Landlord. He referenced numerous documented complaints from this tenant that were submitted as documentary evidence. W.M. scheduled a routine inspection of the rental unit on July 29, 2019 and noted that there were apparent cigarette burns in the carpet and there was an overwhelming odour of fresh smoke in the rental unit. He referenced pictures, submitted as documentary evidence, illustrating the condition of the carpets and he cited the noted damage on the routine inspection report. He also referenced the move-in inspection report to emphasize that the carpet was in good condition at the start of the tenancy.

He issued a written warning to the Tenant advising that the occupant has been smoking in the rental unit, that there is a material term in the tenancy agreement prohibiting smoking, and that this must stop immediately. This warning letter was also submitted as documentary evidence. He then referenced multiple emails from July 31, August 7, and August 13, 2019 that he sent to the Tenant of more complaints regarding the occupant, or a guest of the occupant, smoking in the rental unit. He advised that the tenant affected by this smoke gave her notice to end her tenancy for the end of August 2019 and subsequently vacated the building.

A.F. referred to letters submitted from other tenants of the building confirming that they are not disturbed or bothered by any smells of smoke in the building and he emphasized that the complaints originate from one single tenant only. He advised that the whole building smells of smoke and that the occupant was not home during many of the times that the complaining tenant documented any issues. He stated that the holes in the carpet may be burn holes, but he is not sure; however, any holes in the carpet

were pre-existing. He submitted that the carpet was replaced, at the Tenant's expense, in good faith because of wear and tear and "burns".

Occupant M.M. stated that he only smoked on the balcony, like all of the other residents in the building. However, after the July 29, 2019 warning letter, he left the building whenever he wanted to smoke. He stated that he might occasionally have a guest over, but they do not smoke in the rental unit or on the property. He also advised that he has significant mobility issues and he has difficulty going up and down the stairs. He questioned who would be responsible if he should happen to injure himself by having to leave the building to smoke.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

In considering this matter, I have reviewed the Landlord's Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

I find it important to note that a Landlord may end a tenancy for cause pursuant to Section 47 of the *Act* if any of the reasons cited in the Notice are valid. Section 47 of the *Act* reads in part as follows:

Landlord's notice: cause

> ***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*
> >
> > > *(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;*

(e) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

(i) has caused or is likely to cause damage to the landlord's property,

(ii) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

(g) the tenant does not repair damage to the rental unit or other residential property, as required under section 32

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

(i) the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34 [assignment and subletting];

Furthermore, Policy Guideline # 8 outlines a material term as follows:

> “A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.
>
> To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term.
>
> The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution

> proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether or not the clause is material."

As well, this policy guideline states that "To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy."

With respect to the reason on the Notice of a breach of a material term, I find it important to note that the policy guideline states that "it is possible that the same term may be material in one agreement and not material in another." I find that this means that determining what would be considered a material term is based on the fact pattern of each specific scenario and that it is up to the Arbitrator in each case to evaluate the evidence presented and make a determination on this matter. In the addendum to the tenancy agreement, I am satisfied that there is a term in the tenancy agreement which states that "There is to be no smoking in the rental dwelling or on the property."

Furthermore, the consistent and undisputed evidence is that the Landlord provided a warning letter on July 29, 2019 reminding the Tenant of this material term and advising that smoking must be ceased immediately. While occupant M.M. maintains that he only smoked on the balcony before the warning letter, I find it important to note that the condition inspection report does not indicate that there were any issues with the carpet, so I do not agree with A.F.'s assertion that the damage to the carpets was pre-existing. Moreover, if the deterioration of the carpet was due to regular wear and tear from normal use, it is not clear to me why the Tenant would replace the carpet as this should be the responsibility of the Landlord. Therefore, I find this causes me to be doubtful that occupant M.M. only smoked on the balcony of the rental unit.

In addition, while it was implied that because the complaints of smoking were coming from one tenant of the building only, that this might detract from the validity of the complaints or perhaps that there was a personal difference between the parties. However, the consistent evidence is that this other tenant vacated her rental unit within a relatively short period of time. I do not find it reasonable that a person would vacate their rental unit on a whim or based on a personality conflict. Based on my above

doubts, I find it more likely than not that occupant M.M. smoked within the rental unit and continued to do so after the warning letter.

Finally, while occupant M.M. stated that after the July 29, 2019 warning letter, he always left the building whenever he wanted to smoke, I find it important to note that he also advised that he has significant mobility issues, that he has difficulty going up and down the stairs, and that he complained about who would be responsible if he were to get injured because he was forced to leave the building to smoke. In conjunction with my doubts that occupant M.M. only smoked on the balcony during the tenancy, from his comments about having to leave the building to smoke, I am doubtful that he has been leaving the rental unit to smoke after the warning letter, as he claims. Based on all of these reasons, I do not find the testimony of A.F. or occupant M.M. to be credible, and as a result, I prefer the evidence and testimony of W.M. instead.

The undisputed evidence is that the Landlord served the Tenant with a warning letter advising that there was a problem, that the problem must be fixed by a deadline included in the letter, and if the problem is not fixed by the deadline, the Landlord will end the tenancy. Based on the damage to the carpet and the fact that another tenant moved out of the building, I find that the continued behaviour of the occupant corroborates W.M.'s belief that this issue is not trivial in nature and that any further breaches that are uncorrected gives the Landlord the right to end the tenancy.

When reviewing the totality of the evidence before me, I am satisfied that there is a no smoking term in the tenancy agreement that would be considered a material term necessary to protect the safety of the rental unit and the other occupants in the building. Contrary to this material term, I find that there is a pattern of similar, continuous behaviour where occupant M.M., more likely than not, smoked in the rental unit and continued to breach this term after being warned in writing to refrain. As well, I am not satisfied that this pattern of behaviour will not repeat itself should the tenancy continue.

Ultimately, I find that the Landlord has provided sufficient evidence to justify service of the Notice under the reason of a breach of a material term. As such, I dismiss the Tenant's Application and pursuant to Section 55 of the *Act*, I find that the Landlord is entitled to an Order of Possession that takes effect **two days** after service of this Order on the Tenant. The Landlord will be given a formal Order of Possession which must be served on the Tenant. If the Tenant does not vacate the rental unit **two days** after service of the Order, the Landlord may enforce this Order in the Supreme Court of British Columbia.

As the Tenant was not successful in their claim, I find that the Tenant is not entitled to recover the $100.00 filing fee paid for this application.

Conclusion

The Tenant's Application is dismissed without leave to reapply and the Landlord is provided with a formal copy of an Order of Possession effective **two days** after service on the Tenant. Should the Tenant or any occupant on the premises 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: September 30, 2019

Residential Tenancy Branch