



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Lougheed Enterprises Ltd
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

CNC

Introduction

This hearing was scheduled to deal with a tenant's application to cancel a *1 Month Notice to End Tenancy for Cause* dated August 28, 2019. The tenant and her husband, an occupant of the rental unit, both appeared. The landlord is a corporation and was represented by an agent and the building manager (herein collectively referred to as the landlord). Both parties were given the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

Preliminary and Procedural Matters

At the outset of the hearing, I explored service of hearing documents upon each other. The tenant testified that she wanted to serve the hearing package to the building manager in person but the building manager was unavailable to meet in person so the building manager instructed the tenant to put the documents in the landlord's mailbox located at the residential property. The building manager stated that he was not available to receive the documents when the tenant wanted to deliver them to him in person and he was agreeable to the tenant leaving the documents in the landlord's office. The building manager confirmed receiving the tenant's hearing package in the mailbox for the office on September 10, 2019. Although the tenant was required to serve the landlord either in person or via registered mail, I was satisfied the landlord consented to receiving the document in another way and I deemed the landlord sufficiently served with the tenant's hearing package.

The landlord's agent testified the landlord's evidence package was sent to the tenant via registered mail on October 24, 2019, a notice card was left by Canada Post on October 25, 2019 and the package was picked up on October 30, 2019. The tenant's husband, who was authorized by the tenant to represent her during the hearing, submitted that the landlord's evidence was received only five days prior to the hearing and that they would have gathered rebuttal evidence if they had more time to do so. As such, the tenant was seeking another hearing date. I considered this last statement to be a request for adjournment.

As far as the reason for serving evidence upon the tenant late, the landlord's agent explained that they were waiting to see if the tenant was going to submit evidence. The landlord's agent pointed out that Canada Post had left a notice card for the tenant on October 25, 2019.

Under 3.15 of the Rules of Procedure provides rules for serving an respondent's evidence. The rule states, in part:

The respondent must ensure evidence that the respondent intends to rely on at the hearing is served on the applicant and submitted to the Residential Tenancy Branch as soon as possible. Except for evidence related to an expedited hearing (see Rule 10), and subject to Rule 3.17, the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing.

[My emphasis underlined]

The definition of "days" in the definitions of the Rules of Procedure provides:

In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

In order to comply with the Rules of Procedure, I find the landlord was required to serve the tenant with its evidence to support the basis for ending the tenancy "as soon as possible" but no later than October 28, 2019 to permit the tenant seven full days with the landlord's evidence.

Considering the landlord issued the 1 Month Notice to the tenant on August 28, 2019 and the 1 Month Notice refers to dates between up to August 25, 2019 I am of the view the landlord had, or ought to have had its evidence available to serve much soon than October 24, 2019 which is nearly two months after the 1 Month Notice was served. Accordingly, I am of the view the landlord did not serve its evidence "as soon as possible".

I considered whether the landlord even met its obligation to serve at least seven days before the hearing. Since the landlord chose to send its evidence in the mail, the landlord was also required to allow sufficient mailing time for the tenant to "receive" the mailed documents. Section 90 of the Act provides that documents sent by mail are deemed received five days later. As such, I find that it is reasonable to allow five days for mailing. Even if I were to apply the deeming provision, as opposed to the actual received date of October 30, 2019 the tenant would be deemed to be in receipt of the landlord's evidence on October 29, 2019 which is after the landlord's service deadline.

Where a tenant disputes a landlord's notice to end tenancy, it is the landlord's burden to provide sufficient evidence to demonstrate the tenancy should end. In this case, the landlord provided a fairly significant amount of evidence but did not allow enough time for the tenant to receive the landlord's evidence and gather and provide her rebuttal evidence.

In light of the above, I gave the landlord the opportunity to decide whether to: consent to an adjournment so as to permit the tenant to gather and service her rebuttal evidence, in which case I would admit the evidence of both parties; to proceed as scheduled but without admittance of the landlord's documentary evidence; or, to withdraw the 1 Month Notice without prejudice. The landlord's agent stated the landlord wished to proceed as scheduled and confirmed the landlord's agent understood this meant a decision would be based on oral testimony and oral submissions only, with one exception only: I would review the *1 Month Notice to End Tenancy for Cause* since it is the subject of this hearing. I read aloud the reasons for ending the tenancy as seen on the 1 Month Notice submitted to me and confirmed with the parties that it accurately reflected the 1 Month Notice served to the tenant by the landlord.

Issue(s) to be Decided

Has the landlord proven that the tenancy should end pursuant to the *1 Month Notice to End Tenancy for Cause* issued on August 28, 2019?

Background and Evidence

The tenancy started on January 1, 2018 and the tenant is required to pay rent of \$1,550.00 on the first day of every month. The rental unit is an apartment style unit located in a multiple unit building operated by the landlord. The tenant occupies the rental unit along with her husband.

On August 28, 2019 the building manager personally served the tenant with the subject *1 Month Notice to End Tenancy for Cause* ("1 Month Notice"). The tenant filed to dispute the 1 Month Notice within the time limit for doing so.

The reasons for ending the tenancy are, as indicated on the 1 Month Notice with an "x":

- Tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

In the Details of Cause section of the 1 Month Notice, the landlord wrote:

January 27/19 12am - 1:50am Breach of Tenancy – Smoking on property
April 1/19 11pm Breach of Tenancy – Smoking on property
July 30/19 10:30pm Breach of Tenancy – Smoking on property
August 25/19 10pm Breach of Tenancy – Smoking on property

Landlord's position

The landlord acknowledged that there are other tenants in the building who smoke on the property but stated the building is transitioning to a non-smoking building and the tenant is not permitted to smoke on the property under her tenancy agreement.

The landlord explained that the landlord received multiple complaints from the tenant living above the rental unit concerning smoking by the tenant or her husband on the patio or on the residential property close to the patio. Also, on August 25, 2019 the landlord saw a cigarette butt on the tenant's patio after it was pointed out to him by the tenant living above the rental unit. The landlord stated that he checked with the other smokers in the building and they deny smoking when the complainant alleged smelling smoke.

The landlord submitted that the tenant had been given four breach letters with respect to complaints of smoking on the property on January 28, 2019, April 3, 2019, July 30, 2019 and August 25, 2019 either by hand delivery or in the tenant's mail slot.

The landlord testified that when the first two breach letters were given to the tenant, he also give the tenant an oral warning; however, he just delivered the last two warning letters without an oral discussion with the tenant.

The landlord testified that in speaking with the tenant on January 27, 2019 she indicated she thought it was acceptable to smoke on the property. The landlord testified that on or about July 30, 2019 he spoke with the tenant about smoking and the tenant told the landlord she had smoked because she had an emergency phone call with a family member. The landlord testified that the tenant did not respond to the allegation of smoking on April 1, 2019 and the tenant denied that smoking took place on August 25, 2019.

The landlord stated that even after giving the tenant the 1 Month Notice, multiple complaints concerning smoking have been received from the tenant living above the rental unit.

The landlord asserted that the tenant living above he rental unit has provided a letter from his doctor indicating that smoke is very detrimental to his health.

Tenant's position

The tenant's husband acknowledged he is a "heavy smoker" but claims to leave his cigarettes in his truck, which is parked on public property, and that he smokes in his vehicle. The tenant's husband denied smoking on the patio of the rental unit or elsewhere on the residential property.

The tenant has smoked on occasion and admitted to smoking in January 2019 when the landlord spoke to her about the issue. The tenant does not remember telling the landlord about an emergency phone call in July 2019.

The tenant and her husband also pointed out that the building is transitioning to a non-smoking building and that there are other tenants in the building who smoke, including a tenant living right next door to the person making all of the complaints. The tenant and her husband questioned how the complaining tenant has determined the smoke he smells is coming from them or their unit.

The tenant acknowledged that there was some animosity between her and the tenant living above her when the tenancy first started and there were noise complaints.

The tenant and her husband stated that when the building manager has approached them about the smoking allegations they have invited him into their unit to see for himself that they are not smoking in the unit but he does not come in to investigate further. The tenant maintains that the accusations against them by the tenant living in the unit above are false. The tenant pointed out that there are no photographs of them smoking on the property.

As far as the cigarette butt seen on the patio, the tenant's husband stated that it was not in an ashtray and that it could have been flicked there by a tenant in another unit who smokes or by a person passing by on the street.

The tenant testified that the complaining tenant had asserted that smoke is coming from their unit at 5 a.m.; however, her husband awakes at 6 a.m. to go to work and leaves the rental unit immediately, without having a cigarette or going on the patio, to avoid waking her up.

The tenant testified that during the hearing that while both she and her husband have been on this teleconference call, the tenant upstairs was opening and closing his patio door and stomping on the floor which is what he does when he thinks they are smoking but that they were not smoking since they had been on the phone for this hearing.

Analysis

Where a notice to end tenancy comes under dispute, the landlord bears the burden to prove the tenancy should end for the reason(s) indicated on the Notice. Where more than one reason is indicated on the Notice, it is sufficient to end the tenancy for where one of the reasons is proven. The landlord's burden of proof is the civil standard, which is on the balance of probabilities.

In this case, the landlord indicated two reasons on the 1 Month Notice for ending the tenancy; however, both reasons pertain to the issue of smoking on the property by the tenant or a person the tenant has permitted on the property. The tenant lives in the rental unit with her husband and as such, the tenant is responsible for the actions of her husband and his actions could be grounds to end her tenancy.

The landlord asserted that the tenant and/or her husband have smoked on the property and that doing so violates the tenancy agreement; however, in order to end the tenancy for breach of a material term, the landlord must prove a number of things, as set out below.

Residential Tenancy Branch Policy Guideline 8 provides information and policy statements with respect to material terms. It provides as follows:

Material Terms

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.

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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

[My emphasis underlined]

As described above, a material term is a term in a tenancy agreement that both parties agreed was material and the slightest breach of that term would be grounds for ending the tenancy. Since it is the landlord alleging a breach of a material term and has issued a notice to end tenancy based on the breach of a material term, the landlord must prove:

- The landlord notified the tenant that the tenant, or someone permitted on the property by the tenant, had done something in violation of the tenancy agreement;
- That the landlord considered the term that was violated to be a material term of the tenancy agreement;
- That the problem needed to be corrected within a reasonable amount of time otherwise the landlord would move to end the tenancy; and,
- The violation recurred despite the written warning(s) described above.

In this case, I do not have a copy of the tenancy agreement that was admissible as evidence and the landlord did not read the subject provision of the tenancy agreement into evidence during the hearing. It was undisputed that the landlord gave the tenant four warning letters or breach letters concerning allegations of smoking; however, those warning/breach letters were not admissible as evidence and the landlord did not read the warning/breach letters into evidence and I am unable to determine whether the content of those letters meets the criteria described above. As such, I find the landlord has not met its burden to prove the tenancy should end due to a breach of a material term that was not corrected within a reasonable amount of time after written notice to do so.

The other reason the landlord indicated on the 1 Month Notice is that the tenant, or a person permitted on the property by the tenant, has unreasonably disturbed or significantly interfered with another occupant of the building. I accept that the smell of cigarette smoke may unreasonably disturb another occupant of the building and in such circumstances a tenancy may be ended; however, in this case, the complaint letters from the other tenant were not admissible into evidence. Nor, did the landlord read the complaint letters into evidence and the landlord did not call the complaining tenant to provide testimony. As such, I find the landlord did not meet its burden to prove the actions of the tenant, or those of her husband, have unreasonably disturbed another occupant.

Having found the landlord failed to meet its burden of proof, I cancel the 1 Month Notice dated August 28, 2019 and the tenancy continues at this time.

While I appreciate the outcome of this decision may have been different had the landlord's documentary evidence been admitted into evidence, the landlord had chosen to proceed with the hearing without the benefit of its documentary evidence despite being given other options. Since I have decided this matter with respect to the allegations of smoking up to and including the date of August 28, 2019 the landlord is not at liberty to issue another 1 Month Notice based solely on those same allegations. However, I have not made any determination as to events that may have taken place after August 28, 2019 and if the landlord is of the position the actions of the tenant or her husband after August 28, 2019 give rise to ending the tenancy the landlord may issue another 1 Month Notice to the tenant.

Also, with a view to avoiding further disputes between the tenant and the tenant living above her rental unit I offer the following suggestions. The tenant and her husband had submitted that the

complaints of smoking are originating from one particular tenant and they are of the position those allegations are false. The tenant's husband stated that the landlord is welcome to come into their unit when the landlord receives complaints about them smoking so as to sufficiently investigate the matter but that the landlord has declined the offer. I encourage the landlord to further investigate the complaints it receives from another tenant concerning smoking in the rental unit or on the residential property so as to make a determination without solely relying upon one person's complaint. I appreciate the majority of the complaints, as indicated on the 1 Month Notice, are late at night or in the early morning hours but I encourage the building manager make himself available to investigate complaints within a short amount of time after the offending smell is detected and a complaint is lodged.

Conclusion

The 1 Month Notice issue don August 28, 2019 is cancelled and the tenancy continues at this time.

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: November 06, 2019

Residential Tenancy Branch