



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CASTERA PROPERTIES and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants on November 21, 2019 (the "Application"). The Tenants applied to dispute a One Month Notice to End Tenancy for Cause dated November 13, 2019 (the "Notice").

The Tenant appeared at the hearing. The Agents for the Landlord appeared at the hearing. The Agents confirmed the correct name of the Landlord and this is reflected in the style of cause.

I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence. S.D., for the Landlord, confirmed receipt of the hearing package. She advised that the Landlord did not receive the Tenants' evidence. The Tenant advised that she did not serve her evidence on the Landlord. I gave the parties the opportunity to make submissions on whether the evidence should be admitted or excluded. The Agents for the Landlord agreed to the evidence being admitted and therefore the evidence is admitted. The Tenant confirmed receipt of the Landlord's evidence.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. If the Notice is not cancelled, should the Landlord be issued an Order of Possession?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started December 01, 2012 and was for a fixed term ending May 31, 2013. The tenancy then became a month-to-month tenancy. The parties agreed rent is \$916.00. Rent is due by the first day of each month.

Term 27 in the tenancy agreement states in part:

The tenant must maintain reasonable health, cleanliness, and sanitary standards throughout the rental unit...If the tenant does not comply with the above obligations within a reasonable time, the landlord may discuss the matter with the tenant and may apply for dispute resolution under the Act for the cost of repairs, serve a Notice to End Tenancy, or both.

The Notice was submitted as evidence. The grounds for the Notice are:

1. 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.
2. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

There was no issue that the Notice was posted on the door of the rental unit November 13, 2019 and received by the Tenant the same day.

The Agents for the Landlord testified as follows in relation to the grounds for the Notice.

The Notice was issued due to the rental unit not being clean and an odour coming from the unit given the lack of cleanliness. This is the basis for both grounds in the Notice.

D.D. smelled something in the hall of the building in August of 2019. The Tenants were given a notice to enter their unit, but the Agents did not enter because they were too busy.

On October 24, 2019, the yearly fire inspection was done. When the Agents went into the unit, they noticed the rental unit was not clean and had a bad odour. The fire inspector said the unit had to be cleaned as it was a hazard.

On October 29, 2019, S.D. gave the Tenants a notice to clean the unit before November 05, 2019.

The Agents did a follow-up inspection on November 05, 2019. Nothing had been done in the unit. The Agents took photos which are in evidence. D.D. opened the fridge and there were thousands of dead bugs and a smell of maggots. The fridge was so full he did not know if it was working. S.D. had to leave due to the condition of the rental unit. D.D. felt nauseous due to the condition of the rental unit. S.D. gave the Tenants a detailed cleaning list and notice of a follow up inspection for November 13, 2019.

The Agents entered the rental unit November 13, 2019 and nothing had been cleaned.

The owner of the rental unit attended December 04, 2019. The Agents inspected the unit December 11, 2019 and took photos which are in evidence. The fridge was cleaner, but the fridge and stove were still dirty. The rest of the unit was a mess.

S.D. testified that the previous managers dealt with the same problems with the Tenants and referred to issues on April 13, 2015 and September 12, 2017. She testified that the cleanliness and smell issues are ongoing issues.

In relation to the first ground in the Notice, D.D. testified that the cleanliness and odour issues meet this ground because other tenants on the same floor complain of the odour in the area of the Tenants' unit. He testified that the odour is strong and permeates the whole floor. D.D. submitted that the odour interferes with the quiet enjoyment of other tenants.

In relation to the second ground, I explained to the parties that not all terms in a tenancy agreement are material terms. I read out the definition of a material term from Policy Guideline 8.

The Agents advised that they are relying on term 27 in the tenancy agreement. The Agents could not tell me whether the tenancy agreement states this is a material term. I asked the Agents why the term is a material term. D.D. submitted that the unit was a total mess. He said the smell and everything was atrocious. D.D. testified that the smell disturbs others in the building. D.D. submitted that the Tenants are disregarding the requirement that they keep the unit reasonably clean. S.D. said the Agents gave the Tenants a reasonable time to clean.

The Landlord submitted the following evidence:

- An Incident Note dated April 13, 2015 about the Landlord raising the smell issue with Tenant E.S.
- A Notice to Clean issued to the Tenants September 12, 2017
- A letter sent to the Tenants August 15, 2019 about an odour coming from their unit and telling them to clean the unit
- A Notice to Clean issued to the Tenants October 29, 2019
- A letter sent to the Tenants November 05, 2019 about cleaning the unit
- A Notice to Clean issued to the Tenants November 05, 2019
- A letter sent to the Tenants November 13, 2019 about the cleanliness of the unit

In response, the Tenant denied that the unit smells and referred to a letter from a friend submitted in evidence. The Tenant submitted that the Agents have not proven that there is a smell coming from the unit.

The Tenant further testified as follows. The unit is cleaner every time the Agents do an inspection. She did not know the Agents could look in the fridge. She works a full time job. Nobody is perfect. She has been trying to clean the unit as required. She does not think the unit is in terrible disarray. She did not see any bugs in the fridge. There was mold in the fridge.

The Tenant agreed the photos submitted by the Landlord are accurate.

The Tenant did not agree that term 27 in the tenancy agreement is a material term.

The Tenants submitted a "letter" from J.H. The "letter" is a typed word document and is not signed by J.H. The Tenants submitted two photos of the rental unit.

Analysis

The Landlord was permitted to serve the Notice based on the grounds noted pursuant to sections 47(1)(d)(ii) and (h) of the *Residential Tenancy Act* (the “*Act*”).

The Tenants had 10 days from receiving the Notice to dispute it under section 47(4) of the *Act*. There was no issue that the Tenant received the Notice November 13, 2019. The Application was filed November 21, 2019, within the time limit.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules of Procedure. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

When a party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove the claim and the claim fails.

Sections 47(1)(d)(ii) and (h) of the *Act* state:

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

(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;

Section 32 of the *Act* states:

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

I find the following in relation to the first ground.

Based on the photos submitted by the Landlord, I accept that the fridge in the rental unit was not reasonably clean on November 05, 2019 when the inspection was done. I accept that the fridge was full of items and was dirty. I cannot find from the photos that there were bugs or maggots in the fridge as the photos do not clearly show this.

I have not considered the condition of the rental unit after November 13, 2019 as the issue here is whether the Landlord had grounds to issue the Notice on November 13, 2019.

It may be that the Tenants have not complied with term 27 of the tenancy agreement or section 32 of the *Act*. However, the issue here is whether the Tenants have seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant. I am not satisfied that the Tenants have.

The Agents testified about a smell coming from the unit which interferes with other tenants. The Tenant denied there is a smell coming from the unit. The Tenant pointed to the "letter" from J.H. I place no weight on this letter given it is not signed by J.H. However, it is the Landlord who has the onus to prove the Notice and prove there is a smell that is interfering with other tenants. The Landlord has not done so. The Landlord has not submitted witness statements from other tenants about a smell coming from the unit or complaints from other tenants about this.

D.D. testified that the fire inspector said the unit had to be cleaned as it was a hazard; however, the Landlord did not submit documentary evidence to support this or explain why it is a hazard.

D.D. testified that there were dead bugs and the smell of maggots in the fridge. The Tenant denied this. The photos are not clear enough to show dead bugs or maggots. I am not satisfied there were dead bugs or maggots in the absence of further evidence showing this.

I acknowledge that the cleanliness issue has been an issue in the past. However, I am not satisfied that one incident in 2015, one incident in 2017 and the incidents in 2019 have seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, even taken together. I do not find the number of incidents result in the circumstances meeting the requirement outlined in section 47(1)(d)(ii) considering they occurred over five years.

The Agents have not provided further compelling evidence or submissions showing the cleanliness or smell issues have seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant.

In the circumstances, although I agree the rental unit was not reasonably clean on November 05, 2019, I am not satisfied the cleanliness or smell issues have seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant. The Landlord has failed to prove the first ground for the Notice.

In relation to the second ground, Policy Guideline 8 deals with material terms in a tenancy agreement and states:

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...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.

[emphasis added]

I am not satisfied term 27 of the tenancy agreement is a material term. The Agents could not say whether the tenancy agreement states it is a material term. I do not see where in the tenancy agreement it states it is a material term. The Tenant did not agree it is a material term. The Agents did not provide compelling evidence or submissions about why term 27 is a material term. The Agents did not address the considerations outlined in Policy Guideline 8 regarding whether a term is a material term.

Further, I would not have upheld the Notice based on the second ground in any event as the Landlord has not provided sufficient evidence that the Tenants were given written notice stating they have breached a material term of the tenancy agreement as required in Policy Guideline 8. I acknowledge that the Landlord has issued the Tenants written notices about the cleanliness and smell issues; however, I do not see where in the written notices it states that the Landlord believes the problems are a breach of a material term of the tenancy agreement.

In the circumstances, I am not satisfied that term 27 of the tenancy agreement is a material term of the tenancy agreement. This is a precondition to finding that the Landlord has grounds to end a tenancy under section 47(1)(h) of the *Act*. In the absence of a finding that the term relied on is a material term, the Landlord has failed to prove the second ground for the Notice. Further, the Landlord has failed to prove they complied with Policy Guideline 8.

Given the above, I am not satisfied the Landlord has established the grounds for the Notice. The Notice is therefore cancelled. The tenancy will continue until ended in accordance with the *Act*.

I do caution the Tenants about the cleanliness of the rental unit. As stated, I am satisfied based on the photos that the fridge was not reasonably clean on November 05, 2019. The Tenants are required by the tenancy agreement and *Act* to maintain reasonable cleanliness and sanitary standards throughout the rental

unit. If the cleanliness of the rental unit continues to be an issue, it may be that an arbitrator at a future hearing finds that the Landlord can end the tenancy pursuant to a notice under section 47 of the *Act*.

Conclusion

The Application is granted. The Notice is cancelled. The tenancy will continue until ended in accordance with the *Act*.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: January 22, 2020

Residential Tenancy Branch