



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT, RR

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on December 05, 2019 (the “Application”). The Tenant applied as follows:

- To dispute a One Month Notice to End Tenancy for Cause dated November 28, 2019 (the “Notice”);
- To reduce rent for repairs, services or facilities agreed upon but not provided; and
- For reimbursement for the filing fee.

The Tenant filed an amendment to add a monetary claim for \$1,146.00.

The Tenant and Landlord appeared at the hearing. The Landlord confirmed his full legal name which 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.

The Tenant submitted evidence prior to the hearing. The Landlord did not submit evidence on this file prior to the hearing. The Landlord said he submitted two witness statements on another file related to the Notice. I addressed service of the hearing package and evidence.

The Landlord confirmed receipt of the hearing package and Tenant’s evidence.

The Tenant confirmed he received two witness statements from the Landlord in relation to the other file. I asked the Tenant if he understood that the Landlord was going to rely

on the witness statements at this hearing and the Tenant said he was not sure. The Landlord said it was his mistake that he did not submit the evidence on this file.

In my view, parties are required to submit the evidence they wish to rely on for the hearing on the correct file number. Submitting evidence for a different file number which is before a different arbitrator on a different day is not sufficient. Further, when parties have two or more files before the RTB, it should be clear to the parties what evidence is being relied on at each hearing so that they can properly prepare for the hearing. Given the Landlord did not submit the two witness statements on this file, and given I am not satisfied it was made clear to the Tenant that the Landlord was relying on the two witness statements at this hearing, I decline to obtain the two witness statements from the other file and decline to consider them on this file.

Pursuant to rule 2.3 of the Rules of Procedure (the "Rules"), I told the Tenant at the outset that I would consider the dispute of the Notice and request for reimbursement for the filing fee and that the remaining claims would be dismissed with leave to re-apply as they are not sufficiently related to the dispute of the Notice. The remaining claims are dismissed with leave to re-apply. This does not extend any time limits set out in the *Residential Tenancy Act* (the "Act").

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?
3. Is the Tenant entitled to reimbursement for the filing fee?

Background and Evidence

The parties agreed there was a written tenancy agreement between the previous owner of the rental unit and the Tenant. The parties agreed the Landlord purchased the rental unit and became the landlord. The Landlord testified that this occurred October 25,

2019. The parties agreed the tenancy started December 01, 2017. The Tenant testified that the tenancy is a month-to-month tenancy. The Landlord said he thought it was a fixed term tenancy that became a month-to-month tenancy. The parties agreed rent is \$896.00 per month due on the first day of each month.

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 and put the Landlord's property at significant risk.
2. 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.

The parties agreed the Notice was served on the Tenant in person November 28, 2019.

The Landlord confirmed the Notice was issued based on the Tenant smoking in the rental unit.

The Landlord testified as follows. The Tenant has been smoking in the rental unit since the Landlord took possession of the rental unit in October. The smoke is permeating the walls and going through the air vents to the upper unit. His concern is property damage and health issues. The tenants who lived in the upper unit smoked and he has spent time and money removing the smell and fixing the damage this caused. Smoking in the unit is also a fire hazard.

The Landlord further testified as follows. He believes the Tenant is smoking in the rental unit due to the fresh smell of cigarette smoke in the upper unit. He can smell it coming through the vents and in the closet. The smell is strong. It is not the smell of stale cigarette smoke. The upper unit does smell better from the work that has been done to it.

The Landlord testified that the tenancy agreement does not state that the Tenant cannot smoke in the rental unit. The Landlord testified that he did not give the Tenant written warnings about this issue prior to serving the Notice. The Landlord testified that he gave the Tenant verbal warnings October 11, 2019, November 05, 2019 and November 14, 2019.

The Landlord acknowledged he did not have grounds to issue the Notice based on illegal activity.

The Tenant testified as follows in reply. He cannot recall the last time he smoked in the rental unit, but it might have been in October. He started non-smoking medication November 05, 2019 and has not smoked since November 07, 2019. The Landlord never gave him written notice about this issue prior to serving the Notice. The Landlord spoke to him about the smoking issue October 24 or 25, 2019 and November 14, 2019. The next time the Landlord raised the issue was when he served the Notice. The tenants in the upper unit smoked for 50 years. The Landlord would have to strip the upper unit to get rid of the smell from this.

The Tenant agreed the tenancy agreement does not state that he cannot smoke in 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 (iii) as well as (e)(i) of the *Act*.

The Tenant 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 28, 2019. The Application was filed December 05, 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. 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 (iii) as well as (e)(i) 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
 - (ii) 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...

(emphasis added)

The Landlord acknowledged he did not have grounds to issue the Notice based on illegal activity and therefore the Landlord has failed to prove the second ground for the Notice.

In relation to the first ground for the Notice, the Landlord has not provided sufficient compelling evidence to prove the grounds for the Notice. The Tenant denied that he has smoked in the rental unit since October. The Tenant testified that the Landlord spoke to him about the smoking issue for the first time in late October. The Landlord disagreed with both of these things. However, there is no further evidence before me to support the testimony of the Landlord.

There is no further evidence before me on this file to support the Landlord's testimony about the Tenant smoking in the rental unit.

There is no further evidence before me to support the Landlord's testimony about when he spoke to the Tenant about the smoking issue. Smoking in the rental unit is not prohibited by the tenancy agreement and therefore I find the instances that the Landlord raised this as an issue important. The Landlord did not provide the Tenant with written warnings outlining the issue, which should have been done. The Landlord has failed to prove when he raised the issue verbally.

In the circumstances, the Landlord has not provided sufficient compelling evidence that the Tenant has been smoking in the rental unit after the issue was raised with the Tenant. Therefore, I am not satisfied the Landlord had grounds to issue the Notice.

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

Given the Tenant was successful, the Tenant can deduct \$100.00 from one future rent payment as reimbursement for the filing fee pursuant to section 72 of the *Act*.

Conclusion

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

The Tenant can deduct \$100.00 from one future rent payment as reimbursement for the filing fee.

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 27, 2020

Residential Tenancy Branch