



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

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

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause, dated December 31, 2019 ("1 Month Notice"), pursuant to section 47.

The landlord, the tenant, and the tenant's advocate attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenant confirmed that her advocate had permission to represent her at this hearing. This hearing lasted approximately 33 minutes.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package and the tenant confirmed receipt of the landlord's evidence package. In accordance with sections 88, 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application and the tenant was duly served with the landlord's evidence package.

The tenant confirmed personal receipt of the landlord's 1 Month Notice on December 31, 2019. The landlord confirmed service of the 1 Month Notice on the above date using the above method. Both parties agreed that the 1 Month Notice indicates an effective move-out date of January 31, 2020. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was duly served with the landlord's 1 Month Notice on December 31, 2019.

Issues to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an order of possession?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The relevant aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on July 1, 2014. A written tenancy agreement was signed by both parties. Monthly rent in the current amount of \$458.00 is payable on the first day of each month. A security deposit of \$366.00 was paid by the tenant and the landlord continues to retain this deposit. The tenant continues to reside in the rental unit.

A copy of the landlord's 1 Month Notice was provided for this hearing. Both parties agreed that the 1 Month Notice was issued for the following reasons:

- *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;*
- *Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park;*
- *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 seeks to cancel the landlord's 1 Month Notice. The landlord seeks an order of possession based on the 1 Month Notice.

The landlord stated the following facts. The tenant is not permitted to smoke at the rental property. It is indicated on page 14 of the parties' written tenancy agreement that it is a material term, a breach of which could end the tenancy. The tenant was given a verbal warning by the landlord on August 23, 2014 after she was seen smoking on her balcony. On October 24, 2014, the landlord and her husband saw the tenant smoking on her balcony and gave her the first written notice. On September 8, 2016, the tenant was given her final written notice and warned of a notice to end tenancy, after she was witnessed smoking on her patio. On December 17 and 31, 2019, the landlord received phone calls from another occupant in the rental building, complaining of smoke coming from the tenant's rental unit. This occupant complained that she could not sleep, as the smoke was going into her apartment. On December 31, 2019, the landlord could smell

the smoke coming from the tenant's rental unit and when she confronted the tenant, she admitted to smoking.

The tenant's advocate stated the following facts. Residential Tenancy Policy Guideline 8 discusses material terms of tenancy agreements and in this case, smoking does not qualify as same. The tenant signed the crime free housing addendum which indicates at page 11 that a single violation of specific listed grounds would be a material breach of the tenancy agreement and cause to end the tenancy. Smoking is not included in any of these grounds. The landlord has failed to prove any of the four reasons in the 1 Month Notice on a balance of probabilities and the notice should be cancelled.

The tenant stated that she stopped smoking at the rental property in approximately October 2019, she rectified the issue, and she will not smoke at the rental property in the future. The tenant agreed that she previously smoked approximately 4 to 5 times per year at the rental property, but that she did not receive any complaints from her neighbours, nor did she hear from the landlord, except in twice in 2014 and once in 2016. She denied admitting to smoking on December 31, 2019, when speaking to the landlord. She said that the landlord told her she could smell smoke from her rental unit, and she agreed that the smoke residue caused her rental unit to smell like smoke. She previously smoked for pain relief from sciatica, since she is allergic to over-the-counter and prescription pain medications. She would extinguish the cigarettes in water, to avoid creating any safety hazards at the rental property. She is now using other methods of pain relief, such as chiropractic therapy, and seeing her doctors. The tenant cleaned the rental unit, washed the walls and cupboards, steam cleaned the furniture, and washed the linens. She submitted a statement from someone who inspected the fresh and clean condition of her unit. The landlord has not inspected the tenant's rental unit since February 2018, dispute the tenant's invitations to do so.

Analysis

In accordance with section 47(4) of the *Act*, the tenant must file her application for dispute resolution within ten days of receiving the 1 Month Notice. In this case, the tenant received the 1 Month Notice on December 31, 2019 and filed her application to dispute it on January 3, 2020. Accordingly, I find that the tenant's application was filed within the ten-day time limit under the *Act*. Therefore, the onus shifts to the landlord to prove the reasons on the 1 Month Notice.

On a balance of probabilities and for the reasons stated below, I find that the landlord did not issue the 1 Month Notice for valid reasons.

I find that the landlord failed to provide sufficient evidence that the tenant significantly interfered with, unreasonably disturbed, or seriously jeopardized the health, safety or lawful right of the landlord or other occupants. I accept the tenant's testimony that she stopped smoking at the rental property, and she rectified the issue. I find that the landlord's complaints were made in 2014 and 2016, four to six years prior to this hearing date. I find that there was no consistent follow-up or warning from the landlord, that the tenant's behaviour qualified for one of the reasons listed above. The landlord referenced a "final written notice" in September 2016 but did nothing for over three years until she issued the 1 Month Notice in December 2019.

The landlord claimed that another occupant could not sleep, and smoke was going into their apartment. However, the landlord failed to produce this witness at this hearing and the tenant had no way to challenge these allegations or question this witness without the identity or information. The landlord claimed that the tenant's neighbours were afraid to approach her directly about the smoking but failed to produce witness letters or testimony from them, for this hearing. The landlord did not produce medical records, police records, or other health or safety documents relating to the landlord or other occupants, regarding the tenant's alleged smoking. I find that the landlord failed to provide sufficient documentary or testimonial evidence of significant interference, unreasonable disturbance, or serious jeopardy with respect to the tenant's smoking.

I find that the landlord failed to show that the tenant caused extraordinary damage to the rental unit or the rental property. The landlord did not indicate details of any damage. She did not testify about any quotes or estimates of the damage, nor that it was "extraordinary." The tenant testified that she washed the walls and cupboards, steam cleaned the furniture, washed the linens and had the rental unit inspected and provided a written statement of same. The tenant maintained that her rental unit was not inspected by the landlord since February 2018, more than two years prior to this hearing date. The tenant submitted a witness statement, dated February 5, 2020, of the reasonable condition of her rental unit and no extraordinary damage; the landlord did not dispute this statement.

I also find that the landlord failed to show that the tenant breached a material term of the parties' written tenancy agreement. The landlord referenced page 14 of the tenancy agreement, stating that smoking is a "material term." However, simply referencing smoking as a "material term" does not make it material. The landlord did not indicate how it was material. I find that the landlord's complaints were made in 2014 and 2016, four to six years prior to this hearing date. I find that there was no consistent follow-up or warning from the landlord, that the tenant's behaviour qualified for the reason listed

above. I find that the landlord failed to provide sufficient evidence that smoking is a “material” term of the tenancy agreement or why or how it was material.

Accordingly, the landlord’s 1 Month Notice, dated December 31, 2019, is cancelled and of no force or effect. The landlord is not entitled to an order of possession. This tenancy will continue until it is ended in accordance with the *Act*.

Conclusion

The tenant’s application to cancel the landlord’s 1 Month Notice is allowed. The landlord’s 1 Month Notice, dated December 31, 2019, is cancelled and of no force or effect.

The landlord is not entitled to an order of possession. This tenancy continues until it is 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 *Residential Tenancy Act*.

Dated: March 03, 2020

Residential Tenancy Branch