



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened by way of conference call in response to two Applications for Dispute Resolution, both filed by the Tenant.

The first Application for Dispute Resolution was filed February 04, 2020. The Tenant disputed a One Month Notice to End Tenancy for Cause dated January 29, 2020.

The second Application for Dispute Resolution was filed February 21, 2020. The Tenant disputed a One Month Notice to End Tenancy for Cause dated February 13, 2020 (the "Notice"). The Tenant also sought reimbursement for the filing fee.

The Agent for the Tenant appeared at the hearing. The Landlord appeared at the hearing. I explained the hearing process to the parties. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing packages and evidence and no issues arose.

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

The Landlord confirmed during the hearing that she is not seeking to uphold the One Month Notice to End Tenancy for Cause dated January 29, 2020 and that this notice can be cancelled. Therefore, this notice is cancelled and I have not considered it.

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

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started September 01, 2012 and is a month-to-month tenancy. Rent is \$800.00 per month due on the first day of each month. The agreement includes an addendum with the following term:

1. There is to be no smoking in the suite or on the property. There is a trial period underway to allow smoking at the picnic table at the bottom of the garden. If this causes a problem for the tenant in the upper suite it will have to be discontinued immediately.

The Notice was submitted as evidence. It is addressed to the Tenant. It has an effective date of March 31, 2020. The grounds for the Notice are that the Tenant has breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. The bottom portion of the Notice states the wrong city and postal code for the rental unit address.

The Landlord testified that she sent the Notice to the Tenant and Agent by registered mail February 13, 2020. The Landlord testified that the packages were picked up February 18, 2020 and March 06, 2020. The Agent agreed with these dates.

The Landlord submitted that the Tenant has breached term one in the addendum to the tenancy agreement about smoking. The Landlord testified that this term had been changed verbally and by email to no smoking on the property.

I read out the requirement of a “breach letter” on page two of Policy Guideline 8 and asked the Landlord what communications she was relying on as a “breach letter”. The Landlord said she is relying on a June 03, 2016 email and February 13, 2020 letter sent to the Tenant.

I read out the definition of a “material term” from page one of Policy Guideline 8 and asked the Landlord why term one in the addendum is a material term. The Landlord replied as follows. It is a material term because smoking is an extremely offensive habit to someone else on the property. It is difficult to get the smell of smoke out after a tenant leaves a rental unit. Given these issues, the house has always been non-smoking which is why term one was included in the tenancy agreement.

I asked the Landlord why the addendum does not state that term one is a material term. The Landlord stated this was due to ignorance on her part.

The Landlord testified as follows in relation to the Tenant breaching term one of the addendum. The Tenant was smoking in the rental unit January 29, 2020 which triggered the eviction. There have been email communications between the parties from June 02, 2014 to February 13, 2020 about smoking being an issue. The Tenant never disputed that smoking was an issue. The Tenant was sent a letter February 13, 2020 about not smoking on the property and a further letter February 16, 2020 regarding a complaint about smoking.

The Landlord relied on the following evidence to show the Tenant has been smoking in the rental unit recently. A statement from P.H. about the Tenant smoking in the rental unit January 29, 2020. A February 13, 2020 email from the upstairs tenants about the Tenant smoking. The evidence submitted by the Tenant in which she admits smoking in the rental unit January 29, 2020. The emails between the parties which show the smoking is not a one time issue.

The Agent provided the following testimony and submissions. Term one in the addendum was not changed in writing until the February 13, 2020 email. The Tenant was permitted to smoke at the end of the property until the new tenants moved in. The Tenant did receive the June 03, 2016 email from the Landlord. This email did not refer to materiality or consequences in relation to smoking. The Tenant received the February 13, 2020 letter from the Landlord. There were no further breaches after this. The only breach was on January 29, 2020.

The Agent did not agree that term one in the addendum is a material term. She testified that it was not made clear to the Tenant that it was a material term and that the Tenant had no belief or understanding of it being a material term. The Agent acknowledged the Tenant understood the term was important.

The Agent acknowledged the Tenant smoked in the rental unit January 29, 2020. She testified that the Tenant has not smoked in the unit or on the property since. The Agent referred to an incident in February when the Tenant burned sauce on the stove. The Agent denied the Tenant was smoking in the rental unit on this date.

In relation to the January 29, 2020 incident, the Agent testified as follows. January was a difficult time for the Tenant. The Tenant was under a lot of stress. She had had a bad fall. The Tenant felt insecure going out to the road to smoke. She decided to smoke on the property. While smoking, her phone rang and she ran inside to get it not thinking about the cigarette. This was one bad decision on the Tenant's part.

The Agent referred to a statement from the Tenant's cleaner about smoke in the rental unit.

In relation to the timeline of events, the Agent testified that the Tenant was told in 2016 that she could smoke at the back of the property. The Tenant did this until the new tenants moved in. When the smoking at the back of the property became an issue, the Tenant stopped doing this except the one incident January 29, 2020.

In reply, the Landlord advised that the new tenants moved in October 01, 2019. In relation to the February incident, the Landlord testified that she attended the upper unit and could smell cigarette smoke in the bathroom.

Analysis

The Notice was issued under section 47 of the *Residential Tenancy Act* (the "*Act*").

The Tenant had 10 days from receiving the Notice to dispute it under section 47(4) of the *Act*. The parties agreed the Notice was first received February 18, 2020. The Application was filed February 21, 2020, within time.

The Landlord has the onus to prove the grounds for the Notice pursuant to rule 6.6 of the Rules.

Section 47(1)(h) of the *Act* states:

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies...

(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;

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.

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...

I am not satisfied the Notice should be upheld for two reasons.

I note at the outset that I do not accept that term one in the addendum was changed. I find the parties simply changed their position about what was permitted and what was not permitted given the exception noted in the term.

First, I am not satisfied term one in the addendum is a material term of the tenancy agreement for the following reasons.

The Agent did not agree that the term is a material term and testified that the Tenant had no understanding that it is a material term.

The tenancy agreement does not state term one in the addendum is a material term.

The Landlord did not provide compelling submissions or evidence regarding the facts and circumstances surrounding the creation of the tenancy agreement or the true intention of the parties to support the position that term one in the addendum is a material term.

Term one in the addendum is contradictory as it states there is to be no smoking in the suite or on the property but then outlines that the Tenant can smoke on the property unless it bothers the upper tenant. In my view, if a term was meant to be so important that the most trivial breach would give the Landlord the right to end the tenancy, the term would be clear and not allow for exceptions. Further, in my view, a material term would not be based on the preferences of the upper tenants which could change over time.

As well, if term one in the addendum was a material term, I would expect the Landlord to have sought to end the tenancy when the smoking first became an issue years ago.

Second, I am not satisfied the Landlord provided a proper "breach letter" as outlined in Policy Guideline 8. The Landlord relied on the June 03, 2016 email and February 13, 2020 letter. These do not state that there has been a breach of a material term. Nor do they state that the Landlord will end the tenancy if the smoking issue is not addressed. In my view, these specific requirements are important so a tenant is put on notice that the landlord believes they have grounds to end the tenancy, and will end the tenancy, if the issue is not addressed.

Further, the June 03, 2016 email was sent more than three and a half years prior to the Notice being issued. This is likely insufficient even if it contained the points outlined in Policy Guideline 8. As well, the February 13, 2020 letter was issued the same date as the Notice and therefore is likely insufficient even if it contained the points outlined in Policy Guideline 8.

In the circumstances, I am not satisfied term one in the addendum is a material term of the tenancy agreement. Nor am I satisfied the Tenant was sent a proper “breach letter” as outlined in Policy Guideline 8 as a requirement to end a tenancy.

A finding that term one in the addendum is a material term of the tenancy agreement 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 term one is a material term of the tenancy agreement, the Landlord has failed to prove the grounds for the Notice.

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

Given the Tenant was successful in this application, I award her reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*. Pursuant to section 72(2) of the *Act*, the Tenant can deduct \$100.00 from one future rent payment as reimbursement for the filing fee.

Conclusion

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

The Tenant is awarded reimbursement for the \$100.00 filing fee. 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: April 09, 2020

Residential Tenancy Branch