



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC OLC

Introduction

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

- cancellation of the landlord's One Month Notice to End Tenancy for Cause (the "**Notice**") pursuant to section 47; and
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62.

Both parties 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 testified, and the landlord confirmed, that the tenant served the landlord with the notice of dispute resolution form. The landlord testified, and the tenant confirmed, that the landlord served the tenant with her evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Issues to be Decided

Is the tenant entitled to:

- 1) an order cancelling the Notice; and
- 2) an order that the landlord comply with the Act?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting June 1, 2017. Monthly rent is \$1,015 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$475, which the landlord continues to hold in trust for the tenant. The rental unit is a legal suite located in the basement of the landlord's family home. The landlord and her family (which includes a three-year-old child) live in the upstairs unit.

Neither party submitted a copy of the tenancy agreement into evidence, but the landlord testified that it is the standard form Residential Tenancy Branch tenancy agreement and does not contain an addendum.

On February 20, 2020, the landlord posed the Notice on the door of the rental unit. It specified an effective date of March 31, 2020. It stated the reason for ending the tenancy as:

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

The Notice provided the following details of the cause for issuing the Notice:

You have been given the following warnings to NOT smoke on the property (in writing and verbally)

Aug 15, 2019 – Reminder Letter

Aug 17, 2019 – Face to face conversation

Aug 29, 2019 – First Warning Letter

Aug 31, 2019 – Second Warning Letter

Jan 09, 2020 – Third and final warning letter that clearly stated next time will result in eviction.

[The landlord's husband] confronted you yesterday (Feb 19th) smoking on our property again and in addition you have been smoking beside our garage on our property side and leaving your cigarette butts and lighter where our 2-year-old child has access to them.

The landlord entered copies of these letters into evidence. She testified that the tenant would smoke in the stairwell leading down to the rental unit, or on beneath a window, which caused smoke to enter the landlord's unit and disturb her young child.

The landlord testified that when the rental unit was posted for rent on Craigslist, it was listed as a non-smoking unit. Additionally, she testified that the tenant indicated on her application form that she was a non-smoker. The landlord submitted neither of these documents into evidence.

The tenant testified that she did not smoke when she moved into the rental unit but started in 2019. She testified that the landlord did not complain about her smoking at first. As such, she thought it was unfair that the landlord started issuing the warning letters.

The tenant testified that she doesn't smoke all the time but admitted that has smoked on the landlord's property as alleged by the landlord. She testified that she forgot she was not supposed.

Analysis

I find that the landlord served the Notice on the tenant in compliance with the Act.

Policy Guideline 8 states:

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.

What is not written in this passage, but implicit in the usage of the words “material term”, is that a “material term” must actually be a term of the tenancy agreement.

Although the tenancy agreement was not submitted into evidence, I am satisfied that the tenancy agreement does not contain a no smoking term. The standard form tenancy agreement provided by the RTB, which the landlord testified she used, does not contain a no smoking term. If landlords want to include a no smoking term, they must do so by way on an addendum to the tenancy agreement. The landlord testified that there was no addendum to the tenancy agreement.

As such, the tenant cannot be found to have breached a material term of the tenancy agreement by smoking on the residential property if such a term does not exist.

As the landlord indicated no other grounds for ending the tenancy on the Notice, I must order the Notice be cancelled. As the issue is not before me, I make no finding as to whether the tenant’s conduct breached some other section of the Act or forms some other basis for ending the tenancy.

Conclusion

I order that the Notice is cancelled and of no force or effect. The tenancy shall continue.

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: May 8, 2020