



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes Landlord: OPC, OPN, FFL
 Tenants: CNC

Introduction

This hearing dealt with the tenants' Application for Dispute Resolution seeking to cancel a notice to end tenancy. This hearing also dealt with the landlord's Application for Dispute Resolution seeking an order of possession. The hearing was conducted via teleconference and was attended by the landlord as well as both tenants and their advocate.

The parties agreed that they exchanged their respective Applications for Dispute Resolution in person on August 18, 2020. The tenants confirmed they received the landlord's evidence on the same date.

The tenants acknowledged some confusion between themselves and their advocate regarding how and when some of their evidence was served to the landlord with the bulk of their evidence served to the landlord the day before the hearing. The landlord acknowledged receipt of the bulk of the tenants' evidence and despite the late service the landlord was prepared to respond to their evidence. Based on the testimony of the parties, I find that each party has been sufficiently served with the documents pursuant to the *Act*.

At the outset of the hearing I clarified with the landlord that he had not received a Notice to End Tenancy from the tenants and as such, there was no need for him to apply for an order of possession based on a tenant's notice to end tenancy. Therefore, I amend the landlord's Application to exclude this matter.

I also clarified with the male tenant that his last name had not been used on their Application. I confirmed the male tenant's last name was the same as what the landlord had listed on his Application. Therefore, I amend the tenants' Application to correct the male tenant's name from BS to BK.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession for cause and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 47, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

It must also be decided if the tenants are entitled to cancel a One Month Notice to End Tenancy for Cause, pursuant to Section 47 of the *Act*.

Background and Evidence

The landlord submitted into evidence a copy of a tenancy agreement signed by the parties for a month to month tenancy beginning on January 5, 2004 for a monthly rent of \$525.00 due on the 1st of each month with a security deposit of \$262.50 paid.

I note the tenancy agreement is a standard tenancy agreement that had been available from the Residential Tenancy Branch at the time the tenancy was entered into and that it had 8 additional terms outlined on a one-page addendum. I also note that none of the additional terms speak to any restrictions on smoking of any substances and/or growing of marijuana (cannabis).

The landlord also submitted into evidence a copy of a One Month Notice to End Tenancy for Cause issued on August 1, 2020 with an effective vacancy date of August 31, 2020 citing:

- The tenants 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;
- The tenants 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, or adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the landlord; and
- The tenants have breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

In the Details of Causes section of the Notice to End Tenancy the landlord wrote that he gave the tenants a hand-written notice on July 24, 2020 that they are not allowed to grow marijuana (cannabis) either inside or outside their residence. He stated on the notice that he had given the tenants until July 30, 2020 to remove the plants they had. The details included additional interactions between the parties including the landlord's inspection of August 1, 2020 where the tenants refused to dispose of their 3 marijuana (cannabis) plants.

The landlord testified that the tenants fight with other occupants in the residential property and that he receives complaints against the male tenant but not the female tenant. The landlord testified that there has been, on occasion, police involvement. The landlord submits that the illegal activity that he referred to in the Notice to End Tenancy was that of growing marijuana (cannabis) and that he does not want the tenants smoking marijuana (cannabis) in their rental unit as it disturbs others.

The landlord did not indicate which clause of the tenancy agreement he was citing as a material term and he acknowledged the tenancy agreement does not have any clauses with any stipulation regarding either the growing and/or smoking of marijuana (cannabis).

The landlord provided a copy of a letter from his insurer that for tenant occupied dwellings no marijuana grow operations or drug dealing is allowed on the premises.

The tenants submit that there is no breach of a material term as there are no terms in the tenancy agreement regarding the smoking and/or growing of marijuana (cannabis). The tenants also testified that the female tenant is seeking a medical marijuana permit to grow for her health needs, but currently does not hold such a permit.

The tenants also submit that under current legislation they are allowed to grow as many as four (4) marijuana (cannabis) plants.

The tenants provided a copy of an email from a different named insurer stating that they would provide coverage for insured premises if a “tenant was found to have cannabis plants within the legal parameters”. The tenants submit that despite the different name of the insurer noted on the landlord’s evidence the insurer who responded to their email enquiry has taken over the responsibility of the insurance provided by the company that the landlord’s letter (noted above) was from.

The tenants acknowledge that they smoke both cigarette and marijuana (cannabis) but that they have tried over the years to be as respectful as possible for their neighbours, but the female tenant indicates she has rheumatoid arthritis and she often finds it difficult to go outside to smoke.

They testified they have tried many things over the years including have a fan going in the window all the time, including during the winter. They say they have spoken to the newest tenants up above them and they are not bother by any smoke coming from the tenant’s unit.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if, among other things, one or more of the following applies:

- a) 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;
- b) 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,
 - ii. Has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or
- c) 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.

When a landlord wishes to end a tenancy for cause under Section 47 the burden rests with the landlord to establish that they have cause to end the tenancy for the grounds purported in the Notice to End Tenancy.

While I note the landlord provided testimony that the tenants have a history of disruptive behaviour and policy involvement, I find the landlord has not indicated on the Notice to End Tenancy that this is a cause he intended to use to end the tenancy. Furthermore, I find the landlord has provided no evidence to support the position that the tenants have been disruptive to other occupants in the residential property.

Residential Tenancy Policy Guideline 8 defines 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. The guideline goes on to say:

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. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. 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.

Based on the definition and guidance from the Policy Guideline, I find that it would be incumbent on the parties to have a documented record of what are the terms, including any and all material terms for this tenancy. In fact, the parties had signed a tenancy agreement in 2004 that contains all of the terms of the tenancy. I note from that document submitted into evidence by the landlord that there are no terms whatsoever restricting either smoking (of any substances) or the growing of marijuana (cannabis).

Section 21.1 of the *Act* stipulates that if a tenancy agreement entered into before the cannabis control date includes a term that prohibits or limits smoking tobacco, and does not include a term that expressly permits smoking cannabis, the tenancy agreement is deemed to include a term that prohibits or limits smoking cannabis in the same manner as smoking tobacco is prohibited or limited.

A tenancy agreement entered into before the cannabis control date is deemed to include a term that prohibits growing cannabis plants in or on the residential property unless, on the day before the cannabis control date, among other things, growing the plants is not contrary to a term of the tenancy agreement.

I accept the landlord's submissions that when this tenancy began the smoking and growing of marijuana was not a legal activity and as such it was not contemplated when the tenancy agreement was entered into. However, when personal use of cannabis was decriminalized the *Act* was amended to extend any prohibition of the smoking of tobacco as a term in a tenancy agreement to include the smoking of cannabis.

As there is no term in the original tenancy agreement prohibiting smoking of any products, I find the landlord cannot establish that the tenants have breached any term, let alone a material term, of the tenancy agreement related to smoking of either tobacco or cannabis products.

Furthermore, the smoking of cannabis products is no longer an illegal activity and as such, I find the landlord has failed to establish that any issues related to smoking cannabis includes an illegal activity and as such cannot be used as a cause to end the tenancy.

In regard to the growing of cannabis plants, I accept that the tenancy agreement contained no terms restricting the growing of cannabis plants on the residential property. As such, and pursuant to Section 21.1 I find the tenancy agreement is deemed to include a term that prohibits the growing of cannabis plants, unless the tenant is growing one or more plants that are medical cannabis or the tenant is authorized under federal law to grow plants on the residential property and the tenant is in compliance with the requirements under that law.

While I accept that the female tenant is in the process of applying to grow cannabis for medical reasons, I find that she currently does not have such a permit and as a result, the tenants are not allowed to grow cannabis on the residential property. However, I

find that this is only a restriction under the *Act* and does not constitute an illegal act that could contribute to the end of the tenancy.

Furthermore, while the prohibition of growing cannabis is deemed under Section 21.1 of the *Act*, I find that because this is not an explicit term in the tenancy agreement that both parties had agreed to at the start of the tenancy it cannot be deemed a material term. As a result, I find the landlord cannot use the growing of cannabis to end the tenancy based on the breach of a material term.

However, I caution the tenants that as a result of my findings above they are put on notice that they are in contravention of their tenancy agreement to continue growing cannabis plants on the residential property and should refrain from doing so.

As I have determined that the landlord has failed to establish that either a material term has been breached or the tenants have committed an illegal activity, I find the landlord has failed to establish two of the causes identified on the Notice to End Tenancy as causes to end the tenancy. Therefore, I will address the final reasons - The tenant or a person permitted on the residential property by the tenant has seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant or put the landlord's property at significant risk.

While the landlord has expressed concern about the growing of cannabis on the residential property as not something he wants people to see, especially potential new tenants, on the property, I find the landlord has failed to establish the growing of cannabis has any impact at all on his potential to rent any of the units on the residential property or that it interferes with any other lawful rights.

In addition, I find the landlord has provided no evidence from any of the residents and other occupants on the property that the smoking of either tobacco or cannabis products has seriously jeopardized the health or safety of any occupants on the residential property.

Based on the above, I find the landlord has failed to establish any grounds for ending the tenancy for cause.

Conclusion

I grant the tenants' Application for Dispute Resolution and order the One Month Notice to End Tenancy for Cause issued by the landlord on August 1, 2020 is cancelled and the tenancy will continue until ended in accordance with the *Act*.

I also dismiss the landlord's Application for Dispute Resolution in its entirety without leave to reapply.

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: September 29, 2020

Residential Tenancy Branch