Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, FFL

Introduction

On October 12, 2020, the Landlord applied for a Dispute Resolution proceeding seeking an Order of Possession based on a One Month Notice to End Tenancy for Cause (the "Notice") pursuant to Section 47 of the *Residential Tenancy Act* (the "*Act*") and seeking recovery of the filing fee pursuant to Section 72 of the *Act*.

The Landlord attended the hearing with Y.W. and Ye.W. attending as agents for the Landlord. Neither Tenant attended at any point during the 38-minute hearing. All in attendance provided a solemn affirmation.

Ye.W. advised that the Landlord posted one Notice of Hearing and evidence package, addressed to Tenant A.R., to the door of the rental unit on October 21, 2020. She stated that they had photographic evidence of this posting. Based on this undisputed evidence, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that A.R. was deemed to have received the Notice of Hearing and evidence package three days after it was posted to the door. As the Landlord only served A.R. this package and did not serve the other Tenant on the Application a copy of this package in accordance with Rule 3.1 of the Rules of Procedure, the other Tenant has been removed, as a Respondent to this Application, from the Style of Cause on the first page of this Decision.

Furthermore, based on this undisputed testimony, as the Landlord's evidence was served in compliance with the timeframe requirements of Rule 3.14 of the Rules of Procedure, I am satisfied that A.R. has been served with the Landlord's evidence package. As such, this evidence will be accepted and considered when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to

make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to an Order of Possession?
- Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

Ye.W. advised that the tenancy started on June 15, 2019, that rent is currently established at $1,320.00 per month, and that it is due on the fifteenth day of each month. A security deposit of $600.00 was also paid. A copy of the tenancy agreement was submitted as documentary evidence.

She stated that the Notice was served to the Tenants by posting it to their door on September 7, 2020, and pictures to prove this service were submitted as documentary evidence. The reason the Landlord served the Notice is because of a “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 indicated that the effective end date of the tenancy was October 11, 2020.

She advised that there is a material term in the tenancy agreement prohibiting smoking in the rental unit or on the property; however, the Tenants have been smoking in the rental unit or on the property since approximately January 2020. As the Landlord lives upstairs, this has jeopardized their health because they have not been able to open their windows or use their heater as the smell would emanate into their unit. In addition to the smell of smoke being detected, the Tenants have been observed to be smoking in front of their door on multiple occasions. Photographs have been submitted to support the Landlord’s position.

The Landlord requested multiple times that the Tenants stop smoking; however, this behaviour continued. A written warning letter was served to the Tenants on July 28, 2020 reminding them that there was a no smoking clause in the tenancy agreement and

that they should refrain immediately. A copy of this letter was submitted as documentary evidence. The Tenants continued to smoke and when one Tenant was observed smoking in front of the door on September 7, 2020, the Notice was served.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

In considering this matter, I have reviewed the Landlord's Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

I find it important to note that a Landlord may end a tenancy for cause pursuant to Section 47 of the *Act* if any of the reasons cited in the Notice are valid. Section 47 of the *Act* reads in part as follows:

Landlord's notice: cause

> ***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;*

Furthermore, Policy Guideline # 8 outlines a material term as follows:

> "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. 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."

As well, this policy guideline states that "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."

With respect to the reason on the Notice of a breach of a material term, I find it important to note that the policy guideline states that "it is possible that the same term may be material in one agreement and not material in another." I find that this means that determining what would be considered a material term is based on the fact pattern of each specific scenario and that it is up to the Arbitrator in each case to evaluate the evidence presented and make a determination on this matter. In reviewing the tenancy agreement, I am satisfied that there is a term in the tenancy agreement which states that there is to be no smoking in the rental unit or on the property, and that this is a material term of the tenancy.

When reviewing the totality of the evidence before me, the consistent and undisputed evidence is that the Landlord served the Tenants with a warning letter on July 28, 2020 advising that there was a problem, that the problem must be fixed by a deadline included in the letter, and if the problem is not fixed by the deadline, the Landlord will end the tenancy. Furthermore, I am satisfied that there is a no smoking term in the tenancy agreement that would be considered a material term necessary to protect the safety of the rental unit and the other occupants of the property.
From the Landlord's solemnly affirmed, undisputed testimony and the pictures of the Tenants smoking, contrary to this material term, I find that there is a pattern of similar, continuous behaviour of the Tenants smoking in or around the rental unit, and that they

continued to breach this term after being warned in writing to refrain. As well, I am not satisfied that this pattern of behaviour will not repeat itself should the tenancy continue.

Ultimately, I find that the Landlord has provided sufficient evidence to justify service of the Notice under the reason of a breach of a material term. As such, I find that the Landlord is entitled to an Order of Possession that takes effect **two days** after service of this Order on the Tenant. The Landlord will be given a formal Order of Possession which must be served on the Tenant. If the Tenant does not vacate the rental unit **two days** after service of the Order, the Landlord may enforce this Order in the Supreme Court of British Columbia.

As the Landlord was successful in his claim, I find that the Landlord is entitled to recover the $100.00 filing fee paid for this Application. Under the offsetting provisions of Section 72 of the *Act*, I permit the Landlord to deduct this amount from the security deposit.

Conclusion

The Landlord is provided with a formal copy of an Order of Possession effective **two days** after service on the Tenant. Should the Tenant or any occupant on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: January 5, 2021

Residential Tenancy Branch