Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Rilka Investments Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

For the tenants: CNC, FFT
For the landlord: OPC, FFL

Introduction

The tenants (hereinafter the "tenant") filed an Application for Dispute Resolution on November 8, 2020 seeking an order to cancel the One Month Notice to End Tenancy for Cause (the "One-Month Notice"). They also applied for reimbursement of the Application filing fee.

The landlords (hereinafter the "landlord") filed a cross-Application for Dispute Resolution (the "cross-Application") on November 25, 2020 seeking an order of possession of the rental unit. This is following their service of the One-Month Notice to the tenant on September 22, 2020. Additionally, they applied for reimbursement of the cross-Application filing fee.

The matter proceeded by way of a hearing pursuant to section 74(2) of the *Residential Tenancy Act* (the "*Act*") on February 1, 2021. In the conference call hearing I explained the process and offered each party the opportunity to ask questions.

Both parties attended the hearing, and each was provided the opportunity to present oral testimony and make submissions during the hearing. Both parties confirmed receipt of the evidence prepared by the other. On this basis, the hearing proceeded.

Issue(s) to be Decided

Is the tenant entitled to an order to cancel the One Month Notice, pursuant to s. 47 of the *Act*?

If the tenant is unsuccessful in their Application, is the landlord entitled to an Order of Possession of the rental unit, pursuant to s. 55 of the *Act*?

Is the tenant entitled to reimbursement of the Application filing fee, pursuant to s. 72 of the *Act*?

Is the landlord entitled to reimbursement of the Application filing fee, pursuant to s. 72 of the *Act*?

Background and Evidence

The landlord presented a copy of the tenancy agreement. The tenancy began on August 1, 2019 after the tenant signed the agreement with the landlord on July 12, 2019. The unit rent amount was set at $1,575 payable on the first of each month.

The agreement has a one-page addendum containing the following relevant clauses:

1. Non-smoking building, no smoking within 7.5 meters of any window, door, or air intakes, smoking in dedicated area only.
8. No storage of recreational vehicles unlicensed vehicle ex. Boats trailers ect.

Both parties provided a copy of the One-Month Notice document, signed by the landlord on November 3, 2020. This document was served to each tenant separately by registered mail.

On page 2 of the document the landlord indicated the following reasons:

- tenant or person permitted on the property by the tenant has:
  - seriously jeopardized the health or safety or lawful right of another occupant or the landlord
  - put the landlord's property at significant risk
- tenant or person permitted on the property by the tenant has engaged in illegal activity that has, or is likely to:
  - adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant
- breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The landlord provided the details in an attached 3-page document:

A. they requested proof of insurance for two of the tenant's vehicles parked on the property on August 6, 2020. – this puts the property at significant risk, and is a breach of the rental agreement

B. smoking in the rental unit, and not in the designated identified area outside, with attempts to cover up the odour – this affects health and physical well being where one landlord has significant health issues

C. the tenant barred the landlord's entry to the unit to perform maintenance and inspections – this puts the property at risk

D. the tenant did not make a request to install security cameras – this requires a formal request and approval

E. the tenant attached a tarp to the deck and room dividers to the balcony rails – this affects "the life and safety and design of railing system"

For part A, the landlord provided their letters to the tenant advising them that their vehicle insurance is not up-to-date as stated by the tenant in June-July 2020. On August 6 the landlord requested this proof of insurance within 10 days. On November 3 the landlord advised they were "revoking [the vehicle's] parking privileges permanently." To the landlord this presented as a risk to the tenant by explaining "if your vehicle or vehicles that were parked . . . were to have caught fire for example, and spread to duplex building, our insurance company would want to recover costs from your insurance for repairs. . ." With the filing of their Application, the tenant provided a copy of what the landlord deems to be "an invalid proof of insurance for your remaining vehicle on rental property."

On issue B, a witness for the landlord stated in the hearing that smoke from the tenant (who is on the south side of the building) makes its way to the northwest side of the building. There is also evidence of a perfume or something to mask the odour. The landlord reiterated their concern that the tenant must know exactly where to smoke and cited their legitimate health concerns.

The tenant clarified that this witness did not observe smoking directly. The tenant also presented that there was a discrepancy on the designated smoking area on the property, and that they do not smoke inside the unit. A previous dispute resolution decision held that the landlord could not prove the exact distance of the smoking by the tenant in relation to what is set out in the addendum. The tenant also presented photos showing the areas set aside and marked clearly as 'smoking' or 'not smoking', with this being 9 metres.

For issue C, the landlord presented that they tried to enter the unit properly and legally on August 8, 2020; however, the tenant kept adjusting the time and did not attend at the agreed time. Further, they posted a notice to advise the landlord they were undergoing a quarantine. Prior to this, the landlord attempted to inspect the unit on May 20; however public health restrictions impeded this effort.

The tenant responded to this by stating this was the only single attempt by the landlord to make an inspection without notice. Quite simply, the tenants provided that they have not prevented the landlord's access at any time.

On issue D, the landlord in the hearing stated this was "not really much of an issue." Their only concern here was that the tenant should have made a request in writing to seek permission. They stated: "it's always a demand from the tenants, not a request."

To this, the tenant stated there was no installation of any kind, and there were no cameras still set up. The need at the time was to protect a business vehicle they parked on the property.

For issue E, the landlord presented that the tenant attached a tarp to the building using nails. There was no consultation with the landlord on this. The tarp "flapping in the wind" affects the landlord's quiet peace and enjoyment. Additionally, the bamboo divider installed on the balcony does not meet the BC building code (excerpt provided) for attachments using zip ties in relation to the balcony guard rails. As it exists, it could create a foreseeable accident that the landlord is trying to prevent.

To this, the tenant replied that they are willing to take the tarp down. They submit that the tarp and divider have no significant impact or create an interference on the property.

In a written submission, the tenant also described the issues raised by the landlord in terms of their relation to the grounds indicated on the One-Month Notice. The issue of smoking is not a material term, with no breach proven. This is with reference to the tenant's statement that they were 9 metres away, beyond the 7.5 metres specified by the landlord. In relation to the term "illegality", the tenant submits this is not proven with reference to the "relevant statute or bylaw."

Analysis

The *Act* s. 47 sets out the reasons for which a landlord may give a One-Month Notice. This includes the reasons indicated on that document served to the tenant here.

In this matter, the onus is on the landlord to prove they have cause to end the tenancy. The landlord provided all related correspondence in this matter and spoke to the reasons in their oral testimony. On my evaluation of this evidence, and with consideration to the submissions of the tenant here, I find the One-Month Notice is not valid.

Some of these issues were discussed openly in the hearing forum and I am satisfied from these discussions that there was a resolution:

- The vehicles in question have been moved and notice of their proper insurance has now been provided to the landlord. Alternatively, on this discreet point the landlord has not shown the illegality of *not* having this information, either by way of bylaw, provincial statute, or policy.
- The landlord made their point that a request was necessary for security camera use by the tenants. I find this issue was resolved with the tenant's removal of the cameras which were needed for a temporary purpose and did not require hard installation into the building.
- The tenant understands the need for landlord entry into the unit. I find this was made difficult with the tenant's quarantine in summer 2020. The landlord pledged that the necessary practice of providing advance 24-hour notice to the tenant would continue. I find this issue is resolved insofar as the parties have a mutual understanding of the landlord's need to conduct periodic inspections, and the tenant's need for proper advance notice.
- In the hearing the tenant agreed to take the tarp down. The landlord took issue with the way the tarp was affixed to the structure of the building or balcony. They also reiterated that these installations were not approved. I am satisfied the removal of the tarp will address the landlord's concern about any impact or potential damage to the structure.

The bamboo divider was attached with zip ties. The landlord outlined the potential damage this could cause to the guard rails, and this affects "the life and safety and design of [the] railing system." In their 'Addendum 1' document dated November 3, 2020 the landlord stated: "Feel free to setup and take down as you need, free standing only."

On this discrete point, I accept the tenant's submission that this does not pose a serious jeopardy or significant risk to the property. The risk of damage to the integrity of the guard rail system is not proven, and I find the bamboo divider does not pose a hazard. The way in which it is attached does not constitute a serious risk so as to end the tenancy on this ground. The

tenant is now aware of the landlord's viewpoint on this issue, as well as the specific building codes they refer to. I find the landlord's evidence shows the zip ties are not proper fasteners; however, this is not a high-risk situation that stands as grounds to end the tenancy. Additionally, this is not "illegal activity" of a category contemplated within the *Act* as grounds to end a tenancy for cause.

The most contentious issue between the parties is that of smoking. As the landlord states, this is affecting their own health and physical well being. The landlord states specifically in the Addendum forming part of the One-Month Notice that the tenant continues to smoke in the unit, their house sitter did so, and the tenant's attempts to mask the smell are not working to conceal the smell.

The landlord presented a previous dispute resolution decision (March 16, 2020) where the landlord issued a notice to end tenancy to this same tenant for the issue of smoking. The tenant was cautioned that the record for that decision "would form part of the landlord's case should it again come before an Arbitrator" as it does before me here. The issue in that hearing was specifically that of the tenant's adhering to the designated smoking area outside the unit.

The tenant here submits they are staying within the designated areas to smoke, since March 2020. Additionally, one tenant affirmed they had quit, and the other had cut down significantly. They asserted there is no smoking within the unit.

I distinguish the earlier dispute resolution decision because it addressed the tenant not staying within the designated smoking area. Here, the Addendum forming part of the One-Month Notice is explicit on the point that the tenant is smoking *inside the unit*. I accept the tenant's evidence here that there is no smoking within the unit. While the landlord provided a series of notes detailing their observations (B-14 through B-28) there is no direct observation of the tenant's smoking inside the unit. With this being the more specific ground, I find the evidence does not support that indicated reason for the issuing the One-Month Notice.

The issue is lingering smoke that enters the landlord's unit. I am not satisfied on the evidence presented that the smoke emanates directly from the inside of the tenant's unit. Again, this was the specific reason listed by the landlord as grounds for issuing the One-Month Notice. As the landlord stated in the hearing, the tenant must stay within the established boundaries. I am not satisfied the tenant is violating the boundaries, and the evidence does not show they are smoking indoors.

Finally, I accept the submissions of the tenant where they give the procedure outlining how a landlord must present a material breach term to the tenant. There is no evidence the landlord took these important steps here.

For these reasons, I order the One Month Notice to be cancelled.

As the tenant was successful in this application, I find they are entitled to recover the $100.00 filing fee paid for this Application. I authorize the tenant to withhold the amount of $100.00 from one future rent payment.

Because they are not successful in this hearing, the landlord is not entitled to compensation for the cross-Application filing fee.

Conclusion

For the reasons outlined above, I order the One-Month Notice issued on November 4, 2020 is cancelled and the tenancy remains in full force and effect.

The landlord's cross-Application for an Order of Possession is dismissed without leave to re-apply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: February 25, 2021

Residential Tenancy Branch