Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ESKAYLEE ENT. LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC

Introduction

On November 26, 2020, the Tenants applied for a Dispute Resolution proceeding seeking to cancel a One Month Notice to End Tenancy for Cause (the "Notice") pursuant to Section 47 of the *Residential Tenancy Act* (the "*Act*") and seeking an Order to Comply pursuant to Section 67 of the *Act*.

Both Tenants attended at hearing with N.S. attending as an advocate for them. M.B., S.A., and D.R. attended the hearing as agents for the Landlord. All parties in attendance provided a solemn affirmation.

The Tenants advised that they served the Landlord the Notice of Hearing package by hand, but they were not sure when they did this. S.A. confirmed that the Landlord received this package on or around November 29, 2020. Based on this undisputed evidence, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord has been sufficiently served the Notice of Hearing package.

Tenant J.S. advised that they served their evidence to the Landlord by hand on January 25, 2021. As part of this evidence package, they also included some digital evidence on a disc; however, they did not check to see if the Landlord could view this evidence pursuant to Rule 3.10.5 of the Rules of Procedure. He stated that as the Landlord was not able to view the contents of this disc, he transferred the digital evidence to a DVD and served this to the Landlord on February 8, 2021. He also advised that they served additional evidence to the Landlord after January 25, 2021.

M.B. confirmed that the Landlord received the Tenants' evidence, but they were not able to view the contents of the disc. While they did receive the Tenants' DVD on

February 8, 2021, as it was only served yesterday, they did not have time to review this digital evidence.
Only the Tenants' documentary evidence served on or before January 25, 2021 were served pursuant to the requirements of Rule 3.14 of the Rules of Procedure. This evidence will be accepted and considered when rendering this Decision. However, as their digital evidence was not served in accordance with Rule 3.10.5, this evidence will be excluded and will not be considered when rendering this Decision. In addition, any evidence served to the Landlord after January 25, 2021 will be excluded and will not be considered when rendering this Decision.

S.A. advised that the Landlord's evidence was served to the Tenants by registered mail on January 15, 2021, January 25, 2021, and January 27, 2021. J.S. confirmed that they received the evidence sent on January 15 and January 25, 2021 only. However, the Canada Post tracking history indicated that they also did receive the January 27, 2021 evidence package. Regardless, as this last package was not served in accordance with the timeframe requirements of Rule 3.15 of the Rules of Procedure, this evidence will be excluded and not considered when rendering this Decision. Only the Landlord's evidence sent on January 15, 2021 and January 25, 2021 will be accepted and considered when rendering this Decision.

As stated during the hearing, as per Rule 2.3 of the Rules of Procedure, claims made in an Application must be related to each other, and I have the discretion to sever and dismiss unrelated claims. As such, this hearing primarily addressed the Landlord's One Month Notice to End Tenancy for Cause, and the other claim was dismissed with leave to reapply. The Tenants are at liberty to apply for any other claims under a new and separate Application.

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.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

- Are the Tenants entitled to have the Notice cancelled?
- If the Tenants are unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?

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.

All parties agreed that the tenancy started on August 1, 2020, that rent is currently established at $1,425.00 per month, and that it is due on the first day of each month. A security deposit of $712.50 was also paid. A copy of the tenancy agreement was submitted as documentary evidence.

They also agreed that the Notice was served to the Tenants by posting it to their door on November 18, 2020. The reasons the Landlord served the Notice are because the "Tenant or a person permitted on the property by the tenant has: significantly interfered with or unreasonably disturbed another occupant or the landlord, seriously jeopardized the health or safety or lawful right of another occupant or the landlord, and/or put the landlord's property at significant risk." The Notice indicated that the effective end date of the tenancy was December 31, 2020.

M.B. advised that there is a term in the tenancy agreement prohibiting smoking in the rental unit or on the property, and the Tenants were already warned verbally about smoking in September 2020. On November 8, 2020, the Tenants smoked on their balcony and as a result, started a fire. They then left the building, only to call the fire department approximately an hour and a half later. She stated that leaving the building with a fire in the rental unit is a jeopardization of the safety of residents of the building. She also submitted that the Tenants have caused a lot of angst amongst the other residents of the building and the Landlord has received multiple noise complaints.

D.R. advised that she received a call on the morning of November 8, 2020 from a resident of the building regarding a burning smell. Other residents of the building were also woken up by the smell of something burning or by the voices of the firefighters who

had attended to this emergency call. She stated that the fire department went into the rental unit and extinguished a fire in a planter that was on the balcony. The Tenants were not in the unit to allow the fire department access, but they returned later. Despite this fire, the Tenants elected not to pull the fire alarm in the building but chose to call the fire department later from a coffee shop.
S.A. referenced the documentary evidence that was submitted to support the Landlord's position. She indicated that some residents of the building reported smelling smoke at approximately 5:45 AM and according to the Fire Report, the Tenants first reported this fire at 7:54 AM.

Tenant E.C. acknowledged that they were smoking on the balcony, but this fire was a "one-time incident". Both Tenants stated that they noticed something "smouldering", but they could not locate the origin or the source of the smoke. They suggested that they believed that the smoke could have been coming from another unit or from nearby construction. J.S. then contradictorily stated that the peat moss in a planter was smouldering but there were no flames. He submitted that the WIFI was not working in the rental unit, so they were unable to call the fire department. As a result, they ran to a coffee shop to call, using the WIFI there. They admitted to being remorseful for this incident, but as the balcony was concrete and there were no flames, this was not a threat to anyone's safety. They claimed that the smoke alarms in the building did not go off and one of the residents went back to bed after being awoken by the smoke. Thus, it was not a serious incident.

N.S. advised that it was a reasonable action for the Tenants to have called the fire department and that they expressed remorse for this one-time incident. He stated that they were never given any written warning about not smoking in the rental unit until after the incident happened. He also stated that the Tenants will abide by all terms of the tenancy agreement going forward.

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:*
>
> > *(d) the tenant or a person permitted on the residential property by the tenant has*
> >
> > > *(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,*
> > >
> > > *(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or*
> > >
> > > *(iii) put the landlord's property at significant risk;*

Given the contradictory testimony and positions of the parties, I must first turn to a determination of credibility. I have considered the parties' testimonies, their content and demeanour, as well as whether it is consistent with how a reasonable person would behave under circumstances similar to this tenancy.

The consistent and undisputed evidence is that there is a no smoking clause in the tenancy agreement, that the Tenants acknowledged to smoking on the balcony of the rental unit on November 8, 2020, and that they wrote an apology letter for smoking on the balcony. While N.S. advised that the Tenants were never warned in writing about the no smoking clause, the Tenants did not refute that they were verbally warned not to smoke in the rental unit in September 2020. As such, I find it more likely than not that the Tenants were reminded of this clause, and that this reminder was likely precipitated because they had been previously smoking in the rental unit. Consequently, I am satisfied that the Tenants were smoking in the rental unit, contrary to the no smoking clause in the tenancy agreement, despite being made aware that this was not acceptable.

With respect to the incident with the fire on November 8, 2020, while the Tenants portrayed a scenario during the hearing that they were not aware of where the smouldering or smoke was emanating from, given that they confirmed that they were smoking on the balcony, I find it unlikely that there would have been some mystery of this source. Furthermore, I find it important to note that they stated in their apology letter that, “We smoked on our balcony and accidentally ignited the planter which began smoldering, (a one time incident).” This is clearly inconsistent with their testimony that they could not find the source of the smoke and contradicts their suggested belief that it could have possibly originated from nearby construction. This complete contradiction causes me to doubt the truthfulness of their submissions and to question their credibility on the whole. In my view, it is evident that the Tenants were attempting to portray a fabricated scenario that did not make any logical or plausible sense. As such, I am satisfied that they were smoking on their balcony and that they were responsible for starting a fire in the planter due to their smoking.

As they acknowledged that this situation was serious enough to necessitate calling the fire department, it is not clear why they did not pull fire alarm in building as well. I do not find this to be consistent with common sense or ordinary human experience. While they did eventually call the fire department and claimed to have only been able to do so from a nearby coffee shop that had WIFI, I find that the doubts already created by the Tenants’ dubious testimony cause me to be persuaded that they likely left the rental unit knowing that they started a fire from smoking, and vacated in an attempt to appear as if they were not present and/or responsible for this fire.

When reviewing the totality of the evidence before me, I find that the Tenants’ contradictory, inconsistent, and implausible submissions cause me to give no weight to their evidence. Considered in its totality, I find the Landlord to be more credible than either the Tenants or their advocate. As a result, I prefer the Landlord’s evidence. Consequently, I am satisfied that the Tenants continued to breach a no smoking clause in the tenancy agreement after being warned, that this resulted in a fire on the balcony, and that they left the rental unit while this fire continued without alerting any other residents.

Ultimately, I am satisfied that the Landlord has presented sufficient evidence that the Tenants continued to breach a no smoking clause in the tenancy agreement after being warned and that this demonstrates a pattern of similar behaviour that will likely repeat itself should the tenancy continue. Moreover, I am also satisfied that the Tenants endangered the other residents of the building by leaving a fire unattended and not alerting the rest of the building by pulling the fire alarm. In this instance, I find it

necessary to protect the safety of the rental unit and the other occupants of the property.

As such, I am satisfied that the Landlord has provided sufficient evidence to justify service of the Notice under the reasons of significantly interfering with or unreasonably disturbing another occupant or the Landlord, seriously jeopardizing the health or safety or a lawful right or interest of the Landlord or another occupant, and putting the Landlord's property at significant risk. Therefore, I find that the Landlord is entitled to an Order of Possession that takes effect on **February 28, 2021 at 1:00 PM** after service of this Order on the Tenants. The Landlord will be given a formal Order of Possession which must be served on the Tenants. If the Tenants do not vacate the rental unit after service of the Order, the Landlord may enforce this Order in the Supreme Court of British Columbia.

Conclusion

I dismiss the Tenants' Application and uphold the Notice. I grant an Order of Possession to the Landlord effective **at 1:00 PM on February 28, 2021 after service of this Order** on the Tenants. Should the Tenants 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: February 10, 2021

Residential Tenancy Branch