



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC

Introduction

this hearing was convened in response to an application by the Tenant pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. An Order cancelling a notice to end tenancy - Section 46; and
2. An Order for the Landlord’s compliance - Section 62.

The Parties were each given full opportunity under oath to be heard, to present evidence and to make submissions.

Preliminary Matters

The Tenant is disputing a one-month notice to end tenancy for cause (the “Notice”). The Landlord is represented by an Agent (the “Agent”) who stated at the onset of the hearing that the Landlord was in hospital with serious injuries and that the Agent was called to represent the Landlord at this hearing. The Tenant states that the Landlord provided no evidence to the Tenant. It was confirmed that no evidence was provided to the Residential Tenancy Branch (the “RTB”) from the Landlord. The Agent stated that it was thought that the Landlord has provided a letter. The Agent was informed that the Landlord has the burden of proof to substantiate the reasons on the Notice. As the Landlord had not provided any supporting evidence the Landlord was asked whether they wished to withdraw or cancel the Notice. The Agent stated that there was no authority to withdraw or cancel the Notice. The Agent confirmed its readiness to proceed on oral testimony alone. The hearing continued on that basis.

At the end of the hearing and after the Parties were asked if there was any further evidence to provide, the Agent stated that it was at a disadvantage and asked for an adjournment to gather evidence and proof of the reasons for the Notice. The Tenant did not consent to the adjournment.

Rule 7.9 of the rules of Procedure sets out that in considering a party's request for an adjournment will take into account the possible prejudice to each party. Rule 6.11 of the Rules of Procedure sets out that persons are prohibited from recording dispute resolution hearings. It is up to a party to ensure that they inform themselves of the relevant Rules, the Act and the Regulations and to raise a preliminary request for an adjournment at the onset of the hearing. Although the Agent informed the proceedings of the Landlord's emergency, the Agent also stated that it was ready to proceed on its case. As the Agent did not seek a request for an adjournment until after both Parties had presented their case and as evidence to support a notice to end tenancy should have existed and been available at the time the Notice was given, I considered that to adjourn the matter at this point would prejudice the Tenant. The adjournment was refused whereupon the Agent became agitated and informed the Arbitrator that it was recording the proceedings. The Agent was informed that the Rules of Procedure, as set out above, do not allow recordings and the Agent was cautioned to stop the recording. The Agent became further upset and called the Arbitrator negligent as an adjournment has not been offered to the Agent at the onset of the hearing and because the Agent had not been informed at the onset of the hearing that no recordings were allowed.

Issue(s) to be Decided

Is the Tenant entitled to a cancellation of the notice to end tenancy?

Is the Tenant entitled to an order for compliance?

Relevant Background and Evidence

The following are agreed facts: The tenancy under written agreement started on September 1, 2020. Rent of \$800.00 plus \$20.00 for utilities is payable on the first day

of each month. On December 7, 2020 the Landlord served the Tenant with the Notice by posting the Notice on the door. The Notice sets out an effective move-out date of January 1, 2021 that should read January 31, 2021. The Notice sets out two reasons as follows:

1. The Tenant or person permitted on the property by the Tenant significantly interfered with or unreasonable disturbed another occupant or the Landlord;
2. The Tenant or a person permitted on the property by the Tenant has engaged in illegal activity that has or is likely to
 - a. Adversely affect the quiet enjoyment, security, safety or physical wellbeing of another occupant or the Landlord
 - b. Jeopardize a lawful right or interest of another occupant or the Landlord.

The Notice notes an attachment setting out details however neither Party provided a copy of this attachment.

The Agent states that a letter dated January 30, 2021 sets out the details. The Agent read out the letter that sets out requests for contact information and information for monthly rental payments by etransfer. The letter did not contain anything relevant to the details of the reasons for the Notice. The Tenant confirms that this letter was not the document attached to the Notice and that the attachment to the Notice set out a timeline of events. The Tenant states that it received the Notice on December 15, 2020.

The Agent states that the Tenant caused significant interference and unreasonable disturbance in relation to a wellness check done by the police on some date after the Notice was served. The Agent states that the Tenant also caused significant interference and unreasonable disturbance as it has been smoking inside its unit. The Agent states that the upper tenant complained almost daily about the smell of smoke. The Agent states that at some point prior to the issuance of the Notice and while conducting an inspection of the unit the Landlord found an ashtray with cigarette butts on the kitchen counter. The Agent states that the upper tenant also complained that the Tenant was yelling and screaming at her about her cat. The Agent states that the police

were called at some point due to the Tenant yelling and screaming and upon their attendance the Tenant gave them incorrect contact information. The Agent does not know how it knows of this incorrect contact information. The Agent states that the upper tenant moved out at the end of December 2020 because of the trauma of living above the Tenant.

The Tenant submits that the Landlord informed the Tenant at the outset of the tenancy that while smoking inside the unit was not allowed, the Tenant could smoke outside. The Tenant submits that the Landlord had informed the Tenant that it would enter the unit between 11:00 a.m. and 2:00 p.m. to remove an old fridge. The Tenant submits that by 2:00 p.m. the Landlord had not arrived, so the Tenant left the unit. The Tenant states that the Landlord then entered the unit while the Tenant was away. The Tenant states that prior to leaving that date the Tenant was in a hurry and brought the ashtray into the unit and left it there for cleaning. The Tenant states that it never smoked in the unit and always smokes outside. The Tenant states that the Landlord never informed the Tenant of any smoking complaints.

The Tenant states that it never disturbed or bothered the upper tenant. The Tenant states that it did call the Landlord when the upper tenants were fighting with each other. The Tenant states that it also called the Landlord because a cat was heard screaming and howling from the upper unit and thought that maybe the cat's tail was caught in a door. The Tenant states that the upper unit tenant told the Landlord that they did not have a cat.

The Tenant confirms that the order for the Landlord's compliance was in relation to the Landlord correcting the effective date of the Notice to January 31, 2021.

Analysis

Section 47(1)(d)(i) and 47(1)(e) of the Act provides that a landlord may end a tenancy by giving notice to end the tenancy if

- the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property or if
- the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
 - 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
 - has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord.

The Landlord has no supporting evidence that the Tenant provided false contact information to the police. Even if the Tenant did do such, there is no evidence that this caused the Landlord any interference or disturbance and this was an incident that occurred after the Notice was served. Although the Landlord found an ashtray in the unit the Landlord has no other supporting evidence that the Tenant was smoking in the unit. The Tenant's evidence that the ashtray was in the unit for cleaning and that it does not smoke in the unit held the ring of truth. For this reason, I prefer the Tenant's evidence and find on a balance of probabilities that the Tenant has not smoked in the unit and therefore did not cause any disturbance or interference because of smoking in the unit. Further, smoking in the unit is not an illegal activity. While it may be considered a breach of the tenancy agreement, I note that the tenancy agreement only provides that the Tenant may not smoke "in" the property. I also note that the Notice does not include as a the reason to end the tenancy that the Tenant breached a material term of the tenancy agreement. For these reasons I find on a balance of probabilities that the Landlord has not substantiated either of the reasons on the Notice and that the Tenant is therefore entitled to a cancellation of the Notice. The tenancy continues.

As the claim for an order of compliance was in relation to the effective date of the Notice and as the Parties agreed that this date was wrong, I find that the matter of the Landlord's compliance has been met and I dismiss this claim.

Conclusion

The Notice is cancelled, and the tenancy continues.

This decision is made on authority delegated to me by the Director of the RTB under Section 9.1(1) of the Act.

Dated: March 18, 2021

Residential Tenancy Branch