



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BALAY MANAGEMENT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MT, CNC, PSF, FFT

Introduction

On February 10, 2021, the Tenant applied for dispute resolution under the *Residential Tenancy Act* (“the Act”) seeking more time to make an application to cancel a notice to end tenancy and to cancel a One Month Notice to End Tenancy for Cause. The Tenant also applied for an order that the Landlord provide services and facilities required by the tenancy agreement or law.

The matter was set as a teleconference hearing. The Tenant and Landlord’s agent attended the hearing. The Tenant was assisted by a legal advocate. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to present affirmed oral testimony and to make submissions during the hearing. The parties were informed that recording the hearing was not permitted.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

The Residential Tenancy Branch Rules of Procedure permit an Arbitrator to dismiss unrelated issues with or without leave to reapply. The Tenant’s Application includes a request for the Landlord to provide services or facilities required by the tenancy agreement or law.

I find that the most important matter to deal with is whether or not the tenancy will end based on the One Month Notice. Therefore, I will deal with the Tenant’s request to

cancel the One Month Notice and I dismiss the remainder of the Tenant's application with leave to re-apply.

The Tenant was out of province and only retrieved the Landlord's documentary evidence from the post office a day prior to the hearing. The Tenant stated that he is not asking for the Landlord's evidence to be excluded. I find that the Landlord's evidence was properly served to the Tenant and is admitted and will be considered.

Issues to be Decided

- Should the Tenant be granted more time to dispute the One Month Notice to End Tenancy for Cause?
- Does the Landlord have sufficient cause to end the tenancy?

Background and Evidence

The Landlord and Tenant testified that the tenancy began on September 15, 2005 and is currently on a month to month basis. Rent in the amount of \$1,118.00 is due to be paid to the Landlord by the first day of each month. The Tenant paid a security deposit of \$400.00 to the Landlord.

The Landlord testified that she issued the Tenant a One Month Notice to End Tenancy for Cause dated January 27, 2021 ("the One Month Notice"). The reasons cited within the One Month Notice for ending the tenancy are:

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.*

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 or the Landlord.*

Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written Notice to do so.

The Tenant confirmed that he received the One Month Notice from the Landlord on January 27, 2021.

The One Month Notice provides information for Tenants who receive the Notice. The Notice states that a Tenant has the right to dispute the Notice within 10 days after

receiving it by filing an Application for Dispute Resolution at the Residential Tenancy Branch. If a Tenant does not file an Application within 10 days, the Tenant is presumed to accept the Notice and must move out of the rental unit or vacate the site by the effective date set out on page 1 of the Notice.

The Tenant disputed the One Month Notice on February 4, 2021 within the required time period. The Tenants request for more time to dispute the One Month Notice is not required.

The Landlord testified that the residential building is changing to be a non-smoking property. She testified that new tenants have no smoking terms in their tenancy agreement. She testified that the property is now 60% non-smoking units.

The Landlord testified that in 2017 the Tenant informed her that he smokes in his rental unit.

The Landlord testified that starting in 2019 she began asking the Tenant to stop smoking on his balcony. The Landlord testified that she has received complaints about the Tenant smoking from other occupants living on the property. She testified that the smoke is disturbing them and affecting their health. She testified that the smoke is from cigarettes and cannabis.

The Landlord testified that she has received many verbal complaints and written complaints about the Tenant and his smoking.

The Landlord testified that few months ago she was preparing a rental unit when she went into the hall and noticed it was full of smoke. She stated that two of the adjacent rental units were vacant and another unit is occupied by a non-smoker. She stated that the only other unit in that area belongs to the Tenant.

The Landlord testified that in 2019, 2020, and 2021 she notified the Tenant in writing about complaints regarding his smoking. She submitted that despite the written warnings the Tenant continues to smoke in the rental unit, affecting others.

The Landlord provided documentary evidence of correspondence with the Tenant, and the Landlord also provided some email complaints they have received from other occupants of the residential property. The correspondence and complaints are itemized below:

June 24, 2019	Email from occupant stating smoke coming from Tenant is not enjoyable
September 11, 2019	Email from occupant regarding Tenant smoking
September 12, 2019	Email from occupant stating smoke from Tenant is unpleasant
June 25, 2020	Email from occupant stating strong cigarette smoke from Tenant coming up to apartment
August 4, 2020	Email from occupant indicating apartment is engulfed with smoke coming from Tenant
Undated	Letter from occupant indicating allergy to smoke and asthma condition.

June 27, 2019	Landlord's letter sent to Tenant regarding his conduct regarding smoking
July 17, 2019	Landlord's letter to Tenant stating that the Landlord disagrees that the Tenant can smoke and make it uncomfortable for others.
December 31, 2020	Landlord's letter to Tenant about smoking; Final warning.
September 16, 2019	Tenant's letter to Landlord stating that the Landlord should inform the complaining tenant that he has the right to smoke

The Landlord also provided testimony about the Tenant being aggressive to other occupants by banging on her door and by video taping other occupants of the property who are not wearing face masks. The Landlord stated that the Tenant went ballistic with her while she was with another occupant in the camera room.

In reply, the Tenant testified that he has been out of the province for the past 6 weeks and could not have been smoking on his balcony. He testified that he is not aggressive. He stated that he shakes because of the medication he is taking. He testified that he video records when he enters and leaves the property to prove he is not aggressive. He stated that people are not wearing protective masks and the Landlord is not doing anything about it.

The Tenant testified that his tenancy agreement does not prohibit smoking and he was told he could continue to smoke in his unit. He stated that he informed the Landlord in 2017 that he smokes, and the Landlord told him he is grandfathered.

The Tenant stated that the Landlord has put a smoke sensitive person into a rental unit located above him.

The Tenant stated that he offered the Landlord an opportunity to renegotiate the terms of his lease to agree to no smoking but got no response from the Landlord.

The Tenant provided testimony acknowledging that he received warnings from the Landlord, including the final warning letter. He stated that he feels like the Landlord wants to end his tenancy because his rent amount is low. He stated that he smoked in the unit for 14 years without complaints.

The Tenant's advocate submitted that the incident between the Tenant and the Landlord in the camera room occurred after the One Month Notice was issued and does not form part of the reason why the One Month Notice was issued.

The Tenant's advocate submitted that smoking is not illegal, and the Landlord has not established illegal activity to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant or the Landlord.

The Tenant's advocate submitted that the Tenant was told he is grandfathered and since there is no term prohibiting smoking there is no evidence of a breach of a material term of the tenancy.

The Tenant's advocate submitted that the Tenant only smokes in the rental unit and not in common areas. She stated that it is hard to tell if the smoke is coming from the Tenant or from a neighbor. She submitted that the Tenant feels that his right to quiet enjoyment is being infringed by the Landlord for the past two years.

The Landlord testified that they did not respond to the Tenant's offer to renegotiate the terms of tenancy because he was asking for a reduction of rent from \$1,100.00 to \$800.00 per month.

The Landlord stated that the notice to end tenancy has nothing to do with the amount of rent that the Tenant pays but is about disturbances to other occupants.

Analysis

The Residential Tenancy Branch Policy Guideline # 6 Entitlement to Quiet Enjoyment deals with a Tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. The Guideline provides the following:

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In the matter before me, the Landlord has the burden to prove that the reasons listed in the One Month Notice are valid and sufficient to end the tenancy.

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

I agree with the Tenants advocate that there is insufficient evidence from the Landlord to end the tenancy due to illegal activity or a breach of a material term. Smoking cigarettes or cannabis is not illegal, and smoking is not a material term in the tenancy agreement.

I find that the Tenant may choose to smoke in the rental unit. The Tenant has been smoking in the rental unit for many years.

While the Tenant is permitted to smoke in the rental unit, I find that the Tenant does not have a right to disturb the peaceful quiet enjoyment rights of the surrounding occupants living on the residential property. The issue is not whether the Tenant is smoking in the rental unit, but rather is the second hand smoke disturbing others.

The Landlord has a duty and obligation to protect the right of quiet enjoyment for all occupants of the rental property. I find that the Landlord received complaints that second-hand smoke coming from the Tenant was bothering them. The Landlord had a duty under the Act to raise the matter with the Tenant and deal with the reported disturbances.

Based on the testimony of the Tenant and a review of the correspondence, it appears that Tenant believes, or believed, that his right to smoke in the rental unit absolves him of any of responsibility for second-hand smoke disturbing other occupants. This is not the case. The Tenant is responsible for behaviour that unreasonably disturbs other occupants in the residential property.

I find that the Landlord repeatedly cautioned the Tenant that his smoking was disturbing others. I find that the Landlord has provided sufficient evidence that other occupants of the residential property were disturbed by the second-hand smoke coming from the Tenant. I find that the Tenant has been smoking in the unit for many years and the disturbances caused by second-hand smoke are unreasonable.

I find that the Tenant's smoking unreasonably disturbed other occupants of the residential property or the Landlord.

The Tenant's application to cancel the One Month Notice to End Tenancy for Cause dated January 27, 2021 is not successful and is dismissed. The tenancy is ending.

I find that the Landlord is entitled to an order of possession of the rental unit, pursuant to section 55 of the Act. I grant the Landlord an order of possession effective at 1:00 pm on May 31, 2021, after service on the Tenant. This order may be filed in the Supreme Court and enforced as an order of that Court. The Tenant is cautioned that costs of such enforcement are recoverable from the Tenant.

Conclusion

The Tenant's application to cancel the One Month Notice to End Tenancy for Cause dated January 27, 2021 is not successful. The One Month Notice issued by the Landlord dated January 27, 2021, is upheld. The tenancy is ending.

The Landlord is granted an order of possession for the rental unit effective at 1:00 pm on May 31, 2021 after service on the Tenant.

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: May 05, 2021

Residential Tenancy Branch