



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MEDALLION INDUSTRIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

CNC, FFT

Introduction

On August 2, 2021, the Tenant submitted an Application for Dispute Resolution under the *Residential Tenancy Act* (the “Act”) requesting to cancel a One Month Notice to End Tenancy for Cause, and to recover the cost of the filing fee. The matter was set for a participatory hearing via conference call.

The Landlord’s Agents, their witness and the Tenant and his witness attended the hearing and provided affirmed testimony. They were provided the opportunity to present their relevant oral, written and documentary evidence and to make submissions at the hearing.

Preliminary Matter – Evidence

The Tenant acknowledged receipt of the Landlord’s documentary evidence and raised no concerns regarding the service method or service timelines. As a result, I have accepted this documentary evidence for consideration.

Although the Landlord acknowledged receipt of the first package of the Tenant’s documentary evidence and raised no concerns with regards to the service method or service timelines for this package, they stated that they were unable to open or review a second piece of evidence that was received by them on September 1, 2021, via email. The Landlord contested this evidence and requested that it not be admitted.

I find that the Tenant attempted to serve the second piece of evidence by email and that this was not an approved means of service and the evidence was not served within the timelines pursuant to the Act. As such, I find that the screenshot that the Tenant submitted to the Landlord on September 1, 2021, will not be admissible for this hearing.

Issues to be Decided

Should the One Month Notice to End Tenancy for Cause, dated July 26, 2021, (the “One Month Notice”), be cancelled, in accordance with section 47 of the Act?

If the One Month Notice is not cancelled, should the Landlord receive an Order of Possession, in accordance with section 55 of the Act?

Should the Tenant be compensated for the cost of the filing fee, in accordance with section 72 of the Act?

Background and Evidence

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.

Both parties agreed to the following terms of the tenancy:

The one-year, fixed-term tenancy began on August 1, 2020 and continued as a month-to-month tenancy. The rent is \$935.00 and due on the first of each month. The Landlord collected and still holds a security deposit in the amount of \$467.50.

The Landlord provided undisputed testimony that the One Month Notice was sent via registered mail on July 26, 2021 to the Tenant. The move out date was for August 31, 2021 and the Landlord submitted that the Tenant breached a material term of the Tenancy Agreement by “continual smoking inside the suite after receiving notice.”

The Landlord submitted the Tenancy Agreement and pointed out that the Tenant initialled a “No Smoking” term under term #43.

The Landlord testified that there had been some previous verbal and text warnings with the Tenant about not smoking in the rental unit. The Landlord submitted a copy of a letter, dated June 30, 2021, which reminded the Tenant that smoking is not permitted in the rental unit, deck or hallways, and that “Outdoor smoking is permitted provided is 20 feet away from the building.” The Landlord included a warning that if there are further incidents, the Tenant would receive a notice to terminate the tenancy.

The Landlord received an email from the Tenant’s upstairs neighbour, dated July 23, 2021, that stated the same intense smell of weed started up again and was noted on July 16, July 17, and July 19, 2021.

The Tenant’s upstairs neighbour, Witness S.R. (SR) attended the hearing as a witness for the Landlord and provided the following testimony:

- September 2020 moved into residential property and began to smell marijuana smoke through her balcony door.
- By the time October/November 2020, SR had observed the Tenant smoking marijuana on his deck. She would hear the Tenant's sliding door open and then begin to smell the smoke. SR began taping up her balcony door in an attempt to seal it from the smoke.
- During the heatwave of June 2021, SR had to open her sliding glass door to create ventilation and was overwhelmed by the amount of smoke coming in from the Tenant's balcony. As a result, SR had to leave the rental unit for several nights and subsequently advised the Landlord of the issue.

The Landlord is requesting an Order of Possession for the rental unit as the Tenant has continued to breach a material term after written notice has been provided.

The Tenant testified that he has never smoked inside the rental unit and acknowledged that he smoked marijuana out on his balcony.

The Tenant stated that once he received the written notice on June 30, 2021, he stopped smoking on his balcony and would either go for a walk or smoke in his car that is parked in the parking lot and away from the balconies.

The Tenant testified that there are other people in the residential property that also smoke marijuana. The Tenant stated that he works 5 to 6 days a week and gets up early and is not the one responsible for smoking at 3:00 in the morning as reported by Witness S.R. The Tenant submitted a text message to support his testimony that he was away from the rental unit on one of the occasions Witness S.R. claimed that she smelled him smoking marijuana.

The Tenant called a neighbour in the residential property as a witness. Witness C.A. (CA) testified that he has seen the Tenant smoking in his car lately and that he is a conscientious and friendly tenant.

The Tenant stated that the Landlord has blamed him for smoking marijuana based on one witness. The Tenant stated that he is not smoking marijuana on his deck anymore, would like to work things out with the Landlord, and wants to continue living in the rental unit.

Analysis

The Landlord served the One-Month Notice on the Tenant based on Section 47(1)(h) of the Act that states that the Tenant has failed to comply with a material term and has not corrected the situation within a reasonable time after the Landlord gives written notice to do so.

Residential Tenancy Branch Policy Guideline #8 refers to a material term as 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 arbitrator 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 arbitrator will look at the true intention of the parties in determining whether or not the clause is material.

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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

In this case, I find that the Tenant agreed to a term in the Tenancy Agreement of “No Smoking”. I find that this term was specifically included in the Tenancy Agreement by the Landlord and subsequently acknowledged by both parties by their signatures.

I accept that the Landlord provided a written warning letter to the Tenant on June 30, 2021 and find that this is the first time the Landlord formally defined the “no smoking” term and clarified for the Tenant that smoking is also not permitted on the deck; however, is permitted outside provided it is 20 feet away from the building. Upon review of the June 30, 2021 letter, I find that the Landlord did not advise the Tenant when he had breached a term of the Tenancy Agreement or that the Landlord believed the term of “no smoking” was a breach of a material term.

Upon review of the One Month Notice, I note that the Landlord issued the notice to the Tenant as a result of “continual smoking inside the suite after receiving notice.” I find

that there is no evidence in front of me that suggests the Tenant smoked inside the suite before or after receiving the June 30, 2021 letter from the Landlord.

Based on both the Landlord's testimony and evidence, I find that the Landlord failed to provide sufficient evidence that the term "no smoking" was a term 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. Furthermore, I find that the Landlord, if intending on making the "no smoking" term a material term, could have provided further details regarding "no smoking" in the Tenancy Agreement.

I accept that Witness SR testified that she was significantly disturbed by the Tenant's smoking of marijuana on the balcony of his rental unit prior to June 30, 2021; however, I am not convinced that the Tenant was responsible for the events that occurred after that date.

The standard of proof is based on the balance of probabilities. Based on the totality of the evidence before me, I find that the reason for the issuance of the 10 Day Notice, specifically "continual smoking inside the suite after receiving notice" has not been proven, on a balance of probabilities, by the Landlord.

Furthermore, I find that the Landlord did not establish that "no smoking" was a material term at the beginning of the tenancy and, that the June 30, 2021 letter to the Tenant did not sufficiently outline that the Landlord believed the issue of smoking was a breach of a material term of the Tenancy Agreement.

Based on the above, I find in favour of the Tenant and cancel the One Month Notice to End Tenancy for Cause, dated July 26, 2021.

I find that this dispute resolution process has established some definite context regarding the "no smoking" term in the Tenancy Agreement. I find, based on the Tenant's testimony, that he clearly understands that smoking of any sort is not to occur in the rental unit, on the balcony or anywhere in the residential building. As such, and to provide clarity for this tenancy, pursuant to section 62(3) of the Act, I am adding the following material term for this tenancy:

Smoking is not permitted in the rental unit, on the deck or anywhere in the residential building. Outdoor smoking is permitted provided it is a minimum of 20 feet away from the residential building. If the Tenant is found to be smoking in the rental unit, on the deck or anywhere in the residential building, this would be a material breach of the Tenancy Agreement and the Landlord may issue a One Month Notice to End Tenancy for Cause.

I find that the Tenant was successful with their Application; however, I also find that it was the Tenant's actions that caused some of the problems that led to this dispute. As

such, I decline to award the Tenant compensation for the filing fee, pursuant to section 72 of the Act.

Conclusion

I order that the One Month Notice, dated July 26, 2021, is cancelled. This tenancy will continue until ended in accordance with the Act.

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: September 14, 2021

Residential Tenancy Branch