



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **LL: FFL, OPC**
 TT: CNC

Introduction

This hearing dealt with applications from both the landlord and tenants pursuant to the *Residential Tenancy Act* (the “Act”).

The landlord applied for:

- An order of possession pursuant to section 55; and
- Authorization to recover the filing fee from the tenants pursuant to section 72.

The tenants applied for:

- Cancellation of a 1 Month Notice to End Tenancy for Cause (the “1 Month Notice”) pursuant to section 47.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was represented by their agent (the “landlord”).

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

Preliminary Issue – Service

The tenants testified that they served the landlord with their notice of application and evidentiary materials by registered mail sent on May 24, 2021. The tenants provided a valid Canada Post tracking receipt as evidence of service. The landlord disputed that

they were served with the tenant's materials but provided no cogent explanation of why they were not served. Based on the evidence I find that the landlord is deemed served with the tenant's materials on May 29, 2021, five days after mailing, in accordance with sections 88, 89 and 90 of the Act and has been sufficiently served on that date in accordance with section 71(2)(b).

The tenants dispute that they have been served with the landlord's materials.

The landlord initially testified that they served the tenants in person with their application for dispute resolution, subsequently changed their testimony to state that the tenants were served by registered mail and failed to provide any documentary evidence in support of their testimony. The landlord claimed they served the tenants by registered mail but failed to provide any details such as a tracking number or the date when they mailed the package despite being questioned and given an opportunity to consult their records. The landlord stated that they have no documentary evidence or information to support their position that the tenants have been served in accordance with the *Act*, or at all, but nevertheless they should be granted the relief sought.

I find the landlord's evidence consisting of testimony which contradicts itself, no details as to their claim that they tenants have been served and no documentary materials to support that they have mailed any materials to the tenants to be insufficient to establish that the tenants have been served in accordance with the *Act*.

I find the landlord's suggestion that their failure to serve the tenants should not deter them from pursuing their application to not be at all persuasive and demonstrate the landlord's disregard for the rule of law.

Based on the evidence I am not satisfied that the tenants have been served with the landlord's materials. Consequently, I dismiss the landlord's application in its entirety without leave to reapply.

Issue(s) to be Decided

Should the 1 Month Notice be cancelled?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This fixed-term tenancy began on March 1, 2021. The monthly rent is \$1,400.00 payable on the first of each month. A security deposit of \$700.00 was collected and is still held by the landlord. The parties used a standard form tenancy agreement and a copy of the signed agreement was submitted into evidence. The rental unit is one of three suites in a detached home.

The landlord issued a 1 Month Notice dated April 29, 2021. A copy of the notice was submitted into evidence. The notice provides that the reason for the tenancy to end is:

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

In the details of the cause the landlord writes that they have received complaints from other occupants of the property regarding the tenants smoking on and about the property. The landlord issued a warning letter to the tenants dated April 21, 2021 stating that smoking is not permitted in the unit or on the rental property. The landlord writes in their warning letter that further incidents will lead to a notice to end the tenancy.

The landlord provided rambling testimony complaining about the tenants, suggesting that other occupants of the building have vacated the property and that there are material terms of the tenancy agreement that have been breached by the tenants.

The landlord's primary complaints about the tenancy appear to be that the tenants are smoking on and about the rental property. Despite my repeated requests to the landlord to identify the terms of the tenancy agreement that they believe are material terms that have been breached the landlord could not identify any terms prohibiting smoking.

The landlord also claimed that there is a material term within the tenancy agreement prohibiting the tenants from unreasonably disturbing other occupants of the building but again failed to show that any such clause is contained in the signed agreement.

The parties used a standard form tenancy agreement and added no additional terms or addendums. Section 17 of the tenant agreement reads:

17 ADDITIONAL TERMS

- a) Write down any additional terms which the tenant and the landlord agree to.
Additional terms may cover matters such as pets, yard work, smoking and snow removal. Additional pages may be added.

The landlord submits that as there are no additional terms permitting smoking on the premises, the tenancy agreement should be interpreted to understand that smoking is prohibited and that is a material term of the tenancy.

Analysis

Section 47(4) of the *Act* provides that upon receipt of a notice to end tenancy for cause, the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch.

I accept the evidence of the parties that the tenants were personally served with the 1 Month Notice on April 30, 2021 and filed their application for dispute resolution on May 9, 2021. I find that the tenants were within the statutory timeline to file their application.

If the tenant files an application to dispute the notice, the landlord bears the burden to prove, on a balance of probabilities, the grounds for the 1 Month Notice. The landlord must show on a balance of probabilities, which is to say it is more likely than not, that the tenancy should be ended for the reasons identified in the 1 Month Notice. In the present case the landlord submits that the tenants breached a material term of the tenancy agreement by smoking on the rental property.

Residential Tenancy Policy Guideline 8 defines a material term as a term that is so important that the most trivial breach of that term gives the other party the right to end the agreement. The question of whether a term is material is determined by the surrounding facts and circumstances of the formation of the tenancy agreement.

The landlord failed to identify any clause within the tenancy agreement prohibiting unreasonable disturbance or smoking on the rental property.

I do not find the suggestion of the landlord that because the agreement does not explicitly permit smoking on the property that there must be a prohibition on smoking. I do not find the landlord's submission to be persuasive or consistent with a reasonable reading of the portion of the agreement permitting parties to include additional terms. When a tenancy agreement is silent on an issue, I do not find this to be a material term. A material term must be explicitly stated. The landlord cannot rely upon the absence of a term in a tenancy agreement and interpret that in their favour to consider it a material term of the tenancy. If a restriction on smoking on the rental property was to be a material term the landlord ought to have explicitly included that in the written tenancy agreement.

Even if a restriction on smoking or prohibition from unreasonable disturbance of others was a material term of the tenancy agreement, I find little evidence to support the landlord's position that the term has been breached. I find the single warning letter by the landlord to be insufficient to support their conclusion that the tenants are smoking or that their actions have caused disturbance of other occupants of the rental unit. I find the landlord's self-contradicting testimony and submissions which have no relevance to the matter at hand to be insufficient to meet their evidentiary onus.

I find that the landlord has failed to meet their onus to demonstrate that there is any basis to the 1 Month Notice. I therefore allow the tenants' application and cancel the Notice.

Conclusion

The 1 Month Notice is cancelled and of no force or effect. This tenancy continues 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 16, 2021

Residential Tenancy Branch