Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, LRE, OLC, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- cancellation of the One Month Notice to End Tenancy for Cause (the Notice), pursuant to section 47;
- an order to restrict or suspend the landlord's right of entry, under section 70;
- an order for the landlord to comply with the Act, the Residential Tenancy Regulation (the Regulation) and/or tenancy agreement, under section 62; and
- an authorization to recover the filing fee for this application, under section 72.

Both parties attended the hearing. The landlord was represented by agents RM and SM (the landlord). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000."

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with section 89 of the Act.

Preliminary Issue - Unrelated Claims

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an application for dispute resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the one month notice to end tenancy for cause and the continuation of this tenancy is not sufficiently related to any of the tenant's other claims to warrant that they be heard together.

The tenant's other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the notice. I exercise my discretion to dismiss all of the tenant's claims with leave to reapply except cancellation of the notice to end tenancy which will be decided upon.

Issues to be Decided

Is the tenant entitled to:

1. cancellation of the Notice?
2. an authorization to recover the filing fee?

If the tenant's application is dismissed, is the landlord entitled to an order of possession?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlord's obligation to present the evidence to substantiate the Notice.

Both parties agreed the tenancy started on November 04, 2017. Monthly rent is $820.00, due on the first day of the month. At the outset of the tenancy a security deposit of $400.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It indicates:

> Internet and utilities are included in this rental agreement, but there is no garbage and recycling removal.

> […]
>
> It is hereby agreed upon that there will be no smoking, drinking (parties) or drugs in the building or on the property and if there is, it is the owners right to terminate this tenancy immediately.

Both parties agreed the Notice was served and the tenant received it on July 01, 2021.

A copy of the Notice was submitted into evidence. The Notice is dated July 01, 2021 and the effective date is August 01, 2021. The reasons to end the tenancy are:

- The tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk.
- Tenant has not done required repairs of damage to the unit/site.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The details of the Notice are:

> Tenant has not complied with the lease agreement regarding the "no smoking policy" in or on the property.
> Tenant has been spoken to several times over the years since he moved in back in 2017. Was issued a written notice on Nov 7, 2020 that should he continue, he would be given a 30 day notice to vacate the premises.
> Tenant also has failed to fix the broken window that he caused in his bedroom which has been broken for several years now.

The tenant submitted this application on July 12, 2021 and continues to occupy the rental unit.

The landlord affirmed he inspected the rental unit and noticed the tenant left the stove element on during cold days in the winter of 2019-2020. The landlord texted the tenant on November 21, 2019: "You left two elements on the stove, if this keeps going you will find another place to live". The tenant stated he may have left the stove element on during cold days in the winter of 2020-2021 as the rental unit is not properly heated.

The landlord testified the tenant went on a 2-month trip this summer and left the bedroom window open. The tenant said the window was 'cracked' open for ventilation, his roommate had the key to his bedroom and the rain could not pass through the opening.

The landlord affirmed the tenant damaged the bedroom window when the tenancy started and the landlord is aware of this since 2019. The landlord verbally asked the tenant to repair the window and sent a repair quote when he served the evidence for this application. The tenant stated he did not damage the window, the rental unit was built in 1978, the window seals are cracked, and the glass broke because of the cracked seals.

The landlord testified the tenant used the hose on June 26, 2021 to water the driveway and the landlord warned the tenant not to do so. The tenant purchased his hose and used it to water the driveway again in late June 2021. The tenant said he waters the driveway during heat waves in the summer. The tenant's bedroom is close to the driveway and it got extremely hot during the heat wave in the week of June 26, 2021. The tenant affirmed the landlord verbally authorized him to purchase the hose.

The landlord stated the tenant has been smoking on the driveway around 10 feet from the entrance door. The landlord warned the tenant on November 07, 2020:

> It has come to our attention that we need to address the 'no smoking policy'. It is stated in the Tenancy Agreement that you signed on the second page, paragraph 3 that there will be no smoking in the building or on the property, in which you initialed. We have been notified several times that you continually seem to violate this agreement. We can no longer give "grace" and allow you to be less than considerate of this agreed upon stipulation and as owners have the right to terminate this contract immediately. But we have decided to give you this letter as warning that if at any time it is once again violated, you will be issued a letter of dismissal and will be given 30 days to vacate the premises. We ask that you respect what has clearly been stated and that we will no longer have to deal with this issue again.

The tenant testified he was verbally authorized by the landlord to smoke on the driveway. The tenant said the driveway is about 150 meters long and one day the neighbour called the police because he smoked on the street in front of the property. The landlord affirmed he did not authorize the tenant to smoke on the driveway.

The landlord submitted text messages with the tenant on November 07, 2020:

> Landlord: [tenant] there is no smoking on the property
> Tenant: Yes there is and has been [landlord] for 3 years now…you agreed to it on day one when I came to view the place…
> Landlord: We said no smoking off the property

Analysis

A tenant may dispute a notice to end tenancy for cause within ten days, pursuant to section 47(4) of the Act.

The Rules of Procedure state under definitions:

> Days
> a. If the time for doing an act in relation to a Dispute Resolution proceeding falls or expires on a holiday, the time is extended to the next day that is not a holiday.
> b. If the time for doing an act in a government office (such as the Residential Tenancy Branch or Service BC) falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open. This definition applies whether or not an act can be carried out using an online service.

As the tenth day to dispute the Notice was Sunday, July 11, 2021, and the tenant submitted this application on Monday, July 12, 2021, I find the tenant disputed it within the time frame of section 47(4) of the Act.

Pursuant to Rule of Procedure 6.6, the landlord has the onus of proof to establish, on a balance of probabilities, that the notice issued to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct and sufficient cause to end the tenancy.

Section 47(1)(d)(i) of the Act states:

> (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) put the landlord's property at significant risk;

Based on the testimony offered by both parties, I find the tenant left the stove element on during cold days in the winter. Based on the text message dated November 21, 2019, I find the landlord was aware since November 21, 2019 that the tenant left the stove element on. I find that leaving the element on may put the landlord’s property at significant risk. However, the landlord did not explain why he served the Notice 19 months after the date he was aware that the tenant left the stove element on.

As such, I find the landlord failed to prove, on a balance of probabilities, that the tenant put the landlord’s property at significant risk, as the 19-month delay to serve the Notice indicates there was no significant risk to the property.

I warn the tenant that he may be served a new one month notice to end tenancy if he leaves the stove element on again. The tenant may submit an application for dispute resolution seeking for an order for the landlord to provide adequate heating.

Section 47(1)(g) of the Act states the landlord may end the tenancy if "the tenant does not repair damage to the rental unit or other residential property, as required under section 32(3) of the Act, within a reasonable time."

Section 32(3) of the Act provides that "A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant."

In the case before me the parties provided conflicting testimony regarding damaging the bedroom window. I find the landlord failed to provide satisfactory evidence that the tenant damaged the bedroom window. Furthermore, the landlord did not provide a reasonable time for the tenant to repair the damaged window.

Thus, I find the landlord failed to prove, on a balance of probabilities, that the tenant did not repair the rental unit within a reasonable time.

Section 47(1)(h) of the Act states:

> (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
>
> (h) The tenant:
>
> (i)has failed to comply with a material term, and
>
> (ii)has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

Residential Tenancy Branch Policy Guideline 8 defines a material term and sets conditions to end a tenancy because of a breach of a material term. It states:

> A material term is 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 Residential Tenancy Branch 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 Residential Tenancy Branch 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
>
> (emphasis added)

Based on the November 07, 2020 warning and text messages and the tenancy agreement, I find the tenant failed to prove, on a balance of probabilities, that the landlord authorized him to smoke on the driveway. I find the tenant is not authorized to smoke on the driveway, the tenant has been smoking on the driveway since the outset of the tenancy and the landlord is aware of this since November 07, 2020. The landlord was aware on November 07, 2020 that the tenant has been smoking on the driveway and only served the Notice on July 01, 2021. I find that the 8-month delay to serve the Notice indicates that the tenant did not breach a material term.

As such, per section 47(1)(h) of the Act, I find the landlord cannot end the tenancy for failure to comply with a material term.

I warn the tenant that he may be served a new one month notice to end tenancy if he smokes on the driveway again.

I warn the landlord that he must act in a timely manner if he has cause to end the tenancy.

Based on the testimony offered by both parties, I find the landlord failed to prove, on a balance of probabilities, how the tenant's actions regarding the use of the hose and

leaving the bedroom window partially open are related to any of the grounds of the Notice.

Thus, I find the landlord failed to prove, on a balance of probabilities, the grounds of the Notice. Accordingly, the Notice dated July 01, 2021 is cancelled and of no force or effect.

As the tenant is successful with the application, pursuant to section 72 of the Act, I authorize the tenant to recover the $100.00 filing fee. I order that this amount may be deducted from the next rent payment.

For education purposes, I note that the landlord must provide a written notice to the tenant at least 24 hours before entering the rental unit, per section 29(1)(b) of the Act.

Conclusion

The One Month Notice dated July 01, 2021 is cancelled and of no force or effect. This tenancy will continue in accordance with the Act.

Pursuant to section 72(2)(a) the tenant is authorized to deduct $100.00 from the next rent payment to recover the filing fee.

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 01, 2021

Residential Tenancy Branch