



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Quality Property Management and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes **CNC, FFT**

Introduction

This hearing dealt with the Tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for:

1. Cancellation of the Landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to Sections 47 and 62 of the Act; and,
2. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord's Agent, MM, and witness, PC, attended the hearing at the appointed date and time. The Tenant, JM, and witness, MG, also attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

JM confirmed that he served the Landlord with the Notice of Dispute Resolution Proceeding package for this hearing by using a permitted email address for service purposes immediately after he received the One Month Notice (the "NoDRP package"). The Landlord confirmed receipt of the NoDRP package on August 11, 2021 but stated there was no evidence included in the JM's email. JM only included a copy of the One Month Notice he received from the Landlord in his evidence. He testified that he was going to provide oral evidence at the hearing. MM agreed to go through with the hearing despite the fact that JM had not included any additional evidence. I find that the Landlord was agreeable to conduct the hearing without any additional evidence from the

Tenant and I accept that only providing oral testimony is acceptable evidence for this matter. I find that the Landlord was served with the NoDRP package for this hearing on August 11, 2021, in accordance with Section 43(2) of the Residential Tenancy Regulation.

Issues to be Decided

1. Is the Tenant entitled to a cancellation of the Landlord's One Month Notice to End Tenancy for Cause?
2. Is the Tenant entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

MM testified that this periodic tenancy began on August 1, 2017. Rent in the amount of \$1,250.00 is payable on the first day of each month. The Tenant paid a security deposit of \$625.00 and a pet damage deposit of \$625.00 at the start of the tenancy. MM confirmed that the Landlord still holds both deposits in trust. JM confirmed the above details of the tenancy.

The Landlord served the One Month Notice to End Tenancy for Cause by posting the notice on the Tenant's door on July 20, 2021 (the "One Month Notice"). The One Month Notice stated the reason why the Landlord was ending the tenancy was because the Tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the Landlord of the residential property, seriously jeopardized the health or safety or a lawful right or interest of the Landlord or another occupant, or put the Landlord's property at significant risk; and 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. The effective date of the One Month Notice was August 31, 2021. The Landlord submitted photographic proof that the One Month Notice was posted on the Tenant's door. JM confirmed receipt of the One Month Notice.

MM provided information on the following complaints about JM:

June 19, 2021	Daughter and son smoking marijuana on the balcony.
June 20, 2021	BBQ use causing so much smoke, strata council received complaints. Loud party going beyond the city and strata bylaw hours.
July 18, 2021	Loud party on balcony.
July 29, 2021	Received email that JM's BBQ tank is left on deck in hot weather. JM did move the BBQ tank.
November 23, 2021	Received letter from strata council lawyer saying they want JM to cease and desist.

MM guessed that the bylaw quiet hours in their city begin at 10:30 p.m., and the strata bylaw quiet hours begin at 10:00 p.m. MM testified that JM is a nuisance in the building.

MM said that JM has breached the below condition, which she submits is a material term of his tenancy agreement, and has not corrected the situation in a reasonable amount of time:

PEACE AND QUIET

Tenants are entitled to the quiet enjoyment of their own dwelling, and their neighbors [sic] are entitled to the same. Tenants agree that they will refrain from making loud noises and disturbances, that they will keep down the volume of their music and broadcast programs at all times so as not to disturb other people's peace and quiet, and that they will not install wind chimes. ...

MM submitted into documentary evidence a copy of an email sent to JM on June 21, 2021 informing him that the strata have received complaints from neighbouring tenants regarding noise and the smoke from the use of the BBQ. JM was instructed to remove his BBQ as *'it is a nuisance to neighboring tenants.'* There was no deadline specified in the email when this problem was to be fixed, rather it stated that the email was *'a Cautionary Notice and should I receive another complaint you will be given a notice of eviction.'*

JM testified that in the summer months, he and his girlfriend would sit on his balcony and BBQ. He said BBQing is a permitted activity, and that he has a small propane BBQ and that it does not give off a lot of smoke.

JM maintained that he has not had parties. Him and his girlfriend would sit on his balcony and listen to music which was not cranked up loud and which comes from a small Sony radio inside his unit. JM stated that he does not smoke cigarettes or drugs. He also said that his daughter has not been to his rental unit in the last two years and his son last visited him at his rental unit in March 2021.

JM stated after receiving the email about his propane tank, he called the fire department to ask about its safety. He was told it should not be stored inside his rental unit, and JM did move it so that it was not in the direct sunlight.

JM maintained that MM has not once come to his rental unit to observe when he is BBQing. JM stated that no one has ever called the police on him when he was alleged to be having parties. He maintains that he is not noisy.

PC testified that JM has been using his BBQ since June, although currently he is not using it. PC said he remembered the first time, the smoke was so heavy, he thought there was a fire. He did not call the fire department. PC said he has bad Asthma, and his lungs are filled with fluid.

PC stated the first time he complained about JM's BBQ, he said JM was having a party, that there were more than two people there and that it was loud. This night PC did not call police or the property manager, he said he first spoke to JM. He said though that he found JM to be 'very angry, very aggressive, and bad tempered'. Later he took his complaints to the strata council of which he is a member.

MG, the Tenant's witness, stated she lives below JM. She knows he has lived there approximately four years, and she never has had a problem with him. MG testified that she spends a lot of time outside on her balcony, and she can see a lot of the building residents were BBQing in the summer. She stated that the neighbour on the other side of PC (not JM) would BBQ in the summer and she saw smoke from that BBQ going towards PC's home. MG said she has a clear view of that resident's balcony. MG has never been bothered by party noise from JM, she has a teenage son and would not want him to be distracted by this kind of activity. MG also testified that other residents smoke on their balconies.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 47 of the Act is the relevant part of the legislation in this application. It states:

47 (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) *significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,*
- (ii) *seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or*
- (iii) *put the landlord's property at significant risk;*

...

(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 policy guideline #8 deals with material terms of tenancy agreements. It states that 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. I must assess the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. To end a tenancy agreement for breach of a material term the Landlord 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.

MM did notify JM that there was a problem with the smoke from his BBQ; however, whether this was considered a material term or not was unclear. JM was not provided with a date to fix the problem, rather he was informed that it was a cautionary notice, and if repeated would result in an eviction. Smoke generated from residents' summer BBQing in the residential property must be considered. I do so below.

JM admits to BBQing on his balcony in the summer months, and that it is a permitted activity on the balcony but stated that his BBQ does not generate a lot of smoke. The BBQ smoke in the summer has significantly interfered with or unreasonably disturbed another occupant. It appears in this building that other residents also BBQ in the summer months and smoke from other BBQs was observed flowing in front of the affected occupant's home. I do not find that JM is in breach of a material term of his tenancy agreement in regard to smoke from his BBQ use. If the term was so important, then it must apply to all the residents in the building, and the Landlord cannot cherry-pick to whom this term applies.

BBQing is a permitted activity in the building, and other residents utilize their BBQs from which smoke is generated. Smoke from BBQs can put a vulnerable person's health in jeopardy; however, I find that the Landlord has failed to demonstrate through evidence, that the smoke bothering PC is smoke coming from JM's BBQ.

JM made inquiries into the matter with the local fire department and subsequently relocated his propane tank out of the direct sunlight. Both MM and JM testified to this. On account of JM's actions, especially after being told, he remedied the situation and moved his propane tank. I find that JM's actions were positive and immediate after being asked to move his propane tank, so I do not find that JM put the Landlord's property at risk.

PC testified that JM had, at least, two nights in the summer months where the volume of noise from JM's rental unit was disruptive to PC's quiet peace and enjoyment of his residential unit. JM stated that no police attended his rental unit on the alleged evenings, so maintains he was not making excessive noise. JM has lived in the rental unit since August 2017 without any incidents, and he states that he is not noisy. There

have been no noise complaints since July 18, 2021. I find that JM is not excessively noisy, and the two complaints are not a repeated characteristic of this Tenant.

I do not find that JM has significantly interfered with or unreasonably disturbed other occupants in the residential property. I do not find that he has seriously jeopardized the health or safety of another occupant or put the Landlord's property at significant risk. I also find that he either is not a noisy tenant or that he corrected his situation so that he has not negatively impacted the quiet enjoyment of other occupants' dwellings. I do not find that JM is in breach of a material term of his tenancy agreement in regard to smoke from his BBQ use. I cancel the Landlord's One Month Notice as I do not find cause to uphold it. The Tenant's application to dismiss the One Month Notice is granted. The tenancy shall continue until it is ended in accordance with the Act.

As the Tenant is successful in his claim, he is entitled to recovery of the application filing fee. The Tenant may, pursuant to Section 72(2)(a) of the Act, withhold \$100.00 from one month's rent due to the Landlord.

Conclusion

The Tenant's application to dismiss the Landlord's One Month Notice is granted.

The Tenant may withhold \$100.00 from one month's rent to recover his application 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 Act.

Dated: November 30, 2021

Residential Tenancy Branch