



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

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

- cancellation of the One Month Notice to End Tenancy for Cause (the "**Notice**") pursuant to section 47;

Both parties, the landlord's agents [henceforth "landlord" for brevity] and the tenant, attended the hearing. As both parties were present service of documents was confirmed. The landlord acknowledged service of the tenant's Notice of Dispute Resolution Proceedings. The landlord testified, and the tenant confirmed, that the landlord served the tenant with their evidence package. I find that all parties have been served with the required documents in accordance with sections 89 and 90 of the *Act*.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Residential Tenancy Branch (RTB) Rules of Procedure (Rules) Rule 6.11. The parties were also informed that if any recording devices were being used, to immediately cease the recording of the hearing. In addition, the parties were informed that if any recording was surreptitiously made and used for any purpose, they will be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation under the *Act*.

Issues to be Decided

Is the tenant entitled to:

- 1) an order cancelling the 1 Month Notice to End Tenancy for Cause pursuant to s. 47(1)(h).

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims, and my findings are set out below.

It was agreed the parties entered into a written month to month tenancy agreement starting January 14, 2019. Monthly rent is \$695.00 and is payable on the first of each month. The tenant paid the landlords a security deposit of \$347.50. The landlords still retain this deposit. A copy of the tenancy agreement was provided as evidence by the landlord.

All parties acknowledged that the tenancy agreement includes an addendum that prohibits smoking in the rental unit. It does not prohibit smoking outside in the designated smoking area on the property.

The parties agreed that the landlord issued a warning letter dated October 4, 2021. The tenant acknowledged receipt of the letter, although he could not recall the exact date. The letter sets out that complaints were received *“from another tenant about a strong smell of smoke coming up through the bathroom vent”*. The letter goes on to state, *“Please be advised that any further occurrences of you or your guests smoking inside your unit will be considered a breach of a material term of your tenancy agreement and may result in the termination of your tenancy.”* [emphasis added]

It was also agreed that on October 19, 2021, a “One Month Notice to End Tenancy For Cause” was posted on the tenant’s door at 3:30 p.m. on October 19, 2021.

The tenant filed for dispute resolution on October 27, 2021, within the ten-day deadline required under s. 47(4).

The tenant admitted that “once in a while” he smoked in his bathroom. He turned on the fan and shut the bathroom door. He stood under the fan and smoked a half to a whole cigarette. He only smoked in the bathroom on nights when he would wake up in the middle of the night, unable to sleep. He acknowledges there is a designated smoking area in the complex; however, the tenant does not feel safe going outside to smoke in the middle of the night because on several occasions he saw non-residents wandering around the area inside the property lines.

The tenant stated that in October the upstairs resident approached him in the common area and told him that she smelled cigarette smoke in her apartment that she believed was coming through the vents from his apartment into hers. She asked him upstairs to “smell the smoke”. When he went into her apartment, he noted that she had “the heat registers and everything taped up and air freshener to clean the air”.

When the upstairs resident told him how his smoking affected her, he felt badly and agreed to immediately cease smoking in his apartment. He believed the matter was resolved because the upstairs resident came down the next day with a card and soup to thank him. The tenant testified that he “has not once smoked indoors” since speaking with the upstairs tenant. He is mystified about the other complaint the landlord received and referenced in the evidence package.

The tenant also referenced several written testimonies (uploaded in the evidence package) from residents and a resident manager who have visited the apartment and confirm that the apartment does not smell of smoke and confirming they see him smoke in the designated smoking area. No witnesses were called by the tenant.

The landlord testified that complaints have been received from two residents about the smell of smoke in their apartments that they believe emanate from the tenant's suite. In September 2021, the resident across the hall from the tenant was moved to the apartment above the tenant's unit. When the landlord received complaints from the upstairs resident about the smell of smoke in her apartment, the issue was discussed with the tenant and the tenant promised he would not smoke in his unit.

The landlord submitted into evidence the multiple complaints, primarily from the upstairs resident and one complaint from the adjacent neighboring apartment (Folio V). No witnesses were called by the landlord. Some complaints predated the October 4, 2021, warning letter and complaints continued after the warning letter was provided to the tenant. The landlord referred me to the following evidence found in the folio:

Folio	Date	Summary
E	E-mails dated 28, 29, & 30 Sept	– don't punish tenant -smoking issue resolved
G	E-mail 5 October 2021 –	pot & cigarette smoke in bathroom/ pot smell in bedroom- Resident asked tenant if he smoked pot, said 'yes but did not smoke it of late'.
H	E-mail 6 October 2021-	heavy smell of smoke in bathroom
I	E-mail 6 October 2021-	smell is worse than earlier
J	E-mail 7 & 8 October 2021 –	email exchange between landlord and resident. Landlord explains the legislation and challenges of pinpointing where smoke is coming from & suggests mediation. Resident complains of smelling smoke.
K	E-mail 8 October 2021	Strong smell of pot in the living room.
L	E-mail 12 October 2021	(Saturday) strong smell of pot in bedroom; (Sunday) strong smell of cigarette smoke in bathroom (Tuesday a.m. "putrid" with cigarette smoke.
M	E-mail 14 October 2021	faint then much stronger smell of cigarette smoke in bathroom
N	E-mail 15 October 2021	extreme smell of cigarette smoke in bathroom – whole place reeks.
O	E-mail 16 October 2021	strong smell of cigarette smoke in bathroom
P	E-mail 17 October 2021	Cigarette smoke in bathroom
Q	E-mail 18 October 2021	heavy cigarette smoke
S	E-mail 25 October 2021	strong smell of freshener & cigarette smoke
T	E-mail 26 October 2021	smell of cigarette smoke
V	Letter rec'd October 28, 2021	complaint letter from another resident
W	E-mail 28 October 2021	"nicotine" stench in bathroom
X	E-mail 04 November 2021	"heavy nicotine smell in bathroom" and smoke in apartment

Y	E-mail 12 November 2021	cigarette smoke in bathroom - different times
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One warning letter dated October 4, 2021, was issued to the tenant followed by the Notice to End Tenancy dated October 19 (Folio R).

The landlord stated that she issued the notice to end tenancy because the tenant is smoking on the residential property, which is a breach of a material term of the tenancy agreement.

The landlord concluded by stating that “up until this matter, this tenant has been a “great tenant””. If an OP is awarded, the landlord requests that the move out date be December 31, 2021, to give the tenant time to relocate.

Analysis

I find that on October 19, 2021, at 3:30 p.m. a “One Month Notice to End Tenancy For Cause” was served on the tenant. The “must move out date” was November 30, 2021.

Section 90 of the *Act* stipulates when documents are considered to have been received. Section 90 (c) of the *Act* reads: “A document given or served in accordance with section 88...unless earlier received, is deemed to be received as follows: (c) if given or served by attaching a copy of the document to a door or other place, on the third day after it is attached.

The notice was deemed served by October 22, 2021.

The tenant filed for dispute resolution on October 27, 2021, within the ten-day deadline required under s. 47(4).

The tenant requests an order to cancel the One-Month Notice to End Tenancy for Cause dated October 19, 2021.

Section 47(1)(h): failure to comply with a material term after reasonable notice to do so.

The landlord relied on s. 47(1)(h) in their One-Month Notice. This section provides that a landlord may end a tenancy for cause if the tenant has failed to comply with a material term and has not corrected the situation within a reasonable amount of time after the landlord gives written notice to do so.

While I am satisfied that a material term of the tenancy agreement was broken, before issuing a One Month Notice, the landlord must comply with Policy Guideline 8 by notifying the tenant in writing that:

- He/she has breached the tenancy agreement.

- The breach is related to material terms of the tenancy agreement;
- 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.

The warning letter written on October 4, 2021 states *“Please be advised that any further occurrences of you or your guests smoking inside your unit will be considered a breach of a material term of your tenancy agreement and may result in the termination of your tenancy”*.

The letter did not notify the tenant that non-compliance will end the tenancy.

Notwithstanding the above, I note it is the tenant’s affirmed testimony that he stopped smoking in his room after being served with the written notice (or even before that). Although complaints about the smell of smoke continued after the warning was issued, the landlord failed to investigate and identify the source of the smoke. Based on the evidence, I find on the balance of probabilities the tenant did stop smoking on or before the written notice and thus there is reasonable doubt that the source of the smoke originates from his apartment.

I grant the tenant’s request for an order cancelling the One Month Notice to End Tenancy for Cause.

Conclusion

Based on the evidence and testimony above, I order that the One-Month Notice to End Tenancy for Cause of October 19, 2021 is hereby cancelled and of no force or effect.

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: December 01, 2021

Residential Tenancy Branch