



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenant on July 30, 2021 (the “Application”). The Tenant applied to dispute a One Month Notice to End Tenancy for Cause dated July 23, 2021 (the “Notice”) and to recover the filing fee.

The Tenant appeared at the hearing. The Agent for the Landlord (the “Agent”) appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties provided affirmed testimony.

I have changed the spelling of the Landlord’s name to match the Landlord’s name on the written tenancy agreement in evidence.

Both parties submitted evidence prior to the hearing. I confirmed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the documentary evidence and oral testimony of the parties. I have only referred to the evidence I find relevant in this decision.

Issues to be Decided

1. Should the Notice be cancelled?
2. Is the Tenant entitled to recover the filing fee?

Background and Evidence

A written tenancy agreement was submitted and the parties agreed it is accurate. The tenancy started January 15, 2020 and was for a fixed term ending January 31, 2021. The tenancy then became a month-to-month tenancy. The tenancy agreement includes an addendum with a “non-smoking” term stating:

The tenant(s) agree to the following **material term** regarding smoking. No smoking of any combustible material is permitted on the residential property, including within the rental unit.

The above term is initialled by the Tenant and a co-tenant.

The Notice was submitted as evidence. The Notice is addressed to the Tenant and co-tenant. The Notice refers to the rental unit. The Notice is signed and dated by the Agent. The Notice has an effective date of August 31, 2021. The grounds for the Notice are as follows:

1. Tenant or a person permitted on the property by the Tenant has:
 - a. Significantly interfered with or unreasonably disturbed another occupant or the Landlord.
 - b. Seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.
2. Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Agent testified that the Notice was posted to the door of the rental unit July 23, 2021. The Tenant testified that they “guess” they received the Notice July 23, 2021 posted to the door of the rental unit and that it is “kind of a fog”.

The Tenant submitted that the Notice should have been served in person.

The Agent testified as follows. The Tenant or their guests have been observed smoking on their deck. The Tenant has been sent letters about the smoking issue stating that further issues could cause an end to the tenancy. The Landlord received further verbal

and written complaints about the Tenant or their guests smoking on the rental unit property. A photo of a visitor to the rental unit smoking in front of the garage has been submitted. The Landlord believes the person in the photo smoking is the Tenant's son or a friend. The smoking on the property has continued despite at least three notices to the Tenant about this. The Agent attended the rental unit in August and noted a very strong smell of smoke coming from the garage door which was open four feet. The smoking issue is a constant source of complaints from other tenants.

The Agent also provided testimony about noise issues, a prowler associated to the rental unit and suspicious activity occurring in relation to the rental unit.

The Agent sought an Order of Possession effective January 31, 2022.

The Landlord submitted the following relevant documentary evidence:

- The tenancy agreement
- Letters dated February 06, 2020 and February 03, 2021 sent to the tenants stating that smoking in or around the rental unit is a material breach of the tenancy agreement and that the tenants should cease and desist upon receipt of the letters to avoid putting their tenancy at risk
- Letters dated June 15, 2020 and August 26, 2021 sent to the tenants about not smoking
- A written complaint dated October 16, 2020 about the tenants and their son smoking outside of their front door, on their patio and in their garage
- Emails from the property manager dated December 23, 2020 and February 16, 2021 about witnessing the tenants smoking on the back deck and it being obvious when they did an inspection that someone was smoking in the garage of the rental unit
- Email complaints dated April 29, 2021, June 30, 2021 and August 26, 2021 about the tenants or their guests smoking around the rental unit
- A photo from June 30, 2021 of someone smoking in front of the garage of the rental unit
- The Notice issued July 23, 2021, in part due to smoking
- An email dated August 11, 2021 about the tenants being "known garage smokers"

The Tenant provided the following relevant testimony. The police attended many of the rental units on the property in relation to the prowler, the Tenant does not know why

they are being singled out. The Tenant never saw a prowler. The Tenant has no idea about the person smoking outside the rental unit. The Tenant has had strangers smoking on their property. The Tenant has put “No Smoking” signs up everywhere outside. The neighbours right beside the rental unit have never heard noise as stated in their letter submitted. In relation to noise, their husband leaves the house at 4:30 a.m. and takes tools out of the garage; however, the neighbours have never complained about this.

The Tenant submitted the following relevant documentary evidence:

- A letter dated July 22, 2021 from a neighbour of the Tenant stating that the smoking allegations are a misunderstanding
- A letter from S.D. dated July 28, 2021 asking that the Landlord not evict them and outlining steps they will take in relation to the smoking issue
- Letters from the Tenant dated July 30, 2021, July 31, 2021, August 27, 2021 and September 22, 2021 denying the smoking allegations
- A letter from S.V. dated August 12, 2021 which includes statements disputing the smoking allegations. I note that S.V. does not live at or around the rental unit.
- A letter from E.R. dated August 30, 2021 which includes statements disputing the smoking allegations. I note that E.R. writes from a different province.
- A letter from C.J. dated September 22, 2021 which includes statements disputing the smoking allegations. I note that C.J. lives in a different city than the Tenant.
- An email from the Tenant dated October 06, 2021 about unknown individuals smoking on the rental unit property

Analysis

The Notice was issued pursuant to section 47 of the *Act* and the following subsections:

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...
- (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...

The Tenant had 10 days to dispute the Notice pursuant to section 47(4) of the *Act*. I accept that the Tenant received the Notice July 23, 2021 based on the testimony of the parties. The Application was filed July 30, 2021, within time.

I note that the Landlord was not required to serve the Notice on the Tenant in person.

Pursuant to rule 6.6 of the Rules, it is the Landlord who has the onus to prove the grounds for the Notice. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

Based on the evidence provided, I find it more likely than not that the Tenant or their guests have been smoking on the rental unit property. I find this given the following. The two breach letters sent to the Tenant about smoking. The two further letters sent to the Tenant about not smoking. The five complaints received by the Landlord about the Tenant or their guests smoking. The emails from the property manager about witnessing the Tenant or their guests smoking. The photo of someone smoking in front of the rental unit. The testimony of the Agent that they personally noted a very strong smell of smoke coming from the garage door of the rental unit.

I place significant weight on the photo of someone smoking in front of the rental unit which was provided to the Landlord June 30, 2021.

I understand the Tenant to be denying that they know the person in the photo. I find it unlikely that the person in the photo was not a guest of the rental unit for the following reasons. The garage door to the rental unit is open suggesting that the Tenant or their guests were home at the time the photo was taken. I note that the garage is full of items and I find it unlikely that the Tenant or their guests would have left the garage door open in these circumstances while not at the rental unit. The person is standing

talking on a cell phone and do not appear to be a transient passerby. The person is not wearing anything that would indicate they are attending the rental unit in their work capacity. The person does not have anything on them that would indicate they are attending the rental unit in their work capacity. The person is standing directly in front of the open garage and again does not appear to be a passerby. The person is standing between the open garage and a vehicle parked in the driveway and again does not appear to be a passerby. There is nothing about the vehicle parked in the driveway that indicates it is a work related vehicle. In the circumstances, I find it more likely than not that the person in the photo was permitted on the property by the Tenant.

I acknowledge that the Tenant submitted documentary evidence denying and disputing the smoking allegations. However, I do not find that the Tenant's documentary evidence overcomes the Landlord's evidence about the smoking issue. I do not accept that the smoking allegations are false or a misunderstanding because I accept that there is a photo of someone that the Tenant has allowed on the property smoking on the property. Further, I do not find the evidence of people who do not live at or around the rental unit compelling because I am not satisfied they know what is occurring at the rental unit on a day-to-day basis.

In the circumstances, I accept that the Tenant or their guests have been smoking in the rental unit or on the rental unit property.

I accept that the smoking has significantly interfered with or unreasonably disturbed other occupants and the Landlord of the residential property because the Landlord has submitted several written complaints that support this. I find the smoking is a serious issue given there is a non-smoking term in the addendum to the tenancy agreement which specifically states that it is a material term of the tenancy agreement. I find the existence of a non-smoking term that is a material term of the tenancy agreement further supports that the smoking infraction amounts to a significant interference and unreasonable disturbance. It is reasonable for the neighbours of the Tenant and the Landlord to expect the Tenant and their guests not to smoke in the rental unit or on the property given the non-smoking term in the addendum of the tenancy agreement. The breach of the non-smoking term is significant and unreasonable.

Given the above, I find the Landlord had grounds to issue the Notice.

I have reviewed the Notice and find it complies with section 52 of the *Act* as required by section 47(3) of the *Act*.

Given the above, I dismiss the dispute of the Notice without leave to re-apply and uphold the Notice.

Section 55(1) of the *Act* requires an arbitrator to issue a landlord an order of possession when a tenant disputes a notice to end tenancy, the dispute is dismissed or the notice is upheld and the notice complies with section 52 of the *Act*.

I have dismissed the dispute of the Notice and upheld the Notice. I have found the Notice complies with section 52 of the *Act*. Therefore, pursuant to section 55(1) of the *Act*, I issue the Landlord an Order of Possession for 1:00 p.m. on January 31, 2022.

Given the Tenant was not successful in the Application, the Tenant is not entitled to reimbursement for the \$100.00 filing fee.

Conclusion

The Landlord is issued an Order of Possession effective at 1:00 p.m. on January 31, 2022. This Order must be served on the Tenant. If the Tenant does not comply with the Order, it may be filed in the Supreme Court and enforced as an order of that Court.

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: December 08, 2021

Residential Tenancy Branch