Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

The Tenant applies to cancel a One-Month Notice to End Tenancy dated August 31, 2021 (the "One-Month Notice") pursuant to s. 47 of the *Residential Tenancy Act* (the "*Act*").

K.B. appeared on his own behalf as Tenant. A.B. appeared as agent for the Landlord. H.F. appeared as counsel for the Landlord. Y.K. was called by the Landlord as a witness.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing.

The Landlord advises that the One-Month Notice was personally served to the Tenant on August 31, 2021. The Tenant acknowledges receipt of the One-Month Notice. I find that the One-Month Notice was served in accordance with s. 88 of the *Act* on August 31, 2021.

The Tenant advises that he served the Notice of Dispute Resolution on the Landlord by way of registered mail sent on September 23, 2021. The Landlord acknowledges receipt of the Notice of Dispute Resolution. I find that the Notice of Dispute Resolution was served in accordance with s. 89 of the *Act*.

The Tenant uploaded evidence to the Residential Tenancy Branch, though at the hearing acknowledged not having served it on the Landlord. The evidence comprised of a witness statement and the One-Month Notice itself. As the Tenant's evidence was not served at all, it is not admitted as evidence for the hearing. I make an exception,

however, for the One-Month Notice itself as this was issued by the Landlord themselves and is the subject matter of the application.

The Landlord acknowledged not having served evidence to the Tenant.

Issue(s) to be Decided

1) Should the One-Month Notice be cancelled?
2) If not, is the Landlord entitled to an order for possession?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- the Tenant moved into the rental unit in April 2021;
- rent of $1,670.00 is due on the first day of each month;
- the Landlord holds a security deposit of $777.50 and a pet damage deposit of $777.50 in trust for the Tenant.

The parties confirmed the existence of a written tenancy agreement. However, none was put into evidence. The parties did confirm the existence of a clause within the tenancy agreement, cited by the Landlord as clause 31 in the tenancy agreement's addendum, that prohibited the Tenant or any occupants to smoke within the rental unit.

The Landlord called the resident property manager, Y.K., to provide evidence at the hearing.

Y.K. advised that there had been complaints of cigarette smoke at the residential property beginning in April 2021, though the Tenant's unit had not been confirmed as the culprit of the complaints at that time nor was a warning letter issued. Y.K. further states that on August 16, 2021 she was on the Tenant's floor and smelt smoke coming from the Tenant's rental unit. She knocked on the door and the Tenant's father allowed her access into the rental unit. Y.K. said she witnessed smoke from within the rental unit and asked whether the Tenant's father was smoking. The Tenant's father is said to

have at first denied smoking, then later admitting to Y.K. that he was smoking within the rental unit.

The Landlord says that warning letter was issued on August 16, 2021. The Landlord did not put the warning letter into evidence.

Y.K. further testified to an incident on August 30, 2021 in which she again smelt smoke coming from the Tenant's rental unit, gained access to the rental unit after being allowed in, smelt smoke, and saw ashtrays in the rental unit.

It was after the August 30, 2021 incident that the Landlord issued a final letter and the One-Month Notice on the basis that the Tenant had breached a material term of the tenancy agreement. The One-Month Notice cites the reported incidents of smoking within the rental unit on August 16, 2021 and August 30, 2021.

Y.K. provided further evidence with respect to an episode regarding the Tenant's parking in a contractor's stall at the residential property after the One-Month Notice was issued. The Tenant's vehicle is said to have been towed and a confrontation taken place between the Tenant and Y.K. after which point the police were called.

The Tenant indicates that he was not at the rental unit on August 16, 2021 though denies that his father was smoking within the rental unit. The Tenant further states that he was sleeping when the August 30, 2021 incident took place. The Tenant again denies that anyone was smoking within the rental unit on August 30, 2021 and that the ashtrays were present as the occupants had carried them outside when they went to smoke.

Analysis

The Tenant applies to cancel the One-Month Notice.

Under s. 47 of the *Act*, a landlord may end a tenancy for cause and serve a one-month notice to end tenancy to the tenant. A tenant may dispute a one-month notice by filing an application with the Residential Tenancy Branch within 10 days after receiving the notice. If a tenant disputes the notice by filing an application, the burden for proving that the one-month notice was issued in compliance with the *Act* rests with the landlord.

The One-Month Notice is issued based on s. 47(1)(h) of the *Act*, which permits a landlord to end a tenancy where a tenant has breached a material term of the tenancy agreement and failed to correct the breach within a reasonable time after being giving a written notice to do so by the landlord.

Under the present circumstances, the Landlord argues the tenancy should end by virtue of the Tenant's breach of clause 31 of the tenancy agreement's addendum which prohibits smoking within the rental unit.

Policy Guideline 8 provides guidance with respect to breaches of material terms of the tenancy agreement and states the following on the topic.

> 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.
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> 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.
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> 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.
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> 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:
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> - 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.

> Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

As mentioned previously and as supported by Rule 6.6 of the Rules of Procedure and Policy Guideline 8, the Landlord bears the evidentiary of proving that the One-Month Notice was properly issued. This means proving that the Tenant breached a term of the tenancy agreement, that the term was material, and that the Tenant failed to correct the breach within a reasonable time after receiving written notice to do so by the Landlord.

The Landlord provides no documentary evidence at all in this matter. I accept that the tenancy agreement has a term prohibiting smoking, based on the parties' agreement on this point. However, the Landlord made no submissions with respect to the materiality of the non-smoking term in the addendum. Given that no submissions were made on this point nor was a copy of the tenancy agreement provided, I am unable to make findings on whether the term was material.

Further, the Landlord failed to provide a copy of the warning letter of August 16, 2021 nor were any submissions made with respect to its content. Given that I do not have information or evidence with respect to the content of the August 16, 2021 warning letter, I am unable to make any findings on whether the formal requirements set out under Policy Guideline 8 have been met. The letter may or may not have set out a deadline or that further breach would result in the end of the tenancy. I simply have no information on these points. Without evidence, I cannot make determinations or findings on whether the requirements set out under s. 47(1)(h) of the *Act* have been met.

As the issue raised by the One-Month Notice was with respect to breach of a material term, specifically a non-smoking clause, the parties' submissions with respect to the parking incident after the One-Month Notice was issued are not relevant to the Tenant's application.

The Landlord bears the onus of proving on a balance of probabilities that the One-Month Notice was properly issued. I find that the Landlord has failed to do so. As the Landlord failed to prove that the One-Month Notice was properly issued, I find that the

One-Month Notice is cancelled and is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

Conclusion

I find that the Landlord has failed to prove that the One-Month Notice was properly issued. Accordingly, the One-Month Notice is hereby cancelled and is of no force or effect. The tenancy shall continue until it is 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: January 21, 2022

Residential Tenancy Branch