



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNC, FFT**

Introduction

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

- an order for cancellation of the One Month Notice dated November 16, 2021 ("1 Month Notice") pursuant to section 47; and
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72(1).

The Landlord's agent SF and the Tenant attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. A witness for the Landlord ("JH") attended the hearing when required to provide testimony.

The Tenant testified she served the Notice of Dispute Resolution Proceeding and some of her evidence ("NDRP Package") personally on November 20, 2021. SF acknowledged the Landlord received the NDRP Package. I find the NDRP Package was served pursuant to sections 88 and 89 of the Act.

The Tenant testified she served additional evidence on the Landlord in-person on November 25, 2021. SF acknowledged the Landlord received the additional evidence. I find the additional evidence was served pursuant to section 88 of the Act.

SF testified the Landlord served an evidence package on the Tenant by registered mail on January 17, 2022. SF provided the tracking number of the registered mail to corroborate her testimony on service of the Landlord's evidence package on the Tenant. I find the Tenant was served with the Landlord's evidence package pursuant to section 88 of the Act.

Preliminary Matter – Amendment to Change Respondent

SF testified that, although she is named in the Tenant's application as the Landlord, she is not the Landlord. SF provided the name of the Landlord ("MMA") and referred to the 1 Month Notice and the tenancy agreement which both stated MMA is the Landlord. SF requested the Tenant's application be amended to remove SF as a respondent and to add MMA as a respondent.

Rule 4.2 of the *Residential Tenancy Branch Rules of Procedure* states ("RoP"):

4.2 Amending an application at the hearing

In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.

If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

As SF's request could reasonably be anticipated by the Tenant, I amended the Tenants' application to add MMA as the respondent and to remove SF as a respondent.

Issues to be Decided

- Is the Tenant entitled to cancellation of the 1 Month Notice?
- Is the Tenant entitled to recover the filing fee for her application from the Landlord?
- If the Tenant is not entitled to cancellation of the 1 Month Notice, is the Landlord entitled to an Order of Possession pursuant to section 55(1) of the Act?

Background and Evidence

While I have turned my mind to all the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here. The principal aspects of the Tenant's application and my findings are set out below.

Rule 6.6 of the *Residential Tenancy Branch Rules of Procedure* provides that, when a tenant applies to cancel a notice to end tenancy, the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenant applied for dispute resolution and she is the Applicant, the Landlord presents its testimony first.

SF submitted a copy of the tenancy agreement between the Landlord and the Tenant. Sf testified the tenancy commenced on May 1, 2021, for a fixed term ending on April 30, 2022, with rent of \$1,100.00 payable on the 1st day of each month. The Tenant was to pay a security deposit of \$612.00. The Tenant confirmed the accuracy of the details regarding the terms of the tenancy agreement.

SF stated the 1 Month Notice was served on the Tenant in-person on November 16, 2021. The Tenant acknowledged service of the 1 Month Notice. I find the 1 Month Notice was served on the Tenant in accordance with section 88 of the Act.

The 1 Month Notice stated the cause for ending the tenancy was the Tenant or a person permitted on the property by the Tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. The 1 Month Notice provided the following details for ending the tenancy:

The tenant has smoked in the rental building, contrary to the rental agreement, and in doing so has unreasonably interfered with the quiet enjoyment of the tenant in the adjacent apartment, [unit number of apartment], who complained to the Landlord verbally and in writing. Verbal and written warning November 3rd was given to you, and while you have subsequently provided the Landlord with advice and some evidence of treatment for smoking, the allegations from your neighbour have continued, along with details about the serious interference this creates.

This Notice provides details as to how you may dispute this Notice by commencing an application for arbitration of the issue, at which time of hearing would be provided opportunity to give your evidence about the issue. At the same time, the Landlord will ask your neighbour to detail their evidence. Meanwhile, the Landlord has taken all reasonable steps to resolve the complaints, without success, but is bringing this Notice (and, if you wish, potential arbitration) to satisfy the Landlord's obligation to provide quiet enjoyment to the premises of your neighbour. Please read carefully the strict time limited for you to commence a Dispute of this Notice.

SF referred to paragraph 44 of the tenancy agreement which states:

NO SMOKING ON PROPERTY NO GROWING MARIJUANA
NO BBQ'S
NO PETS

SF stated the Tenant lives on the second floor of the building that is approximately 50 years old. SF stated the Landlord received verbal and written complaints from JH who lives in a rental unit next door to the Tenant's rental unit. SF submitted a copy of a letter dated November 3, 2021, served by the Landlord on the Tenant whereby the Landlord states in part:

So this is a final warning that, if observed smoking after this date, we will issue a 30-day Notice for you to vacate the apartment. This is a material term of the agreement, and the evidence is overwhelming as to your breach.

SF stated that she is aware that two other tenants on the first floor of the residential building smoke and the two rental units occupied by those tenants are located on the same side of the building as the rental units occupied by JH and the Tenant. When I asked, When I asked, SF stated she has never seen the Tenant smoking on the residential property since the beginning of September. SF submitted a copy of an email ("Complaint Email") dated November 9, 2021, from another tenant ("JH"). In the Complaint Email, JH listed 10 dates from May 18, 2021 to November 6, 2021 when she was disturbed by tobacco or cannabis smoke.

JH was called to provide oral testimony at the hearing. JH affirmed the information set out in her Complaint Email and testified she suffers from asthma. JH stated tobacco and cannabis smoke aggravates her medical condition and she uses a daily inhaler and has an emergency inhaler when required for severe asthmatic attacks. JH stated she shares a balcony with the Tenant which is separated by a plastic partition. JH stated that, on a number of occasions, she was disturbed by tobacco and cannabis smoke. JH stated she has seen smoke coming from the Tenant's side of the balcony. JH stated on one occasion when she smelled smoke, she heard the balcony door close on the Tenant's side of the plastic partition. JH stated the Tenant approached her on one occasion outside a drugstore and the Tenant told her that she quit smoking. JH stated that there have been occasions where the Tenant has caused loud banging in the Tenant's rental unit so as to aggravate JH's PTSD symptoms. When I asked, JH stated that she has never actually seen the Tenant smoking.

The Tenant testified she quit smoking in September 2021 and has not smoked in the rental unit or on the balcony since that time. The Tenant stated she stays at her boyfriend's house on weekends since May 2021. The Tenant stated that she was not home on some of the dates that JH has complained to the Landlord about smelling smoke. The Tenant submitted an email from her boyfriend that stated that the Tenant stays with him on weekends. The Tenant submitted an invoice for \$595.35 for laser acupuncture smoking treatment dated September 21, 2021. The Tenant stated that she burns sage in her apartment to mask the musty odour of the building. SF submitted a text dated November 30, 2021, from a tenant who lives in the rental unit above the Tenant in which the tenant stated "I have never noticed any smells or sounds from [the Tenant]. The Tenant submitted an email dated December 30, 2021, in which the writer states she is a close friend of the Tenant and that she has not seen the Tenant smoke in social situations since September 2021.

Analysis

Subsection 47(1)(d) of the Act states in part:

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;
- [...]

- (2) A notice under this section must end the tenancy effective on a date that is
 - (a) not earlier than one month after the date the notice is received, and
 - (b) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
- (3) A notice under this section must comply with section 52 *[form and content of notice to end tenancy]*.
- (4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.
- (5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant
 - (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
 - (b) must vacate the rental unit by that date.

The 1 Month Notice was served on the Tenant in-person on November 16, 2021. Pursuant to section 47(4) of the Act, the Tenant had 10 days to make an application for dispute resolution to dispute the 1 Month Notice. The records of the Residential Tenancy Branch disclose the Tenant made her application on November 16, 2021. Accordingly, the Tenant made her application to dispute the 1 Month Notice within the 10-day dispute period required by section 47(4) of the Act.

SF stated that she received complaints from JH regarding smelling tobacco and cannabis smoke emanating from the Tenant's balcony since the Tenant moved into the rental unit in May 2021. JH submitted a warning letter dated November 3, 2021 from the Landlord in which the Tenant was warned that, if she was observed smoking after the date of the warning letter, the Landlord would issue a One Month Notice requiring the Tenant vacate the rental unit. SH stated that she has never actually seen the Tenant smoke on the residential premises.

JH stated that she has smelled tobacco and cannabis smoke in her rental unit and her balcony since the Tenant moved into her rental unit in May 2021. JH stated that she suffers from asthma and requires inhalers to control her medical condition. JH stated smoke has entered and continues to enter her rental unit and onto her balcony which aggravates her medical condition. JH stated she has seen smoke coming from the Tenant's side of the partition of the shared balcony with the Tenant but JH has never actually seen the Tenant smoking.

The Landlord admitted that there are two tenants on the ground floor that she believes are smoking in their rental units. SF stated that she has not actually seen the Tenant smoking on the residential property since September 2021. The Tenant has provided evidence to corroborate her testimony that she quit smoking in early September as well as a text from the tenant above her in which he states that he does not smell smoke.

I find the testimony of SF, JH and the Tenant to be honest and credible. However, neither SF nor JH have seen the Tenant smoke on the residential property. Furthermore, SF admitted that she is aware of two tenants on the ground floor nearby the rental units of JH and the Tenant. I find the Landlord has not provided sufficient evidence to prove, on a balance of probabilities, that the Landlord has cause for ending the tenancy pursuant to subsections 47(1)(d)(i) of the Act. Based on the above, I cancel the 1 Month Notice and the tenancy continues until ended in accordance with the Act.

As the Tenant has been successful in this application, I grant the Tenant recovery of the filing fee of \$100.00 pursuant to subsection 72(1) of the Act. Pursuant section 72(2)(a) of the Act, the Tenant is allowed to enforce this order by deducting \$100.00 from the next month's rent, notifying the Landlord when this deduction is made. The Landlord may not serve the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent when this deduction is made by the Tenant.

Conclusion

The 1 Month Notice is cancelled and of no force or effect.

The Tenant is ordered to deduct \$100.00 from next month's rent in satisfaction of her monetary award for recovery of 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: February 13, 2022

Residential Tenancy Branch